The Evolving Competition Law Landscape for M&A

1. Introduction

The substantive statutory provisions governing combinations are contained in sections 5 and 6 of the Competition Act, 2002 (**"Act"**). They came into effect from June 1, 2011 and consistent with other countries, stipulated that every combination which met the criterion specified in section 5 had to be notified to the Competition Commission of India (**"CCI"**) within the prescribed time period. Under section 6, CCI has to determine whether such combination caused or is likely to cause an appreciable adverse effect on competition.[1] So, prior consent of the CCI is necessary when the statutory thresholds are met. To assist in the determination, the government framed the process in the CCI (Procedure in Regard to the Transaction of Business relating to Combinations) Regulation, 2011.

The present newsletter provides an update on the development and the changes to the statutory thresholds and what that means.

2. The Triggers & Thresholds

Section 5 of the Act defines a combination as one which involves: **(a)** the acquisition of control,[2] shares, voting rights or assets of an enterprise by a person; **(b)** the acquisition of control of an enterprise where the acquirer already has direct or indirect control of another engaged in identical business; or **(c)** merger or amalgamation between or among enterprises. It also prescribes certain financial thresholds which must be crossed for a combination to occur. In case of an acquisition, such combination is determined with reference to the combined asset value and the turnover of the acquirer, target and the combined resultant entity. When an amalgamation or merger is to take place, the evaluation is done with respect to the combined asset value and turnover of the "group" to which the target or resultant company will belong pursuant to the proposed acquisition or merger, as the case may be. Schedule I of 2011 Combination Regulations specify a list of transactions that would not ordinarily require notifying the CCI.

The Act further mandates that the government **(a)** must every two years, enhance or reduce the financial thresholds, which trigger a pre-merger notification on the basis of the wholesale price index or fluctuations in exchange rate of rupee or foreign currencies;[3] **(b)** can exempt certain enterprises or classes of enterprises from the purview of the Act if necessary in public interest.[4] Accordingly, on March 4, 2011 different notifications[5] were issued and, one enhanced the values of the assets and turnover, prescribed in section 5, by 50% factoring the wholesale price index. Another notification exempted target enterprises *whose control, shares, voting rights or assets* acquired in India had assets valued up to INR 2.5 billion; **or** turnover up to INR 7.5

[1] This determination is done on the basis of consideration of all or any of the factors stated in section 20(4) of the Act and not detailed here

[2] The explanation to section 5 defines control in an inclusive manner and prescribes controlling the affairs or management by one or more enterprises or groups, jointly or singly, respectively over another enterprise or group. Group means two or more enterprises who can, directly or indirectly, exercise 26% or more *voting rights* in another enterprise; or appoint more than 50% *of the Board* of the other enterprise; or control the *management or affairs* of the other enterprise

[3] See section 20(3)

[4] See section 54

[5] See S.O. 480 (E) and 482 (E)

billion. This exemption was for five years. On March 4, 2016 similar notifications[6] were issued whereby:

- March 2011 notification was superseded;
- Values of section 5 assets and turnover were enhanced by 100% factoring the wholesale price index;
- Exemptions were put in place for another five years, but with increased thresholds;
- The revised asset value was INR 3.5 billion (versus INR 2.5 billion) and the revised turnover was INR 10 billion (versus INR 7.5 billion). Both 2011 and 2016 notifications covered situations in the context of acquisitions only. In dollar terms, the revised thresholds after March 2016 notification stood at about USD 54 million[7] for assets value and USD 154 million for turnover.

  The current position, therefore, of section 5 thresholds is as follows.

- In case of parties to the combination **(a)** w*ithin India:* value of the assets should be more than INR 20 billion (USD 308 million) and turnover should be more than INR 60 billion (USD 923 million); **(b)** *outside, but including Indian values:* assets more than USD 1 billion, including at least INR 10 billion in India (USD 154 million) and turnover more than USD 3 billion and, at least, INR 30 billion arising in India (USD 462 million).
- In the second instance, value of the group where the enterprise will become a part of after acquisition, merger or amalgamation becomes key **(a)** w*ithin India:* value of the assets should be more than INR 80 billion (USD 1.2 billion) and turnover should be more than INR 240 billion (USD 923 million); **(b)** *outside, but including Indian values:* assets more than USD 4 billion, including at least INR 10 billion in India (USD 154 million) and turnover more than USD 3 billion and, at least, INR 30 billion arising in India (USD 462 million).

3. The Revised Triggers

Within just over a year, on March 29, 2017 the Indian government again revised the landscape for M&A activity valid through the next five years. This time it extended[8] the scope of small target exemptions to include transactions other than acquisitions i.e., mergers or amalgamations as well. Now, the position is target enterprises where value of the assets being *acquired*, *taken control of*, *merged or amalgamated* is up to INR 3.5 billion (about USD 54 million) in India; or turnover up to INR 10 billion (about USD 154 million) in India stand exempted and do not have to approach the CCI for a transaction clearance.

Further, where the acquisition, amalgamation or merger is only of a business, division or portion of an enterprise[9] then, only the asset and turnover value of such business or division or attributable portion will be considered. Value of the assets shall include brand value, goodwill, values of various intellectual property rights involved, as well as other similar commercial rights. The asset value shall be based on the enterprise's book value of the assets in the audited accounts.

