Competition Law - A new Era waiting to unfold

The Mergers & Acquisition activity in India is at a threshold of anticipated strict controls, pre-notification reporting and supervisions by the draconian Competition Commission of India *(CCI)*. Whilst the Competition Act 2002 prohibits anti-competitive agreements and abuse of dominant position it regulates combinations. The Competition Act 2002 once enforced would require all mega deals domestic, cross border and totally offshore to seek the approval of the CCI. The regulator can ask the parties involved to modify or keep certain businesses out of the deal to ensure fair competition in the market.

The Competition Act 2002 prescribed different threshold levels for individual and group companies depending on their exposure to domestic and overseas markets. The Competition Commission Act uses assets and turnover criteria for defining thresholds and provides for these thresholds to be revised every two years. The last change was made in 2007, when the Competition Act was amended. After notification of section 5 & 6, all mergers, which would increase the combined assets of the two entities to more than Rs 1000 Crores or raise the turnover to Rs 3000 Crores would require the CCI's nod.

As per the latest update, it is learned that the CCI plans to introduce a scheme of pre-merger consultation for companies considering merger & acquisitions. The consultation process, if put in place will allow companies a chance to seek competition regulator's views before they file their proposals and the opinion of the CCI will not be binding. The draft provisions will be shortly listed on the CCI's website for comments.

In which case, whilst conducting due diligence activities and preparing exhaustive transactional checklists and legal audits, one will also have to evaluate the implications of the Competition Act 2002 on mega transactions and then factor in the timelines for closing subject to the proposed "pre-merger consultation" provisions of the Competition Act 2002.

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Equity Count to decide if FDI proposal needs CCEA nod

The Government has permitted the Foreign Investment Promotion Board (FIPB) to clear proposals with total foreign equity investment of up to Rs 1200 crore to encourage faster processing of foreign investment proposals. Until now, the FIPB could only approve proposals with a total project cost of Rs 600 crore. The Cabinet Committee on Economic Affaires (CCEA) clears proposals above this threshold. In cases where entities have already taken prior FIPB or CCEA approval for their initial investments under sectoral caps, no fresh approvals would be required. The Cabinet has approved changes in the policy and will be issuing a single FDI policy on 31st March 2010.

Modifications to the ECB Policy

The recent modifications to the External Commercial Borrowers (ECB) are enumerated below :

i. **All-in-cost ceilings** under the approval route for ECB's where Loan Agreements have been signed on or after January 1, 2010 shall be:

Average Maturity Period	All-in Cost over six months Libor
3 years and upto 5 years	300 basis points
More than 5 years	500 basis points

ii. **Integrated Townships**

Corporates engaged in the development of integrated townships permitted to avail ECB's under the approval route until 31st Dec 2010.

iii. **Buy back of Foreign Currency Convertible Bonds (FCCB's)**

Buy back of FCCB's both under the automatic and approval route has been discontinued w.e.f 1^{st} January 2010

iv. **ECB for the NBFC Sector**

NBFC's exclusively involved in financing infrastructure projects are permitted to avail ECB's from the recognized lender category including international banks under the approval route, subject to complying with the prudential standards prescribed by the Reserve Bank of India and the borrowing entities fully hedging their currency risks.

v. **ECB for Spectrum in Telecommunication Sector**

Eligible Borrowers in the telecommunication sectors permitted to avail ECB for the purpose of payment of spectrum allocation with immediate effect under the automatic route. Further, the payment of spectrum allocation may initially be met out of Rupees resources by successful bidders to be refinanced with a long-term ECB under the approval route subject to the following conditions:

- The ECB should be raised within 12 months from the date of payment of the final installment to the Government
- The designated AD Bank to monitor end use of funds;
- Banks in India will be unable to provide any form of guarantees and
- All other conditions of ECB, such as eligible borrower, recognized lender, all-in-cost, average maturity etc should be implied.

Sebi eases norms for raising funds from bond market

Issuers will have to maintain 100% Asset Cover Sufficient to discharge principal amount for Debt Issuance. Capital market regulator Securities and Exchange Board of India (Sebi) on Thursdaym, 26^{th}December, '09, eased norms for security the asset cover, required for issuing secured bonds. Sebi said that issuers will have to maintain a 100% asset cover that is sufficient to discharge the principal amount at all times for their debt securities offerings. Sebi has also enhanced disclosures to investors by issuers. "The periodic disclosures to the stock exchanges will now require disclosure of the extent and nature of security created and maintained," the regulator said. Issuers will also be required to furnish a statement of deviations in use of issue proceeds to the stock exchange on a half-yearly basis, besides publishing in the newspapers along with the half-yearly financial results.

