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Indian Merger Control Regime gets a Makeover: Amendments go Live

INTRODUCTION

On 10 September 2024, the merger control provisions of the Competition (Amendment) Act 2023 (Amendment Act) along with the attendant rules and regulations have been made effective. The key changes are discussed below.

1. ENFORCEMENT OF THE TRANSACTION SIZE OR DEAL VALUE THRESHOLD (DVT)

DVT has been introduced as an additional notification threshold to determine whether a transaction will require prior approval from the Competition Commission of India (CCI). The existing asset / turnover based thresholds will continue to exist alongside the DVT. Pertinently, transactions that meet the DVT will not benefit from the Small Target / *De Minimis* Exemption.

Under the DVT, a transaction will require prior approval from the CCI if (i) the “transaction value” is more than INR 20 billion (~USD 239.52 million / ~EUR 220.87 million) and (ii) the target (whose shares, voting rights, assets or control is being acquired or is merged or amalgamated) has “substantial business operations in India” (SBOI). The Competition Commission of India Regulations, 2024 (Combination Regulations) provide guidance on calculation of deal value and determination of SBOI.

Critically, if the binding trigger documents for a transaction have already been executed (prior to 10 September 2024) but the transaction has not closed completely, such transaction will require prior approval from the CCI - if it breaches the DVT. Accordingly, a partially consummated transaction will also need to be notified if it breaches the DVT, and no steps towards consummation of the unclosed limbs of such transaction should be taken until receipt of CCI approval. However, gun-jumping penalties will not be imposed for the part(s) of the transaction already consummated. It is likely that this obligation will significantly protract timelines for transactions which breach the DVT but whose documentation was executed without considering the possibility that an approval

was required from the CCI.

Deal Value

The Combination Regulations clarify that “deal value” will include every valuable consideration, whether direct or indirect, immediate or deferred, cash or otherwise. Deal value is to specifically include the following:

- (i) consideration payable for any obligation, covenant, undertaking or restriction imposed, if agreed upon separately (e.g. separate consideration for non-compete);
- (ii) consideration for inter-connected transaction(s);
- (iii) consideration for any prior acquisition by one of the parties (or its group entity(ies)) in the target, anytime within two years before the date of execution of the transaction documents;
- (iv) consideration for arrangements entered into as part of the transaction or incidental thereto where such consideration is payable during two years from the closing of the transaction (e.g. intellectual property licensing agreements, technology supply agreements, etc.);
- (v) consideration for call options and shares to be acquired (on an as converted basis);
- (vi) the full subscription amount for the open offer in transactions involving listed companies; and
- (vii) consideration payable for future outcomes specified in transaction documents.

If the transaction’s value cannot be established with reasonable certainty, the parties are required to presume that the DVT is met.

Substantial Business Operation in India (i.e. SBOI)

The Combination Regulations also provide the following objective criteria to determine SBOI:

- (i) a target providing digital services will be deemed to have SBOI if it has (i) 10% of its total global business users or end users in India; or (ii) 10% of its total global gross merchandise value (GMV) attributable to India; or (iii) 10% of its total global turnover in India; and
- (ii) any other target (not being a digital service provider) will be deemed to have SBOI if it has (i) 10% of its total global GMV whose value is at least INR 5 billion (~USD 59.88 million / ~EUR 55.21 million) in India; or (ii) 10% of its total global turnover with a turnover of at least INR 5 billion (~USD 59.88 million / ~EUR 55.21 million) in India.

2. REDUCED TIMELINES

Under the Combination Regulations, the time for *prima facie* approval for a combination has been reduced from 30 "working" days to 30 "calendar" days. Further, the overall review period has been shortened from 210 "calendar" days to 150 "calendar" days.

3. DEROGATION OF STANDSTILL OBLIGATIONS FOR ON-MARKET PURCHASES

Under the Amendment Act, open market purchases shall be allowed prior to CCI approval subject to the following conditions:

- (i) the approval for the acquisition should be sought within 30 days from the date of the first acquisition; and
- (ii) the acquirer shall only exercise the below rights until receipt of the CCI's approval:
 - a. economic benefits such as dividend or any other distribution, subscription to rights issue, bonus shares, stock-splits and buy-back of securities; and

- b. voting rights only in matters relating to liquidation and / or insolvency proceedings.

4. IDENTIFICATION OF RELEVANT ENTITIES TO ASSESS AVAILABILITY OF THE GREEN CHANNEL

Under the revised legislative framework, transactions can continue to secure deemed approval under the green channel route - so long as there are no horizontal, vertical or complementary overlaps between (i) the acquirer group and its affiliates, on one hand and (ii) the target and its affiliates, on the other hand.

In this regard, it is clarified that an enterprise shall be considered an "affiliate" of another enterprise if the other enterprise has (i) more than 10% shareholding / voting rights in the affiliate enterprise, or (ii) the right or ability to have representation on the board of directors of the affiliate enterprise (either as a director or as an observer), or (iii) the right or ability to access commercially sensitive information of the affiliate enterprise.

Financial sponsors generally have expansive information and inspection rights as classic investment protection rights. Accordingly, the number of portfolio entities which will now be considered as "affiliates" is likely to increase substantially. On account of this, it is expected that the number of transactions eligible for the green channel route will reduce.

5. INCREASE IN STATUTORY FILING FEES

The revised filing fees are (i) INR 3 million for a Form I (~USD 35,928.14 / ~EUR 33,130.87) and (ii) INR 9 million (~USD 107,784.43 / ~EUR 99,392.60) for a Form II.

6. EXEMPTED TRANSACTIONS:

The Amendment Act has empowered the Central Government of India to identify exempted transactions by way of rules. Relevant exemptions under the rules are as below:

- (i) acquisition of less than 25% shares / voting rights solely as an investment in the first instance, without the acquisition of control. Exemption is also subject to certain conditions such as the parties' presence in overlapping markets;
- (ii) creeping acquisition of shares or voting rights between (a) 0 to 25%, (b) 25 to 50%, and (c) 50 to 100%, subject to certain conditions;
- (iii) asset acquisition in the ordinary course;
- (iv) intra-group (a) asset acquisitions, (b) mergers, and (c) amalgamations, without change in control; and
- (v) de-merger resulting in the acquisition of direct / indirect mirror shareholding

except for the discharge of consideration for fractional shares.

The amendment refines the exemptions in the earlier legislative / regulatory framework. The acquisition-based exemptions have been streamlined to address contentious issues handled by the CCI over the years. Lastly, the demerger exemption is welcome and in-sync with the international position on routine restructurings. The impact of these changes is looked forward to and is expected to reduce uncertainty while availing them.

- Competition Law Group

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