

Lessons for Investors: CCI on Minority Acquisitions

24 January 2025

Introduction

In an order dated 14 January 2025, the Competition Commission of India (CCI) reiterated its stance that convertible instruments such as optionally convertible debentures (OCDs) could lead to an approval requirement. Further, since such instruments were accompanied by rights providing access to commercially sensitive information (CSI), CCI imposed a penalty of INR 4 million (~USD 46,000) for incorrect application of the minority acquisition exemption.

Transaction

In December 2020, Goldman Sachs AIF Scheme-1 (GS AIF), through Goldman Sachs (India) Alternative Investment Management Private Limited (collectively, GS), subscribed to OCDs issued by Biocon Biologics Limited, along with certain rights. The OCDs were convertible into a 3.81% shareholding on a fully diluted basis. Additionally, the OCDs were accompanied by rights, including (i) reserved matter rights, (ii) information rights, and (iii) access to premises and personnel during normal business hours, upon providing a reasonable prior written notice (Access Right). The information rights also provided access to the minutes of board, committee, and shareholder meetings (Minutes Right).

Arguments and CCI Findings

It was argued that the subscription of OCDs, represented less than 10% shareholding in the target, without a right to appoint a director or observer, or participation rights in the target's management or affairs and thus, qualified for the minority acquisition exemption. It was also argued that the rights package was available to all the investors equally rendering it an "ordinary shareholder" right.

However, the CCI disagreed, stating that Minutes Right and Access Right provided access to target's strategic, confidential, and CSI, including financial data, strategic plans, and proprietary technology. As per CCI, these rights, along with the reserved matter rights underscored the transaction's strategic nature.

The CCI clarified that the subscription of the OCDs in this case was equivalent to share acquisition for notifiability purposes. The CCI also reiterated that a transaction which is made with the intent of remaining invested for a relatively longer period and involves the acquisition of any rights more than what an ordinary shareholder possesses, cannot be considered as in ordinary course of business.

Comment

The decision reaffirms the CCI's stance that convertible instruments can trigger notifiability requirements. The decision also provides a recap of the metrics to determine a strategic versus a passive financial investment.

While this decision is based on the erstwhile exemptions, the decision is rooted in the ability to access CSI through Minutes Right and Access Right. This is significant considering that the revamped exemption rules

(effective 10 September 2024), codify access to CSI (as opposed to rights in excess of ordinary shareholder rights) as the relevant criterion for determination of eligibility for the minority acquisition exemption.

In summary, the decision serves as a reminder for financial sponsors to meticulously evaluate notifiability of transactions in light of the accompanying rights package, given the intricacies of the “material influence” standard that India adopts.

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