COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
August 2013

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Cyril Shroff & Nisha Kaur Uberoi[1]

I. INTRODUCTION: COMPETITION LAW FRAMEWORK IN INDIA

The (Indian) Competition Act, 2002 ("Act"), replaced the erstwhile (Indian) Monopolies and Restrictive Trade Practices Act, 1969, which contained provisions dealing with cartelization and unfair trade practices but not merger control. It is therefore not surprising that the creation of a new regulator to monitor M&A activity was resented by the industry for more than nine years.[2] The merger control provisions of the Act were finally brought into force on June 1, 2011 and, since then, the Competition Commission of India ("CCI"),[3] has passed 121 orders[4] approving a total of 116 combinations.[5]

The merger control regulatory framework has evolved over this period as well, with crucial amendments being made to the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ("Combination Regulations") in February 2012 and April 2013 and further amendments to the Act having been recently tabled before the lower house of the Indian Parliament.

While the law in this field continues to formally evolve to meet industry needs and policy expectations, this article attempts to analyze the learning to be drawn from the Orders of the CCI until now.

II. 121 ORDERS: A TREND ANALYSIS

An acquisition of one or more enterprises or merger or amalgamation of enterprises, where certain prescribed assets or turnover thresholds are crossed, needs to comply with the merger control provisions contained in Sections 5 and 6 of the Act and the Combination Regulations.

The Government of India, through the Ministry of Corporate Affairs, issued a notification dated March 4, 2011, whereby a combination would not require prior notification to, and approval from, the CCI if the target enterprise, including its divisions, units, and subsidiaries

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[2] The Act was enacted in 2002 but the merger control provisions of the Act were brought into force only in 2011, after substantial amendments in 2007.

[3] The regulatory authority established under the Act.

[4] At the date of going to publication, i.e. June 13, 2013.

[5] As defined in Section 5 of the Act.

has either assets of the value not exceeding Rs. 250 crores in India or turnover not exceeding Rs. 750 crores in India ("Target Exemption").

Out of the 121 orders dealing with Form I and Form II notifications passed by the CCI to date, 55 orders deal with intra-group reorganizations. Interestingly, Item 8A of Schedule I to the Combination Regulations provided a partial exemption from notification for only mergers or amalgamations involving subsidiaries wholly-owned within the same group until April 2013, when, by further amendments to the Combination Regulations, the exemption from notification was extended to all intra-group mergers and amalgamations and the earlier qualification which required the entities involved to be wholly-owned, was dispensed with.[6]

As a result, up to April 2013, the intra-group merger or amalgamation exemption was not available for transactions which involved even a single listed entity and such transactions were notified to the CCI even though they presumably did not cause any competition concerns. Understandably, the intra group-merger and amalgamation exemption is still not available for transactions that result in a change in control.

The CCI has not discussed or debated the asset and turnover figures submitted by parties in any of its orders. Given that the Act does not contain detailed guidance on what heads and sources of income ought to be taken into account to determine turnover for the purpose of calculating the turnover thresholds prescribed under the Act, one would expect the CCI to develop jurisprudence on this subject by precedent. However, it appears that parties must engage with the regulator (for instance, by way of a pre-merger consultation) or test on a case-by-case basis the manner of calculating turnover for different industries.

For instance, a real estate company is likely to have assets worth thousands of crores but if it has not undertaken any construction in the year preceding M&A activity, it will not have any turnover for the relevant year and may avail itself of the Target Exemption. Similarly, an asset management company ("AMC") may have assets and turnover of less than Rs. 250 crores and Rs. 750 crores, respectively, but may have schemes under management, the turnover of which may exceed thresholds prescribed under the Target Exemption. It is a question open to debate whether the turnover derived from such schemes over which the AMC exercises decisive influence ought to be aggregated in order to determine notifiability.[7]

It is also unclear as to how "Indian turnover" is to be calculated for the purposes of international business houses which may have cross-border trade into and outside India, i.e. whether Indian turnover is turnover derived from goods or services produced in India, irrespective of where they are consumed, or turnover derived from sale of goods or services in India, irrespective of where they are produced, or both.

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[6] The Act defines "group" to mean two or more enterprises which, directly or indirectly, are in a position to:

a) exercise 50 percent or more of the voting rights in the other enterprise (for the purposes of computation of thresholds);
b) appoint more than 50 percent of the members of the board of directors in the other enterprise; or
c) control the management or affairs of the other enterprise.

