India
Global merger control handbook – update

APRIL 2020

Merger control legislation updates since 1 July 2018

On 9 October 2018, the Competition Commission of India ("CCI") notified a set of amendments to the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ("Combination Regulations")[1].

Key highlights of the amendment are as follow:

- It was clarified that the 210-day timeline for approval of a combination does not include additional time taken to, amongst other things, provide additional information to the CCI and remove defects from the filing.
- Where a combination that has already been notified to the CCI undergoes a significant change, the parties can withdraw the previous notice, and refile a fresh notice.
- Earlier, the CCI could accept voluntary modifications only if it considered it necessary to do so. Now, the CCI may accept voluntary modifications even when it does not deem such modifications to be necessary.
- Parties may now offer modifications, prior to a formal Phase II process, in response to a show cause notice under Section 29(1) of the Competition Act, 2002 ("Act").

On 13 August 2019, the CCI again notified a set of amendments to the Combination Regulations more specifically, introduction ofthe Green Channel Route ("GCR")[2].

[1] The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2018 – Link

[2] The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2019 – Link

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Key highlights of the amendment are as follow:

- The GCR is a mechanism which can be optionally utilized by the parties to certain types of transactions set out in the newly added Schedule III to the Combination Regulations.
- Upon receipt of the acknowledgment of a notification filed under the GCR, the transaction will be deemed to be approved.
- Schedule III of the Combination Regulations stipulates that GCR will be available to the parties which do not have any horizontal, vertical or complementary overlaps. While determining overlaps, parties are now required to consider all plausible alternative relevant market definitions. Further, the overlaps also need to be evaluated vis-à-vis: (i) the parties themselves, (ii) all the group entities for all the parties, (iii) all entities where the parties indirectly or indirectly hold shares, and (iv) all entities where parties directly or indirectly exercise control.
- In line with this GCR there are certain amendments that have been made to the notification form that is filed before the CCI for the approval of the transaction.

On 30 October 2019, the CCI further amended the Combination Regulations[3] with respect to the filing fee, enhancing the filing fee which is payable along with the merger notification to the CCI for a pre-merger approval. This amendment to the filing fee marks the third instance where there has been an increase in the filing fee by the CCI. The first such amendment was in February 2012 followed by a further enhancement in the filing fee in March 2014.

- The filing fee to be remitted for a Form I filing has been increased from INR 1,500,000 (Indian Rupees One million five hundred thousand) (approx. USD 21,200 (US Dollars Twenty-one thousand two hundred)) to INR 2,000,000 (Indian Rupees Two million) (approx. USD 28,250 (US Dollars Twenty-eight thousand two hundred and fifty)).
- Form I is a short Form and typically filed where the market shares of the parties are comparatively lower.
- The filing fee to be remitted for a Form II has been increased from INR 5,000,000 (Indian Rupees Five million) (approx. USD 70,600 (US Dollars Seventy thousand six hundred)) to INR 6,500,000 (Indian Rupees Six million five hundred thousand) (approx. USD 91,800 (US Dollars Ninety-one thousand eight hundred)).
- Form II is filed where the combined market share of the parties to the transaction who are horizontally placed in the relevant market, i.e., are competitors, is more than 15% or if the combined market share of the parties is more than 25%, in case the parties are vertically placed in the downstream/ upstream relevant markets.

On 27 March 2020, by way of the guidance notes to Form I, the CCI clarified the scope of information required to be furnished along with the Revised Form I and the recently introduced GCR to illustrate the eligibility criteria for GCR (Guidance Note)[4].

Key highlights of the revised Guidance Note are as follows:

- **Expansion of disclosure of contractual rights acquired in a combination**: the Guidance Note requires that parties expressly set out the special rights acquired pursuant to a transaction. To this end, disclosure will be required of veto rights, affirmative voting rights, right to nominate a director, right to appoint an observer on a target's board, information sharing rights as well as other rights or advantage of commercial nature acquired in the target or any other enterprise.
- **Relaxation in duration of market facing information with low combined market shares**: the Guidance Note clarifies that three (3) years data is only needed if the combined market share of parties is 10% or above in the concerned overlapping market. As a corollary, where combined market shares are less than 10%, parties need not furnish market data for three (3) years.
- **Complementary overlaps explained**: the Guidance Note now defines complementary products/services and clarifies the scope to be those products/services that are related because they are combined and used together (e.g., printers and ink cartridges). It explains that complementary products are not vertically related, do not compete, and generally enhance the value of the combined product or service.

To avail the GCR, there should be no horizontal, vertical and complementary overlaps between: (i) the parties to the combination; (ii) their respective group entities; and (iii) any entity in which they, directly or indirectly, hold shares and/or control.

