Merger Control Qua Competition law Regime

G. R. Bhatia
Partner & Head of Competition Law Practice

103 Ashoka Estate
24 Barakhamba Road
New Delhi – 110 001
Competition in markets brings prosperity:

- Reduces prices
- Improves quality
- Boosts choice
- Facilitates better governance
- Promotes efficiency
- Encourages innovation
- Punishes THE LAGGARDS
- Ensures AVAILABILITY OF GOODS in abundance of acceptable quality at affordable price (AAA)
Traits of structural change

- Markets are polluted by Anti competitive practices of economic actors and policies of State
- Functional arrangements of enterprises- short duration and easily amenable
- Structural changes-generally long/perpetual and difficult to modify
- Pre merger notice and waiting requirement is imperative
Merger control under the other laws

- Compromises, arrangements and amalgamation are governed by the Companies Act
- Substantial Acquisitions/Takeover are regulated by Takeover Regulations
- Prior to merger control under the Competition Act, scrutiny of proposed transaction was not from the lens of competition in markets
Benefits of Restructuring

- Vehicle of inorganic growth
- Ensures economies of scale and scope
- Facilitate availability of products in abundance of acceptable quality at affordable price.
Occasional pitfalls

- Results in reduction of number of players in market
- Increases market share, market powers
- Enables post merger to act in an unconstrained way - both in price and non-price conducts
A word of caution

☐ Can’t unscramble an omelet into an egg

☐ Prevention is better than cure- philosophy

☐ It is better to prevent and prepare rather than to repent and repair
Acquisitions- Qualify as Merger

- Globally qualifying merger also covers acquisitions by one of another
- In India, acquisition of shares, voting rights, assets, control is required to be notified if it leads to control.
- Control includes controlling the affairs or management by one (jointly or singly) of another - open ended
Prudence of Merger Control under the Competition Act?

☐ The whole philosophy is based on an ancient English Maxim: “Prevention is better than cure”.

☐ Merger control enables a competition authority to ex ante regulate changes in the market structure.

☐ Mergers bring about a lasting or permanent change on the market and may result in enterprises acquiring or strengthening their position or market power.

☐ An acquisition or strengthening of market power could potentially result in an increase in the market price of the products or services in question or a reduction in the level of competition.
A lasting or permanent change in market structure can –

- result in an increase in the levels of concentration in the market;
- allow firms to acquire a dominant position;
- reduce competitive pressures that otherwise exist;
- lead to inefficiencies in production, supply, innovation;
- result in creation of entry barriers or lead to exit of smaller players from the market.
The Competition Act –
Regulation of ‘Combinations’

- The provisions are in force w.e.f June 01, 2011
- ‘Combinations’ include:
  i. the acquisition of shares, voting rights, assets or control;
  ii. the acquisition of control by a person where such person already has direct or indirect control over another enterprise engaged similar or identical business; and
  iii. a merger or amalgamation.

where such transactions cross the thresholds set out in the Act.

- No ‘combination’ can take effect unless it is notified to and approved by the CCI.
Approvals by CCI from June, 2011 to date

- The CCI received 120 cases and all cases have been approved.
- The minimum time taken: 7 days
- The maximum time taken: 30 days
- Statutorily, the maximum time the CCI can take to form a *prima facie* view is 30 days and if within a period of 210 days, no final decision is given, it implies deemed approval.
### Threshold Limits: India - Size of Parties

<table>
<thead>
<tr>
<th>Operations</th>
<th>Individual Parties</th>
<th>Group</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>In India</strong></td>
<td>Aggregate value of assets more than <strong>INR 1,500 crores</strong> (approx. USD 333 million) or turnover more than <strong>INR 4,500 crores</strong> (approx. USD 998 million).</td>
<td>Aggregate value of assets more than <strong>INR 6,000 crores</strong> (approx. USD 1.3 billion) or turnover more than <strong>INR 18,000 crores</strong> (approx. USD 3.9 billion).</td>
</tr>
<tr>
<td><strong>In India and Outside India</strong></td>
<td>Aggregate value of assets more than USD 750 million <em>(including at least assets of INR 750 crores in India</em> (approx. USD 165 million) or turnover of USD 2.25 billion <em>(including at least turnover of INR 2,250 crores in India</em> (approx. USD 499 million)</td>
<td>Aggregate value of assets more than USD 3 billion <em>(including at least assets of INR 750 crores in India</em> (approx. USD 165 million)) or turnover of USD 9 billion <em>(including at least turnover of INR 2,250 crores in India</em> (approx. USD 499 million).</td>
</tr>
</tbody>
</table>
Calculation of Assets & Turnover

- **Assets:** the value of assets shall be determined by reference to the book value of assets, as shown, in the audited books of account of the enterprise, in the financial year immediately preceding the financial year in which the transaction takes place, as reduced by depreciation. It will include the value ascribed to intangible assets such as brand value, goodwill, and intellectual property.

