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Analysing developments impacting business

INDIAN COMPETITION AUTHORITY PUBLISHES THE DRAFT MERGER REGULATIONS WITH GUIDANCE ON DEAL VALUE THRESHOLD

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On 11 April 2023, the Competition (Amendment) Act, 2023 (Amendment Act) received presidential assent to reform the Competition Act, 2002. The Amendment Act proposed expansive changes to the merger control regime in a bid to bring parity with global developments. While several provisions of the Amendment Act were enforced on 18 May 2023, the changes pertaining to merger control are largely pending implementation. Our detailed discussions on the Amendment Act are available [here](#), [here](#), [here](#), and [here](#).

To supplement the newly introduced provisions, the Competition Commission of India (CCI) has published the draft Competition Commission of India (Combinations) Regulations, 2023 (Draft Regulations) for public consultation. The headline changes brought forth by the Draft Regulations are set out below.

I. Clarity on the deal value threshold and substantial business operations

a. Position under Amendment Act

The Amendment Act introduces the Deal Value Threshold (DVT) as a new notification threshold where a transaction will require the CCI's prior approval if (i) the transaction value is more than INR 2,000 crore (~USD 240 million / ~EUR 224 million) and (ii) the target has substantial business operations in India.

b. Proposal under Draft Regulations

The Draft Regulations provide guidance on ascertaining "*value of transaction*" and "*substantial business operations in India*".

Clarity on Transaction Value

Value of transaction is proposed to mean "*every valuable consideration, whether direct or indirect, immediate or deferred, cash or otherwise*". This catch-all definition is further augmented with the clarification that transaction value will include (i) non-compete fees, (ii) consideration attributable to inter-connected transactions, (iii) consideration for transactional or incidental commercial arrangements entered within 2 years of the closing of the notifiable transaction, (iv) consideration for options and securities on an as converted basis, and (v) consideration payable for contingencies.

Two noteworthy aspects called out in the Draft Regulations are set out below.

- Where the true and complete transaction value is not captured in transaction documents, the value considered by the board of directors (or a similar approving authority) should be considered.
- Where the precise transaction value cannot be established with "*reasonable certainty*", the notifying party should presume that the INR 2,000 crore (~USD 240 million / ~EUR 224 million) threshold is met and proceed accordingly.

Clarity on Substantial Business Operations in India

Compared to transaction value, the guidance on “substantial business operations in India” is prescriptive. A target will be considered to have substantial business operations in India if (i) the number of its users, subscribers, customers, or visitors in India, in the 12 months preceding the deal execution date, is 10% or more of its total global number of users, subscribers, customers, or visitors, or (ii) the target’s gross merchandise value (GMV) in India, for the 12 months preceding the deal execution date, is 10% or more of its total global GMV, or (iii) the target’s turnover for the preceding financial year in India is 10% or more of its total global turnover.

II. **Guidance on acquisitions through open offers or open market purchases**

a. Position under Amendment Act

In alignment with global standards, the Amendment Act will allow parties to close acquisitions through open offers and open market purchases, on a regulated stock exchange, pending the CCI’s approval. This will be subject to the acquirer not exercising any ownership or beneficial rights or interest in such shares, unless permitted by the relevant regulations.

b. Proposal under Draft Regulations

The Draft Regulations provide that the acquirer must notify the transaction within 30 days from the date of acquisition of the shares / securities.

They clarify that prior to the CCI’s approval, the acquirer *vis-à-vis* the acquired shares / securities can undertake the following:

- avail economic benefits such as, receiving dividends, or participating in a rights issue, bonus issue, stock-splits or buy back;
- dispose of shares or securities acquired; and
- exercise voting rights, but only in relation to matters relating to liquidation or insolvency proceedings.

The Draft Regulations specifically prohibit the acquirer from directly or indirectly influencing the target’s activities in any manner.

III. **Introduction of layered requests for additional information**

a. Position under Amendment Act

The Amendment Act proposes to reduce the review period from 30 working days to 30 calendar days to speed up the review process.

b. Proposal under Draft Regulations

The Draft Regulations introduce a layered review process. Once a merger notice is filed, the CCI can ask parties to remove defects in the notice within 10 working days. The CCI’s review clock of 30 calendar days will start only after the defect-free merger notice is filed.

Importantly, the 30-calendar day review period will continue to be exclusive of time taken by parties to respond to any subsequent query of the CCI.

The CCI may also extend the review period by:

- 22 days to collect information from third parties and consider their submissions and/or
- 10 days (and such additional time as requested by parties to appear) if it deems it necessary to provide an opportunity of oral hearing to the transacting parties.

IV. **Change in mechanism for modifications to notified transactions**

a. Position under Amendment Act

If the CCI finds that a transaction is likely to cause competitive concerns, it can consider modifications to the transaction as a condition for approval. Modifications may be provided either by the parties or the CCI.

b. Proposal under Draft Regulations

Under the Draft Regulations, modifications can be proposed by the CCI or by the parties to the transaction either before the CCI has concluded that a transaction is likely to cause concerns or after such findings.

- Where the CCI proposes modifications, the parties will have 7 days from the date of receipt of the proposal to accept or reject the modification. The CCI’s review clock will exclude up to 15 days that may be required for the CCI to formulate the proposal and the parties to consider the proposal.

- Alternatively, the parties may propose modifications on their own to the CCI under a format provided in the Draft Regulations. In such a scenario, the CCI's review period will exclude up to 12 days which may be required for evaluating the modifications.

While offering modifications, parties will have to provide the scope of the behavioral or structural remedy and details of the monitoring mechanism. For divestments, parties will have to provide an assessment for the business case of the divested business, the criteria for being a qualified acquirer and the overall timelines for divestment.

V. *Enhanced filing fee*

A merger notification to the CCI is ordinarily made in a Form I format. However, if the parties' combined market share exceeds 15% in any horizontally overlapping market or exceeds 25% in any vertically overlapping market, the parties may notify the transaction in Form II.

The filing fee for a Form I is presently INR 20 lakh (~USD 24,000 / ~22,000 EUR) which is proposed to jump to INR 30 lakh (~USD 36,000 / ~33,500 EUR). For Form II, the current fee is INR 65 lakh (~USD 78,000 / ~73,000 EUR) which is proposed to move to INR 90 lakh (~USD 108,000 / ~101,000 EUR).

Conclusion

In sum, the Draft Regulations suitably complement the Amendment Act's merger control provisions and streamline the entire process.

The Draft Regulations aptly capture the CCI's cautioned disposition to not allow transactions to circumvent the DVT, particularly considering the ineligibility of transactions for the de minimis exemption if they breach the DVT. Changes in review processes and the mechanism for modifications demonstrate the CCI's intent to ensure expedited approvals without compromising on the quality of its review. This intent is echoed in the provisions allowing limited actions in open market purchases or block deals pending the CCI's approval. Although the Draft Regulations require some refinement, they are a welcome change to the current merger control regime.

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