[3] The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Second Amendment Regulations, 2019 – Link

[4] Notes to Form I Link

Further, the Guidance Note now clarifies the contours that need to be considered for point (iii) above. As such, only those companies where parties:

- hold a direct or indirect shareholding of 10% or more; or
- have a right or ability to exercise any right (including any advantage of commercial nature with any of the party or its affiliates) that is not available to an ordinary shareholder; or
- have a right or ability to nominate a director or observer.

Landmark merger control cases since 1 July 2018

WAL-MART INTERNATIONAL HOLDINGS, INCORPORATED/ FLIPKART PRIVATE LIMITED[5]

- On 8 August 2018, the CCI approved the acquisition of Flipkart Private Limited ("Flipkart"), engaged in business-to-business ("B2B") sales and the provision of online marketplaces for e-commerce, by Wal-Mart International Holdings, Incorporated. Interestingly, during its assessment, the CCI received representations from various third parties alleging that the acquisition may aid Flipkart's alleged practice of "predatory pricing". The CCI noted that while the concerns had merit, they were not a consequence of the combination, but a pre-existing practice of Flipkart that could be challenged separately under the Act.
- The acquisition valued at approximately USD 16 billion, is also notable for being the largest acquisition by a foreign buyer in India.

LINDE AKTIENGESELLSCHAFT/PRAXAIR, INCORPORATED[6]

On 6 September 2018, the CCI approved the merger of industrial gas firms Linde AG ("Linde") and Praxair Incorporated ("Praxair"), pursuant to a Phase II investigation. The CCI identified several overlaps between the products produced and supplied by the parties in the markets for industrial, medical and specialty gases. The approval was subject to both parties divesting certain industrial gas plants and cylinder gas stations in India. The CCI also ordered the divestment of the parties' stakes in helium sourcing units in Qatar. The order is notable for reconfirming that the CCI continues to prefer structural remedies over behavioral remedies in combinations with significant overlaps.

NORTHERN TK VENTURE PTE. LIMITED/ FORTIS HEALTHCARE LIMITED[7]

On 29 October 2018, the CCI approved the acquisition of Fortis Healthcare Limited ("FHL"), a company which operates multispecialty hospitals in India, by Northern TK Venture Pte. Limited ("NTK"). NTK is an indirect wholly-owned subsidiary of IHH Healthcare Berhad ("IHH"). The transaction is notable for the CCI's assessment of complex relevant markets involving overlaps in the quaternary and multispecialty tertiary hospital services of the parties. It is also interesting for the CCI's assessment of a Joint Venture ("JV") entered between a subsidiary of IHH and Apollo Hospitals. The CCI expressed concerns that since FHL and the parents of the JV were competitors, the JV could act as a platform to facilitate collusion. To alleviate these any concerns, NTK undertook a voluntary commitment to ensure that the JV and entity created post transaction would operate as separate, independent and competitive businesses. This is the first instance of the CCI approving a transaction based on a long-standing ring-fencing obligation.

SCHNEIDER ELECTRIC INDIA PRIVATE LIMITED, LARSEN & TOUBRO LIMITED[8]

- On 18 April 2019, the CCI granted a conditional approval to the India leg of the global transaction involving Larsen and Toubro Limited ("L&T"), Schneider Electric India Private Limited ("SEIPL") and MacRitchie Investments Pte. Ltd. ("MacRitchie"). The transaction envisaged the (i) acquisition of L&T's electrical and automation business ("E&A business") by SEIPL and (ii) acquisition of of 35% shareholding in SEIPL by MacRitchie.
- The CCI narrowed down 15 product markets which were highly concentrated and where the combined market shares of the parties were on an average 30%. At the cluster level 6 product were identified where the combined market shares of the parties were in range of 55-60%. The CCI formed a *prima facie* view that the transaction would be likely to cause an adverse impact in the overall market for low voltage (LV) switch gears in India and conducted a Phase II investigation.
- The parties offered an alternative remedy package with several behavioural commitments to the CCI. The CCI accepted these and approved the transaction with adherence to those commitments.
- The acquisition valued at approximately USD 210 million.

