



cyril amarchand mangaldas
ahead of the curve

Merger Regulation in India

Cheat Sheet



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A Thought Leadership Publication

We now present this Cheat Sheet 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 regulations.

This document captures the salient features and practical aspects of the Indian merger control regime.



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.
- ▮ Appeals against orders of the CCI lie to the National Company Law Appellate Tribunal (**NCLAT**) and then, to the Supreme Court of India.

Obligation to notify

The Indian merger control regime is **mandatory & suspensory**. If there are no exemptions that the parties can avail, and the thresholds under Section 5 of the Competition Act are breached, then parties are required to seek the CCI's approval by notifying the proposed transaction in the prescribed form. Notifiable transactions cannot be consummated (entirely, or in part) prior to obtaining CCI's approval. If the transaction is consummated (entirely, or in part) before the CCI approves it, parties can be penalized.

Inter-connected transactions

A single notice covering **all these transactions** has to be filed by the parties for transactions that involve a series of transactions or interconnected transactions leading up to the main acquisition or merger. In essence, steps of an inter-connected transaction or a series of multiple transactions that may not be notifiable as standalone transactions will also have to be notified to the Commission, and cannot be closed before obtaining CCI's approval.

Right to Appeal

If a combination is rejected or approved by the CCI, parties and / or affected third parties have a right to appeal the CCI's decision before the NCLAT. The final appellate authority for orders passed under the Competition Act, is 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.

The CCI, at its sole discretion, has the authority to invalidate any notification filed by parties, if the notification is incomplete or not in compliance with the Combination Regulations. An opportunity to be heard prior to invalidation may be given by the CCI to the parties. 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. The timeline for review of an invalidated notice will restart when the complete form is refiled with the CCI. Parties do not have to repay the filing fees for invalidated forms.



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 43A 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.

An analysis of the decisions of the CCI over the last two years indicates that there is a reduction in the quantum of penalty imposed by the CCI for gun-jumping violations. A few notable cases where the CCI has imposed penalties under Section 43A are:

Name of Case	Penalty Imposed (INR 1 million = ~ USD 13,650)
<i>Piramal Enterprises Limited / Shriram Transport Finance Company</i>	INR 50 million on Piramal Enterprises Limited
<i>General Electric / Alstom India Limited</i>	INR 50 million on General Electric
<i>Baxalta / Baxter International Inc.</i>	INR 10 million on Baxalta
<i>Eli Lilly and Company / Novartis AG</i>	INR 10 million on Eli Lilly and Company
<i>SCM Soifert Limited / Mangalore Fertilizers and Chemicals Limited</i>	INR 20 million on SCM Soifert Limited and Deepak Fertilizers and Petrochemicals Corporation Limited
<i>Zuari / UB Group</i>	INR 30 million on Zuari.
<i>Thomas Cook (India) Limited / Thomas Cook Insurance Services (India) Limited/ Sterling Holiday Resorts (India) Limited</i>	INR 10 million on each party.
<i>Hindustan Colas Private Limited / Shell India Markets Private Limited</i>	INR 5 hundred thousand on Hindustan Colas Private Limited
<i>Ultratech Cement Limited / Jaiprakash Associates Limited</i>	INR 1 million on Ultratech Cement Limited

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. However, there is no limitation period on the CCI's powers to initiate proceedings under Section 43A to impose penalties for failure to notify the CCI of a notifiable transaction.

