

Competition M&A rules in India finalized

Introduction

The Competition Commission of India (CCI) yesterday published the CCI Regulations (Procedure in regard to the transaction of business relating to combinations), 2011 ('Combination Regulations'). This follows the publication of Draft Combination Regulations ("Draft Regulations") setting out the scheme for implementing the merger control provisions (see legal update¹) and the extensive consultation period which followed.

The Combination Regulations are certainly a step forward and seem to have taken on board most of the suggestions made by stakeholders (including Mayer Brown) during the consultation process. Key reforms include:

- prescription of a list of combinations that 'normally need not be notified' such as a combination taking place entirely outside India with insignificant local nexus and effect on markets in India;
- simplification of Form I;
- clarification of 'ongoing deals' that need to be notified after 1 June 2011;
- reduction of the filing fees;

Filing requirements

The requirement to notify the CCI is mandatory under the Competition Act, 2002 (as amended) ("Act"). The filing thresholds that we had provided in our previous legal update remain the same. They relate to either (i) the acquirer and the target (the "Parties") or (ii) the group to which the target/merged entity will belong post-acquisition (the "Group") and are as follows:

- The Parties have combined assets in India of Rupees 1500 crores (approx. \$333 million) or combined turnover in India of Rupees 4500 crores (approx. \$1000 million); or

- The Parties have combined worldwide assets of \$750 million or combined worldwide turnover of \$2250 million and combined assets in India of Rupees 750 crores (approx. \$166 million) or combined turnover in India of Rupees 2250 crores (approx. \$500 million); or
- The Group has assets in India of Rupees 6000 crores (approx. \$1300 million) or turnover in India of Rupees 18000 crores (approx. \$4000 million); or
- The Group has worldwide assets of \$3000 million or worldwide turnover of \$9000 million and assets in India of Rupees 750 crores (approx. \$166 million) or turnover in India of Rupees 2250 crores (approx. \$500 million).
- For a period of 5 years from 1 June 2011 a proposed transaction that would have to be notified under Section 5 of the Act will not have to be notified if the target enterprise has assets of not more than Rupees 250 crores (approx. \$55 million) or a turnover of not more than Rupees 750 crores (approx. \$166 million).

The Combination Regulations now provide for categories of transactions not likely to have an appreciable adverse effect on competition in India for which a notification "*need not normally be filed.*" The categories of transactions include an:

- (i) Acquisition of shares or voting rights:
 - solely as an investment or in the ordinary course of business in so far as the total shares or voting rights held by the acquirer directly or indirectly, do not exceed 15% percent of the total shares or voting rights of the target company, of which shares or voting rights are being acquired, directly or indirectly or in accordance with the execution of any document including a share holders' agreement or articles of association, not leading to acquisition of control of the target company;
 - where the acquirer, prior to acquisition, has 50% or more shares or voting rights in the enterprise whose shares or voting rights are being acquired, except in the cases where the transaction results in transfer from joint control to sole control;

¹ No more 'cry wolf' - India's merger control provisions come into effect on 1 June 2011 <http://www.mayerbrown.com/publications/article.asp?id=10596>

- pursuant to a bonus issue or stock splits or consolidation of face value of shares or subscription to rights issue to the extent of their entitled proportion, not leading to acquisition of control;
 - by a person acting as a securities underwriter or a registered stock broker of a stock exchange on behalf of its clients, in the ordinary course of its business and in the process of underwriting or stock broking, as the case may be.
- (ii) Acquisition of assets not directly related to the business activity of the party acquiring the asset or made solely as an investment or in the ordinary course of business, not leading to control of the enterprise whose assets are being acquired except where the assets being acquired represent substantial business operations in a particular location or for a particular product or service of the enterprise, of which assets are being acquired, irrespective of whether such assets are organized as a separate legal entity or not.
- (iii) Amended or renewed tender offer where a notice has been filed before the CCI by the party making the offer, prior to such amendment or renewal of the offer provided that the compliance with regulation relating to intimation of any change is duly made.
- (iv) Acquisition of stock-in-trade, raw materials, stores and spares in the ordinary course of business.
- (v) Acquisition of current assets in the ordinary course of business.
- (vi) Acquisition of control or shares or voting rights or assets by one person or enterprise of another person or enterprise within the same Group.

