

COMPETITION LAW – BRIEF STUDY OF COMBINATION PROVISIONS – EFFECTIVE 1st JUNE, 2011

The Competition Act, 2002 (“the Act”) was enacted to regulate (a) anti-competitive agreements, (b) abuse of dominance, and (c) Combinations. The provisions relating to regulation of combinations (for instance mergers, acquisitions, amalgamations, takeovers etc.) had been in abeyance for some time. These have now been notified **Vide Notification No. S.O. 479(E) dated 4 March, 2011** and shall come into effect from 1 June, 2011. On 1 May, 2011, the CCI has released **The Competition Commission of India (Procedure in regard to the transaction of business relating to combination) Regulations, 2011** (“the Regulations”). Consequently, combinations covered by the prescribed monetary thresholds, based on assets or turnover of the parties (or groups) to the combination, shall now require filing and prior approval of the Competition Commission of India (“CCI”) effective 1 June, 2011.

What is a Combination?

Briefly, a **Combination** is an acquisition of one or more enterprises by one or more persons, or merger or amalgamation of enterprises, if it meets the prescribed monetary thresholds, and involves:

1. Any acquisition of control, shares, voting rights or assets of any enterprise;
2. Any acquisition of control by a person over an enterprise, where such person already has direct/indirect control over another enterprise in a similar business; or
3. Any merger or amalgamation of enterprises.

Control includes controlling the affairs or management by (i) one or more enterprises over another enterprise or group; or (ii) one or more groups over another group or enterprise.

Monetary thresholds Prescribed under the Act and enhanced vide Notification No. S.O. 480(E) dated 4 March, 2011 for a combination to be covered by the Act have been prescribed on the basis of the assets or turnover of the parties to the combination jointly, or of the enterprise/group remaining after, or created as a result of, a merger/amalgamation. The same are set out below:

Parties to the combination jointly have		Acquiring ‘Group’ and target jointly have	
In India	In India or Outside India	In India	In India or Outside India
Assets over INR 1,500 crore	Assets over USD 750 million, (of which at least INR 750 crore	Assets over INR 6,000 crore	Assets over USD 3 billion (of which at least INR 750 crore in

crore	in India)	crore	India)
Or	Or	Or	Or
Turnover above INR 4,500 crore	Turnover above USD 2250 million, (of which at least INR 2,250 crore in India).	Turnover above INR 18,000 crore	Turnover above USD 9 billion (of which at least INR 2,250 crore in India)

To be considered as a Group, two or more enterprises, directly or indirectly, must be in a position to either

- exercise 26% or more (see special exemptions* below) of the voting rights in the other enterprise; or
- appoint more than half of the board of directors in the other enterprise; or
- control the management or affairs of the other enterprise.

*Special Exemptions: For the first 5 years from 1 June, 2011, the following have been exempt from combination regulations under the Act:

- Group exercising less than 50% of voting rights in the other enterprise (Exempted vide notification No. S.O. 481(E) dated 4 March, 2011) , and
- Enterprises whose control, shares, voting rights or assets are being acquired, having assets of the value not more than INR 250 crores or turnover not more than Rs. 750 crores . (Exempted vide notification No. 482(E) dated 4 March, 2011)

In addition to the monetary thresholds and special exemptions, Schedule I of the Regulations lists certain categories of transactions (briefly set out in Appendix A to this note) which ordinarily are not likely to cause an appreciable adverse effect on competition in India. It has thus been clarified that for combinations mentioned in Schedule I, notice need not “normally” be filed.

Transitional provisions – which combinations require filing of notice effective 1 June, 2011?

- ➡ Combinations which need to be notified to the CCI for its evaluation and approval are:
- ➡ Mergers or amalgamations where the proposals have been approved by the board of directors (i.e. the final decision of the board) on or after 1 June, 2011, and,

- ➡ Acquisitions where the binding document(s) are executed on or after 1 June, **2011**.

What is the process for filing notices with the CCI ?

Under the Act, notice is to be filed in the prescribed form with requisite filing fee, within 30 days of the:

- Board approval of the enterprises in case of a proposed merger/amalgamation; or
- Execution of any agreement or 'other document' in case of a proposed acquisition.

The Regulations have clarified the meaning of the board of directors in case of non-corporate entities like sole proprietors, HUF, statutory corporations, association of persons, partnerships, cooperative society, local authorities and other forms.