Name of Case	Penalty Imposed (INR 1 million = ~ USD 13,650)
<i>Schulke & Mayr GmbH / Johnson & Johnson Private Limited (2017)</i>	INR 2.5 Million on Schulke & Mayr GmbH
<i>Reydel Automotive Holding B.V. / Visteon Interiors System India Private Limited (2017)</i>	INR 2.5 Million on Reydel Automotive Holdings B.V.
<i>Sarva Haryana Gramin Bank / Punjab National Bank (2017)</i>	INR One Hundred Thousand on Sarva Haryana Gramin Bank and Punjab National Bank
<i>Rajasthan Marudhara Gramin Bank / State Bank of Bikaner and Jaipur (2017)</i>	INR One Hundred Thousand on Sarva Rajasthan Marudhara Gramin Bank and State Bank of Bikaner and Jaipur
<i>Cairnhill CIPEF Limited and Cairnhill CGPE Limited / Mankind Pharma Limited (2017)</i>	INR Five Hundred Thousand on Cairnhill CIPEF Limited and Cairnhill CGPE Limited
<i>Avago Technologies Limited / Broadcom Corporation (2017)</i>	INR One Million on Avago Technologies Limited
<i>Future Consumer Enterprise Limited / Grasim Industries Limited (2017)</i>	INR One Million on Future Consumer Enterprise Limited
<i>EMC Limited / MKN Investment Private Limited (2017)</i>	INR Five Hundred Thousand on EMC Limited and MKN Investment Private Limited
<i>ITC Limited / Johnson & Johnson Group (2017)</i>	INR Five Hundred Thousand on ITC Limited
<i>Akira Marketing Private Limited, Mama Catering Private Limited, Claridges Hospitality Private Limited and Azure Hospitality Private Limited (2018)</i>	INR One Hundred Thousand on the parties
<i>Intellect Design Arena Limited / Polaris Financial Technology Limited (2018)</i>	INR One Million on Intellect Design Arena Limited
<i>Reliance Jio Infocomm Limited / Reliance Communications Limited (2018)</i>	INR Five Hundred Thousand on Reliance Jio Infocomm Limited

Name of Case	Penalty Imposed (INR 1 million = ~ USD 13,650)
<i>Telenor ASA / Lakshdeep Investments & Finance Private Limited (2018)</i>	INR Five Hundred Thousand on Telenor ASA
<i>Chhatwal Group Trust, Shrem Infraventure Private Limited, Shrem Roadways Private Limited / Dilip Buildcon Limited (2018)</i>	INR One Million on Chhatwal Group Trust, Shrem Infraventure Private Limited and Shrem Roadways Private Limited
<i>Bharti Airtel Limited / Tata Teleservices Limited (2018)</i>	INR One Million on Bharti Airtel Limited
<i>LT Foods Limited / Hindustan Unilever Limited (2018)</i>	INR Five Hundred Thousand on LT Foods Limited and LT Foods Middle East DMCC
<i>Adani Transmission Limited / Reliance Electric Generation and Supply Limited (2018)</i>	INR One Million on Adani Transmission Limited
<i>Bharti Airtel Limited and Bharti Hexacom Limited / Aircel Group (2018)</i>	INR Five Hundred Thousand on Bharti Airtel Limited and Bharti Hexacom Limited
<i>Bharti Airtel Limited / Videocon Telecommunications Limited (2018)</i>	INR Five Hundred Thousand on Bharti Airtel Limited
<i>Canada Pension Plan Investment Board/ ReNew Power Limited</i>	INR 5 million on Canada Pension Plan Investment Board.



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.

Transactions are notified with the CCI upon the occurrence of one of the following trigger events:

- In case of acquisitions, the trigger to notifying the CCI is the execution of binding transaction documents, or any other binding document that indicates an agreement to acquire control, shares, voting rights, or assets. A subset of acquisitions are transactions involving takeover of listed companies pursuant to an open offer in terms of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeover) Regulations, 2011 (as amended). In such cases, the public announcement made to the Securities and Exchange Board of India is considered as the "other document" and is the trigger to notifying the CCI.
- In mergers or amalgamations (a court approved process in India), the approval of the transaction by the board of directors of the respective parties is the trigger event.
- More recently, IBC acquisitions of distressed assets have been notified to the CCI upon finalization of the acquirer's resolution plan.

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.

The question of whether it was the global agreement or the local implementation agreement that triggered the CCI notification is no longer relevant because of the omission of the 30 calendar day deadline to filing.

Parties to the global filing must ensure that the CCI has approved the transaction before the transaction closes globally and in India.

Carve outs / hold separate agreements

An issue that is yet to be settled by the CCI is the question of whether carve outs / hold separate agreements would be treated as 'gun jumping' or premature completion under the Act. The Baxter / Baxalta and Eli Lilly / Novartis cases give limited guidance on this issue. The CCI found, in these cases, that the parties' independent behaviour had likely ceased after the transactions were completed globally in spite of the 'carve out' of the Indian businesses. It may be arguable that carve outs / hold separate agreements may be allowed, if parties can establish that they do continue to operate independently in Indian markets.

VII

Thresholds, The De-minimis Exemption and 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 notification issued by the Ministry of Corporate Affairs (**MCA**) 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 excluding indirect taxes, other income not connected with operations, intra-group sales (only sales made by and between Indian group entities are to be excluded 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.