- **Turnover:** Section 2(y) of the Act defines ‘turnover’ as: “‘turnover’ includes value of sale of goods or services”. The Combination Regulations have stated that the turnover of the enterprise(s) has to be net of indirect taxes, as applicable. The determination of turnover is as per the audited books of account for the immediately preceding financial year.
The Government, on March 04, 2011 notified:

- **for the purposes of calculating ‘assets’ or ‘turnover’ for a ‘Group’,** excluding those entities where that ‘Group’ holds less than fifty per cent of voting rights in such entities; and

- **exempting acquisition transactions where the target entity has less INR 250 crores (approx USD 55 million) in assets or less than INR 750 crores (approx USD 165 million) in turnover** from the provisions of Section 5 of the Act and, hence, not requiring such transactions to be notified for prior approval of the CCI.

Upon triggering the thresholds set out in the Act, the parties would need to self-assess whether the proposed transaction is can use the escape route provided by the notifications or Schedule I of the Combination Regulations.
Transactions which may not require filing

- Under the Regulations, the CCI has classified certain transactions as ‘combinations’ not likely to cause an AAEC in India and has indicated that under normal circumstances no notice needs to be filed with the CCI for prior approval.

- Schedule I of the Regulations carves out categories of transactions, for instance, intra-group acquisition; an acquisition of stock-in-trade, raw materials stores and spares in the ordinary course of business, an acquisition of shares or voting rights pursuant to a bonus issue or stock splits, etc.

- Amplifications in Schedule 1 on 4th March, 2013
Forms of Notification

- The Regulations provide for **Form I** (short form) and **Form II** (long form) along with applicable fee.

- Acquisitions by public financial institutions, foreign institutional investors, bank or venture capital funds are to be filed without any fee in **Form III**. Such transactions do not require prior approval from the CCI and only need to be intimated.

- Regulation 5 (2) provides an inclusive list of transactions which require a Form I filing such as, an acquisition as a result of gift or inheritance, an acquisition by a liquidator, administrator through court proceedings etc.
When does the obligation to file trigger?

- Parties to a ‘Combination’ will need to file the requisite Notice with the CCI within 30 days of –
  - approval of the proposal relating to merger or amalgamation, by the Board of Directors of the concerned enterprises; or
  - execution of any agreement or other document for acquisition.

- The Combination Regulations have clarified that the ‘other document’ shall mean any binding document, by whatever name called, conveying an agreement or decision to acquire control, shares, voting rights or assets.
Responsibility of Filing & Filing Fees

- In cases of acquisition, the responsibility to make a filing under Form I or Form II along with applicable fee devolves upon the **acquirer**; and in cases of mergers or amalgamations, the merging parties are expected to file a **joint notification**.

- **Filing Fees:**

<table>
<thead>
<tr>
<th>Type of Notification</th>
<th>Fees Payable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Form – I</td>
<td>Rs. 10,00,000</td>
</tr>
<tr>
<td>Form – II</td>
<td>Rs. 40,00,000</td>
</tr>
</tbody>
</table>
Approval Time-lines

- The Regulations envisage that CCI shall form a *prima facie* opinion as to whether a Combination has or is likely to have appreciable adverse effect on competition within the relevant market in India in 30 days of receipt of a valid notice (excluding any additional time taken by parties to file any additional information);

- The Regulation states that CCI will endeavor to pass an order or issue directions within 180 days of a valid notification (though the law contemplates a maximum 210 day period). This 180 days period excludes any additional time taken by the parties to file any additional information.
Informal Consultation

- The Commission, in accordance with international best practices is providing the facility of informal and verbal consultation with the staff of CCI prior to the filing of notice to a proposed combination. The advice is an additional assistance facility and would not be deemed to be the opinion of the Commission in any manner whatsoever or binding on the Commission.

- Scope of informal consultation – Limited.
Orders and Remedies

Subsequent to an inquiry, if a combination causes or is likely to cause AAEC, the CCI may pass orders:

(a) **blocking the transaction**; or

(b) **allowing the transaction** after suitable modifications/changes are carried out to remove competition concerns.

- **Failure to Notify** a ‘combination’ attracts a penalty which may extend to one percent of the total turnover or the assets of the combination, whichever is higher.
Issues and Challenges

☐ Ambiguity in definition of control;

☐ Amendent Bill, 2012 inter-alia seeks to empower CCI to notify different thresholds for different sector/industries- such a move will give rise to ambiguities.

☐ Turnover should also exclude ‘Subsidy/State-Aids’;

☐ Export business also needs to be excluded.
Contd...

- PFI, FII, Banks and VCF should be allowed to intimate within 30 days as against 7 days;

- Parties should be allowed to suggest modifications to combinations;

- Need to extend the scope of Informal consultation;

- Allow informal consultation without disclosing names of parties.

- Absence of hot line mechanism of consultation.
Fresh vegetables from the garden

- CCI directing modification often not reasoned.
- No provision for mentioning before the CCI
- CCI shy of interpreting or shedding its light on several dimension of law.
- Amplification of scope of exempted categories of transaction
- CCI needs to look for transactions which were to be notified and have not been reported
- Limited exemption for certain intra-group mergers and amalgamations involving subsidiaries wholly owned by the
G. R. BHATIA

103, Ashoka Estate
24 Barakhamba Road
New Delhi – 110001
Tel No. 011-41215100
Email: gbhatia@luthra.com