CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
April2011 (1)

Competition Law: A Merger Perspective

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Competition is a process of economic rivalry between market players to attract customers. Competition Law aims at promoting and sustaining competition in markets by preventing anti-competitive practices, abuse of dominance, regulation of combinations and thereby maintaining a competitive environment along with controlling monopolistic, unfair and restrictive trade practices. Competition Policy involves two major aspects: one is a state policy framework that defends and promotes competition, and the other is a law that too coupled with an authority that enforces the law.

Historically, the Monopolies and Restrictive Trade Practices Act, 1969 have regulated competition in India, ("MRTP Act"), which had public interest and consumer welfare as the core objectives yet, failed to cope up with the fast growing 'market driven economy'. The MRTP Act underwent several amendments during the course of its journey. However, due to inherent weakness in its own structure and in the composition of the MRTP commission, it could not deliver the desired results.

The rate at which the Indian economy was growing, it was imperative to introduce new set of laws for safeguarding healthy competition in the market as the MRTP Act had become obsolete in certain areas and was not as effective to regulate the Indian markets. As a result, to promote competition and to promulgate a modern competition law, the Government constituted a Committee in 1999, which lead to the enactment of the Competition Act, 2002 ("Act") followed by the Competition (Amendment) Act, 2007 enacted in September 2007.

India has been witnessing mergers and acquisitions across the small, medium and large companies since its independence. However, post 1992, there has been no rules or regulations to keep a check on the impact of mergers and acquisitions on the competition in the market. Hence, it was vital to review combinations because of their potential adverse effect on competition in the relevant market.

The Act was brought into force (through notifications) in stages. In 2009, the Ministry of Company Affairs, Government of India notified the provisions relating to anti-competitive agreements and abuse of dominance along with making the Competition Commission of India ("CCI") fully operational and effective from May 20, 2009 and by September 2009, the whole MRTP Act was repealed dissolving the MRTP Commission. However, the provisions relating to mergers and acquisitions were not notified till March 2011.

At last, India has arrived and like several other jurisdictions in the world, has introduced merger control regime by notifying the pertinent regulations controlling combinations, which will come into effect from June 1, 2011. The notification of sections 5 and 6 of the Act have come along with revised thresholds and draft regulations outlining the procedure in regard to the merger transaction ("Draft Regulations").

Under the Act, combination means any acquisition of control, shares, voting rights or assets, acquisition of control by a person over an enterprise where such person has control over

another enterprise engaged in competing businesses, and mergers and amalgamations between or amongst enterprises, when such transactions exceed the thresholds set in the Act.

Section 6 of the Act provides that "no person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant markets in India and such a combination shall be void." The Act primarily prohibits any combination, which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India.

The notification of the merger control regulations has not been welcomed as warmly as it should have been by the industry and banking sector. The antagonism by the industry against the merger control regulations has been a major impediment in making the merger control regime operational. The opposition by the industry was due to the fact that the merger regulations instead of checking competition in the market would end up hindering the growth of industries due to the relatively low-value of the thresholds and long review period extending up to 210 days which was viewed as a slowdown of the economy.

Section 5 of the Act provides the threshold limits for bringing in the combination under the ambit of the CCI. The limits set out are defined in the table at the end of this paper.

However, the plea of the industry partners was that that the thresholds prescribed under the Act were too low that even the smallest transaction may fall under it, which would lead to piling up of applications with the CCI thereby delaying the whole transaction. Owing to the concerns raised by the industry, the Government of India has increased the limits stated in the table below by fifty per cent on the basis of wholesale price index. Further, the Group (as defined under the Act) exercising less than fifty per cent of voting rights in other enterprise have been exempted from the provisions of the Act for a period of five years. And for providing immediate relief, the Government of India has further exempted an enterprise whose control, shares, voting rights or assets are being acquired has assets of the value of not more than rupees 2500 million or turnover of not more than rupees 7500 million from the provisions of section 5 of the said Act for a period of five years.

After June 1, 2011, any merger or acquisition transaction falling under the ambit of CCI cannot be completed unless approved by the CCI. The Draft Regulations issued along with the notifications lay down the procedure in regard to obtaining the approval from CCI. The Act provides for a review period of 210 days, however the new regulations provides that the CCI should endeavor to pass the final order within 180 days. This may not be of much relief for the industry sector as the Act would prevail over the regulations and thereby make the 180 day period non-binding. However, to speed up the process the notification had made it mandatory for the CCI to form a *prima facie* opinion, within 30 days of filing, on whether a combination has caused or is likely to cause an adverse effect on the competition. Apart from that if a notification is found to be incomplete, the review time period will not run while the parties correct the notification.

The CCI can *suo motu* initiate an inquiry incase the parties entering into a merger transaction fails to inform the CCI about the Transaction. The CCI has also been empowered to order the parties to modify the transaction if it feels that the proposed transaction can be anti-competitive in nature. The entity may also have to publish the details of the combination, in case CCI feels that such combination would have an appreciable adverse effect, which may hamper the commercial interest of the concerned entities.

The Draft Regulations also provide for pre-merger consultations, if any enterprise which proposes to enter into a combination may request in writing to the designated authority, for an informal and verbal consultation about filing. Hence, the Draft Regulations depict a marked improvement from the previous drafts issued by the government; however certain concerns still needs to be addressed.

Overall, establishing a merger control regime for a fast growing economy like India was the dire need of the hour and the same should be appreciated. All legal systems have to pass the test of time and so does the merger control regime.

THRESHOLD LIMITS

Nature of Combination	Relevant Person	Criteria	In India (INR in Millions)	In or outside India (in Millions)
Acquisition by persons of control, shares, voting rights, or assets of other enterprise	Parties to the acquisition—jointly	Assets	10,000	U.S. $500 (at least INR 5,000 in India)
		Turnover	30,000	U.S. $1,500 (at least INR 15,000 in India)
	Group to which the enterprise, whose control, shares, voting rights or assets have been acquired or are being acquired would belong after acquisition - jointly	Assets	40,000	U.S. $2,000 (at least INR 5,000 in India)
		Turnover	120,000	U.S. $6,000 (at least INR 15,000 in India)
Acquiring of control by a person over an enterprise when such person has already control over another enterprise engaged in production, distribution, trading or provision of similar, identical or substitutable goods or services	Enterprise over which control has been acquired along with the enterprise over which the acquirer already has direct or indirect control – jointly	Assets	10,000	U.S. $500 (at least INR 5,000 in India)
		Turnover	30,000	U.S. $1,500 (at least INR 15,000 in India)
	Group to which the enterprise, whose control, has been acquired or are being acquired would belong after acquisition - jointly	Assets	40,000	U.S. $2,000 (at least INR 5,000 in India)
		Turnover	120,000	U.S. $6,000 (at least INR 15,000 in India)
Merger or Amalgamation of an enterprise	Enterprise remaining after merger or created as a result of amalgamation	Assets	10,000	U.S. $500 (at least INR 5,000 in India)
		Turnover	30,000	U.S. $1,500 (at least INR 15,000 in India)
	Group to which the enterprise remaining after merger or created as a result of amalgamation would belong, after the merger or amalgamation	Assets	40,000	U.S. $2,000 (at least INR 5,000 in India)