The Regulations have clarified the term 'other document' to mean any binding document conveying an agreement or a decision to make an acquisition. In case of a hostile acquisition, 'other document' would mean any executed document conveying a decision to acquire. In a case where no document has been executed but the intention to acquire is communicated to the Central Government or the State Government or to any Statutory Authority, the date of such communication shall be deemed to be the date of execution of the 'other document'.

Schedule II to the Regulations prescribes the following three forms to file notices with CCI for combinations:

1. Form I (Short Form) with a filing fee of INR **50,000**,
2. Form II (Long Form) with a filing fee of INR **10,00,000/-**; and
3. Form III (for public financial institutions, foreign institutional investors, banks and venture capital funds) without any filing fee.

The parties to the combination can elect between Form I and Form II, though "ordinarily" Regulation 5(2) indicates that Form I should be used including for certain instances specified in the said Regulation (briefly set out in **Appendix B** to this note). The CCI can direct the parties to furnish additional information or file Form II. In case the CCI directs the parties to file Form II, the fees paid for filing Form I can be adjusted against fees payable for Form II.

Forms can be viewed on CCI's web site. Salient information required under the forms is briefly outlined in **Appendix C** to this note.

The Regulations have also clarified that where the ultimate intended effect of a business transaction is achieved through smaller individual transactions (interconnected or inter-dependent), one or more of which may amount to a combination, a single notice covering all these transaction may be filed.

Who is obliged to file the form with the CCI?

In case of merger or amalgamation, the obligation is jointly of the parties to the combination.

In case of acquisition, the obligation is of the acquirer. In case of acquisitions, without consent of the enterprise being acquired, the acquirer is to furnish only such information as is available and the CCI can direct the enterprise being acquired to furnish additional information.

What is the timeline and process for evaluation by the CCI ?

The Act prescribes a period of 210 days from the date of filing notice for CCI to pass an order, or issue directions in respect of a combination notified for approval. Till CCI passes an order, the combination cannot take effect. If CCI does not pass any order within 210 days, the combination shall be deemed to have been approved.

The review by the CCI as to whether or not the proposed combination is likely to cause or has caused appreciable adverse effect on competition within the relevant market in India, shall be in two phases (i) CCI is to form a *prima facie* opinion in 30 days of receipt of the notice; and if such opinion confirms that there is likely to be an appreciable adverse effect on competition in India, then, (ii) to undertake a detailed investigation within 180 days thereafter which would include calling for a report from the Director General, directing parties to publish the details of the combination in the prescribed form (Form W) to invite written objections from any person or member of the public affected or likely to be affected by the said combination and giving such affected parties an opportunity of being heard.

The Regulations specify certain instances where the time taken by the parties will be excluded from the 210 day approval period, or the 30 day period for forming *prima facie* opinion by the CCI. These instances include- (a) time taken to provide information in case of an incomplete form, (b) time taken to furnish additional information required by the CCI, (c) time taken to file Form II in case so directed by CCI, etc.

What are the factors for evaluation of the Combinations by the CCI ?

To determine whether the combination would have the effect of or is likely to have an appreciable adverse effect on competition in the relevant market, the CCI is to have due regard to certain factors specified under the Act. These factors are briefly set out in **Appendix D** to this note.

Will information furnished by the parties be kept confidential ?

Any party may submit a written request for confidentiality of information or documents submitted during investigation and such request shall be considered as per the procedure laid down in The Competition Commissions of India (General) Regulations, 2009. The request for confidentiality needs to be accompanied by a statement setting out cogent reasons (viz. making part or whole of the document public would result in disclosure of trade secrets or destruction or appreciable diminution of commercial value of any information or cause serious injury) for such treatment and to the extent possible, the date on which such confidential treatment shall expire. The CCI may determine if, to what extent, and for what period, the request should be granted and direct accordingly. Where request for confidentiality is rejected and the party is still unwilling to make the documents or part thereof public, such documents or parts thereof shall be returned to the party and the information contained therein shall be

disregarded. Any person, party or expert appointed or engaged by the CCI, who is privy to the confidential information shall be bound by confidentiality obligations and any breach thereof shall constitute ground for initiation of disciplinary proceedings or for termination of the engagement by the CCI. The right to seek confidentiality extends only to documents submitted and not to the transaction itself.

What orders may CCI pass on Combinations ?