Any transactions that meet the prescribed thresholds (and don't qualify for an exemption) are mandatorily notifiable. There is no express exemption based on local nexus for foreign-to foreign transactions. The CCI has jurisdiction over parties where parties to foreign-to foreign transactions meet the Section 5 thresholds (through subsidiaries, associate companies, etc.).

Small Target Exemption

Where the target in a proposed merger / acquisition has assets less than INR 3.5 billion (approx. USD 48 million / GBP 354 million / EUR 40 million / JPY 5.04 billion) or turnover less than INR 10 billion (approx. USD 137 million / GBP 100 million / EUR 113 million / JPY 14.4 billion), the transaction qualifies for the de minimis exemption notified by the MCA by notifications dated 4

March 2011, 4 March 2016 and 29 March 2017 (**Small Target Exemption**). Such transactions (including mergers and amalgamations, and acquisitions) are not notifiable to the CCI.

Earlier, in case of asset acquisitions, the Small Target Exemption thresholds and the Section 5 thresholds were applied basis the vendor or seller, as opposed to the “true” target (i.e., the assets or division being acquired). Presently, when only a “portion of an enterprise or business is being acquired”, the asset and turnover value of the specific portion of the enterprise, business or division is considered to assess the applicability of the Section 5 thresholds and the Small Target Exemption.

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 136.49 million / 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)

The relevant reference period for the Section 5 thresholds is the last completed financial year that immediately precedes the year in which the proposed transaction will be completed. The thresholds analysis is conducted using the consolidated audited financial statements of the parties, and group if the group tests are applied. If the audited financials for the previous year are unavailable, the unaudited financial statements or the best available estimates may be referred to. Total assets as provided in the consolidated balance sheet (less depreciation) and total turnover as provided in the consolidated profit and loss statement including revenue from exports, net revenue from operations but excluding indirect taxes, other income not connected with operations, intragroup sales (only 8 sales made by and between Indian group entities are to be excluded while determining the Indian turnover) must be considered. Moreover, the CCI has issued some including specific guidance for calculation of total turnover of entities operating in the banking and insurance sector.

VIII

Exemptions Under The Competition Act

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)	▮ 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)	▮ 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	▮ 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	▮ 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	<u>Acquisitions of assets are exempt if:</u> ▮ The acquisition is not directly related to the business activity of the acquirer; or ▮ Solely as an investment; or ▮ In the ordinary course of business; ▮ The acquisition should not lead to control over the enterprise whose assets are being acquired. <u>This exemption will not apply if:</u> ▮ 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	▮ 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	▮ 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)	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. 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).

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 working 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).

Filing Deadline of 30 calendar days

Position before 29 June 2017

Parties were only allowed 30 calendar days to notify the Commission of a transaction from the date of signing the binding document for an acquisition or the date of the board meeting for mergers and amalgamations (which are the trigger events to a filing).

Present position

On 29 June 2017, the MCA issued a notification removing this filing deadline. Notifiable transactions can now be intimated to the CCI at any time after the occurrence of the trigger event, but before the transaction is completed / closed (in part or full).

Timeline for Clearance Prima facie opinion

The Commission is required to form a prima facie opinion on whether a proposed combination would cause an AAEC within 30 working days of the parties notifying it.

The CCI may request additional information from the parties to the combination. The time taken by the parties to respond to such a request for information is excluded from the 30 working day period – the assessment clock stops and only restarts when parties present complete responses to the request for information.

The Regulation 19 review through third party responses

In cases where the CCI reaches out to third parties for the assessment of the impact of a transaction, an additional 15 working days are available to it.

If the CCI's prima facie opinion is that the transaction does not, or is not likely to cause an AAEC in India, then the CCI passes an order approving the proposed combination. This is loosely referred to as a Phase I investigation.

Show Cause Notice

If the CCI is of the opinion that there is likely to be an AAEC on the market a notice under Section 29 of the Act is issued to the parties' on why a detailed investigation to assess the proposed combination's competitive effects should not be conducted. If the parties successfully address the CCI's concerns in response to the SCN, which could include offering behavioral and / or structural remedies, then the CCI may approve the transaction. If the CCI's concerns persist, it will commence a Phase II investigation.

Outer review timeline

It may take up to 210 calendar days for the CCI to review and approve a transaction (Phase I or Phase II) from the date of filing of the notification excluding time taken by parties to respond to CCI's information request. An additional 60 working days may be available to the CCI in certain circumstances². In our experience, the Commission is committed to clearing "no-issues" transactions within the 30 working day timeline.

