

Merger Control Regime in India

Merger has become a commonly used strategy for enhancing growth, expanding markets, and achieving synergies by the corporations across the globe. Mergers may result in creation of dominant corporations which can limit competition and harm consumers' interest. Merger Control is the mechanism for ensuring healthy competition and promoting market efficiency.



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INTRODUCTION

Merger has become a commonly used strategy for enhancing growth, expanding markets, and achieving synergies by the corporations across the globe. Mergers may result in creation of dominant corporations which can limit competition and harm consumers' interest. Merger Control is the mechanism for ensuring healthy competition and promoting market efficiency. Merger Control ensures that mergers do not result in the concentration of market power that hampers fair competition and makes an adverse impact on the other market players. It aims at identifying and addressing anti-competitive practices

that may arise from creation of a dominant market player. It plays an important role in protecting the interests of consumers by ensuring competitive markets which give a wide range of good quality products and services at lower costs. Merger control encourages market efficiency such as economies of scale and synergies. It ensures that mergers make a contribution to the overall economic welfare and contributes in promoting a level playing field for all types of market players. Merger control authorities thoroughly scrutinize the mergers in order to strike a balance between protecting competition and permitting merger.

LEGAL FRAMEWORK

The Indian merger control regime comprises of the Competition Act, 2002 ('Act') and the Competition Commission of India (Procedure in regard to the transaction of business relating to Combinations) Regulations, 2011 ('Combination Regulations') made by the Competition Commission of India ('CCI') in exercise of power conferred on it under section 64 of the Competition Act, 2002. Under section 5 of the Competition Act, 2002, any acquisition of one or more enterprises or any merger or amalgamation of enterprises exceeding the threshold limits prescribed therein shall be a 'Combination' for the purposes of the Act. These threshold limits, based on assets and turnover of the parties, are revised from time to time on the basis of changes in Wholesale Price Index or fluctuations in the exchange rates of currencies. The parties to combination are mandatorily required to notify the combination to the CCI where the threshold limits are triggered for approval of combination and exemptions are not available. The requirement of notification within thirty days of triggering of threshold has been removed by the Central Government. Now, the transaction are required to be notified before completion of combination.

The Combination Regulations provide that in case of acquisition or hostile takeover, it is the responsibility of the acquirer to notify and in case of a merger or an amalgamation, a joint notice has to be filed by merging or amalgamating parties. However, in case of joint venture, it is the responsibility of all the parties to file a notice.

The Central Government, on 27th March 2017, by a notification exempted any acquisition, merger or amalgamation, if the enterprise being acquired, taken control of, merged or amalgamated has assets less than ₹ 350 crore or turnover less than ₹ 1000 crore. This exemption was valid for five years from date of notification. On 16th March 2022, the Central Government has extended *de-minimis* for a further period of five years.

The CCI regulates such combinations in order to prevent appreciable adverse effect on competition within the relevant market in India. The CCI has to give due regard to the factors listed under section 20(4) of the Act while determining whether a combination would have an appreciable adverse effect on competition in the relevant market. These factors include actual and potential level of competition through imports in the market, extent of barriers to entry into the market, level of combination in the market, degree of countervailing power in the markets etc.

The CCI has power to direct modification of a combination to ensure that the combination does not result in an appreciable adverse effect on competition within the relevant market in India. While exercising the powers, the CCI can propose both behavioural and structural modifications whereby appreciable adverse effect on competition can be eliminated by suitable modification to the proposed combination. The orders issued by the CCI available on its website show that the CCI has mostly approved the combinations and on certain occasions, it has approved with modifications. Certain enterprises are exempted from filing merger control notification in India such as public financing institution, public sector bank etc. The CCI has extra-territorial jurisdiction under section 32 of the Act by virtue of which it can review global transactions as well.

As far as the procedure for investigation of combination is concerned, within 30 days from the receipt of notice, the CCI has to form a *prima facie* opinion as to whether the combination is likely to cause or has caused appreciable adverse effect on competition within the relevant market in India. If the CCI forms a *prima facie* opinion that the combination would not cause an appreciable adverse effect on competition in the relevant market in India, then it approves the combination. If the CCI is of the *prima facie* opinion that a combination has caused or is likely to cause adverse effect on competition in India, then it shall issue a show cause notice to the parties as to why investigation in respect of such combination should not be conducted. After receiving response from the parties, the CCI shall deal with the notice as per the provisions of the Act. The CCI has been empowered to call for additional information from the parties to deal with the proposed combination. It may require the parties to accept modifications for forming its *prima facie* order.

MERGER CONTROL AUTHORITY IN INDIA

The CCI has played a significant role in facilitating the mergers in India in spite of concerns relating to delays in the process of merger. After enforcement of merger control in India, the CCI has approved 859 merger applications till March 2022 as per their Annual Reports by using analytical tools. By removal of filing timeline, the merger control regime was aligned with international best practices. The CCI introduced 'Green Channel' keeping in view the needs of the market and the best practices in other jurisdiction. Green Channel allows automatic system of approval for combinations and reduces the burden on parties to transactions which have no effect on competition and needs notification only for technical reasons. Following the global best practices, CCI allows an informal and verbal consultation with the Officers of CCI prior to filing of the notice to proposed combination by the parties. Parties can make a request for a pre-filing consultation to seek informal



guidance on (a) determining filing related requirements, (b) information required in the notice for proposed combination and (c) Green Channel. Parties use these consultations to clarify their doubts and seek guidance from CCI. CCI has ensured that the merger control regime in India does not lead to abuse of market power, adversely affect the competition and harm the interest of consumers. It has facilitated the growth of a dynamic and efficient economy in India.