[5] Combination Registration No. C-2018/05/571- Link

[6] Combination Registration No. C-2018/01/545 – Link

[7] Combination Registration No. C-2018/09/601 – Link

[8] Combination Registration No. C-2018/07/586 – Link

HYUNDAI MOTOR COMPANY, KIA MOTORS CORPORATION/ ANI TECHNOLOGIES PRIVATE LIMITED AND OLA ELECTRIC MOBILITY[9]

- On 30 October 2019, the CCI approved the acquisition of a minority stake in ANI Technologies Private Limited ("Ola") and Ola Electric Mobility ("Ola Electric") by Hyundai Motor Company ("HMC") and Kia Motors Corporation ("KMC") subject to compliance with the voluntarily submitted behavioural modifications to the combinations.
- The combination involved the (i) acquisition of 3.61% and 0.90% shareholding in Ola by HMC and KMC, respectively, (ii) acquisition of 4.54% and 1.13% shareholding in Ola Electric by HMC and KMC, respectively, and (iii) strategic cooperation between (a) HMC and Ola and (b) HMC and Ola Electric, in relation to Ola and Ola Electric's mobility businesses (Strategic Cooperation Agreements).
- The CCI observed concerns with respect to the strategic collaboration among parties however, as a result of the parties' commitments, the CCI cleared the combination.

CANADA PENSION PLAN INVESTMENT BOARD[10]

- On 21 November 2019, the CCI imposed a penalty of INR 5,000,000 (approximately USD 66,555) on the Canada Pension Plan Investment Board ("CPPIB") for failing to notify an inter-connected transaction with a transaction that had been previously notified (also genreally known as gun jumping).
- The acquisition of 16.33% stake in ReNew Power Limited ("ReNew") by CPPIB ("Transaction I") was notified to the CCI on 27 November 2017 and received the CCI's approval on 9 January 2018. However, ReNew's acquisition of Ostro Energy Private Limited (Ostro) ("Transaction II") which was supported by Transaction I and closed on 28 March 2018 was not notified to the CCI.
- The CCI held that Transaction I and Transaction II were inter-connected and CPPIB and ReNew, being the acquirers in Transaction II, were held to be in contravention of the obligation to notify the CCI. Further, the CCI held that the facts and developments regarding Transaction II were material to Transaction I, which were omitted at the time of notification of Transaction I.
- This was the only instance of a penalty being imposed for not notifying the transaction to the CCI (gun jumping) in the year 2019.

ELI LILLY AND COMPANY/ NOVARTIS INDIA LIMITED[11]

- On 12 March 2020, the National Company Law Appellate Tribunal ("NCLAT") set aside the order of the CCI imposing a penalty of INR 10 million (USD 0.14 million approx.) on Eli Lilly and Company ("Eli Lilly") for not notifying the acquisition of Novartis Animal Health business in India ("NAH") (a business division of Novartis India Limited) to the CCI or gun jumping.
- The CCI had concluded that Eli Lilly was in contravention of the Competition Act for not notifying its acquisition of NAH. As a background, the Central Government had issued a notification dated 4 March 2011 whereby it exempted from merger control notification obligations to an "enterprise" that was being acquired and whose value of assets and turnover in India fell below a certain defined threshold (De Minimis Exemption). The CCI held that whether De Minimis Exemption is applicable and would not be assessed on the basis of the assets/turnover of the business being acquired i.e., NAH, but on the basis of the assets/turnover of the incorporated entity, i.e., Novartis India Limited.
- The NCLAT concluded that the CCI had failed to appreciate that the De Minimis Exemption was available to the acquisition of NAH by Eli Lilly. The NCLAT held that the intent of the Government was that the exemption should be available to the business being acquired and not merely to incorporated entities. It held that for the purpose of the calculation of assets and turnover what is being acquired is relevant as the assets/turnover of what is left over with the sellers after the acquisition will have no role to play in the context of the business conducted by the purchaser post-acquisition.

Web link to the national competition authority

Competition Commission of India: https://www.cci.gov.in/

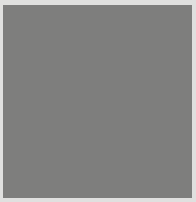
National Company Law Appellate Tribunal, the appellate authority: https://nclat.nic.in/

[9] Combination Registration No. C-2019/09/682 – Link.

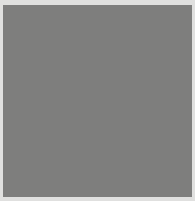
[10] Proceedings against Canada Pension Plan Investment Board and ReNew Power Limited under Chapter VI of the Competition Act – Link

[11] TA (AT) (Competition) No. 03 of 2017 (Old Appeal No. 44/2016) – Link

Your Merger Control Contacts in India



Arshad (Paku) Khan
Executive Director, Khaitan & Co
T +91 11 4151 5454
paku.khan@khaitanco.com



Sagardeep Rathi
Partner, Khaitan & Co
T +91 11 4151 5454
sagardeep.rathi@khaitanco.com