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A weathered wooden boat, possibly a fishing vessel, is shown from a low angle, resting on a pile of debris and seaweed. The boat is heavily damaged, with its hull and deck structure exposed. The background is a clear blue sky with some light clouds. The overall scene conveys a sense of abandonment and decay.

CHANGES TO THE MERGER CONTROL REGIME IN INDIA

- COMPETITION LAW UPDATE

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1. Introduction

- 1.1. Recently the Indian Parliament approved the Competition (Amendment) Bill, 2022 (“**Bill**”) which introduces significant changes to the Competition Act, 2002 (“**Act**”). The Bill, *inter alia*, introduces changes to the merger control regime, seeks to broaden the scope of anti-competitive agreements and introduces a settlement and commitment framework to reduce litigation.
- 1.2. The key changes in the merger control regime and their impact are discussed in this paper. The topics discussed are as follows:
- **Approval of the Competition Commission of India (CCI) would be required not only on the basis of the assets and turnover of the entity, but also on the basis of the transaction value**
 - **Negative control is control?**
 - **Defining “turnover” for merger control**
 - **Time period for notifying a combination**
 - **Time limit for passing an order reduced**
 - **Exemptions to FPIs, VCFs etc**
 - **Enabling provision for deemed approvals**
 - **Open offers**
 - **Investigation of combinations**
 - **Modifications to a combination can be proposed by a party**
 - **Changes in penalties**
 - **Framing of rules and regulations**
 - **Savings provision**

2. Approval of the Competition Commission of India (CCI) would be required not only on the basis of the assets and turnover of the entity, but also on the basis of the transaction value

2.1. Current requirement

Currently, CCI’s prior approval for an acquisition or merger is required only if certain thresholds in terms of assets and turnover of the parties to an acquisition or the relevant group to which the target would belong, are met. The thresholds are given below:

| | | Assets | | Turnover |
|-------------------------|-----------------------------|---|-----------|--|
| Enterprise level | India | > Rs. 2,000 crore | OR | > Rs. 6,000 crore |
| | Worldwide with India | > USD 1 billion with atleast Rs. 1,000 crore in India | | > USD 3 billion with atleast Rs. 3,000 crore in India |
| OR | | | | |
| Group level | India | > Rs. 8,000 crore | OR | > Rs. 24,000 crore |
| | Worldwide with India | > USD 4 billion with atleast Rs. 1,000 crore in India | | > USD 12 billion with atleast Rs. 3,000 crore in India |

There is also an exemption from the requirement of seeking CCI’s approval if the value of the assets being acquired, taken control of, merged or amalgamated is not more than Rs. 350 crore (Rs. 3.5 billion) in India or turnover of not more than Rs. 1,000 crore (Rs. 10 billion) in India.

2.2. **New requirement**

Henceforth, CCI's prior approval will also be required if:

- the **value of any transaction exceeds Rs. 2,000 crore (Rs. 20 billion)**; and
- the enterprise which is being acquired, taken control of, merged or amalgamated has **substantial business operations in India**.

As a result of the amendment, the number of transactions which would potentially require CCI's approval has certainly increased.

2.3. **Some issues that may arise**

- **What is 'substantial business operations'?**

The new provision is dependent on further regulations being framed. What constitutes 'substantial business operations' is yet to be defined. A substantive analysis would be involved in determining whether an enterprise has 'substantial business operations' in India.

While the final regulations are awaited, one may refer to European jurisdictions such as Austria and Germany where transaction value thresholds have been introduced by the Austrian Federal Competition Authority and the German Federal Cartel Office. Under Austrian and German competition law, a merger would be subjected to merger control provisions if the company to be acquired has substantial domestic operations in Austria or Germany, respectively. A systemic analysis of, *inter alia*, the following criteria is undertaken to determine whether the target company has substantial domestic operation:

- a. measurement of the domestic activity;
- b. geographical allocation of the domestic activity;
- c. market orientation; and
- d. significance of the domestic activity.

- **Scope of the term 'value of transaction'**

'Value of transaction' has been given a broad and inclusive definition. The term is defined as including *every valuable consideration whether direct or indirect, or deferred for any acquisition, merger or amalgamation*. By using the word 'includes' in the definition, the intent is to make the definition non-exhaustive and as broad as possible.

Issues may still arise while calculating the value of a transaction. For instance, the manner of factoring in any amount to be paid which is contingent on the happening of certain events, earnouts, post-closing adjustments etc may pose a challenge. Another question that can arise is that, if there are multiple investors in an investment round, would the value be calculated qua an investor or the entire round.

3. **Negative control is control?**

- 3.1. CCI's prior approval is required in case of an acquisition of control of an enterprise, if the asset or turnover test (mentioned above) is met. The scope of the definition of 'control' has been broadened by the Bill.
- 3.2. Earlier, 'control' was defined as including **controlling** the affairs or management of an enterprise or group.

