



REQUIREMENT OF NOTICE FOR ACQUISITION OF COMPANY FACING PROCEEDINGS UNDER IBC

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Section 6 of the CA mandates that an enterprise intending an acquisition covered under section 5 of the CA, must give a notice to the Competition Commission of India (“**CCI**”) seeking its approval of the acquisition to the extent that such acquisition shall not cause and is not likely to cause an appreciable adverse effect on competition within the relevant market in India. Failure to furnish such notice to the CCI has repercussions under section 43A of the CA, which may extend to a penalty of 1% of the total turnover or assets, whichever is higher. Section 6 requires that in case of an acquisition, such notice shall be given within 30 days of “execution of any agreement or other document” concerning acquisition. Though the 30 day requirement has been done away with until June 28, 2022, vide an exemption notification of the Ministry of Corporate Affairs dated June 29, 2017, necessity of furnishing the notice and consequences of non-compliance remain intact. Recently, in 2 separate bids for acquisition of Binani Cements Limited (that is facing bankruptcy proceedings before the National Company Law Tribunal under the IBC) by Ultratech Cement Ltd. and the Rajputana Properties (a subsidiary of Dalmia Bharat Limited), respectively, this issue came up once again, i.e. what is the trigger event for furnishing a section 6 notice to the CCI in such cases where the target is in the midst of bankruptcy proceedings? News reports confirmed that both bidders had already filed such section 6 notices, and Rajputana Properties had, in fact, also obtained the CCI’s approval within 13 days only.

PSA view: Presently, the CA does not answer this question unambiguously, and an acquirer of a target engulfed in bankruptcy proceedings is left to itself to ascertain the timing of its section 6 filing. Therefore, one way to approach this situation would be to follow existing rulings of the CCI in different cases involving such filing, where it has observed that a notice under section 6 shall be furnished within a reasonable time (previously 30 days); (i) from execution of first binding agreement towards the intended acquisition, (ii) of disclosure to a stock exchange or (iii) of obtaining approval of another regulator. In other words, an acquirer can either follow the aforesaid jurisprudence and file within a reasonable time from the happening of the said trigger events, or shall act in abundant caution, and approach the CCI with such notice as soon as there are talks between it and the target’s representatives, which are then translated into a document capturing their intent, even if this may be a Term Sheet or Letter of Intent considering the uniqueness of proceedings under the IBC.

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