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ahead of the curve

Merger Regulation in India

A sneak peek for the Antitrust Practitioner



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A Thought Leadership Publication

We now present this guide to enable readers to have an overview of the systems and legal rules and regulations that are essential for business operations in India.

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OVERVIEW



The Indian merger regulation under the Competition Act, 2002 (as amended) (**Competition Act or Act**) became effective on 1st June 2011. Over 800 notifications have been filed with the Competition Commission of India (**CCI or Commission**) since 2011. The CCI has also issued a series of amendments to the associated Competition Commission of India (Procedure in regard to the transaction of Business relating to Combinations) Regulations, 2011 (**Combination Regulations**).

This is a ready reference for the antitrust practitioner.



Mandatory & Suspensory Regime

- ▮ The Indian merger control regime is **mandatory** and **suspensory**. Notifiable transactions cannot be consummated (entirely or in part) before CCI approval. Inter-connected transactions (including internal reorganizations, in some cases) must remain in abeyance till the CCI approves the transaction.
- ▮ Transactions are notifiable, if thresholds prescribed under Section 5 of the Competition Act are met and if exemptions are unavailable.
- ▮ A **single notice** explaining multiple **interconnected transactions** (even if individually not notifiable to the CCI) must be filed with the CCI where a single such transaction is notifiable.
- ▮ Appeals against orders of the CCI lie to the National Company Law Appellate Tribunal (**NCLAT**) and then, to the Supreme Court of India.



Invalidation

- ▮ If a notification is incomplete, or not in compliance with the Combination Regulations, the CCI may invalidate the filing. The timeline for review restarts when the Parties have filed the fresh notification.
- ▮ Parties have the option of withdrawing and refiling a merger notification, before the CCI issues a show cause Notice (**SCN**). In this regard, the CCI has also clarified that the filing fee already paid shall be adjusted against the fee payable for the new notification, provided the new notification is given within three months from the date of withdrawal.



Form of Filing

- ▮ Parties can either file a short Form I or a long Form II with the CCI. A Form III (post completion notification) is prescribed for certain exempt transactions.
- ▮ If parties are competitors and hold a market share exceeding 15%, or if parties are vertically integrated and hold an individual or combined market share exceeding 25%, a Form II filing is recommended.
- ▮ Filing fees for a Form I and II are INR 2 million (approx. USD 27,299¹) and INR 6.5 million (approx. USD 88,722) respectively.

¹ For the purpose of conversion, we have used the Reserve Bank of India's spot exchange rates for the last six months as on April 19, 2021.

IV

Failure to Notify & Limitation

- Under section 43 of the Act, the maximum **penalty** for failure to notify the CCI is 1% of the combined assets or turnover, whichever is higher, of the combining parties, if a notifiable transaction is not notified to the CCI or where such a notifiable transaction is consummated in part or in totality before receipt of the CCI approval. The maximum penalty that the CCI has imposed till date, is INR 50 million (approx. USD 682,472).
- The CCI can **look back** at the effects of a transaction that was not notified for a period of 1 year from the date of its completion even based on its own information or knowledge of the transaction. There is no time **limitation** to the CCI's power to penalize parties for a failure to notify it.



Trigger Events

- ⌋ Trigger events for **acquisitions**: the execution of transaction documents or agreements to acquire control, voting rights etc.
- ⌋ Trigger event for **mergers**: the approval of the transaction by the board of directors of the respective parties.
- ⌋ Trigger event for acquisitions of **distressed assets** under the Insolvency and Bankruptcy Code, 2016 (IBC acquisitions): Where a resolution plan contains a provision for combination, the resolution applicant shall obtain the approval of the CCI prior to the approval of such resolution plan by the Committee of Creditors.

VI

Global Transactions & Carve Outs

- ▮ The trigger event for notifying global transactions could be either a country specific implementation agreement, or the global agreement. Parties must notify prior to closing/consummation of the transaction.
- ▮ Carve outs / hold separate agreements are not permitted by the CCI unless parties establish that they continue to operate independently in Indian markets.

VII

Thresholds, The Small Target Exemption & Local Nexus

- ▮ All transactions (including foreign-to-foreign transactions) that breach the thresholds under the Competition Act must be notified to the CCI.
- ▮ Small Target Exemption: available for acquisitions, mergers and amalgamations, where the target's asset value in India is **less than** INR 3.5 billion (approx. USD 48 million) or its turnover value, in India, is **less than** INR 10 billion (approx. USD 137 million).
- ▮ Where the Small Target Exemption is inapplicable, a threshold analysis basis Section 5 of the Competition Act read with the notification issued by the Ministry of Corporate Affairs on 4 March, 2016 will determine the need to notify the transaction.
- ▮ There are **8 different threshold** tests related to worldwide and domestic assets and turnover of the transacting parties as well as at the group level.
- ▮ Consolidated **accounts** are the point of reference for the Small Target Exemption & Section 5 threshold analysis. Fixed and current assets; and the total turnover of the enterprise, including revenue from exports, net revenue from operations but including indirect taxes, other income not connected with operations, intra-group sales (only sales made by and between Indian group entities are to be included while determining the Indian turnover) must be considered.
- ▮ In **asset acquisitions**, business transfers etc., the asset / turnover of **only the** true target (and **not** the seller) is considered when applying the Small Target Exemption & the Section 5 thresholds.
- ▮ The Section 5 threshold analysis references the audited financial statements of the financial year immediately preceding the year in which the transaction will be completed.