- 3.3. Now, it is not required to be shown that there is control over the affairs or management of an enterprise or group. ***The ability to exercise material influence, in any manner whatsoever, over the management or affairs or strategic commercial decisions, would be sufficient to demonstrate 'control'***. Defining 'control' in terms of 'material influence' certainly reduces the threshold for determining 'control'. What is interesting is that the 52nd Report of Standing Committee on Finance (2022-23) noted the Ministry of Corporate Affairs' comments that under the Competition Act "***in case of notifiability as well as substantive assessment of combinations, acquisition of negative control may be vital.***"

4. Defining "turnover" for merger control

- 4.1. As mentioned above, CCI's prior approval is required if the turnover test is met. Under the Act, 'turnover' is defined as including the '*value of sale of goods and services*'.
- 4.2. Now, a more elaborate definition of 'turnover' is proposed to be added. While calculating 'turnover', it is now explicitly stated that the following shall be excluded:
- intra-group sales
 - indirect taxes
 - trade discounts
 - all amounts generated through assets or business from customers outside India
- 4.3. This is a welcome change as it provides clarity on the exclusions while calculating 'turnover'. Previously CCI had discussed the scope of the term 'turnover' and had held that intra-group sales are excluded from the computation of turnover.

5. Time period for notifying a combination

- 5.1. When the Act was initially notified, all combinations satisfying the asset and turnover test (unless exempted) had to notify CCI within 30 days of the approval of the merger or execution of the agreement for acquisition etc. Subsequently, CCI issued a notification S.O. 2039(E) dated June 29, 2017 pursuant to which the requirement of giving a notice within the said 30 days was exempted.
- 5.2. The Bill incorporates what the notification stated and amends the Act to state that CCI has to be notified after the approval of the merger or execution of the agreement for acquisition etc., but prior to the consummation of the combination. Hence, the time period of 30 days will no longer be mentioned in the Act.

6. Time limit for passing an order reduced

Currently, no combination can come into effect until 210 days have passed from the date on which notice has been given to CCI or CCI has passed orders, whichever is earlier. The Bill reduces this timeline to 150 days.

7. Exemptions to FPIs, VCFs etc

- 7.1. Currently, the Act exempts acquisitions by public financial institutions, foreign institutional investors, banks and venture capital funds from the requirement of seeking CCI's prior approval if the acquisition is pursuant to any covenant of a loan agreement or investment agreement. However, these entities are required to notify the combination within 7 days from the date of the acquisition.

- 7.2. The Bill continues with the exemptions and now includes all category I alternative investment funds. However, the exempted entities will no longer be required to notify the combination within 7 days from the date of the acquisition.

8. Enabling provision for deemed approvals

- 8.1. An enabling provision has been introduced pursuant to which if a combination fulfils such criteria as may be prescribed and is not otherwise exempted, then notice for such combination may be given to CCI in such form as may be specified by regulations, disclosing the details of the proposed combination and thereupon a separate notice seeking CCI's prior approval would not be required to be given for such a combination.
- 8.2. Upon filing of the above notice and its acknowledgement by CCI, the proposed combination would be deemed to have been approved by CCI. However, if CCI finds that the combination does not fulfil the requirements for the relaxation, or that the information or declarations provided in the form are materially incorrect or incomplete, then the deemed approval shall become void *ab initio*, and CCI can pass an order after giving the parties to the combination an opportunity of being heard.
- 8.3. Further, the Bill provides that if the notice is found to be *void ab initio* then a notice may be given by the acquirer or parties to a combination, as may be applicable, within a period of 30 days of the order of the CCI. Furthermore, the CCI cannot take any action till the 30 day period is expired.

9. Open offers

- 9.1. Under the Act, a combination which requires the prior approval of CCI cannot be implemented unless CCI approves the same. This gave rise to certain difficulties in case of open offers to public shareholders of a public listed company under the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulation, 2011 as well as in case of on-market transfers. On one hand, as per SEBI's regulations, the transaction had to be completed within a given time frame, and on the other hand, the transaction could not be consummated till CCI gave its approval.
- 9.2. The Bill addresses this concern. Now, an open offer or acquisition of shares or securities convertible into other securities from various sellers, through a series of transaction on a regulated stock exchange can be implemented if the following two conditions are met:
- The notice of the acquisition should be filed with CCI within such time period as may be prescribed by CCI; and
 - The acquirer should not exercise any ownership or beneficial rights or interest in the acquired shares or convertible securities, including voting rights and receipt of dividends or any other distributions, except as may be specified by CCI, till the approval of such an acquisition by CCI.