[7] Since the schemes could be deemed to constitute assets over which the AMC exercises control.

While the CCI projects itself as a progressive regulator and is keen to engage with the industry to help obviate their concerns and make the merger approval process more efficient, the Act and Combination Regulations, as presently drafted and interpreted by the CCI, are often at cross-roads with prevalent commercial practice and transaction structures. For instance, in the *Reliance/Bharti AXA case*,[8] the CCI held that an option to acquire, notified as part of transaction, including a series of steps, should be notified at the time of exercise and not at the time of entering into the agreement containing the option.

Also recently, in the course of pre-merger consultations, the CCI has raised concerns regarding the possibility of giving blanket approvals to the exercise of ROFO rights under transaction documents. The background to this approach is that the Act provides for scrutiny of impending and definitive acquisition of shares, assets, control, or voting rights whereas options or ROFO rights merely create a future possibility of acquisition. The CCI appears to be of the opinion that the competitive landscape ought to be re-examined at the time of exercising such options for effective enforcement of competition law. However, it is interesting to note that in the *Acquisition by Independent Media Trust case*,[9] the CCI construed the acquisition (and not the exercise of) of zero coupon optionally convertible debentures ("ZOCDs"), which are exercisable within a period of ten years and entitle the acquirer to 99.9 percent of the target companies' equity upon conversion, to be the acquisition of shares within the meaning of the Act as well as the acquisition of decisive control and influence over such companies.

III. NOTIFICATIONS

A. Trigger Documents: When To File?

According to Section 6 of the Act, parties are required to file a notification with the CCI within 30 days of the final board approval (in the case of a merger or amalgamation) or the execution of any agreement or other document (in the case of an acquisition), as the case may be ("Trigger Document"). The term "other document" is defined in Regulation 5(8) of the Combination Regulations as any binding document conveying an agreement or decision to acquire control, shares, voting rights, or assets. This definition is wide enough to include a Memorandum of Understanding ("MOU").

While Section 6 is fairly clear on what constitutes the trigger event for filing a notification, CCI precedent has led to introduction of a new test of "definitiveness" that applies while determining what constitutes the Trigger Document. After the *ABNL/PRIL* case,[10] the possibility of the CCI reviewing a transaction on the basis of a binding MOU/other agreement/other document executed in relation to an acquisition has become suspect. In this case, the CCI returned the merger notification[11] filed pursuant to a binding MOU (which constitutes an "other document") as well as a Subscription and Investor Rights Agreement (a

[8] C-2011/07/01

[9] C-2012/03/47

[10] C-2012/10/82

[11] By way of a non-appealable order under Regulation 14 read with Regulation 5 of the Combination Regulations.

definitive document executed on stamp paper creating an escrow mechanism) which were both executed on the same day on *inter alia* the following grounds:

a) the MOU lacked sufficient details in terms of transaction specifics;

b) the MOU provided that it would be superseded by any final agreements that the parties would execute in furtherance of the transaction; and

c) the monies deposited in escrow pursuant to the Subscription and Investor Rights Agreement were to be returned if the transaction was not completed.

It appears that CCI's concern lies in the fact that if filings made on the basis of an MOU are accepted, parties to the proposed transaction may use it as an opportunity to alter key terms of the deal in the final agreements, after obtaining CCI approval. The CCI disregarded the fact that the trigger was not just the binding MOU but also the Subscription and Investor Rights Agreement which was a binding agreement and served as a trigger given that the escrow arrangement could be terminated.

Further, while the CCI in previous cases conceded that a demerger amounts to an acquisition,[12] in the *ABNL/PRIL case* the CCI asked the parties to re-submit the notification after obtaining the final board approval for all steps of the transaction, including the demerger. This has led to doubt in relation to whether combinations involving a demerger can be notified on the basis of a definitive document or final board approval. According to Section 43 of the Act, a belated filing attracts a penalty of up to one percent of the combination's total turnover or assets, whichever is higher. Therefore, determination of the Trigger Document is crucial, as a pre-mature filing may ensue in a filing being returned by the CCI, with no adjustment made for filing fees already paid, while a delayed filing will attract substantial penalties under the Act.