If audited statements are not available, unaudited or best available estimates may be used.

Section 5 Thresholds

Direct Parties Test: India		
For Acquisitions:	Direct Acquirer + Target	
For Competitor Acquisitions:	Target + Competing enterprise included in acquirer's group	
For Mergers & Amalgamations:	Merging Enterprises	
Assets	OR	Turnover
Combined Indian assets >INR 20 billion (approx. USD 272.98 million/EUR 226.51 million/GBP 199.83 million/JPY 28.81 billion)		Combined Indian turnover >INR 60 billion (approx. USD 818.96 million / EUR 679.52 million / GBP 599.51 million / JPY 86.45 billion)

Direct Parties Test: Worldwide & India		
For Acquisitions:	Direct Acquirer + Target	
For Competitor Acquisitions:	Target + Competing enterprise included in acquirer's group	
For Mergers & Amalgamations:	Merging Enterprises	
Assets	OR	Turnover
Combined worldwide assets >USD 1 billion Combined Indian assets >INR 10 billion (approx. USD 136.49 million/ GBP 100 million/ EUR 113 million/ JPY 14.4 billion)		Combined worldwide turnover >USD 3 billion Combined Indian turnover >INR 30 billion (approx. USD 409.48 million/ EUR 339.76 million/ GBP 299.75 million/ JPY 43.23 billion)

Acquiring Group Test: India		
For Acquisitions (including competitor acquisitions):	Acquiring Group + Target	
For Mergers & Amalgamations:	Group to which merged enterprise will belong	
Assets	OR	Turnover
Combined Indian assets >INR 80 billion (approx. USD 1.09 billion / EUR 0.91 billion / GBP 0.79 billion / JPY 115.27 billion)		Combined Indian turnover > INR 240 billion (approx. USD 3.27 billion / EUR 2.72 billion / GBP 2.39 billion / JPY 345.83 billion)

Acquiring Group Test: Worldwide & India		
For Acquisitions (including competitor acquisitions):	Acquiring Group + Target	
For Mergers & Amalgamations:	Group to which merged enterprise will belong	
Assets	OR	Turnover
Combined worldwide assets >USD 4 billion and Combined Indian assets >INR 10 billion (approx. USD 136.49million/ GBP 100 million/ EUR 113 million/ JPY 14.4 billion)		Combined worldwide turnover >USD 12 billion and Combined Indian turnover >INR 30 billion (approx. USD 409.48 million/ EUR 339.76 million/ GBP 299.75 million/ JPY 43.23 billion)

VIII

Exemptions To Notification

Transactions that meet the Section 5 thresholds may avail certain exemptions listed in the Combination Regulations issued by the CCI:

Schedule I Exemptions

Item No.	Type of Acquisition	Conditions	
		Shareholding / Voting Rights Threshold	Qualifying Conditions
Item 1	Shares or Voting Rights	0 to 10% (solely as an investment)	<ul style="list-style-type: none"> ▮ The acquirer has ordinary shareholders' rights - no special rights; ▮ Acquirer is not a member of the Board of Directors of the target; ▮ Acquirer does not intend nominating a director on the Board of the Target; and ▮ Does not intent to participate in the affairs and management of the target enterprise.
		0 to 25% (ordinary course of business)	<ul style="list-style-type: none"> ▮ The acquirer must not control the target; and ▮ “Control” is broadly defined concept that includes affirmative / veto rights.
Item 1A	Additional Shares or Voting Rights	<ul style="list-style-type: none"> ▮ Acquirer or its group already has 25% & acquires additional shares not exceeding 50% of target; and ▮ Acquirer should not acquire control (sole or joint). 	
Item 2	Acquisition of Shares or Voting Rights	<ul style="list-style-type: none"> ▮ Acquirer or its group holds 50% and acquires additional shares; and ▮ There is no transfer of joint to sole control. 	

Item No.	Type of Acquisition	Conditions
Item 3	Acquisition of Assets	<p><u>Acquisitions of assets are exempt if:</u></p> <ul style="list-style-type: none"> ▮ The acquisition is not directly related to the business activity of the acquirer; ▮ Solely as an investment; ▮ In the ordinary course of business; and ▮ The acquisition should not lead to control over the enterprise whose assets are being acquired. <p><u>This exemption will not apply if:</u></p> <ul style="list-style-type: none"> ▮ The assets being acquired represent substantial business operations irrespective of whether the assets are organized as a separate legal entity.
Item 8	Intra-group acquisitions	<ul style="list-style-type: none"> ▮ The acquirer and target belong to the same group; ▮ The target must not be a company jointly controlled by enterprises not within the same group; and ▮ The concept of “group” is defined in the Competition Act.
Item 9	Intra-group mergers & amalgamations	<ul style="list-style-type: none"> ▮ A merger or amalgamation where one enterprise holds 50% or more of the other enterprise; ▮ A mergers or amalgamation where enterprises within the same group hold more than 50% of each of the merging enterprises; and ▮ The transaction should not result in change from joint to sole control.

