

# From Joint Control to Sole Control



Under competition regime, acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises is known as combinations. The Competition Act, 2002 regulates the combinations in certain cases. The key provisions in this regard are prescribed under Section 5 and 6 of this Act. Schedule I of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 provides for certain categories where the approval under this Act is normally not required. One such exempt category relates to the cases where acquirer is already in control of the acquired enterprise. However if an acquisition results in transfer from joint control to sole control of the target enterprise, such exemption is not available. This article contains the application of relevant legal provisions to the cases involving transfer from joint control to sole control. Read on...



**Surendra U. Kanstiya**

(The author is a Company Secretary and visiting faculty at St. Francis Institute of Management and Research, Mumbai. He can be reached at kanstiyask@rediffmail.com.)

## Combinations and the Competition Act, 2002

According to the Competition Act, 2002 (the Act), acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises is a combination, if the combined asset or the turnover of the enterprises exceeds certain thresholds. Different categories of combinations and the respective thresholds are provided in Section 5(a), 5(b) and 5(c). Parties to a combination are required to give a notice to the Competition Commission of India (the Commission) in the prescribed form. The Commission, on receipt of such notice, deals with it and approves or rejects a combination. Section 6 of the Act declares a combination void, if it causes or

is likely to cause an appreciable adverse effect on competition within relevant market in India.

### The Combination Regulations

The Commission has notified the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (the Regulations). These Regulations have been framed to address various issues relating to the regulation of various combinations.

### Section 5(a) Combinations

Section 5(a) covers the combinations effected by acquisitions. Such cases are divided into following two categories:

- (i) Acquisitions where the parties to the acquisition, being the acquirer and the enterprise, whose control, shares, voting rights or assets have been acquired or are being acquired, jointly have assets or turnover beyond specified thresholds; or
- (ii) Acquisitions where, the group, to which the enterprise whose control, shares, assets or voting rights have been acquired or are being acquired, would belong after the acquisition, jointly have or would jointly have assets or turnover beyond specified thresholds.

### Schedule I combinations

In view of the duty cast upon the Commission under Section 18 and powers conferred under Section 36 of the Act, the Commission has provided that, certain categories of combinations as listed in Schedule I of the Regulations, are ordinarily not likely to cause an appreciable adverse effect on competition in India. This Schedule lists out 11 categories which are known as exempt categories and, therefore, notice under section 6 need not normally be filed in such cases. Of course, even if a transaction belongs to any of these categories, filing provisions are attracted, if the

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transaction is likely to cause an appreciable adverse effect on competition.

### Transfer from Joint Control to Sole Control

Category 2 of Schedule I provides for the exemption to acquisition by an acquirer who, prior to acquisition holds 50% or more shares or voting rights in the acquired enterprise. However, an exception is created in such cases and no such exemption is available if the acquisition results in transfer from joint control to sole control. The said clause reads as under:

*"(2) An acquisition of shares or voting rights, referred to in sub-clause (i) or sub-clause (ii) of clause (a) of section 5 of the Act, where the acquirer, prior to acquisition, has fifty percent (50%) or more shares or voting rights in the enterprise whose shares or voting rights are being acquired, except in the cases where the transaction results in transfer from joint control to sole control."*

Therefore, if the acquirer holds 50% or more shares or voting rights in an enterprise, subsequent acquisition of shares or voting rights need not be approved by the Commission. However, if such acquisition results in the transfer from joint control to sole control, Section 6 is attracted and the prior approval from the Commission is required.

The significance of transfer from joint control to sole control was highlighted by the Commission in the combination relating to acquisition of shares of Multi Screen Media Private Ltd. In its Order under Combination Registration No. C-2012/06/63, the Commission stated as under:

*"Joint control over an enterprise implies control over the strategic commercial operations of the enterprise by two or more persons. In such case, each of the person in joint control would have the right to veto/block the strategic commercial decision(s) of the enterprise which could result in a deadlock situation. Joint control over an enterprise may arise as a result of shareholding or through contractual arrangements between the shareholders. However, careful scrutiny is required to differentiate mere investor protection rights from those rights which result in a situation of joint control. The assessment of joint control over an enterprise would depend on the facts and circumstances of each case with due consideration of relevant factors such as statutory and contractual rights of the shareholders."*

