RECENT CHANGES IN MERGER CONTROL REGIME VIS-À-VIS THE COMPETITION ACT

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1. INTRODUCTION

The Indian merger control regime under the Competition Act, 2002, has been in force for nearly five years. The merger control regime was originally issued by the Competition Commission of India (CCI) in May 2011. CCI has since then amended these regulations from time to time on the basis of the wholesale price index or fluctuations in exchange rate of rupee or foreign currencies. The Government has also the power to provide exemptions to certain enterprises from the provisions of the Act in public interest.

The provisions of the Competition Act are to be read together with the notifications issued, from time to time, by the Ministry of Corporate Affairs (MCA), Government of India and the Competition Commission of India (CCI)[1] Regulations, 2011. Exercising its powers, the Ministry of Corporate Affairs

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[1] The Competition Act, 2002.

(MCA) has previously enhanced the jurisdictional thresholds under the Competition Act and also introduced exemptions.[2]

Besides the CCI, there are sector-specific regulators such as the Department of Telecommunication, the Insurance Regulatory Authority of India, the State Electricity Regulatory Commissions, etc. which examine the sector-specific mergers under the relevant statutes. In addition, listed companies are also required to comply with the regulations of the Securities Exchange Board of India (SEBI), including that of the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011. Further, in case of acquisitions or amalgamations, the scheme of acquisition or amalgamation is required to be approved by the concerned High Court after taking comments from the Regional Directors in the Ministry of Corporate Affairs under the Companies Act, 1956 (since replaced by the Companies Act, 2013).

With regard to shake off the Indian inertia towards merger and acquisitions, on 5 March 2016, the Ministry has published Notifications S.O. 673(E), 674(E) and 675(E)[3] dated 4 March

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[2] *Notification dated March 4, 2011*, MINISTRY OF CORPORATE AFFAIRS, http://www.cci.gov.in/sites/default/files/notification/SO479%28E%29%2C480%282C482%28E%29240611.pdf.

[3] *Notification dated March 4, 2014*, MINISTRY OF CORPORATE AFFAIRS, http://www.cci.gov.in/sites/default/files/notification/SO%20673%28E%29-674%28E%29-675%28E%29.pdf.

2016, enhancing the existing jurisdictional thresholds under the Competition Act and amending and extending the existing exemptions for the target enterprise and group.

2. LEGISLATIONS GOVERNING THE MERGER CONTROL REGIME IN INDIA

The Competition Act, 2002, is the main statute for regulation of merger control in India. Further, the Competition Commission of India (CCI) (Procedure in Regard to the Transaction of Business Relating to Combinations) Regulations, 2011, as amended from time to time, serve as the implementing regulations; while the Competition Commission of India (CCI) (General) Regulations, 2009, clarify and streamline the procedure for notification and regulation of combinations[4]. Besides the Competition Act, the Companies Act, 2013[5] and the Takeover Code are the other principal laws which govern mergers and acquisitions in India. Foreign Direct Investment in India is governed by the FDI Policy issued by the Government of India and the provisions of the Foreign Exchange Management Act, 1999.

[4] Jitender Bhargava v CCI & Ors, Appeal 44 / 2013.
[5]The Companies Act, 2013.

3. KEY CHANGES BROUGHT IN BY THE MERGER CONTROL REGIME, 2016

The merger control regime in India has been in practice for over five years now and has significantly transformed the manner in which mergers and acquisitions activity is governed in India. Under the Competition Act, 2002, every two years, the Government is required to enhance or reduce the financial thresholds for big ticket transactions which may have an adverse effect on competition in the relevant market. The Government has also the power to provide exemptions to certain enterprises from the provisions of the Competition Act in public interest.

Three major changes were brought in by March 04, 2016 notification:[6]

a) Thresholds for pre-merger notification increased by 100%.

b) Target de-minimis threshold increased for a pre-merger notification.

c) Definition of Group revised unto 50%.

[6] Merger Notification & Review (N&P) subgroup developed RPs for Merger Notification to facilitate convergence-adopted by ICN-April 2006-non binding jum, 09-03-200.

3.1. Financial Jurisdictional Threshold enhanced by 100%

Section 5 of the Competition Act specifies the asset and turnover threshold limits which trigger the applicability of the notification requirement under the Act. Vide the notification dated March 4, 2011; the said thresholds were increased by 50%. Vide the latest notification dated March 04, 2016, the threshold, as in the original Competition Act, 2002, has now been increased by 100%.

The revised thresholds for notification to the Competition Commission of India are as follow:

S.No.	Nature of transaction	Assets	Turnover
1.	Acquisition by Investors (in India), Investors and the Target (jointly) have.	INR 1,000 crores	INR 3,000 crores
2.	Acquisition by Investors (in and outside India), Investors and the Targets (jointly) have.	USD 500 million (including at least INR 500	USD 1.5 billion (including at least INR 1,500

		crores in India)	crores in India
3.	Acquisition by the Investors (Group level) (in India), Investors Group and the Target (jointly) have.	INR 4,000 crores	INR 12,000 crores
4.	Acquisition by the Investors (Group level) (in and outside India), Investors Group and the Targets (jointly) have.	USD 2 billion (including at least INR 500 crores in India)	USD 6 billion (including at least INR 1,500 crores in India

3.2. **Increase in thresholds of De Minimis Exemption:**

De Minimis exemption in literal terms means small target exemption. The Ministry of Corporate Affairs (MCA) took cognizance of the fact that the small target transactions will

have negligible impact on the competition in the relevant market[7]. Hence, the Ministry of Corporate Affairs (MCA) through a notification dated March 4, 2011, and a corrigendum dated May 27, 2011 had introduced de minimis exemption to exempt the small target companies from the notification requirement under the threshold limit. Pursuant to Notification dated March 04, 2016, acquisitions where enterprises whose control, shares, voting rights or assets are being acquired, have assets of not more than 350 crores in India or turnover of not more than 1000 crores in India are exempt from section 5 of the Act for a period of 5 years[8].

