

India Competition Report

1. Summary

The key developments over the last three months are as follows:

- For the calculation of thresholds the Competition Commission of India (“CCI”) seems to have adopted the position that, if the target is a business division of a company and not a separate legal entity, then the whole of the turnover of the company to which the target relates must be taken into account.¹
- For notification of an intra-group transaction, the CCI’s view seems to be that transactions which relate to subsidiaries which are wholly owned or are majority owned (sole control) would not have to be notified if the transaction is an acquisition of shares or voting rights.² It would seem to follow that if the thresholds are satisfied, notification would be required if the intra-group transactions are effected in any other way e.g. mergers, amalgamations or possibly even asset transfers.
- In all but one of the notified transactions the CCI sent an additional information request to the notifying party/parties. This suggests pre-filing consultation could be better used by all stakeholders.³
- Six travel agent associations were fined in relation to a call for the boycott of ticket sales of Singapore Airlines. Though it seems that only three of the associations were actively involved, because the other ‘passively’ involved three associations did not object to the use of their logo, they were determined to be equally relevant.

2. Report on cases

A. Mergers

1. Walt Disney/UTV Software Communications

The combination related to the acquisition of sole control of UTV Software Communications (“UTV”) by Walt Disney Company (“Walt Disney”) which already held joint control of UTV with its 50.44% stake. The notified acquisition of shares envisaged a two-step process:

- Acquisition of shares held by public shareholders through a delisting offer; and then
- Acquisition of shares held by the individual, Rohinton Screwvala and his associates.

A single notification was filed as the intended effect would have been achieved through steps related to each other. There is an exemption for intra-group transfer of shares through acquisition of shares or voting rights, though this does not apply for transactions with a change from joint to sole control. It is not expressly stated in the order, but we assume that the two-step process envisaged a change from joint to sole control and hence a notification was required.

Some of the businesses considered by the CCI while analysing the effect of the transaction included the business of: (i) motion pictures in India (ii) TV broadcasting (iii) creation and distribution of content for interactive media such as mobiles and (iv) character merchandising and publishing.

There is no declaration as such that these businesses would be the relevant market and hence it is not clear whether it can be considered as a precedent for future transactions. It may be the case that the CCI does not want to bind itself to precedents in the early years of its operation. Authorities in Europe and other mature jurisdictions also leave the definition of the market open when the transaction does not raise substantive issues.

¹ See Section 2.A.3 below for more details.

² See Section 2.A.4 below for more details.

³ See, Consultation prior to filing of notice of the proposed combination available at: <http://www.cci.gov.in/May2011/Home/ConsultationPrior250511.pdf>

The notification was filed on 1 August 2011 after the passing of a Director's resolution (25 July 2011) by Walt Disney and the clearance order was given by the CCI on 25 August 2011. There was a request for additional information from the CCI on 10 August 2011 which was complied with on 16 August 2011. Although the CCI can 'stop the clock' in such instances it is not clear whether there was such a decision.

2. G&K Baby Care and Danone Asia Pacific/Wockhardt Limited

The transaction related to the proposed acquisition by G&K Baby Care Private Limited ("G&K") and Danone Asia Pacific Holdings Pte Limited ("Danone Asia Pacific") (together "Acquirers") of the assets of (i) Wockhardt Limited (ii) Carol Info Services Limited ("Carol") and (iii) Wockhardt EU Operations (Swiss) AG ("Wockhardt EU") (together "Target").

G&K is a special purpose vehicle and a wholly owned subsidiary of Danone Asia Pacific. The ultimate parent company of both these companies is Danone SA listed in France. Carol is a fellow subsidiary of Wockhardt limited and Wockhardt EU owns the intellectual properties for both Carol and Wockhardt limited. Although there were three separate acquisitions, a single notice was filed covering all three acquisitions as they were considered to be inter-dependent and inter-connected.

The order seems to accept the classification of the market provided by the Acquirers into (i) baby food business and (ii) medical nutrition business. Two further sub-categories namely (a) weaning cereals (b) milk food was also suggested for the baby food business, which also seems to be have been accepted by the CCI.

