Merger Control Regime in India

With enforcement of provisions related to Mergers and Acquisitions (M&A) as provided in Competition Act, 2002, Indian economy entered into a new era of merger control regime in line with rest of the world. While this regime is decades old in EU and US, it is pretty new for Indian Corporate and economy as a whole. At the heart of the regime is the fundamental principle that M&A deals which are likely to adversely affect competition in the market in India will not be permitted to be consummated. This article provides a glimpse into the merger control provisions applicable in India.

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The provisions of Competition Act, 2002 (the Act) relating to regulation of M & A (Referred to as Combinations in the Act) *i.e.* Section 5, 6, 20, 29, 30 and 31 were enforced through Central Government Notification with effect from 1st June, 2011. Competition Commission of India (Commission) has the power to make regulations for implementing the provisions of the Act. The Commission had issued the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (Combination Regulations) for implementing the provisions of the Act relating to regulation of combinations on 1st June, 2011. Commission has notified certain amendments to these regulations on 23rd February, 2012.

What are Combinations?

Section 5 of the Act describes combinations as mergers/amalgamations or acquisition of control, shares, voting rights or assets when the value of assets/turnover of the parties to the combination or the group that meet asset or turnover thresholds provided in the Act. The

present threshold limits are detailed below.

a) Enterprise level: Parties to the combination have, either combined assets of more than ₹1,500 crores or combined turnover of more than ₹4,500 crores in India. If both or any of the parties to the combination have assets/turnover outside India also, then parties to the combination have, either combined assets of more than $ 750 million including at least ₹750 crores in India or combined turnover of more $ 2,250 million including at least ₹2,250 crores in India. These thresholds are summarised below.

	Assets	Turnover
In India	₹1,500 crores	₹45,00 crores
In India and outside India	$ 750 million (including ₹750 crores in India)	$ 2,250 million (including ₹ 2,250 crores in India)

b) Group level: The group to which the enterprise whose control, shares, assets or voting rights are being acquired *i.e.* the target enterprise would belong after the acquisition or the group to which the enterprise remaining the merger or amalgamation would belong has either assets of more than ₹6,000 crores in India or turnover more than ₹18,000 crores in India. If the group has assets/turnover outside India also, then the group has assets of more than $ 3 billion including at least ₹750 crores in India or turnover of more than $ 9 billion including at least ₹2,250 crores in India.

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In India	₹6,000 crores	₹18,000 crores
In India and outside India	$ 3 billion (including ₹750 crores in India)	$ 9 billion (including ₹2,250 crores in India)

Turnover includes value of sale of goods or services excluding indirect taxes, if any. Assets include not only the fixed assets but all the current assets including investments and shall be determined by taking the book value of the assets as shown, in the audited books of account of the enterprise, in the financial year immediately preceding the financial year in which the date of proposed merger falls.

Target Enterprise Exemption

In order to provide relief to smaller acquisitions, Government of India, *vide* notification dated 4th March, 2011 and 27th May, 2011, has exempted an enterprise whose control, shares, voting rights or assets are being acquired and having turnover less than ₹750 crores in India or assets less than ₹250 crores in India from the provisions of Section 5 of the Act for a period of five year. This notification is applicable only to combinations in the form of acquisition of control, shares, voting rights or assets only and is not applicable to combinations in the form of mergers and amalgamations.

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What is Group?

Group has been defined as two or more enterprises which are in a position to:-

a. exercise 26% or more of the voting rights in the other enterprise; or
b. appoint more than 50% of the members of the board of directors in the other enterprise; or
c. control the management or affairs of the other enterprise.

Government of India, *vide* notification dated 4th March, 2011, has exempted a group exercising less than 50% of voting rights in any other enterprise from the provisions of Section 5 of the Act for a period of five years.