### **Combinations Involving Transfer from Joint Control to Sole Control**

The Commission has, from time to time, received the notices relating to the combinations involving transfer from joint control to sole control and all of them have been approved. Following cases, which have been approved by the Commission, give an idea about the applicability of the relevant provisions in different situations:

- *UTV Acquisition [Combination Registration No. C-2011/08/02]*: Notice for acquisition by The Walt Disney Company (Southeast Asia) Pte. Ltd. (acquirer) and UTV Software Communications Ltd. (acquired enterprise) involved the transfer from joint control to sole control. In this case, the acquirer held 50.44% of the equity shares of the acquired enterprise (AE) and was in the joint control with Rohinton Screwvala and his associates. The acquirer passed a resolution approving the acquisition of shares in AE, held by public shareholders and Rohinton Screwvala and his associates. The acquisition was to be completed through a two step transaction in the following manner:
  - (a) acquisition of shares held by the public shareholders through a delisting offer. As a part of the process of the delisting offer, those shareholders who choose not to tender their shares through the delisting offer have an exit option that shall remain open for a period of one year; and
  - (b) subject to a successful delisting offer, acquisition of shares from Rohinton Screwvala and his Associates.
- *ESPN Star Sports Acquisition [Combination Registration No. C-2012/07/64]*: Notice for acquisition by STARTV ATC Holding Limited, was another case of transfer from joint control which was approved by the Commission. In this case, a Partnership Interest Purchase Agreement was entered into between the concerned parties for acquisition of entire partnership interest of EGP Company in ESPN Star Sports by STARTV ATC, an indirect wholly owned subsidiary of News Corporation (NWS). As a result of this combination, the partnership interest of NWS would increase from 50% to 100% and consequently NWS would acquire sole control not only over ESPN Star Sports but also its subsidiaries in India namely, ESPN Software India Pvt. Ltd. and Scorpio Television India Pvt. Ltd.

**Category 2 of Schedule I provides for the exemption to acquisition by an acquirer who, prior to acquisition holds 50% or more shares or voting rights in the acquired enterprise. However, an exception is created in such cases and no such exemption is available if the acquisition results in transfer from joint control to sole control.**

- *Acquisition of shares of Multi Screen Media Pvt. Ltd. [Combination Registration No. C-2012/06/63]*: In this case, 62% of the equity shares in Multi Screen Media India Pvt. Ltd. (MSM India) were held by SPE Mauritius Holdings Ltd. and SPE Mauritius Investments Ltd. (the acquirers) and 20.28% and 12.11% equity shares were held by Grandway Global Holdings Ltd. and Atlas Equifin Pvt. Ltd. respectively. This combination was proposed for acquisition of 20.28% and 12.11% equity shares by the acquirers through execution of two separate share purchase agreements with Grandway and Atlas respectively.

The matter was examined by the Commission in detail. In view of the presence of a large number of players and prevalence of intense competition among them, availability of ample choice and variety of products to the consumers, demand driven nature of the business, interchangeable and converging nature of the businesses involved, relative ease of entry and exit in these businesses, less likelihood of any co-ordinated or exclusionary behaviour, regulatory oversight in TV broadcasting and the future growth potential in addition to the fact that the Acquirer is already in joint control of the Acquired Enterprise, the Commission approved the combination.

In this acquisition, the acquirers submitted to the Commission that the acquirers already had sole control over MSM India and, therefore, the further acquisition of 32.39% equity shares was purely for the purpose of consolidation. It was stated that the rights of Grandway and Atlas, pursuant to a Shareholders Agreement were only limited (and mostly statutory) minority investor protection and the same did not rise to the level of joint control over MSM India.

The Commission, however, rejected the said submission and treated this as a combination involving transfer from joint control to sole control. Of course, the combination was approved as the same was not likely to have an appreciable adverse effect on competition in India.

- *Acquisition of shares of Mahindra Navistar Automative Ltd. [Combination Registration No. C-2013/01/105]*: In this case, 51% of the issued and paid up capital of Mahindra Navistar Automative Ltd. (MNAL) was held by Mahindra & Mahindra Ltd. and 49% of the issued and paid up capital was held by International Truck and Engine Mauritius Holding Limited. This combination proposed the acquisition of 49% of the issued and paid up capital by Mahindra & Mahindra Ltd. (the acquirers) through execution of a share purchase agreement.