The CCI order found that the parties have less than seven percent market share in both the sub-categories and that Nestle is the leading player in the baby food business. The CCI also considered the effect of the transaction on the medical nutrition business where the Target had less than ten per cent market share. As in the case of the notification described above in Section 2.A.1 there is no declaration that these businesses would be the relevant market.

The transaction was notified on 24 August 2011 and the clearance decision was issued on 15 September 2011. The Acquirers were directed by the CCI on 29 August 2011 to provide additional information and documents. The information was furnished on 5 September 2011 and some additional information was provided on 9 September 2011. It is not clear from the decision in this case whether the 'clock was stopped'.

3. AICA Kogyo Company Limited and Aica Laminates Indian Private Limited/Bombay Burmah Trading Company Limited

From this decision it would appear that the CCI's interpretation of the Competition Act, 2002 (as amended) ("Act") is that in identifying the target for the purpose of calculation turnover, the turnover of the seller should be taken into account for sales of businesses, in contrast to sales of legal entities. On this interpretation, many business sales will be caught.

The transaction related to the proposed acquisition by AICA Kogyo Company Limited ("AICA Japan") through its wholly owned subsidiary Aica Laminates Indian Private Limited ("AICA India") of the laminates division of Bombay Burmah Trading Company Limited ("BBTCL").

The sales turnover for laminates of BBTCL during the financial year 2011 was 78 crores (approx. \$16 million).⁴ According to the Regulations under the Act, a proposed transaction that meets the thresholds will not have to be notified if the target enterprise does not have:

- assets of not more than Rupees 250 crores (approx. \$55 million) or;
- a turnover of not more than Rupees 750 crores (approx. \$166 million).

It seems to be the case that the CCI was of the view that since the laminates division proposed to be acquired was not a separate legal entity the turnover of the whole of BBTCL should be taken into account for determining whether thresholds for notification are met. This interpretation would not be consistent with the rules for notification in other major merger control regimes.

⁴ BBTCL annual report 2011 available at: <http://bbtcl.com/images/bombay-burmah-annual-report2011.pdf>

It also appears the parties to the transaction did not consider there were any horizontal or vertical overlaps between them, and accordingly completed Part I of Form 1, which is a short form notification and relevant to such situations. However, after notification the CCI considered that the surfacing/decorative laminates manufactured by AICA Japan and BBTCL were similar products. Consequently, the CCI requested further information and completion by the parties of Part II of Form 1, which is required to be completed where the parties to a transaction 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 in the relevant market is less than 15%; or
- 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 in the relevant market is less than 25%.

AICA India was a newco created for the transaction, and thus had no business, whilst AICA Japan produced relevant products but did not export them to India. On this basis it would appear that the CCI concluded that AICA Japan is a potential competitor (horizontal relationship), and hence preferred to have Part II of Form 1 completed.

Part II of the notification form was completed and other requisite information/documents submitted to the CCI. The transaction was notified on 7 September 2011. The clearance decision was issued on 30 September 2011 although it seems that the 'clock was stopped' from 14 September 2011 to 22 September 2011.

4. Alstom Holdings (India) Limited and Alstom Projects India Limited

The CCI by this decision seems to consider that an intra-group transaction relating to a subsidiary wholly owned or majority owned (sole control) would not have to be notified if the transaction is an acquisition of shares or voting rights.⁵ Notification would be required if the intra-group transaction is effected in any other way e.g. mergers, amalgamations or possibly even asset transfers.

The transaction related to the merger of Alstom Holdings (India) Limited ("AHIL") into Alstom Projects India Limited ("APIL") pursuant to a scheme of amalgamation. AHIL is a wholly owned subsidiary of Alstom Holdings, the holding company of the Alstom Group of Companies incorporated in France. APIL listed on the Bombay Stock Exchange and National Stock Exchange is an indirect subsidiary of Alstom Holdings which holds 68.46% of the equity share capital. This share capital was held by Alstom Holdings through its wholly owned subsidiaries AHIL, Alstom finance BV and Lorelac. The remaining 31.54% of the share capital is held by the public.

The transaction was notified on 12 October 2011 and the clearance decision was issued on 19 October 2011.

