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Analysing developments impacting business

NON-COMPETE COVENANTS OUT OF THE CCI'S MERGER CONTROL NET

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In a positive development, the Competition Commission of India (CCI) has removed the Non-Compete Covenants (NCCs) disclosure requirement from merger filings. To that effect, the CCI amended the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 on 26 November 2020 (Amendment).

Prior to the Amendment, the CCI's Form I (short merger Form) required notifying parties to provide details of NCCs agreed between them (including its scope, territorial extent, and temporal duration) and corresponding justifications as a precondition to the CCI's merger clearance. Until 2017, the CCI in appropriate cases required parties to restrict the scope of NCCs, where it viewed them as excessive, disproportionate, or not necessary for implementing the concerned transactions.

In 2017, the CCI issued a guidance note (Guidance Note), outlining the general approach for assessing if NCCs are reasonable. Since then, the CCI's decisional practice evolved and instead of requiring modification to NCCs, it merely declared NCCs to be "not ancillary" where they were seen as unreasonable. NCCs were viewed ancillary if aligned with the principles in the Guidance Note, and thereby, deemed to be cleared by the CCI. On the other hand, if the CCI stated in its merger approval order that NCCs are not ancillary, its approval did not validate the NCCs. The CCI, however, had clarified that a "not ancillary" remark does not, by itself, raise a presumption that such restrictions automatically infringe the behavioural provisions (Sections 3 and 4) of the Competition Act, 2002, as amended (Act).

On 15 May 2020, the CCI invited public comments to its proposal to remove non-compete assessment as part of its merger review. It recognised in the proposal that prescribing a general set of standards for assessing NCCs is not practical given the dynamic business environment and short merger review timeline. Merger timeline could be even shorter in the future since the Competition (Amendment) Bill, 2020 has proposed to reduce the overall merger review timeline from the current 210 calendar days to 150 calendar days and Phase I review from the current 30 working days to 20 working days. The CCI also reasoned that the Amendment would allow parties the flexibility in determining the scope of NCCs and reduce information and regulatory burden on parties and the CCI.

At the same time, it is important to highlight that parties enforcing NCCs will remain responsible to ensure that NCCs are competition-compliant since they can still be

assessed under the behavioural provisions of the Act. Therefore, parties have to self-assess the reasonableness of their NCCs to ensure they are not anti-competitive.

Comment

We welcome the Amendment and believe it is a forward-looking step towards self-assessment and potentially swifter merger clearances. It aims to allow more flexibility to parties to determine the scope of NCCs in dynamic business environments. The intention also seems to enhance the ease of doing business in India and reduce the compliance burden on parties.

That said, so far, parties had the comfort that if the CCI considered their NCCs ancillary to transactions while approving it, it would not raise antitrust risk in the future. However, that certainty is lost with the Amendment, and parties are to self-assess whether such covenants are competition-compliant.

It is noteworthy that the CCI has not yet examined an NCC in detail under the behavioural provisions of the Act. Nonetheless, such scrutiny cannot be ruled out in the future, especially if an aggrieved party raises concerns before the CCI. We will have better insight in the future, but given the rationale behind the Amendment, one may expect the CCI to be more open to business needs while assessing NCCs.

The bottom line is that parties should exercise caution to ensure that NCCs do not unduly restrict the freedom of trade of the relevant entities. We encourage them to engage in a separate antitrust assessment for NCCs.

The Amendment can be accessed [here](#).

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