The penalty for a belated filing or not filing a notifiable transaction with the CCI can extend up to one percent of the total assets or turnover of the entities involved, whichever is higher. While the CCI instituted penalty proceedings for belated filings in nine instances in the first year of merger control in India, no penalty was levied. However, the CCI's stand in this regard has toughened and it has levied penalties for belated filings in two instances. The most notable occasion was in the *Titan International/Titan Europe*[13] matter, which involved an off-shore acquisition by Titan International of an equity interest in Titan Europe and required a filing to be made to the CCI on account of Titan Europe's presence in India through an associate company. The CCI levied a penalty of INR 10 million on the parties instead of the INR 1450 million penalty that it could have levied based on the parties' turnover.

B. Form II Notifications

To date, there have been only two Form II notifications filed with the CCI.[14] The CCI cleared the first Form II[15] in 26 days (excluding clock stops), with the entire review process by the

[12] *Sterlite Industries/Madras Aluminium Company/Ekaterina/Sesa Goa,* C-2012/03/45.

[13] C-2013/02/109.

[14] The authors have been involved in both these notifications.

[15] GDNL/GGCL (C-2012/11/88).

CCI comprising a total period of 69 days. This was also the first case in which the CCI dealt with a sector involving a natural monopoly and in which the CCI sought behavioral commitments from the acquirer (discussed below).

The CCI cleared the second Form II[16] within a record time of 19 days, with the review process comprising 84 days (including clock stops). The CCI granted unconditional approval for the acquisition of up to 53.4 percent equity shares in United Spirits Limited by Diageo plc by way of a Share Purchase Agreement, Shareholders Agreement, Preferential Allotment Agreement, an open offer under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, - 2011 ("Takeover Code"), and potential creeping acquisitions on the stock exchange, and by exercise of ROFO rights, for a period of 5 years.

The promptness with which the CCI dealt with the first two complex Form II filings has allayed industry concerns to an extent.

C. Form III Notifications

Anomalies also exist in the case of a Form III filing, which is a post-facto filing required to be made by public financial institutions, foreign institutional investors, banks, or venture capital funds within seven days from the date on which they make an acquisition pursuant to any covenant of a loan agreement or an investment agreement. The CCI, in its order relating to the *Acquisition by GS Mace*[17] held that a contract note issued by a stockbroker confirming the execution of a trade on the stock exchange by the stockbroker on behalf of the buyer/seller of securities is more in the nature of a receipt issued by the stock broker and does not amount to an investment agreement.

Such on-exchange transactions, therefore, cannot avail themselves of the post-facto filing benefit and must be notified to the CCI prior to completion of the transaction and can be effected only upon receipt of CCI approval. The dynamics of on-exchange transactions and the gamut of regulations governing listed entities are such that it is impossible to crystallize an acquisition in a formal agreement and wait for the 30-day review period available to the CCI to approve of the transaction as such conduct will tip off market speculators and investors and will most likely cause price distortions.

Interestingly, only four Form III filings have been made to date, and no other transaction similar to the *Acquisition by GS Mace* has been notified to the CCI. Further, since non-notification of a combination that is otherwise notifiable in Form III does not attract any penalty, industry practice appears to be to ignore the provisions of the Act and dispense with the need to engage with the competition regulator.

IV. INTERPLAY WITH THE TAKEOVER CODE

The need to engage with more than one regulator has added many difficulties to the management of transaction timelines. For instance, the interplay of protocol and timelines between the CCI and the Securities and Exchange Board of India ("SEBI") is a constant source of speculation. While, thus far the CCI has been prompt in its approval process and has cleared all

[16] Diageo/United Spirits Limited (C-2012/12/97).

[17] C-L/2011/12/03.

transactions involving listed entities prior to the receipt of necessary approvals from SEBI,[18] there are certain requirements under the SEBI regulations which may pose a problem if CCI approval is delayed on account of any reason.

For instance, the Takeover Code mandates that an acquirer must make a payment to public shareholders within 15 days from the date of closure of an open offer.[19] If such a payment is not made, an obligation by the acquirer to pay interest on the amount arises. However, under the Combination Regulations, the CCI has a period of 210 days (not including clock stops) to clear a deal. This mismatch of timelines can result in a high interest burden if the CCI approval is delayed. Further, under the Takeover Code, an acquirer is required to disclose in a public announcement if the target's assets are proposed to be disposed off and provide an undertaking that it will not dispose of target's assets without shareholder approval. However, the CCI could pass a structural commitment and order such a divestiture.