Time Limit for filing Notice

Section 6(2) of the Act provides that any person or enterprise, who or which proposes to enter into a combination, shall give a notice to the Commission disclosing the details of the proposed combination, within 30 days of approval of the mergers/ amalgamations or acquisition, as the case may be, by the board of directors or of the execution of any other agreement or document in relation to the acquisition. Combination Regulations provide that reference to board of directors shall mean and include –

a. Individual himself in case of sole proprietorship,
b. Karta in case of HUF,
c. Board of Directors in case of a company,
d. Governing body so empowered in case of corporation established under an Act, association of person, body of individuals, cooperative societies, local authority,
e. Authorised partner in case of firm,
f. Person authorised to act in this behalf in case of any other artificial juridical person.

Commission may also admit a notice filed beyond the period of 30 days. However, in such cases, Commission may proceed to impose penalty under Section 43A of the Act. As per Section 43A of the Act, the Commission can impose a penalty for failure to give a notice of the combination, which may extend to 1% of the total turnover or the assets of the combination, whichever is higher. Commission also has the power to inquire into a combination which has not been filed but ought to have been filed with the Commission within one year from the date on which such combination has taken effect.

Section 6(2A) provides that the proposed combination cannot take effect for a period of 210 days from the date it notifies the Commission or till the Commission passes an order, whichever is earlier. If the Commission does not pass an order during the said period of 210 days the combination shall be deemed to have been approved.

Acquisitions by Financial Institutions

Provisions of Section 6(1) and Section 6(2) of the Act would not apply to share subscription or financing facility or any acquisition by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant of a loan agreement or investment agreement. However, they are required to report the details of acquisition including the details of control, circumstances for exercise of such control and the consequences of default arising out of such loan agreement or investment agreement, as the case may be within seven days from the date of the acquisition in Form III as provided in regulations.

Factors to be considered for assessment of Combinations

The basic premise for regulating combinations lies in determining whether a combination may have appreciable adverse effect on competition in relevant market in India. In order to assess/determine this effect, following factors will be considered by the Commission in accordance with Section 20(4) of the Act.

a) actual and potential level of competition through imports in the market;
b) extent of barriers to entry into the market;
c) level of combination in the market;
d) degree of countervailing power in the market;

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e) likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
f) extent of effective competition likely to sustain in a market;
g) extent to which substitutes are available or arc likely to be available in the market;
h) market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;
i) likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;
j) nature and extent of vertical integration in the market;
k) possibility of a failing business;
l) nature and extent of innovation;
m) relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;
n) Whether the benefits of the combination outweigh the adverse impact of the combination, if any.

Prima Facie Opinion

The Commission has to form a *prima facie* opinion within a period of 30 calendar days of receipt of the said notice as to whether the proposed combination is likely to cause or has caused appreciable adverse effect on competition in India. If the Commission is *prima facie* of the opinion that a combination has caused or is likely to cause appreciable adverse effect on competition, it will issue a show cause notice to the parties as to why investigation in respect of such combination should not be conducted. On receipt of the response, if Commission is of the *prima facie* opinion that the combination has or is likely to have appreciable adverse effect on competition, the Commission may initiate investigation as per the provisions of the Act.

Exemption from notification of combination

Regulation 4 of combination regulations provides the categories of combinations (mentioned in Schedule I of the combination regulations) which are ordinarily not likely to cause an appreciable adverse effect on competition in India, and therefore need not normally to be reported to the Commission. These categories are summarised as below:

1) An acquisition of shares or voting rights, solely as an investment or in the ordinary course of business in so far as the total shares or voting rights held by the acquirer does not entitle the acquirer to hold 25% or more of the total shares or voting rights

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of the target enterprise and also do not lead to acquisition of control of the target enterprise.

2) An acquisition of shares or voting rights, where the acquirer already holds 50% or more shares or voting rights in the target enterprise, except in the cases where the transaction results in transfer from joint control to sole control.
3) An acquisition of assets, not directly related to the business activity of the acquirer or made solely as an investment or in the ordinary course of business, not leading to control of the target enterprise.
4) An amended or renewed tender offer where a notice to the Commission has been filed by the party making the offer, prior to such amendment or renewal of the offer.
5) An acquisition of stock –in-trade, raw materials, stores and spares in the ordinary course of business.
6) An acquisition of shares or voting rights pursuant to a bonus issue or stock splits or consolidation of face value of shares or buy back of shares or subscription to rights issue, not leading to acquisition of control.
7) Any acquisition of shares or voting rights by a securities underwriter or a registered stock broker of a stock exchange on behalf of its clients.
8) An acquisition of control or shares or voting rights or assets by one person or enterprise of another person or enterprise within the same group.
9) A merger or amalgamation of subsidiaries wholly owned by enterprises belonging to the same group.
10) An acquisition of current assets in the ordinary course of business.
11) A combination taking place entirely outside India with insignificant local nexus and effect on markets in India.