THE COMPETITION (AMENDMENT) ACT, 2023

Recently, on 18th May 2023, Ministry of Corporate Affairs (MCA) notified enforcement of certain provisions of the Competition (Amendment) Act, 2023 ('Amendment Act') including the provisions relating to combinations. With the aforesaid notification, the new threshold limits for filing notice has also been introduced in the Competition Act, 2002. These revised limits are significantly higher than earlier limits. In addition to revising threshold limits, the Amendment Act has also introduced a new criterion for determining notifiability of a combination. Under the new criterion, the CCI has to be notified regarding the combination where the value of any transaction, in connection with acquisition of any control, shares, voting rights or assets of an enterprise, merger or amalgamation exceeds ₹ 2000 crore. However, the enterprise which is a party to the transaction should have substantial business operations in India as may be specified by the regulations.

Table No.1

Threshold Limits for Filing Notice			
		Asset	Turnover
Enterprise	India	More than ₹ 2000 crore	More than ₹ 6000 crore
	Worldwide with India	More than US\$1 billion with at least more than ₹ 1000 crore in India	OR More than US\$3 billion with at least more than ₹ 3000 crore in India
Group	India	More than ₹ 8000 crore	More than ₹ 24000 crore
	Worldwide with India	More than US\$4 billion with at least more than ₹ 1000 crore in India	OR More than US\$12 billion with at least more than ₹ 3000 crore in India

The Amendment Act has given statutory recognition to the *de-minimis* exemption which was earlier provided through a notification. The provision states that "where either the value

of assets or turnover of the enterprise being acquired, taken control of, merged or amalgamated in India is not more than such value as may be prescribed, such acquisition, control, merger or amalgamation, shall not constitute a combination under section 5". However, the *de-minimis* exemption shall not be applicable to combinations notifiable on the newly added basis of deal value threshold. The requirement of substantial business operations in India shall work as *de-minimis* for such combinations.

Table No.2

Threshold Limit for <i>de minimis</i> exemption for acquisitions			
Target Enterprise (In India)	Assets	OR	Turnover
	Not more than ₹ 350 crore in India		Not more than ₹ 1000 crore in India

With the objective of clarifying the scope of turnover to be considered for the purpose of ascertaining whether the transaction meets the financial thresholds, the Amendment Act has provided methodology for computation of turnover.

The Amendment Act has also given statutory recognition to 'Green Channel' which was introduced in August 2019 by CCI, through regulations, for automatic approval of combinations in the spirit of promoting trust based regulation. 'Green Channel' is a unique system, wherein deemed approval is automatically granted to the transactions on the day of filing notice. 'Green Channel' is presently available to those parties that do not exhibit overlap of anykind.

The Amendment Act has also modified the definition of 'control' to include 'the ability to exercise material influence, in any manner whatsoever, over the management or affairs or strategic commercial decisions'. The definition of 'group' has been amended to 'two or more enterprises where one enterprise is directly or indirectly, in a position to exercise twenty-six per cent or such other higher percentage as may be prescribed, of the voting rights in the other enterprise'.

Further, the Amendment Act has introduced section 6A as an enabling provision to allow open market transactions on stock exchanges to be undertaken as an exception to

standstill obligations. Under this new framework, parties can conduct market purchase without a prior notification to the CCI. However, parties are required to give notice of such purchase to the CCI within the specified time. Moreover, parties are prohibited from exercising any ownership or beneficial rights or interest in such shares until the CCI approves the combination, except as specified by the regulations.

The Amendment Act has also reduced the time limit for review of combinations from 210 days to 150 days. It has also introduced the timelines for prima facie opinion. Now, CCI is required to form prima facie opinion within thirty days of receipt of notice. If the CCI cannot form prima facie opinion within the thirty days period, then the combination shall be deemed to have been approved.

CONCLUSION

The mandatory notification has provided a mechanism for CCI to ensure that there shall be no violation of the Competition Act, 2002 at the time of merger. The merger control is an effective and efficient mechanism to check the control the abuse of concentration of powers through merger. In this regard, CCI has played a proactive role in granting approvals to the combination since merger control regime came into force in India. As per annual reports of CCI, the average number of working days for disposal of merger filing increased from 16 days in 2011-2012 to 29 working days in 2016-17 and from there it has come down to 17 working days in 2021-22. However, there are issues relating to streamlining of process in order to reduce the time taken to clear merger filings. It is expected that the competition regulator will continue to balance the requirements of an efficient merger control regime with the need to promote and sustain competition while protecting consumers interest and ensuring freedom of trade in the markets in India. Further the new amendments with significant higher threshold limits, extension of *de-minimis* exemption and Green Channel are welcome steps to meet the practical challenges in merger control.

REFERENCES:

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