Perquisite Valuation rules notified by CBDT

The Central Board of Direct Taxes (CBDT) has made amendments to abolish Fringe Benefit Tax (FBT) vide the Income Tax 13^{th} Amendment Rules. The Board has notified the new valuation guidelines w.e.f. 1^{st} April, 2009, for AY-2010-11. Perquisites given by the employer such as residential accommodation, conveyance facility and other benefits to the family of the employee would be added to their salary for income-tax purposes. For taxing ESOP, the Board has focused on Fair Market Value (FMV) which will be the average of the opening price and closing price of the shares on the date of excercise on the recognised stock exchange which records the highest volume of trading in shares. This will be in the case of listed companies. For unlisted ones, the FMV will be the value determined by a merchant banker.

Tax Deduction at Source(TDS)- Latest provisions

With effect from 1st April 2010, tax at a higher of the prescribed rate or 20% will be deducted on all transactions liable to TDS, where the Permanent Account Number (PAN) of the Deductee is not available. The law will also apply to all non-residents in respect of payments/remittances liable to TDS. As per the new provisions, certificate for deduction at lower rate or no deduction shall not be given by the assessing officer under section 197 or declaration by Deductee under section 197A for non-deduction of TDS on payments shall not be valid unless the application bears PAN of the Applicant/Deductee.

IRDA unveils disclosure guidelines

In a step towards initial public offer (IPO) guidelines for insurance companies, the Insurance Regulatory and Development Authority (IRDA) has in Jan 2010 come out with final public disclosure norms, to be effective from March 2010. The regulator has segregated company website and newspaper disclosures. It has asked insurance companies to publish balance sheets, profit & loss accounts, revenue accounts and key analytical ratios on a quarterly, half-yearly and yearly basis from March. In addition, it has asked them to disclose segment-wise reports on their website on quarterly, half-yearly and yearly basis. The disclosures will remain the same for companies going to tap the market. For the sake of uniformity, IRDA has standardised key analytical ratios for life and non-life insurance companies. However, insurers have been asked to put up disclosures for a minimum of five years.

Simpler Trademark Regime

THE Lok Sabha as on 18th December, '09, has given its assent to the Trade Marks (Amendment) Bill 2009, settling the stage for a much simpler process for registration of trademarks in the country. Under the new regime, a person seeking global trademarks will now not need to apply for it in several countries incurring additional costs. Trademarks registered in the country under the new law will be valid globally. The new bill is in line with the provisions in the Madrid Protocol, which is a cost-effective system for international registration of trademarks, enables nationals of its member countries to obtain trademark registration within 18 months by filling a single application with one fee and one language in their country of origin. This in turn is transmitted to other designated countries. India's accession to the protocol entailed the changes in the law.

Once the bill is passed by the Rajya Sabha, the bill becomes an Act of Parliament which will come into force only when the Central Government notifies the same. The Trademark (Amendment) Bill, 2009 was originally introduced into Parliament as the Trademark (Amendment) Bill, 2007. The 2007 bill lapsed and therefore it had to be re-introduced in July 2009.

Minimum wage hiked to Rs 100 per day

The Government has decided to hike the minimum wage to Rs 100 from existing Rs 80 per day which would be implemented with retrospective effect from November 1, 2009," a labour ministry source said. "The national floor labour minimum wage has been revised from November 1 on the basis of ensuing consumer price index," the source said. Consequently, the Ministry has asked states and Union Territories to "fix and revise minimum rates of wages" so as to ensure that in none of the scheduled employment, the minimum wages are less than Rs 100 per day. The wages were last revised in 2007 from Rs. 56 to Rs. 80.

Surety for loan by foreign arm to attract tax

An Indian company that provides a bank guarantee (BG) against a loan taken by a subsidiary abroad will now have to pay tax in India for standing guarantee for its associate, irrespective of whether or not it has received a commission from the latter for the BG. However, from the current fiscal, the Transfer Pricing orders are subject to approval of the recently instituted Dispute Resolution Panel (DRP), a collegium of three members, two commissioners and a director, International Taxation. An aggrieved taxpayer can appeal before, DRP, whose order (if at variance with the TP regime) becomes binding on the department.

The international practice is to charge the associate parties abroad a rate ranging from 0.5% to 3% of the bank loans advanced to them, for which the Indian parent stood guarantee. The TP administration took a stand that since the Indian companies were taking huge risks by standing guarantee to the loans taken by their subsidiaries abroad, the latter are obliged to pay a service charge to the parent company in India. Therefore, transfer pricing officers in India found it reasonable to levy a tax on the Indian Company which provided the bank guarantee. Tax regimes in other countries also levy a tax on such transactions, informed the official. At present, the Indian TP administration directs companies to pay tax if they had arranged to give bank guarantees to their subsidiaries abroad, irrespective of whether or not the associates had actually made payments to them.

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