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Regulating combinations: Is the leash too tight?

Regulations Must Be Brought Into Effect Only After All Ambiguities And Concerns Are Adequately Addressed

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CORPORATE deals in India may slowdown if the changes proposed to the competition law regime in India go through. To resolve the concerns raised by industry players over some of these changes, the Competition Commission of India (CCI), the apex body vested with the responsibility of regulating competition in India, recently promulgated a draft of the Competition Commission (combinations) Regulations. The regulations, which seek to govern "combinations" (a term defined under competition law to encompass an acquisition, merger or amalgamation) provide much-awaited clarity on several issues pertaining to such transactions, but regrettably create new areas of uncertainty.

Background

The competition law in India is primarily governed by the Competition Act, 2002 (Act); an act that attempts to make a shift from curbing "monopolies" under the archaic Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act), to curb practices having "adverse effects on competition" and promote and sustain competition. While a majority of the procedural provisions of the Act with respect to setting up CCI have entered into force, the substantive provisions of the Act dealing with 'anti competitive agreements', 'abuse of dominant position' and 'regulation of combinations' have not yet entered into full force and effect.

Mired in litigation soon after its enactment on the grounds of being constitutionally invalid, certain amendments were proposed to the Act, resulting in the passing of the Competition (Amendment) Act, 2007, (Amendment Act). The Amendment Act, which received presidential assent towards the end of 2007, will come into effect after it has been notified. In essence, India's competition laws are thus embodied in acts, amendments to acts and regulations, all of which are mere drafts that are yet to attain the force of law.

Most significant 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 drafted by CCI to provide for a framework for the regulation of combinations.

Exempted Transactions

The Act provides thresholds for various combinations, and includes foreign transactions with a domestic nexus. The Act also provides that no person or enterprise shall enter into a combination, which causes or is likely to cause an appreciable adverse effect on competition in India. In an attempt to provide some guidance, the regulations seek to carve out 13 transactions from the purview of combinations that are "likely to have an appreciable adverse effect on competition in India". For instance, any acquisition of less than 26% of a company's share capital where such acquisition is made solely as an investment or in the ordinary course of business, and which does not lead to control of the company by such acquirer, has been classified as a combination that is not likely to have an appreciable adverse effect on competition in India. Another key transaction that has been exempted is any acquisition of a company where the acquirer already holds more than 50% of such company prior to the acquisition.

Strangely, the regulations simply provide that these transactions, amongst others, are not likely to cause an appreciable adverse effect on competition in India. However, 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 (which exceed prescribed thresholds) would nonetheless have to approach CCI for its approval, and sit out the waiting period, thereby rendering such exemption of transactions virtually redundant.

Filing Requirements — Costs & Procedure

The regulations prescribe certain forms, through which CCI is to be notified prior to undertaking any combination. These forms are exhaustive and call for various details, however, portions of information requested may be classified as confidential and would thus be difficult to disclose. Additionally, CCI also has the power to compel parties to publish the details of a proposed combination to enable any member of the public to raise objections to such a combination. This would allow competitors to keep track of significant M&A transactions that are underway and may jeopardise the closing of such transactions. The fees for filing the prescribed forms with CCI have been set at Rs 20 lakh (\$50,000), which may increase to Rs 40 lakh (\$100,000) in some cases. Given the stiff filing fees, CCI should be made accountable for qualitative and prompt action. However, CCI has instead been given 210 days to examine a proposed combination, during which time several transactions may fall through.

Conclusion

While the regulations lay out the framework to provide for the manner in which combinations are sought to be regulated by CCI, there are several issues that need to be resolved prior to bringing the regulations into force. In summation: the ambit of combinations that are brought within the mandatory notification process remains too vast. It is hoped that the regulations are brought into full force and effect only after all ambiguities and concerns are addressed, and that combinations are regulated in a manner that is not a hindrance to the economic growth of India.

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