Local Nexus

The filing requirements thresholds can be satisfied even though one party for example, the target has no assets in India or turnover in/into India. Consequently the Act would catch transactions with no local nexus. This was the subject of criticism from several quarters. The Combination Regulations have greatly improved the situation by providing that “a combination taking place entirely outside India with insignificant local nexus and effect on markets in India” “need not normally be filed”.

This test will need to be interpreted either through guidance or through decisional practice.

Form of notice

The Draft Regulations had provided for three different notification forms i.e. Form I (short form), Form II (long form) and Form III (where acquisition, share subscription or a financing facility is entered into by a financial institution, foreign institutional investor, venture capital etc. under a loan or investment agreement). This continues to be the case but it is to be noted that on the positive side the Combination Regulations now provide for a less burdensome Form I. However the CCI could direct the parties to file a Form II notification and the time required to file such notice would be excluded from the calculation of the time period under which the CCI is required to pass orders.

The Combination Regulations also provide for some indication as to when a Form I notification is appropriate and two of such instances are provided below:

- where the parties to a combination are engaged in the production, supply, distribution, storage, sale or trade of similar or identical or substitutable goods/ service and the combined market share of the parties to the combination is less than 15%;
- where the parties to a 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 provision of services and their individual or combined market share is less than 25%.

If the market shares are greater than those stated above the implication is that the longer more detailed Form II should be used. The Combination Regulations further provide that where the intended effect of a business transaction is achieved by way of a series of steps or smaller individual transactions which are inter-connected or inter-dependent on each other one or more of which may amount to a combination, a single notice covering all these transactions may be filed by the parties to the transaction.

Time period for filing of notification and fees

Although the clause relating to pre-notification consultation has been deleted, the Chairman of the CCI in a press statement yesterday declared that the doors of the CCI remain open to such consultations. The

deletion of this clause may not be of much significance for now as there seems to be a lot of apprehension among corporations about the ability of the CCI to guarantee confidentiality of information.

The Act provides that a notification has to be made within 30 days of the:

- approval of the proposed merger or amalgamation by the Board of Directors of the enterprises concerned;
- execution of any agreement or other document for the acquisition or acquiring of control.

Although it is not expressly stated as such it seems that the notification requirement is met when the earlier of either of these events occurs. It is clarified in the Combination Regulations that the words 'other document' above shall mean any binding document, by whatever name called, conveying an agreement or decision to acquire control, shares, voting rights or assets. In case of a hostile takeover 'other document' refers to any document executed by the acquiring enterprise, by whatever name called, conveying a decision to acquire control, shares or voting rights. In case such a document has not been executed but the intention to acquire has been communicated to the Central Government or State Government or a Statutory Authority, the date of such communication shall be deemed to be the date of execution of the 'other document' for acquisition.

A marked improvement from the Draft Regulations is the fact that the CCI clarifies in the Combination Regulations that a notification needs to be provided for:

- mergers or amalgamations, only in regard to proposals approved by the Board of Directors on or after the 1 June 2011 and this approval refers to the final decision of the Board of Directors;
- acquisitions, where the binding document(s) is executed on or after 1 June 2011

As for filing fees, whereas the Draft Regulations had provided for a sliding scale of fees ranging from Rupees 10 lakhs (approx. \$ 22,000) to Rupees 40 lakhs (approx. \$89,000), it would come as a relief to many corporations that this has been significantly reduced to Rupees 50,000 (approx. \$ 1100) and Rupees 10 lakhs (approx. \$ 22,000) for a Form I and Form II notification respectively.

Time required for issue of orders

The provisions contained in the Draft Regulations that the CCI is to form a prima facie opinion on the proposed transaction within 30 days of submission of the notification form is retained. The proposed transaction will then be cleared or subject to what could possibly be termed as a second 'phase' investigation. The Combination Regulations provide that the CCI "shall endeavour to pass an order" in a second 'phase' investigation within 180 days from the date of submission of the notification form. It is to be noted, however, that the time limit under the Act to pass a final order continues to remain as 210 days. As an improvement to the Draft Regulations it has been clarified that reference to 'days' shall be to calendar days.

Conclusion

The Combination Regulations is a much improved version compared to the Draft Regulations. It does show willingness on the part of the CCI to engage in consultations with stakeholders and make improvements to the legislation. There is scope for improvement such as the explanation of the situations in which it may be deemed that there is a change from sole to joint control and for synchronization of the laws with other laws and regulations in India. It is hoped that this will happen soon and that the CCI will continue to demonstrate its willingness to engage with stakeholders in future.

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