B. Anti-competitive agreements

The CCI on 4 October 2011 imposed a fine of Rupees one lakh (approx. \$2000) on several travel agents associations based in India. A travel agent, Uniglobe Mod Travels Ltd. ("Uniglobe") filed a complaint against the Travel Agent Federation of India ("TAFI") alleging that that TAFI has suspended its membership and also threatened to expel Uniglobe from its membership. Following a complaint by one travel agent against its travel agents association, the CCI broadened the scope of its investigation and ultimately imposed a fine on six travel agent associations.

It may be noted that whilst six travel agents associations were fined, it seems that only three were actively involved. However, because the other 'passively' involved three associations did not object to the use of their logo, they were determined to be equally relevant. It is interesting to note that the investigating officer found that this passive engagement was insufficient to determine culpability. However, the CCI disagreed and found all six culpable.

Travel agents such as Uniglobe have to be members of associations such as TAFI to enjoy some benefits such as obtaining tourism licenses from the Department of Tourism, registration at embassies to submit visa forms etc. The travel agents were previously getting a fixed commission from the airlines on tickets sold. Some of the international airlines such as Singapore Airlines decided to implement a transaction fee model instead of commissions for the travel agents.

⁵ See Section II.A.4 below for more details.

It was alleged by Uniglobe that associations such as TAFI were against the move of the airlines to implement the transaction fee model. It was further alleged that TAFI and other trade associations had been calling on its members to boycott business and commercial dealings with Singapore Airlines and to enforce this boycott were threatening members with suspension.

The order of the CCI finds that travel agents account for more than three quarters of the total tickets booked and that travel agents possess market power. The CCI also found that the call to boycott deprived consumers of the availability of choices of air travel on the routes where Singapore Airlines is operating and that the boycott call by TAFI against Singapore Airlines was followed by other associations.

The report of the investigation officer points out the specific situation of the market in India where bookings through internet are only an emerging alternative and that the penetration of internet and e-payment services is limited. The CCI order also finds that given the nature of the market, the conduct of the associations would have an effect on consumers.

The CCI imposed a fine which is relatively low considering the evidence on record and the anti-competitive nature of the conduct. The CCI may have been swayed by the fact that the conduct related to a period when the Competition Act had not been in force and that the agents had resumed sales of the tickets of Singapore Airlines.

The CCI's decision is a clear warning to corporations and trade associations operating in India that they need to adjust and become compliant with competition policy.

News and related developments

A. CCI gets new Chairman

Mr. Ashok Chawla was sworn in as the new Chairman of the CCI on 20 September 2011. The post had been vacant since the retirement of the former Chairman, Mr. Dhanendra Kumar on 5 June 2011. Mr. Chawla retired as Finance Secretary in January this year and was heading a committee on allocation, pricing and utilisation of natural resources till recently.

B. Proposed reduction in thresholds for deals in the pharmaceutical sector

In the last few years India had seen a number of deals in the pharmaceutical sectors such as the acquisition by Mylan Inc. of Matrix Laboratories Limited (2006), Daiichi Sankyo's acquisition of Ranbaxy Laboratories (2008), Sanofi Aventis' acquisition of Shanta Biotech (2009), Abbot Laboratories' acquisition of Piramal Healthcare (2010).

A high-level committee had been appointed by the Cabinet Committee on Economic Affairs to report on foreign direct investment in the pharmaceutical sector. There was a fear that there might be a roll back on the 100% FDI which was permitted in this sector. The Committee has however only recommended that the government strengthen the powers of the CCI when investigating mergers and acquisitions in the pharmaceutical sector. The government has apparently accepted the report and also proposed to bring changes to the competition rules including reduction of thresholds.⁶

C. Commission seeks more powers

It is understood from press reports that the an internal report will soon be submitted to the Ministry of Corporate Affairs by the CCI seeking amendments to the Competition Act.⁷ Some of the proposed changes relate to the vesting of more powers in relation to search and seizure and tighter rules for imposition on fines on trade associations.

⁶ Tighter M&A norms for pharma sector confuse CCI, experts: Live Mint press report dated 11 Oct 2011 available at: <http://www.livemint.com/2011/10/11211218/Tighter-MampA-norms-for-phar.html>

⁷ CCI seeks powers to penalise trade bodies, Financial express press report dated 13 Sep 2011 available at: <http://www.financialexpress.com/news/CCI-seeks-powers-to-penalise-trade-bodies/845770/>

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