[6] See S.O. 674 and S.O.675(E)

[7] Applying a conversion rate of USD 1 = INR 65 and the figures rounded off

[8] Gazette Notification dated March 29, 2017 covered S.O. 988(E) issued by Ministry of Corporate Affairs on March 27, 2017. By SO 989(E), also dated March 27, 2017, the notification of March 4, 2016 was rescinded

[9] The definition of enterprise makes it clear that a division, unit or even assets are not enterprises by themselves. Enterprise effectively refers to a going concern that is already conducting or has previously conducted business

Where accounts are not yet due to be filed, then it will be based on the statutory auditor's report in the fiscal preceding the financial year where the date of the intended combination falls, while considering depreciation as well.

In view of the overarching objective of the Act to promote competition for public welfare, these latest changes of March 2017 are wide and appear to be targeted to spur economic growth. The goal behind them appears to be to ensure that transactions involving small enterprises should be kept outside CCI's scrutiny as they cannot adversely impact the market. Hopefully, this will ensure transactional costs come down as do closing timelines. So, to underscore, if the jurisdictional thresholds are met and no exemptions are available, the proposed combination needs to be mandatorily notified to the CCI.

Interestingly, on June 29, 2017[10] the government removed the requirement on parties to notify combinations to the CCI within 30 calendar days of the relevant trigger event. Failure to give the prescribed notice within the statutory period empowered the CCI, under section 43A, to impose a penalty on the defaulting parties which could extend up to 1% of the total turnover or the assets, whichever is higher. The exemption to notify will be in effect for five years from June 29, 2017. Going forward, the position is that execution of a binding agreement will not be a trigger event, but parties will be obligated to ensure that closing will occur after securing CCI approval or upon expiry of 210 days, where they have notified the CCI.

4. Approval & Considerations

4.1 *The Two Forms*: As noted above, the primary consideration is to determine whether the combination will cause or be likely to impact competition adversely within the relevant market in India. In order to secure an approval for the combination, two forms are to be filed; and, the filing fee for Form I is INR 1.5 million or USD 23,000 while for the long Form II is INR 5 million or USD 77,000. The obligation to pay is on the acquirer, in case of an acquisition, or the parties to a merger or amalgamation in those cases. In case of a joint notification, fees are payable jointly or severally. If the parties fail to notify prior to closing, the CCI has the power to impose sanctions and parties will be exposed to penalties, referred above. Unlike many other regulators, CCI has used these powers regularly. Therefore, parties must be cognizant of the fact that they pay acute heed to this requirement. Both forms require extensive information, far more than required by the equivalent law in the US or EU. When parties have withheld information, or neglected to provide required details CCI has invalidated the forms compelling fresh filings.

4.2 *Process Overview:* Upon receipt of the form, the sequential steps are as follows. CCI has to form a *prima facie* opinion within 30 working days after it receives the initial notice of the proposed combination. It has a right to reach out to third parties or statutory authorities which it may or may not exercise. If it does, the time period may be extended by up to 15 working days with possibility of another extension by another 15 working days if modifications are to be done. If CCI concludes that the transaction will not affect competition adversely, or the parties will make necessary changes to address its concerns, it will clear it. Where it forms a *prima facie* opinion that a combination is likely to cause, or has caused, an adverse effect it shall issue a show-cause notice to the parties seeking explanation(s) why it should not be investigated. After the parties file their reply,[11] CCI may either direct the Director-General to conduct a detailed investigation or do so on

[10] See notification no S.O. 2039(E) issued by Ministry of Corporate Affairs
[11] The parties are given 30 days to reply

its own. If an investigation is essential, parties have to publish combination details in four leading daily newspapers, including at least two business ones, their websites and CCI's website within 10 days of the decision to investigate. Such publication allows public to comment or object which, in turn, allows CCI to seek additional clarifications which, once provided, forms the basis of its review. In its final order, it can approve, reject or propose modifications to the combination.

4.3 ***Review criterion & time:*** Under section 20(4), the evaluation whether a combination should be approved or rejected requires an assessment of several factors which include, actual and potential level of competition through imports in the market; extent of barriers to entry in the market; likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins. The CCI also considers the extent to which substitutes are available or likely to be available in the market; relevant market share, of the persons or enterprise, individually and as a combination; likelihood that the combination would result in the removal of a vigorous and effective competitor(s) in the market. It is also important to see whether benefits of a proposed combination outweigh the adverse impact (if any) it is likely to have.

As stated, the regulator has up to 210 days to approve or reject the proposed combination, excluding the time taken for the parties to respond and provide clarifications to the questions raised. The Act is silent on the circumstances of a speedier review. Time is of essence, but the clock stops when parties take time to provide considered responses to formal requests for information. It would be fair to state that most often CCI has been quick in its reviews, but complex transactions can easily take 210 days.

5. Conclusion

It is worth highlighting that the filing process is not easy; rather, parties need to be well-prepared and carefully assess all possible market definitions. Since June 2011, when the merger control provisions became effective almost all notifications of combinations were cleared rapidly, obviating the need for a detailed review. Public orders were published in three cases[12] and approved subject to remedial action. Then, CCI cleared certain transactions but with certain behavioral commitments and modified non-compete terms. There have been no prohibition decisions. Further, the revised trigger exemptions of March 2017 combined with the removal of the pressure to notify CCI in 30 days upon execution of a binding agreement ought to benefit all stakeholders. Conglomerates eyeing India ought to now have greater flexibility to align global strategies with the review timelines.

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[12] These were Sun & Ranbaxy, Lafarge & Holcim, and PVR & DT