The CCI may (i) order that the combination is approved; or (ii) in case CCI finds that a combination shall have, or is likely to have, an appreciably adverse effect on competition in the relevant market, the CCI may order (a) that the combination should not be given effect to; or (b) suggest suitable modifications to amend the transaction structure and based on the response of the parties, pass further orders.

The CCI can also appoint independent agencies (like accounting firm, management consultancy, law firm, or other professional organisations) to supervise the modifications to combination proposed by the CCI and accepted by the parties if CCI so deems fit.

Any transaction found to be likely to cause, or to have caused, an appreciably adverse effect on competition in the relevant market in India can be declared as void and of no effect by the CCI.

APPENDIX A

Proposed Combinations for which filing may not be normally required

The following transactions (detailed in Schedule I to the Regulations, only briefly outlined below) have been clarified as ordinarily not likely to have appreciable adverse effect on competition in India and hence notice need not normally be filed with CCI:

1. Acquisition of not more than 15% of the shares or voting rights of the target, solely as investment or in the ordinary course of business, not leading to control;
2. Acquisition of shares or voting rights of the target where the acquirer already has 50% or more shares or voting rights, except in cases where transaction results in transfer from joint control to sole control;
3. Acquisition of assets not directly related to the business activity of the acquirer or made solely as investment or in the ordinary course of business, not leading to control of the enterprise except where the assets being acquired represent substantial business operations of the target in a particular location or for a particular product or services, irrespective of whether such assets are organized as a separate legal entity or not;
4. Amended or renewed tender offer where notice has been filed by the party making the offer prior to such amendment or renewal of offer. Provided that prior intimation of such change has been duly made;

5. Acquisition of stock-in-trade, raw materials, stores and spares in the ordinary course of business;
6. Acquisition of shares or voting rights pursuant to a bonus issue or stock-splits or consolidation of face value of shares or subscription to rights issue (to extent of entitlement), not leading to acquisition of control;
7. Acquisition of shares or voting rights by a securities underwriter or a registered stock broker on behalf of clients, in the ordinary course of their respective businesses;

Acquisition of control or shares or voting rights or assets by one person or enterprise of another person or enterprise within the same group, ("Group" is defined to mean two or more enterprises which, directly or indirectly, are in a position to either exercise 50% or more of the voting right in the other enterprise or appoint more than half of the board of directors in the other enterprise or control the management or affairs of the other enterprise);

- Acquisition of current assets (i.e. interest accrued on investments, stores and spare parts, loose tools, stock-in-trade, works-in-progress, sundry debtors, cash balance on hand and bank balance) in the ordinary course of business.
- Combinations taking place entirely outside India with insignificant local nexus and effect on markets in India.

APPENDIX B

Some Proposed Combinations for which Form I may be used Combinations (detailed in Regulation 5(2), outlined below) where:

- none of the parties to the combination are engaged in production, supply, distribution, storage, sale or trade of similar or identical or substitutable goods or provision of similar or identical or substitutable services, or the parties to combination are not engaged at different stages or levels of the production chain in different markets in goods or provision of services in which another party to the combination is engaged;
- parties to the combination are predominantly engaged in exports of goods or services (i.e. at least 75 of the turnover of the party to the combination is derived from exports out of India) and continue to be predominantly engaged in exports of goods or services after the combination takes effect, provided that the market share of the combined entity is less than 15% in the relevant market in India;
- an acquisition or acquiring of control over an enterprise by a liquidator, administrator or receiver appointed through court proceedings or through any scheme approved under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 or under the Sick Industrial Companies (Special Provisions) Act, 1985 or any other modification or re-enactment of the law;

- an acquisition results from a gift or inheritance;
- an acquisition is of a trustee company or arises from a change of trustees of a mutual fund established under the Securities and Exchange Board of India (Mutual Fund) Regulations 1996, as amended from time to time;
- the parties to combination are engaged in production, supply, distribution, storage, sale or trade of similar or identical or substitutable goods or similar or identical or substitutable service and the combined market share after such combination is less than 15% in the relevant market;
- the parties to the combination are engaged at different stages or levels of the production chain in different markets in respect of production, supply, distribution, storage, sale or trade in goods or services, and their individual or combined market share is less than twenty five percent (25%) in the relevant market.

APPENDIX C

Forms for Notifying Proposed Combination

Forms are specified in Schedule II to the Regulations, the salient aspects of information required are briefly outlined below:

Form I – Part 1 seeks information including name, registration details, addresses and roles of the parties to the combination.