It is also interesting to note that while the Takeover Code allows creeping acquisition of up to 5 percent each year by a shareholder already holding 25 percent equity in an entity, until April 2013 such creeping acquisition required prior approval from the CCI on each occasion as long as the concerned shareholder's equity interest in the entity was less than 50 percent.[20] After that date, by way of amendments to the Combination Regulations, creeping acquisitions of up to 5 percent each year in an entity in which the acquirer already holds 25 percent have been exempted from notification. However, this exemption is not available for transactions that result in a change in control. In any event, the disconnect between the Takeover Code and the Act continues to exist as, unlike the Takeover Code, the 5 percent acquisition under the Combination Regulations would be covered within its ambit acquisitions of convertibles.

V. TREATMENT OF JOINT VENTURES

The Target Exemption was effectively diluted by the amendments to the Combination Regulations in February 2012 by inclusion of Regulation 5(9) which provides that if, as part of a series of steps in a proposed transaction, particular assets of an enterprise are moved to another enterprise (i.e. a separate legal entity), which is then acquired by a third party, the entire assets and turnover of the selling enterprise (from which these assets and turnover were hived off) will also be considered when calculating thresholds for the purposes of Section 5 of the Act. This principle of aggregation applies to any transferor company's assets and turnover in entirety (even if only a single asset were to be transferred to a special purpose vehicle ("SPV") into which an investment is being made) as well as the assets and turnover of the SPV, both of which would effectively constitute the target enterprise.

[18] Except in the case of the first and second Form II i.e. GDNL/GSPC and Diageo/United Spirits Limited. In the case of the first Form II, although SEBI's final observations on the Letter of Offer were received prior to CCI's approval, the open offer itself closed only after CCI approval was received.

[19] A stage that is likely to be reached within 70-100 days of the date on which the acquisition of shares or control is made.

[20] Item 8 of Schedule I to the Combination Regulations provides an exemption from notification to acquisitions by a person or enterprise in another person or enterprise within the same group. *See supra* note 6 for definition of "group."

In the course of pre-merger consultations, the CCI has informally indicated that this principle of aggregation also applies to a joint venture entity, whereby the assets and turnover of both the parent entities would be taken into consideration to calculate whether the asset and turnover thresholds were met for the purposes of merger control under the Act.

However, no Greenfield joint venture has been notified to the CCI to date, and while the industry is divided in its opinion on whether the principle of aggregation ought to apply to Greenfield joint venture entities, it remains to be seen whether the CCI will use its *suo motu* investigation powers[21] to review the creation of a joint venture entity that may have escaped notification by taking advantage of the Target Exemption.

The 2013 amendments to the Combination Regulations have clarified that an acquisition of shares, voting rights, or assets by a person or enterprise in another person or enterprise within the same group would require a notification to be filed with the CCI in the event that the target enterprise is jointly controlled by two different groups. This amendment ostensibly seeks to capture instances where one joint venture partner exits or sells its interest to another joint venture partner.

VI. CONCEPT OF "CONTROL"

Different legislations and regulations define "control" differently in different contexts. While the (Indian) Companies Act, 1956 ("Companies Act") provides for one definition of control, SEBI regulations and the statutory authorities administering them have taken varied approaches to this term at different stages and in different contexts. Explanation (a) to Section 5 of the Act provides that "control" shall include "controlling the affairs or management by:

a) one or more enterprises, either jointly or singly, over another enterprise or group;

b) one or more groups, either jointly or singly, over another group or enterprise."

There is, however, no clarity on whether negative control also amounts to control. The CCI, through a series of precedents, has progressively taken a more aggressive stand[22] and the position in law at present appears to be that a shareholder holding more than a 25 percent equity stake in an entity can be regarded as having "control" over that entity. The CCI has clarified that control includes positive and negative control, such as veto rights, decision-making relating to appointment of management personnel, budget, business plans, etc.

In its order in the case of *MSM India/SPE Holdings/SPE Mauritius*,[23] the CCI held that joint control over an enterprise "implies control over the strategic commercial operations of the enterprise by two or more persons. In such a case, each of the persons in joint control would have the right to veto/block the strategic commercial decision(s) of the enterprise, which could result in a dead lock situation. Joint control over an enterprise may arise as a result of shareholding or through contractual arrangements between the shareholders."

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[21] Section 20 of the Act.

[22] *Alok Industries/ Grabal Alok Impex Limited* (C-2012/01/28); *Century Tokyo Leasing Corporation/Tata Capital Financial Services Limited* (C-2012/09/78).

[23] C-2012/06/63.

