BNA International

Corporate Restructuring

International Information for International Businesses

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This article has been published in the January 2008 issue of BNA International's *Corporate Restructuring*

www.bnai.com

Competition: The rules of the combination game in India

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The Competition Commission of India ("CCI"), the apex body vested with the responsibility of enforcing the provisions of the Competition Act, 2002 ("Act"), has, pursuant to the Competition (Amendment) Act, 2007 promulgated a draft of the Competition Commission (Combinations) Regulations ("Regulations").

The Regulations which seek to govern "combinations" (a term defined under the Act to encompass an acquisition, merger or amalgamation) provide much-awaited clarity on several issues pertaining to combinations, but regrettably also create new areas of uncertainty.

Background

The Competition (Amendment) Act, 2007 ("Amendment Act") which received presidential assent towards the end of 2007 brought significant changes to the Competition Law regime in India. Most noteworthy of the changes proposed by the Amendment Act was the introduction of a mandatory notification process for persons undertaking combinations above prescribed threshold limits. The Amendment Act also introduced a lengthy waiting period of 210 days within which the CCI is required to pass its order with respect to the notice received, failing which, the proposed combination is deemed to be approved. In pursuance of the changes proposed by the Amendment Act with respect to combinations, the Regulations have been set by the CCI to provide for a framework for the regulation of combinations.

Summary of the Regulations

The key provisions of the Regulations are summarised thus:

- exempting combinations resulting from certain types of transactions from the ambit of "combinations that are likely to have an appreciable adverse effect on competition in India";
- specifying the party that is required to notify the CCI on the basis of the type of combination that is proposed;
- specifying the filing fees and associated costs to be incurred by parties to a combination;
- prescribing forms for notification to the CCI, both with respect to prior notifications for combinations and for other situations envisaged by the Regulations; and
- setting out the framework for the functioning of the CCI in connection with regulating combinations (procedure for inquiries, investigations, hearings *etc*).

Exempted transactions

The Regulations carve out 13 transactions from the purview of combinations that are likely to have an appreciable adverse effect on competition in India. Some of the key transactions that have been exempted include:

a. any acquisition of shares or voting rights of a company of not more than 26 percent of the total shares or voting rights of the company;

b. any acquisition of assets that are not directly related to the business of the acquirer; however, this exemption would not apply where assets of the company that are being acquired represent the entire business operation in a particular location or relate to a particular product or service of such company;

   The Regulations also provide that the acquisitions, as listed under a. and b. above, should be acquisitions which are made solely as an investment or in the ordinary course of business and which do not lead to control of the company by such acquirer.

c. an acquisition of or acquiring of control of or an M&A transaction, where the domestic nexus for foreign parties engaged in a combination (*i.e.,* with thresholds of Rs. 500 crores (approx USD 125 Million) of assets or Rs. 1500 crores (approx USD 375 Million) of turnover), does not comprise of assets of Rs. 200 crores (approx USD 50 Million) or a turnover of Rs. 600 crores (approx USD 150 Million), of each of at least two of the parties to such combination;

d. any acquisition of shares or voting rights of a company where the acquirer already holds more than 50 percent of the shares or voting rights of such company prior to the acquisition; and

e. any acquisition pursuant to a bonus or rights' issue or sub-division of shares, but not including any acquisition resulting out of relinquishment of rights.

It may be noted that the Regulations simply provide that these transactions, amongst certain others, are not likely to cause an appreciable adverse effect on competition in India. It is disappointing to note that the Regulations do not exempt such transactions from the mandatory notification requirements under the Amendment Act. Consequently, parties that propose to undertake any of these transactions would nonetheless have to approach the CCI for its approval, and sit out the waiting period thereby rendering such exemption of transactions virtually redundant.

Filing requirements: Costs and procedure

While the Act makes it mandatory to notify the CCI, it does not specify the manner in which such notice is to be filed, nor does it specify which party to the combination is to notify the CCI. The Regulations seek to resolve such ambiguities by prescribing certain forms (which may be either Form 1 or Form 2) through which the CCI is to be notified. Form 1 as prescribed by the Regulations is an exhaustive form calling for various information and details. However, portions of such information requested may be classified as confidential and would thus be difficult to disclose. The Regulations do not guarantee the confidentiality of the information submitted, and hence pose a significant privacy risk, which the CCI should address expeditiously, and certainly before the law is brought into full force and effect.

Given the stiff filing fees, one would expect some measure of speed and accountability to be fixed by the Regulations. Unfortunately, there are no mechanisms to ensure that this is the case. The CCI should be made accountable for quality of service, and speed and efficiency of outcome. The failure to do so would make such filings not only costly, but also time-consuming and may ultimately lead to stifling M&A activity in India or involving India.

Conclusion

While the Regulations lay out the much required framework to provide for the manner in which combinations are sought to be regulated by the CCI, the ambit of combinations that are brought within the rigors of the Act remains too vast. An appreciable retardation of investment and M&A activity could be an outcome upon notification of the operative provisions of the Act/Amendment Act.

Given the significant passage of time and high economic growth, the threshold limits that were prescribed as early as 2002 were anticipated to be increased either by the Amendment Act or the Regulations; however such changes have not been made. The procedure to render any combination void and the ensuing consequences of undoing any merger or acquisition continues to be neglected. The draft Regulations as they stand do not fully achieve their intended objective. It is hoped that the Regulations are brought into full force and effect only after all ambiguities and concerns are adequately addressed, and that combinations are regulated in a manner that is not a hindrance to the economic growth and development of India.

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