Form I – Part 2 seeks the following salient information:

- a. **summary of the combination** including business objective and/or economic rationale and how they are intended to be achieved, relevant markets, any proposed horizontal overlap or vertical arrangements post combination;
- b. **basic information on the combination** including details of the products, services, market share of the parties, total size of the market in terms of value of sales (in rupees) and volume (in units), name and contact details of 5 largest competitions (along with market shares), customers and suppliers, information about the group etc.

Form II is a very exhaustive form and seeks information in detail, some of the salient elements of information are outlined below:

- a. **Summary of the combination** including rationale, objectives, strategy and likely impact of the combination, markets (including its structure and state of competition) in which the combination have or likely to have impact,
- b. **Purpose of the Combination** including business objectives, economic rationale of the combination and its impact on the economy, market and consumers,

- c. **Details about the Combination** like nature of the combination, shares/ voting rights/ assets being acquired
- d. **Several supporting documents are required to be filed including** annual reports, analysis, reports, studies or surveys analyzing the impact of the combination, final version of documents the parties considered for purpose of evaluating/assessing/analyzing the combination along with name and title of each individual who prepared such document;

Information about the size of the combination including on monetary thresholds, details about value of assets and aggregate turnover of each of the parties to the combination as per audited annual accounts of the immediately preceding financial year and current financial year, aggregate value of assets and turnover for the proposed combination for the immediately preceding financial year and current financial year. Such values are to be provided for India as well as outside India.

- **Ownership and Control** including details of the intended structure of ownership and control of the target entity/acquiring entity/combined entity after completion of the combination;
- **Information on Products and Services with supporting documents** including identical or substitutable products or services, market shares, existence of other producers or suppliers, applicable laws rules etc, licensing arrangements, government policies applicable, distribution facilities, details on production, prices, pricing policies of the parties and competitors, minimum viable scales etc
- **Information on the Market Structure** (Demand and Supply Structure, Market Entry and Innovation) including

-list of main competitors in the relevant market and estimate of market share in value of all the competitors having at least 5% of the geographic market,

-level of concentration (Herfindahl-Hirschman Index) in the relevant market and how the level of concentration would change after combination takes effect,

-number of entities entering and exiting or attempting to exit the relevant market in the last 5 years along with detailed information of such entities and likelihood of entry of enterprises of significant size in the next one or two years,

-details of the barriers to entry and factors influencing the entry

- whether parties to the combination or any competitors have any 'pipeline products or services' likely to be brought to the market in the near future or have plans to expand or contract production or sales capacity projected sales and market shares of the parties over next 3 to 5 years

- **Documents of Compliance and filing in other jurisdictions** including orders passed on a competition issue in the past 5 yrs.

- The notes to Form II clarify the basis for providing information including accounting standards to be followed, computation of assets, rate of conversion of foreign currency into INR or USD, computation of turnover/exclusion of indirect taxes, provision of unaudited figures etc.

Form III seeks the following salient information:

1. Nature and extent of acquisition and **justification** that acquisition attracts section 6(4);
2. Confirmation whether the acquisition meets the **threshold limits** prescribed for combinations under the Act;
3. Any foreign filing requirements.
4. **Relevant product market** and **geographic market** of the products/services of the target entity and **relevant market** keeping in view the relevant product market and relevant geographic market;
5. **Determination of control** by parties to the acquisition through details of entities exercising control, form and manner in which it is exercised and the details of common directors/partners/co- partners/trustees;

APPENDIX D

Factors for evaluation of Proposed Combination

To determine whether the combination would have the effect of or is likely to have an appreciable adverse effect on competition in the relevant market, CCI is to have due regard to certain factors specified under the Act. These factors are briefly set out below:

1. Actual and potential level of competition through imports in the market;
2. Extent of barriers to entry to the market;
3. Level of combination in the market;
4. Degree of countervailing power in the market;
5. Likelihood that the combination would result in the parties to the combination
6. being able to significantly and sustainably increase prices or profit margins;
7. Extent of effective competition likely to sustain in a market;
8. Extent to which substitutes are available or are likely to be available in the market;
9. Market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;

10. Likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;
11. Nature and extent of verticals integration in the market;
12. Possibility of a failing business;
13. Nature and extent of innovation;
14. Relative advantage, by way of the contribution to the economic development, by any combination having or likely to have an appreciable adverse effect on competition;
15. Whether the benefits of the combination outweigh the adverse impact of the combination, if any.

Relevant market means the relevant product market or relevant geographical market or both.