Other Exemptions

Item No.	Exemption
Item 4	Amendment or renewal of an open offer (for a listed target) is exempt, where a prior intimation is made to the Commission of such amendment.
Item 5	Acquisition of current assets are exempt, if it is made in the ordinary course of business.
Item 6	Acquisition of shares due to bonus issue, stock splits, consolidation of face value, buy back, or subscription to rights of issue of shares are exempt, provided that such acquisition does not lead to control.
Item 7	Any acquisition of shares by persons in their ordinary course of business, like an underwriter or stockbroker are exempt.
Item 10	Acquisition after transaction approved by the CCI under Section 31 of the Act.

Exemptions under Section 6

Provision	Exemption
Section 6(4)	<p>Share subscriptions or financing facilities, 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.</p> <p>Foreign institutional investor and venture capital fund have the meanings assigned to them in section 115AD and the explanation to clause 23 FB of section 10 of the Income Tax Act, 1961 (as amended).</p>

Exemptions to Certain Banking Companies & Petroleum Companies

Exemption
Amalgamations of regional rural banks have been exempted from the requirement to notify the Commission vide a notification issued under the Regional Rural Banks Act, 1976.
Reconstitution, transfer (whole or part), and amalgamation of nationalized banks have been exempted vide a notification issued under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970.
Acquisitions, mergers and amalgamations under the Petroleum Act, 1934 or the Oilfields (Regulation and Development) Act, 1948 that involve Central Public Sector enterprises and their wholly or partly owned subsidiaries have been exempted from the requirement to notify the CCI.

Green Channel Approval

In line with the government's policy to improve ease of doing business in India, the CCI, by way of a notification published on 13 August, 2019 has introduced the concept of a 'Green Channel' approval route (**Green Channel**).

This will allow parties to file a simplified version of Form I and receive deemed approval of the transaction immediately upon notifying the CCI. However, the Green Channel will apply to only those transactions where the acquirer (and the acquirer group) has no existing interests in companies:

- that may be seen as competitors of the target's business;
- that operate in markets with vertical linkages to the target's business; and
- with complementary linkages to the target's business.

IX

Deadline for Filing & Timeline For Clearance

- ▮ Parties applying under the Green Channel will receive an on-spot approval from the CCI instead of waiting for the 30 days period.
- ▮ The CCI usually approves simple notifications with 30 working days (approx. 45-60 calendar days), concluding that these transactions do not cause an appreciable adverse effect on competition (**AAEC**) in India. This is casually referred to as a Phase I investigation.
- ▮ The CCI may request parties for additional information. The assessment clock stops while the parties respond to requests for information from the CCI.
- ▮ The CCI may approach third parties for information while making its assessment.
- ▮ If the CCI is of the opinion that there is likely to be an AAEC on the market, then it will issue a notice to the parties asking them to explain why a detailed investigation should not be conducted. This is the Show Cause Notice (**SCN**).
- ▮ If the parties address the CCI's concerns in their response to the SCN, the CCI may approve the transaction. If not, it will commence a detailed investigation (casually referred to as a Phase II investigation). It is open to the parties to offer behavioral and structural modifications to the proposed transaction in response to the SCN.
- ▮ The CCI may take 210 calendar days (and an additional 60 working days, in certain circumstances) to approve a transaction (Phase I or Phase II).



Joint Ventures

- ▮ The Act does not expressly cover joint ventures. Joint ventures created as a result of transfer of assets by one or more enterprises (casually referred to as “brown field joint ventures”) may be notifiable provided the jurisdictional thresholds provided under Section 5 are met.
- ▮ Joint ventures formed afresh by capital contributions by one or more enterprises (casually referred to as “green field JVs”) are generally exempt from the requirement to notify the CCI prior to its formation.
- ▮ While determining the applicability of Section 5 thresholds and the Small Target Exemption, only the relevant asset and turnover value of the assets being transferred by the parent(s) need be considered.

XI

Remedies

- ▮ So far the CCI has cleared 8 Phase II investigations with modifications. The CCI has also cleared cases as part of protracted Phase I investigations where the parties voluntarily offered to divest certain assets.
- ▮ While the CCI has publicly stated that it prefers structural remedies over behavioural remedies, the remedies which are eventually accepted by the CCI depends on the specific facts of each case. In the 8 phase II investigations conducted by the CCI so far, it can be seen that both structural and behavioural remedies (and sometimes a combination of both) have been adopted and there is no straight jacket formula to determine the type of remedy.
- ▮ In certain cases, the CCI has allowed parties to complete the proposed combination before completion of the divestment process. However, it has also insisted on completion of the divestiture prior to completion of the proposed combination. The CCI is open to clearing a combination expeditiously where parties offer divestment as well as an acceptable buyer for the assets upfront.

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