Since a shareholding of more than 25 percent would enable a shareholder to veto strategic decisions which require approval by way of a special resolution under the Companies Act, a holder of more than 25 percent equity can be regarded as exercising negative control over the entity concerned.

VII. COMMITMENTS & UNDERTAKINGS: THE BARGAIN FOR APPROVAL

The CCI, thus far, has not imposed any structural commitments and has sought behavioral commitments in only two instances:

1. In *Orchid Chemicals and Pharmaceuticals Limited/Hospira Healthcare India Private Limited*,[24] ("Orchid case") the transaction related to the pharmaceutical sector and the non-compete obligation extended to the target enterprise for five years and the promoter of the target enterprise for eight years in relation to certain business activities relating to the business division that was transferred, i.e. research, development and testing of injectable formulations of certain kinds of active pharmaceutical ingredients ("APIs"). The CCI, in its order, restricted the product scope of the non-compete clause to existing injectable forms of APIs, thereby permitting the target enterprise and the promoter to engage in research, development, and testing on new kinds of injectable API formulations. Further, the CCI restricted the temporal scope to four years and limited the geographical scope to the domestic market in India.

   While the industry has so far followed the EU Notice on Restrictions Directly Related and Necessary to Concentrations, 2005, as the guiding principle to evaluate non-compete clauses, the CCI's order in the *Orchid* case will now be the yardstick to determine the viability of such clauses.

2. In *GSPC Distribution Networks Limited/ Gujarat Gas Company Limited*,[25] which related to the acquisition of 65.12 percent of the total issued equity share capital of Gujarat Gas Company Limited ("GGCL") by GSPC Distribution Networks Limited ("GDNL"), the CCI sought undertakings from GDNL to the effect that:

   a) post-transaction, GDNL will comply with the provisions of the Petroleum and Natural Gas Regulatory Board Act, 2006, and the regulations made thereunder; and

   b) GDNL will review the customer contracts entered into between GGCL and its customers and submit a report to the CCI within a period of six months post the closing of the transaction, to ensure that such contracts are in compliance with the provisions of the Act.

Therefore, while legislative debates continue on what exactly ought to be the scope of CCI's role in sectors which are already heavily regulated by sectoral regulators, the CCI's stance appears to be that of due deference to the rules and regulations of the relevant sectoral regulator for technical aspects while undertaking its competition review of such sector.

[24] C-2012/09/79.

[25] C-2012/11/88.

VIII. WHAT CAN ONE EXPECT FROM THE NEXT 100 CASES

There is ample scope for legislation to evolve in order to refine India's merger control regime. However, debates over the need for different sectoral thresholds to determine notifiability, transaction thresholds, and clearer definitions of "assets" and "turnover" continue with legislative initiative falling short in comparison to industry expectations.[26] Therefore, it falls upon the regulator to step-up and clarify the uncertainties and loopholes in India's merger control regime.

As the CCI matures with experience, we can expect to see the evolution of a more determined regulator that can develop the law in keeping with industry needs, addressing concerns like unnecessary extension of timelines caused due to merger approvals required in intra-group reorganization cases (the CCI cleared the last intra-group reorganization in 19 days[27]).

While the CCI has done a commendable job in dealing with the merger notifications filed to date in an efficacious manner and in setting out the parameters of "control" through precedent, the need of the hour is clearly reasoned orders, as reasoned speaking orders alone can help industry understand the dynamics involved in the CCI's merger review process and capture the learning of the merger regime to date, thereby serving as a beacon to industry by providing clear cut principles. On May 6, 2013, the Supreme Court of India, in the case of *Rangi International Limited v. Nova Scotia Bank & Ors.,*[28] made an observation to the effect that "the Competition Commission as well as the Competition Appellate Tribunal are exercising very important quasi judicial functions. The orders passed by the Commission and the Appellate Tribunal can have far reaching consequences. Therefore, the minimum that is required of the Commission as well as the Appellate Tribunal is that the orders are supported by reasons, even briefly."

In addition to the learning that can be drawn from developed merger control regimes in jurisdictions such as the EU, the CCI now has its own experience of more than 100 cases to rely upon and learn from.

[26] The recently proposed amendments to the Act, introduced before the lower house of the Indian Parliament in December 2012, leave a lot to be desired.

[27] *FVIL, ILCL, LEE, PRIL AND FLFL* (C-2012/12/99).

[28] Civil Appeal Nos. 253-253A of 2012.