Form for filing the Notice

Notice related to proposed combination can be filed with the Commission either in the Form I or Form II specified in combination regulations. Form I is a very short form for initial scrutiny wherein basic details regarding parties to the combination, brief about the proposed combination etc. are to be given. On the contrary, Form II is a long form wherein detailed information is required to be given by parties. Though, parties have a choice to file the notice in any of these forms, but the Commission desires that, in following cases, notice may be given preferably in Form II.

1. Where parties to the combination are engaged in similar business activities and their combined market share is more than 15% in relevant market; or
2. Where parties to the combination have vertical relationship with each other and their individual or combined market share is more than 25% in relevant market.

Amended combination regulations have increased the applicable fee to ₹10,00,000/- and ₹40,00,000/- for filing Form I and Form II respectively.

Obligation to file the Notice

In case of acquisition, it is the obligation of the acquirer to file the notice with the Commission and in case of merger/amalgamation, parties are required to jointly file the notice. The notice should be duly signed and verified by –

a. Individual himself in case of sole proprietorship firm;
b. Karta in the case of a Hindu Undivided Family (HUF);
c. Managing Director and in his or her absence, any Director or the company secretary, duly authorised by the board of directors in the case of a company;
d. President or the Secretary in the case of an association or society or similar body or the person so authorised by the legal instrument that created the association or the society or the body;
e. Partner in the case of a partnership firm;
f. CEO in the case of a co-operative society or local authority;
g. In the case of any other person, by that person or by some person duly authorised to act on his behalf.

Notice is to be filed along with two copies and one electronic version. Recent amendment to regulation also requires a summary of the combination in not less than 2,000 words along with nine copies and an electronic version to be filed along with the notice.

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Defects and incomplete information in the Notice

Under regulation 14 of combination regulations, during scrutiny of the notice, if the Commission is of the opinion that notice has not been filed properly or incomplete information has been given in the notice, it may ask the parties to remove these defects in the notice.

Further as per regulation 5, in the course of inquiry, if the Commission founds that it requires additional information, it may direct the parties to provide such additional information within the time prescribed. Time taken by parties to submit their response is excluded from the period of 30/210 days as the case may be.

Relevant Market

Appreciable adverse effect on competition is assessed with reference to relevant market in India. Delineation of relevant market is the first step in the assessment of appreciable adverse effect on competition. The factors prescribed under Section 20 (4) are analysed with reference to the relevant market.

As per Section 2(r), "relevant market means" the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets.

As per Section 2 (s), "relevant geographic market" means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas.

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As per Section 2 (t) "relevant product market" means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use.

Orders of the Commission

On the basis of its assessment of the combination, in accordance with the factors laid down in Section 20(4) of the Act, if the Commission is of the opinion that the -

- Proposed combination does not have any appreciable adverse effect on competition, it will approve the combination.
- Proposed combination has an appreciable adverse effect on competition, but such adverse effect can be eliminated by suitable modification to such combination, it may propose appropriate modification to the combination. If the parties accept and carry out such modifications, the Commission will approve the combination. Parties may also propose amendment to such modifications. If the Commission agrees to such amendments, then it will approve the combination otherwise parties will be given time to accept the modifications originally proposed by the Commission. If the parties fail to accept these modifications, the combination will be deemed to be have an appreciable adverse effect on competition and thus, will be ordered not to be consummated.
- Proposed combination has an appreciable adverse effect on competition, it will direct that the combination shall not take effect. However, prohibition is generally resorted to when it is possible to alter the combination so as to remove its anti competitive effects on the relevant market.

Though the Act prescribes 210 days as the period for assessment, through the Combination Regulations, the Commission has self imposed a limit of 180 days to pass the final order.