Since the earlier notification was set to expire, the Ministry of Corporate Affairs has issued a new notification extending the period of applicability for another five years until 4 March 2021. Further, the Ministry has also increased the financial thresholds to exempt any enterprise being acquired with assets worth INR 350 crores or less, or having a turnover of not more than INR 1000 crores from the provisions of Section 5 as against the earlier threshold limits of INR 250 crores for assets and INR 750 crores for turnover respectively.

[7] Combination Registration No. C-2014/07/190
[8] Combination Registration No. C-2014/05/170.

3.3. Definition of Group revised unto 50%[9]

A "group" as defined under the Act, means two or more enterprises which, directly or indirectly,

a) are in a position to exercise 26% or more of the voting rights in another enterprise; or

b) appoint more than 50% of the members of the board of directors in another enterprise; or

c) control the management or affairs of another enterprise.

For the Group Test, provided above, all enterprises which form part of a "group" are to be considered for calculating the monetary thresholds.

The Ministry of Corporate Affairs, by way of a notification dated March 04, 2011, had revised the definition of group, to exempt enterprises exercising less than 50% (fifty per cent.) of voting rights in another enterprise, from filing a notification with the CCI, for a period of five years (i.e. valid until March 04, 2016). The Ministry of Corporate Affairs, by way of the Notification dated March 04, 2016, has further extended this exemption for another five years.

[9] Combination Registration No. C-2014/07/190

4. EFFECT OF THE CHANGES BROUGHT IN BY THE MERGER CONTROL REGIME

4.1. Effects of the revised jurisdictional thresholds

a) The thresholds provided under the Act are based on the combined value of assets and turnover of the parties to the transaction i.e., the acquirer and the target.

b) In case of an acquisition, the relevant entities for a Enterprise Test are the acquirer and the target enterprise (including its subsidiaries, units and divisions). For the Group Test, the relevant entities refer to the group to which the target enterprise would belong after the acquisition.

c) In case of a merger or amalgamation, the relevant entities for the Enterprise Test are the enterprise remaining after the merger or the enterprise created as a result of the amalgamation. In case of Group Test, it would be the group to which the enterprise remaining after the merger or created as a result of the amalgamation, would belong, post-transaction.

d) These thresholds are applicable on transactions where the binding agreement (in case of an acquisition) is signed or a public announcement is made or a final board approval (in

case of a merger or amalgamation) is passed, by the parties on or after March 04, 2016

e) The revised threshold limits are likely to facilitate the ease of doing business by exempting many transactions from the lengthy and time-consuming filing requirements as required by the Act.

4.2. Effects of the De Minims Exemption

a) The extension of the target-based exemption for another five years is a welcome measure, however, contrary to industry expectations; the government has not clarified on the inclusion of amalgamations in this notification. In the absence of specific coverage for amalgamations, the notification would continue to be available only in cases of 'acquisitions'.

b) The target enterprise (i.e. the enterprise whose control, shares, voting rights or assets are being acquired) is exempt from filing a notification with the CCI, if it has assets less than INR 350 crores (INR 3.5 billion) or turnover less than INR 1000 crores (INR 10 billion), in India, until March 04, 2021, irrespective of the parties or the group test (as provided below).[10]

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[10] Combination Registration No. C-2014/07/190.

c) The Revised Target Exemption continues to be applicable on transactions effected by an acquisition only and is inapplicable in case of transactions effected by mergers and amalgamations.

d) In case of asset acquisitions, the "target" continues to be the enterprise housing the assets and not the assets themselves.

e) The Revised Target Exemption is applicable on acquisitions where the binding agreement is signed, or where a public announcement is made in terms of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, on or after March 04, 2016

4.3. **Effects of the definition of the Group extended**

a) For the purposes of calculating jurisdictional thresholds, enterprises that exercise more than 50% control over another enterprise will constitute "group".[11]

b) The validity of this exemption continues to remain questionable. The Act only empowers the MCA to exempt categories of enterprises or transactions from the purview

[11] Thomas Cook (India) Limited & Ors. v. Competition Commission of India, Appeal No.48 of 2014, order dated Aug. 26 2015 at para 21.

of the Act. However, the above "group" exemption has the effect of amending the Act, which is beyond the powers of the MCA. From a practical standpoint, the revised "group" exemption seems to be applied across the provisions of the Act.

5. BOTTLENECKS IN THE EXECUTION OF THE AMENDED MERGER CONTROL REGIME

a) The De Minimis Exemption seems to be lacking in scrutiny. The Competition Commission of India seems to have overlooked the existence of fragmented sectors and the possibility of a large acquirer to keep acquiring smaller companies and gain significant market share without the Competition Commission of India's scrutiny.

b) The De Minimis Exemption has not been extended to transactions which have been structured as "mergers or amalgamations" and is restricted to "acquisitions". This is obscurity in wording of the exemption seems to be a glitch.

c) The De Minimis Exemption applies only to the target group and missed the acquirer group. The Exemption threshold should be party neutral/agnostic and it should not just apply to the target

6. CONCLUSION

The merger control regime, 2016 is welcome change for the Indian trade and development. The regime advance the economy's projection of being a powerful and hub for international trade and development. Overall, CCI in a very short time has established itself as an efficient and credible competition regulator. The challenges associated with Indian merger control regime may perhaps be unique but are not impossible. A little bit of planning, careful reading of the law and continuous cooperation with CCI is all that is required to secure quick approvals for most transactions.