10. Investigation of combinations

Certain changes in the procedures and processes have been introduced in relation to the investigation of combinations. A summary of the changes in timeline are given below:

| S.N. | Section | Provision | Old timeline | Revised timeline |
|------|---------|---|--|--|
| 1. | 29(1) | Response by parties to the combination to the show cause notice of CCI. | 30 days from the date of receipt of show cause notice. | 15 days from the date of receipt of show cause notice. |
| 2. | 29(2) | CCI to issue notice to the parties to the combination | 7 working days from the date of receipt of response of the parties. | 7 days from the date of receipt of response of the parties. |
| 3. | 29(2) | Publication by parties to the combination of relevant information of the combination. | 10 working days from the direction of CCI. | 7 days from the direction of CCI. |
| 4. | 29(3) | Invitation to persons, who are affected or are likely to be affected by such a combination to file their written objections to the combination. | 15 working days from the date on which the information about the combination is published. | 10 days from the date on which the information about the combination is published. |
| 5. | 29(4) | Call for additional or other information from the parties to the combination by CCI. | 15 working days from the expiry of the period under section 29(3). | 7 days from the expiry of the period under section 29(3). |
| 6. | 29(5) | Parties to furnish information sought by CCI. | 15 days from the expiry of the period specified under section 29(4). | 10 days from the expiry of the period specified under section 29(4). |

11. Modifications to a combination can be proposed by a party

- 11.1. Currently, section 31 of the Act provides that, if in the opinion of CCI there is any appreciable adverse effect on competition, then CCI can propose modifications to the combination to eliminate such an adverse effect. If the parties to the combination do not accept the modifications proposed by CCI, they can submit amendments to the modification proposed by CCI.
- 11.2. A new section 29A has been inserted by the Bill which deals with the manner of proposing modifications to a combination which is being scrutinised by CCI. If CCI is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition, it shall issue a statement of objections to the parties identifying such appreciable adverse effect on competition and direct the parties to explain within 25 days from receipt of the statement of objections, as to why such a combination should be allowed to take effect.

- 11.3. If the parties to the combination consider that the appreciable adverse effect on competition as elucidated in the statement can be eliminated by making suitable modification to such combination, they may submit an offer of appropriate modification to the combination along with an explanation to the statement of objections.
- 11.4. If CCI does not accept the modification proposed by the parties, then it shall, within 7 days of receiving the modifications, communicate to the parties the rationale behind the modification not being sufficient to eliminate the appreciable adverse effect on competition. Thereafter, CCI will provide 12 days to the parties to furnish revised modifications, if any, to eliminate the appreciable adverse effects on competition.
- 11.5. CCI can also *suo motu* propose modifications to the combination which may be considered by the parties to the combination.
- 11.6. This proposed amendment is likely to save time in the process of approval of combination by providing an opportunity to the parties to the combination to propose a modification at an earlier stage.

12. Changes in penalties

The Bill introduces a number of changes in provisions dealing with penalties under the Act. These changes are summarized below.

12.1. ***Penalty for non-furnishing of information on combination***

Currently, under section 43A, if any person or enterprise fails to give notice to CCI regarding the combination or fails to submit any information pursuant to an inquiry then CCI may impose a penalty which may extend to 1% (one percent) of the total turnover or assets whichever is higher.

Henceforth, the value of the transaction will also be considered and accordingly, the penalty can now be extended to 1% (one percent) of the total turnover or assets, or value of the transaction, whichever is higher, of the combination.

12.2. ***Increase in penalty for furnishing false statement or omission to furnish material information***

Currently, if any person who is a party to a combination, makes a statement which is false or omits to state any material particular knowing it to be material, such a person shall be liable to a penalty in the range of Rs. 50,00,000 (Rupees fifty lac) and Rs. 1,00,00,000 (Rupees one crore), as determined by CCI. The Bill increases the range of penalty to the range of Rs. 50,00,000 (Rupees fifty lac) and Rs. 5,00,00,000 (Rupees five crore).

13. Framing of rules and regulations

- 13.1. It is evident that the implementation of many of the provisions are subject to rules and regulations being framed.
- 13.2. The Bill clarifies that till such time as the rules or regulations are made, the rules and regulations made under the Act on the matters referred to in the provisions as they stood immediately before the commencement of the Competition (Amendment) Act, 2023 shall continue to be in force.

14. Savings provision

Any order passed or any fee imposed or combination consummated or resolution passed or direction given or instrument executed or issued or thing done under or in pursuance of any rules and regulations made under the Act shall continue to be in force, and shall have effect as if such order was passed or such fee was imposed or such combination was consummated or such resolution was passed or such direction was given or such instrument was executed or issued or done under or in pursuance of the Act.

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