

## ERGO

*Analysing developments impacting business*

### MCA EXTENDS APPLICABILITY OF KEY NOTIFICATIONS UNDER COMPETITION ACT

21 March 2022

“Ease of doing business in India” is one of the fundamental *mantras* in the economic policy framework of the Government of India. In an effort to re-affirm its resolve, the Ministry of Corporate Affairs (“MCA”) renewed two significant notifications on 16 March 2022. This *Ergo* recaps their necessity and highlights the ramifications of their revival.

#### **NOTIFICATION RELATING TO SMALL TARGET EXEMPTION (STE)**

Section 5 of the Competition Act, 2002 (as amended) sets out 8 assets and turnover based (standalone and group) thresholds to determine the notifiability requirement of an acquisition / merger / amalgamation. Should the cumulative value of assets / turnover of the parties jointly exceed the notification thresholds, a transaction requires a prior approval from the Competition Commission of India (CCI).

Resultantly, even if a transaction entails the acquisition or transfer of a comparatively small enterprise / business, such transaction may attract CCI scrutiny if the acquirer’s financials alone meet the notification thresholds.

Based on the premise that competitive concerns are unlikely to arise from transactions involving such small target enterprises, the MCA through a series of notifications, the latest of which was dated 27 March 2017<sup>1</sup> had exempted transactions from a pre-clearance requirement where the value of assets of the target asset / target enterprise was not more than INR 3.5 billion (~USD 45.98 million) in India; or the turnover of the target asset / target enterprise was not more than INR 10 billion (~USD 131.39 million). This notification was valid for 5 years until 28 March 2022. (2017 STE Notification).

As a favourable decision regarding the continuance of the 2017 STE Notification was eagerly awaited by stakeholders, MCA through its notification dated 16 March 2022 (2022 STE Notification), extended the exemption on an *as is* basis with the same thresholds for another 5 years until 28 March 2027.

#### **NOTIFICATION RELATING TO MERGER FILING TIMELINES (TIMELINE NOTIFICATION)**

Section 6(2) of the Competition Act, 2002 (“Act”), provides that parties to a combination are required to file a merger notification to the CCI within 30 calendar

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<sup>1</sup> The STE Notification was first introduced on 4<sup>th</sup> March 2011 with asset and turnover thresholds of INR 2.5 billion and INR 7.5 billion respectively for a period of 5 years. This was only applicable to acquisitions. In March 2016, the STE benefit was renewed for 5 years with enhanced thresholds. Subsequently in March 2017, rescinding the March 2016 notification, the STE benefit was extended to mergers / amalgamations.

days of a "trigger event". Typically, in case of a merger or amalgamation, a board resolution is considered as a "trigger event", and in case of an acquisition, execution of the binding documents is considered as a "trigger event".

Pertinently, a failure to notify a transaction within the 30-calendar day timeline can expose transacting parties to gun-jumping proceedings, despite such belated filing may not truly be a case of gun-jumping, and resultant penalties. Given that India has a mandatory and suspensory regime, and that preparation of comprehensive merger notification is a time-consuming process, the MCA by way of notification dated 29 June 2017 had relaxed the onerous 30 day requirement to file the merger notification with the CCI. This statutory timeline requirement was suspended until the validity of the notification up to 28 June 2022.

The MCA pre-emptively through notification dated 16 March 2022 has extended the filing time-period relaxation for 5 years until 28 June 2027. Resultantly, parties can easily file a merger notification after the occurrence of a trigger event and prior to the consummation of the proposed transaction in part or whole.

Takeaway:

Despite speculation on the STE thresholds being revised or the criteria for exemption being altered in view of the increasing concerns on a number of sizeable tech deals escaping CCI scrutiny, the MCA has retained status quo. The renewal signals India's continued commitment to boost India's appeal in the M&A and foreign investments' space and equally support India's start-up ecosystem by keeping minimal transactional burden. Renewal of the Timeline Notification is also welcome, in line with global best practices, and reinforces India's resolve to fuel economic growth.

That said, another significant MCA notification which quietly lapsed in March 2021 and merits a revival is the group definition notification that was first introduced in March 2011 to raise voting rights thresholds for the purposes of defining a "group" from 26% to 50%. This concession was renewed in March 2016 for a further 5 years' period until 3 March 2021 and has since expired. Absence of this notification, the value of assets and turnover of entities in which voting rights meet or exceed 26% are required to be aggregated while assessing a transaction's notifiability under the group thresholds test stipulated in Section 5 of the Act. The roll back to the 26% threshold can potentially trigger a surge in merger filings and increase in the regulatory burden on the CCI.

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