Request for Confidentiality

Parties to the combination may request for confidential treatment in respect of information given to the Commission if the same contains business and trade secrets, price sensitive information, details of key suppliers and competitors, business plans, etc. The request should clearly state the reasons, justification and implication for the business of the parties to the combination. The Commission will take a decision on the basis of this request and may grant confidentiality treatment to the information submitted.

Appeals

Appeals against the orders of the Commission may be filed with Competition Appellate Tribunal within 60 days of the receipt of order/direction/decision of the Commission.

Rationale behind amendments in the combination regulations as notified on 23rd February, 2012

Combination Regulations were amended through a notification issued on 23rd February, 2012. As per the press release issued by the Commission, the amendments are with a view to provide relief to the corporate entities from making filings for combinations which are unlikely to raise adverse competition concerns, reduce their compliance requirements, make filings simpler and to move towards certainty in the application of the Act and the Regulations. Major amendments in the combination regulations are discussed below.

1. Newly inserted regulation 5(9) provides for attribution of value of assets and turnover of a transferor company to the transferee company where assets are transferred to the transferee company for the purpose of effecting a combination. The implication of this amendment is that if a division/unit is transferred to a group company and then other entities invest in the latter, then value of assets/turnover of the enterprise transferring the division/unit shall also be considered for computing thresholds under the Act.

   Illustration

   Company A has two business divisions namely X and Y. Now A hives off division X into its newly created wholly owned subsidiary company B. Since this is an intra-group acquisition of assets, this transaction would not be required to be notified in terms of regulation 4 read with category 8 of Schedule I of the Combination Regulations. After that, another company P acquires 51% stake in B. For the purpose of P's acquisition, assets and turnover of A will be added to the assets and turnover of B for computing assets and turnover for the purpose of Section 5 of the Act i.e. determining whether the transaction is a combination.
2. By amending category (1) of Schedule I, Commission has dispensed notification requirement in respect of acquisition of shares or voting rights that are less than 25% of the total shares or voting rights and not leading to acquisition of control of the target enterprise. However, the acquisition should be solely as an investment or in the ordinary course of business of the acquirer. By this amendment, Commission has aligned its guidelines with recently released takeover code by SEBI.
3. Newly inserted category 8(A) in Schedule I has dispensed notification requirement in respect of merger or amalgamation of subsidiaries wholly owned by enterprises belong to the same group. Earlier, the notification requirement was dispensed only in respect of intra-group acquisitions of control or voting rights or shares or assets.
4. By amending category (6) of Schedule I, in addition to bonus issue, stock splits, consolidation of face value and right issue in some cases, the Commission has dispensed notification requirement in respect of acquisition of shares or voting rights pursuant to buy back or right issue not leading to control.
5. Before the amendment, Form I was divided into 2 parts. In some cases, only part I was required to be filled. Now this distinction has been done away with and for all transactions Form I is to be filled in its entirety. This will lead to more clarity and uniformity in filing requirement. Further, parties are now required to provide details of value of assets and turnover and copies of approval of the combination.
6. Applicable fee has been increased to ₹10 lakh (from existing ₹50,000) for filing Form I and ₹40 lakh (from existing ₹10 lakh) for filing Form II. This has been done after considering resources deployed in the assessment of the notice, and keeping in view the fees charged by other regulatory authorities in India and abroad.

Opportunities for CAs

As per the provisions of the Act, Chartered Accountants, holding certificate of practice, are eligible to appear before the Commission on behalf of their clients. CAs may also provide advisory services in relation to filing the notices with the Commission.

Conclusion

Though the merger control regime is in nascent stage but it is a good beginning for betterment of society at large. It is an international regulatory process designed to prevent anti competitive effects of mergers and acquisitions. Corporate India should see this regime as in larger interest of society. It has been nearly 11 months that merger control regime has been in force in India. During this time period more than 45 cases (filed in Form I and II) have been approved by the Commission and on an average time taken by Commission to approve the cases is only 15-17 days approximately. This is in addition to 3 Form III cases noted by the commission. Thus, Commission has lived up to the expectations of all stakeholders. ■