In this acquisition, the acquirers submitted that as a result of the acquisition of 49% of the issued and paid up capital, MNAL would become a wholly owned subsidiary of M&M and, therefore, will be under the sole control of the acquirers.



**On combination matters, Chartered Accountants (CAs) play a key role. Knowledge and expertise of CAs are of immense help, especially for (i) assets/turnover determination (ii) market share analysis (iii) group/control impact (iv) failing business costing and impact.**

The Commission approved the combination resulting in acquisition of sole control of MNAL as the same was not likely to result in adverse effect on competition in India.

- *Acquisition by Exide Industries Ltd. [Combination Registration No. C-2013/01/108]*: ING Vysya Life Insurance Company Limited (ING Life) was a joint venture between Exide Industries Limited (holding 50% equity share capital of ING Life) and ING Insurance International B.V., Netherlands (holding 26% equity share capital of ING Life). Through 3 separate Share Sale and Purchase Agreements with the existing shareholders of ING Life, Exide proposed to acquire remaining 50% equity share capital of ING Life from existing shareholders.

The Commission observed that apart from their interest in ING Life, Exide and InG International were neither engaged in the life insurance business in India nor did they have any direct or indirect control over any other enterprise engaged in the life insurance business in India. Hence, the acquisition of sole control by Exide was not likely to result in adverse effect on competition in India and the proposed combination was approved.

- *Acquisition of shares of L & T Komatsu Ltd. [Combination Registration No. C-2013/03/113]*: L&T Komatsu Limited was a 50:50 joint venture company of Larsen and Toubro Ltd. (the acquirers) and Komatsu Asia Pacific Pte. Ltd. By executing a share purchase agreement, the acquirers were to acquire all shares held by Komatsu Asia Pacific Pte. Ltd. and terminate the joint venture.

The acquisition was to result in the transfer from joint control to sole control in L&T Komatsu Limited. The Commission approved the combination as the same was not likely to result in adverse effect on competition in India.

#### **Evolution of Exemption Clause – A Historical Perspective**

It is interesting to note that during the public consultation stage, there was no restriction on transfer from joint control and such acquisitions were not presumed to be anti-competitive. Before notifying the Regulations in May 2011, the Commission, on four different occasions, released the draft of the Regulations for public comments. These drafts were

released in January 2008, July 2008, January 2011 and March 2011. The cases of acquisition resulting in the change of status from joint control to sole control were always exempt in all these draft regulations.

The draft of the Regulations released in January 2008 and July 2008 carried the following clause, to grant exemption from filing, to such combinations:

*An acquisition of shares or voting rights, referred to in sub-clause (i) or (ii) of clause (a) of section 5 of the Act, where, prior to such acquisition, the acquirer holds more than 50% of the shares or voting rights in the enterprise of which further shares or voting rights are being acquired;*

The draft of the Regulations released in January 2011 and March 2011 carried the following clause, to grant exemption from filing, to such combinations:

*An acquisition of shares or voting rights, referred to in sub-clause (i) or sub-clause (ii) of clause (a) of section 5 of the Act, where the acquirer is already in control of the enterprise whose shares or voting rights are being acquired.*

However, in the final Regulations as notified on 11th May 2011, the Commission withdrew the exemption

in case of acquisition, where the transaction results in transfer from joint control to sole control. The clause, as in force now, reads as under:

*An acquisition of shares or voting rights, referred to in sub-clause (i) or sub-clause (ii) of clause (a) of section 5 of the Act, where the acquirer, prior to acquisition, has fifty percent (50%) or more shares or voting rights in the enterprise whose shares or voting rights are being acquired, except in the cases where the transaction results in transfer from joint control to sole control.*

### Combinations and Chartered Accountants

On combination matters, Chartered Accountants (CAs) play a key role. Knowledge and expertise of CAs are of immense help, especially for (i) assets/turnover determination (ii) market share analysis (iii) group/control impact (iv) failing business costing and impact. Notification requirement for the combinations involving transfer of joint control to sole control is an appropriate provision under the competition regime. This would ensure that the corporate restructuring effected through combinations eliminate the probable competitive harm and the competition concerns are addressed in an appropriate manner. ■

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