

Competition Law Hotline

May 31, 2011

MERGER CONTROL PROVISIONS FURTHER SIMPLIFIED!

The Ministry of Corporate Affairs ("MCA"), vide its notification dated May 27, 2011¹ has clarified the exemption from the filing requirement under the Competition Act, 2002 ("Act") available to combinations² involving acquisition of enterprises whose turnover / asset size is less than a certain prescribed threshold. In another related move, the Competition Commission of India ("CCI") introduced the provision for consultation with the staff of CCI prior to making a filing regarding the combination under the Act.³ These are welcome developments in the area of competition law in India.

We had earlier analysed the newly notified provisions of the Act relating to 'combinations' and the new regulations relating thereto in our hotlines "Indian Merger Control Regulations Finally Notified!!!" dated May 13, 2011 and "Acquirers Beware: Indian Merger Control Regulations Notified!" dated March 8, 2011.

SMALL ENTERPRISES EXEMPTION

Pursuant to its notification dated March 4, 2011, the MCA had exempted the acquisition of enterprises whose turnover is less than INR 7.5 billion (approx. USD 167 million) or whose assets value is less than INR 2.5 billion (approx. USD 56 million) from the definition of combination as defined under Section 5 of the Act. However, there was no clarity on whether the asset value / turnover threshold should be calculated on a consolidated world-wide basis, or on a standalone basis for the target, or be limited to asset value / turnover in India.

The MCA has now clarified that for the purpose of availing of the aforesaid exemption, the asset value / turnover of the target in India should be considered. Therefore, in the event the turnover or the value of the assets of the target in India is less than the above prescribed threshold, the transactions involving the acquisition of such target would not fall under the definition of 'combination' and therefore, no filing would have to be made with the CCI in that regard.

PRE-FILING CONSULTATION

The CCI under the draft regulations dated March 2, 2011 had first introduced the provision for pre-filing consultation. However, this found no mention in the recently issued final Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011, dated May 11, 2011.

The CCI has now, in accordance with international best practices, re-introduced the facility of informal and verbal consultation with the staff of CCI prior to the filing of notice under the Act in connection with the proposed combination. In this regard it is important to note that any advice given by the staff of CCI pursuant to such informal and verbal consultation shall not be binding on the CCI. Be that as it may, given the novelty of the merger control regulations in India, the introduction of pre-filing consultation is a positive move as it gives an opportunity to the parties to the combination to consult the CCI on whether or not the filing requirements would be triggered by the proposed combination.

CONCLUSION

The clarification regarding the small enterprise exemption and the introduction of pre-filing consultation are both steps in the right direction especially in light of the provisions of the Act relating to combination coming into effect from tomorrow (June 1, 2011). It is hoped that in coming days there will be further clarifications made by the CCI to iron out the lacunae in the current provisions of the Act and the regulations.

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¹ http://www.mca.gov.in/Ministry/notification/pdf/SO_Corrigendum_27may2011.pdf

² A 'combination' under the Act has been defined to include- (a) the acquisition of control, shares or voting rights or assets by a person; (b) the acquisition of control of an enterprise where the acquirer already has direct or indirect control of another engaged in identical business; and (c) a merger or amalgamation between or among enterprises; that cross the financial thresholds as set out in Section 5 of the Act.

³ <http://www.cci.gov.in/May2011/Home/ConsultationPrior250511.pdf>

* For reference USD 1 = INR 45

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