Phase II Cases

So far the Commission has initiated 8 Phase II investigations in – (1) Sun Pharmaceutical Industries Limited / Ranbaxy Laboratories Limited (**Sun Pharma / Ranbaxy Case**),³ (2) Holcim Limited / Lafarge S.A.,⁴ (3) PVR Limited / DLF Utilities Limited,⁵ (4) Dow Chemical Company / E.I. du Pont de Nemours and Company,⁶ (5) Agrium Inc. / Potash Corporation of Saskatchewan,⁷ (6) Bayer Aktiengesellschaft / Monsanto Company (**Bayer / Monsanto Case**),⁸ (7) Linde / Praxair Inc.,⁹ and (8) Larsen & Toubro Limited / Schneider Electric India Private Limited and Macritchie Investments Pte. Ltd. (**L & T / Schneider case**).¹⁰

² In the event the parties do not accept the modifications suggested by the CCI then the parties have to propose changes to the CCI within a period of 30 working days. Thereafter, if the CCI does not accept the changes proposed by the parties to the modification suggested by the CCI then the parties will be allowed a further period of 30 working days to accept the modifications initially suggested by the CCI.

³ Combination Registration No. C-2014/05/170, available at http://www.cci.gov.in/sites/default/files/C-2014-05170_0.pdf.

⁴ Combination Registration No. C-2014/07/190, available at http://www.cci.gov.in/sites/default/files/C-2014-07190_0.pdf.

⁵ Combination Registration No. C-2015/07/288, available at <http://www.cci.gov.in/sites/default/files/event%20document/C-2015-07-288.pdf>.

⁶ Combination Registration No. C-2016/05/400, available at http://cci.gov.in/sites/default/files/Notice_order_document/Order%20-31_400%2018.07.2017_Public%20Version%20-%20WebUpload.pdf

⁷ Combination Registration No. C-2016/10/443, available at http://cci.gov.in/sites/default/files/Notice_order_document/36%20Order_C-2016-10-443.pdf

⁸ Combination Registration No. C-2017/08/523, available at http://cci.gov.in/sites/default/files/Notice_order_document/Order_14.06.2018.pdf

⁹ Combination Registration No. C-2018/01/545, available at http://cci.gov.in/sites/default/files/Notice_order_document/C-2018-01-545.pdf

¹⁰ Combination Registration No. C-2018/07/586, available at http://cci.gov.in/sites/default/files/Notice_order_document/Public1.pdf



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 “brownfield 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 “greenfield 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 straightjacket 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.

Phase I Decisions

In the table below we have set out a few important cases where the CCI has granted an approval based on voluntary modifications suggested by the parties during the Phase I review period.

Case	Sector	Time for Clearance	Commitment offered by the parties to the Combination
Abbott Laboratories / St. Jude Medical Inc. (C-2016/08/418)	Medical Surgical Products – Vascular Closure Devices	135 calendar days	The parties volunteered to divest the small hole vascular closure devices business of St. Jude Medical Inc., to a third party on a worldwide basis.
China National Agrochemical Corporation (Chemchina)/ Syngenta AG (C-2016/08/424)	Agrochemical – Crop Protection Products	266 calendar days	The parties volunteered to divest three crop protection brands that were sold by Syngenta in India. Separately, to alleviate other antitrust concerns, the parties had also agreed to hold separate Adama India and Syngenta India for a period of 7 years.

Phase II Decisions

In the table below we have set out the cases where the CCI has granted an approval based on modifications suggested by the CCI and/or the parties during the Phase II review period.

Case	Sector	Time for Clearance	Commitment offered by the parties to the Combination
Sun Pharmaceutical Industries Limited / Ranbaxy Laboratories Limited (C-2014/05/170)	Pharmaceutical	214 calendar days	Based on its assessment, the CCI required the parties to divest 7 pharmaceutical brands.
Holcim Limited / Lafarge SA (C-2014/07/190)	Cement	569 calendar days	As Per initial order dated 30 March 2015, the CCI required the parties to divest 2 cement plants in the affected market. Due to certain regulatory hurdles for transfer of mining leases delayed the closure of the deal. In light of this the CCI modified its order on 2 February 2016. An alternate proposal was offered by the parties for divesting 100% share capital of Lafarge India. The CCI accepted the alternate proposal offered by the parties.
DLF Utilities Limited (DUL)/ PVR Limited (PVR) (C2015/07/288)	Film Screening – Movie Theatres / Multiplex	302 calendar days	PVR offered to modify the transaction documents in order to acquire lesser number of screens from the seller in order to alleviate competition law concerns. In addition, the acquirer i.e., PVR undertook other commitments such as not acquiring direct/indirect interest over the assets that were excluded from the sale. Also the acquirer undertook to not expand in certain markets either organically or inorganically for a period of 5 years.

