



ERGO

Analysing developments impacting business

CCI UPDATES THE GUIDANCE NOTES TO FORM I

30 March 2020

In August 2019, the Competition Commission of India (CCI) amended the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (Combination Regulations) to: (i) introduce an automatic approval route for transactions where there is absence of any horizontal, vertical or complementary overlaps between businesses of the parties (Green Channel Route or GCR); and (ii) provide a substantially revised Form I format with incremental queries (Revised Form I).

In order to clarify the scope of information required to be furnished along with the Revised Form I and illustrate the eligibility criteria for GCR, the CCI published revised guidance notes to Form I on 27 March 2020 (Guidance Note).

The key takeaways from the Guidance Note are set out below:

- Revised Form I
 - Expansion of disclosure of contractual rights acquired in a combination
 - The Guidance Note requires that parties expressly set out the special rights acquired pursuant to a transaction. To this end, disclosure will be required of veto rights, affirmative voting rights, right to nominate a director, right to appoint an observer on a target's board, information sharing rights as well as other rights or advantage of commercial nature acquired in the target or any other enterprise.
 - The rationale behind this requisition perhaps stems from the recent trend where several minority acquisitions are coupled with strategic collaborations that allow the purchaser to acquire a degree of influence or commercial advantage in relation to the target's business affairs.
 - Relaxation in duration of market facing information with low combined market shares:
 - The Revised Form I had expanded the scope of market facing information and sought details of market size and market share information for three (3) years instead of one (1) year for all business

overlaps. This was the position regardless of the combined market shares of the transacting parties.

- As a relief, the Guidance Note clarifies that three (3) years data is only needed if the combined market share of parties is 10% or above in the concerned overlapping market. As a corollary, where combined market shares are less than 10%, parties need not furnish market data for three (3) years.

- Complementary overlaps explained

- The Revised Form I included disclosure on complementary overlaps for merger assessments in addition to horizontal and vertical overlaps but did not provide any guidance on the definition of complementary products.
- The absence of clarity surrounding complementary overlaps resulted in uncertainty and unpredictability since the parties remained oblivious to the expectation of the CCI. However, the Guidance Note now defines complementary products/services and clarifies the scope to be those products/services that are related because they are combined and used together (e.g., printers and ink cartridges). It explains that complementary products are not vertically related, do not compete, and generally enhance the value of the combined product or service.

- Eligibility criteria for GCR

To avail of GCR, there should be no horizontal, vertical and complementary overlaps between: (i) the parties to the combination; (ii) their respective group entities; and (iii) any entity in which they, directly or indirectly, hold shares and/or control.

It was suspected that inclusion of point (iii) above will materially diminish the effectiveness of GCR considering that based on the bare text of the expression "hold shares and/or control", holding a single share in a company engaged in overlapping business could disqualify the transaction from benefiting from GCR. However, in practice, the CCI was taking a liberal view by allowing transactions to avail GCR despite some shareholding in competing portfolio.

In furtherance of such spirit, the Guidance Note now clarifies the contours that need to be considered for point (iii) above. As such, only those companies where parties:

- hold a direct or indirect shareholding of 10% or more; or
- have a right or ability to exercise any right (including any advantage of commercial nature with any of the party or its affiliates) that is not available to an ordinary shareholder; or
- have a right or ability to nominate a director or observer.

will need to be considered.

Comment

The Guidance Note is a welcome step as it elucidates the exact scope of information required to be filed for the Revised Form I. In effect, it sets out the expectation of the CCI in a merger filing. This clarity will enable parties to file comprehensive merger applications and consequently avoid invalidations.

However, a few pressure points which may result in hardship for transacting parties could be collation of granular data for assessing overlaps in companies where the acquirer holds rights or commercial advantages or has the ability to appoint an observer. This is an onerous requirement and may also narrow down the scope of eligibility of transactions for GCR which in reality do not pose any competition concerns.

It is also interesting to note that the enunciation of the expression "any entity in which they, *directly or indirectly, hold shares and/or control*" possibly has roots in the concept of "material influence" that has been introduced in the Competition Act (Amendment) Bill, 2020, which seeks to broaden the definition of control under the existing statutory framework.

The Guidance Note can be accessed [here](#).

- Anisha Chand (Partner), Swati Bala (Senior Associate) and Anmol Awasthi (Associate)

For any queries, please contact: editors@khaitanco.com

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Mumbai

One Indiabulls Centre, 13th Floor
Tower 1 841, Senapati Bapat Marg
Mumbai 400 013, India

T: +91 22 6636 5000
E: mumbai@khaitanco.com

New Delhi

Ashoka Estate, 12th Floor
24 Barakhamba Road
New Delhi 110 001, India

T: +91 11 4151 5454
E: delhi@khaitanco.com

Bengaluru

Simal, 2nd Floor
7/1, Ulsoor Road
Bengaluru 560 042, India

T: +91 80 4339 7000
E: bengaluru@khaitanco.com

Kolkata

Emerald House
1 B Old Post Office Street
Kolkata 700 001, India

T: +91 33 2248 7000
E: kolkata@khaitanco.com