Case	Sector	Time for Clearance	Commitment offered by the parties to the Combination
Dow Chemical Company (Dow) /E.I. du Pont de Nemours and Company (DuPont) (C2016/05/400)	Agro Chemical and Chemicals	386 calendar days	The CCI ordered the parties to divest 1 product. The CCI also required the parties to undertake certain commitments such as not to undertake commercialization of another product for a certain time period from the date of undertaking.
Agrium Inc. (Agrium) /Potash Corporation of Saskatchewan (Potash Corp) (C-2016/10/443)	Agro Chemical and Chemicals	383 calendar days	The CCI approved the combination on the basis of the commitment from the Potash Corp to divest its shareholding in 3 companies who were also selling Potash in the Indian market.
Bayer Aktiengesellschaft / Monsanto Company (c-2017/08/523)	Agro Chemicals	311 calendar days	The CCI ordered Bayer to divest the businesses of glufosinate ammonium; crop traits of cotton and corn; and hybrid seeds of vegetables to an independent entity. It also ordered Monsanto to divest its shareholding in Maharashtra Hybrid Seed Company Limited (26%) to an independent entity. Further, the parties also made certain behavioural commitments to CCI including a policy of non-exclusive licensing of certain products by the combined entity, access of certain data on a fair, reasonable and non-discriminatory terms etc.

Case	Sector	Time for Clearance	Commitment offered by the parties to the Combination
Linde Aktiengesellschaft and Praxair, Inc (C-2018/01/545)	Industrial Gases	238 calendar days	The CCI considered the particularity of the industrial gases market. It proposed a divestiture of Praxair's on-site plants in the eastern region and Linde's stake in Belloxy in the southern region involved in production and supply of bulk and tonnage gases and cylinder filling stations engaged in production and supply of cylinder gases. The purchaser was required comply with east / south region purchaser requirements. The CCI also took into account transitional support as may be required by the approved purchaser in the east/south region.
Larsen & Toubro Limited (L&T), Schneider Electric India Pvt. Ltd. (Schneider) and MacRitchie Investments Pte. Ltd (MacRitchie) (C-2018/07/586)	Electronics	276 calendar days	In order to eliminate the competition concerns, the CCI ordered Schneider and MacRitchie to reserve a part of L&T's installed capacity to offer white labelling services to third party competitors in respect of five high market share LV switchgears. Third party competitors could take L&T products on a reasonable price for 5 years and get access to the technology for manufacturing white labelled products for the next 5 years. Schneider was also required to (a) remove de facto exclusivity in its distribution agreements; and (b) not discontinue L&T products and not increase their average selling price, for five years.

Timing of Divestiture

The timing of divestitures is critical to complex M&A when time is of the essence. It is critical for the parties, deal teams and the antitrust teams to identify the antitrust risk associated with the deal upfront with an estimate of likely timelines for CCI clearance.

While, the assets to be divested are identified by the CCI in its order, the CCI allows for identification and approval of an eligible purchaser to occur either prior to the closing of the proposed combination¹¹ or after the closing of the proposed combination.¹²

The CCI has also considered pre-identified purchaser divestitures scenarios (i.e., where the merging parties have identified a purchaser and entered into an agreement during the merger review process and before closing of the merger) in the case of Abbott Laboratories / St. Jude Medical Inc. (C-2016/08/418) and to a limited extent, in Dow/Dupont case relating to the R&D business for crop protection products.

¹¹ In the Sun / Ranbaxy (C-2014/05/170) order the CCI required the parties to complete the divestment prior to closing the transaction.

¹² In certain instances involving global deals such as Holcim / Lafarge (C-2014/07/190), Dow/Dupont (C-2016/05/400), Chemchina / Syngenta (C-2016/08/424) and Agrium / Potash (C-2016/10/443), the CCI has allowed the parties to consummate the global deal while keeping their Indian leg of the transaction in abeyance till such time the parties complete the divestment.

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