Competition Law Bulletin

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From the Editor's Desk...

Dear Reader,

We are happy to present this **special merger issue.**

As you are all aware, the Competition Act, 2002 ("Act") was partially enforced on May 20, 2009 whereby the provisions relating to anti-competitive agreements and abuse of dominant position were notified. Finally, the Ministry of Corporate Affairs, Government of India has on March 4, 2011 notified Sections 5, 6, 20, 29, 30 and 31 of the Act, which deals with merger control, will come into force on June 1, 2011.

With the enforcement of these sections, all mergers, amalgamations and/or acquisitions falling within the thresholds indicated in section 5 of the Competition Act, 2002 will require prior approval of the Competition Commission of India.

This is undoubtedly an exciting phase in the development of Competition Law jurisprudence. We hope that our bulletin continues to invoke your interest and invite your views on the same and look forward for your continued support.

Yours truly,

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INDIAN PERSPECTIVE

SPECIAL FEATURE

Long awaited merger control provisions notified by Government

CCI publishes fresh draft regulations

CCI on March 1, 2011 has published the new draft merger regulations titled "Competition Commission of India (Procedure in regard to the transaction of business relating to combination) Regulations, 201_". The draft regulations are available on the website of CCI www.cci.gov.in.

Some of the key features of the new draft regulations are listed below:

1. **Pre-Merger Consultation** - The CCI has provided for voluntary pre-merger consultation on a specific request made by the parties. It should be noted that the views expressed by the CCI during such consultations will not be binding.

2. **Shorter Review Period –** CCI will form its prima facie opinion within 30 days of filing of the notice for the proposed merger clearance. The draft regulations also require CCI to pass a final order within 180 days of filing of merger notification, as opposed to earlier waiting period of 210 days.

3. **Exemption for certain target enterprises under acquisition-** The new draft merger regulation specifies a list of transactions (in **Schedule I**), including the target enterprise, whose control, shares, voting rights or assets are being acquired having assets of the value of more than ₹ 250 crores or turnover of not more than ₹ 750 crores for which parties can file a short notice in **Form I**. However, in view of the third notification issued by the Central Government, as mentioned above, such target enterprise under acquisition are exempted from the filing notice requirement for 5 years.

4. **Three types of Notice Formats -** The draft regulations provide for three forms of notices to be filed for obtaining approval wherever required.

   Form I, which is short notice form includes,

   a. Acquisitions of not more than 15 percent of the total shares solely for an investment purpose or in the ordinary course of business and which does not lead to a control of the enterprise;

   b. Acquisitions where the acquirer is already in control of the enterprise;

   c. Acquisition of assets where the assets of the parties are not directly related to the business activities of the party acquiring or made solely as an investment or in the ordinary course of business.

   d. Acquisitions taking place within the group.

   Form II – The longer notice Form which is to be filed in case of combinations other than those listed above.

   Form III – This Notice Form is to be used by public financial institutions, foreign institutional investors, banks or venture capital fund, in respect of share subscription or financial facility or any acquisition made by them pursuant to any covenant of a loan agreement or investment agreement, in pursuant to sub-section (5) of Section 6 of the Act.

5. **Filing Fee -** The amount of fee payable along with the notice in Form I or Form II, as may be applicable, shall be as under :-

Value of Acquisition	Fee (₹)
Less than rupees five hundred crores	Ten lakhs (₹ 10,00,000)
From rupees five hundred crores to less than rupees one thousand crores	Twenty lakhs (₹ 20,00,000)
Rupees one thousand crores and above	Forty lakhs (₹ 40,00,000)

   (a) in case of merger or amalgamation or acquiring of control over an enterprise, the fee shall be rupees forty lakhs (₹ 40,00,000);

   (b) in case of acquisition of shares, voting rights or assets of the enterprise, the fee shall be as given in the Table below:-

6. The draft merger regulation imposes the obligation to notify on the acquirer.

7. Draft regulations propose that the combinations which have taken effect prior to the date of notification of merger control in India will be exempt from the filing requirement.

8. **Request for Confidentiality –** The draft regulations propose that any request for confidentiality of the

documents submitted during the investigation shall be duly considered having due regard to the procedure laid down in the Competition Commission of India (General) Regulations, 2009.

9. **Appointment of independent agencies to oversee modification** - The draft regulations provide for appointment of independent agencies to oversee the carrying of modifications suggested by the CCI in cases where the parties have accepted such modifications and their implementation by the parties, in the opinion of CCI, needs supervision. The agencies to be appointed shall have no conflicts of interest. Such agencies may include an accounting firm, management consultancy firm or any other professional organization or independent practitioners of repute.

Merger control provisions notified by the Central Government

The Central Government vide four Gazette notifications issued on Friday, **March 4, 2011** has brought the provisions of the Competition Act, 2002 (the Act) relating to regulation of "combinations" i.e. acquisitions, acquiring of control, mergers or amalgamations into force, with some modifications.

According to the **first** notification issued under sub-section (3) of section 1 of the Act, sections 5, 6, 20, 29, 30 and 31 of the Act dealing with the definition of combinations, regulation of combination, power of the Competition Commission of India (CCI) to inquire into combinations, procedure for investigation of combination and procedure in case of notice under sub-section 2 of section 6 of the Act and orders of the CCI on certain combinations, respectively, have been brought into force with effect from **June 1, 2011.**

According to the **second** notification issued under section 20(3) of the Act, the thresholds for qualifying the transaction as a combination under section 5 of the Act have been increased by fifty percent (50%) on the basis of the increase in the wholesale price index.

According to the **third** notification issued under clause (a) of section 54 of the Act, the target enterprise, whose control, shares, voting rights or assets are being acquired having assets of the value of more than ₹ 250 crores or turnover of not more than ₹ 750 crores have been exempted from the provisions of section 5 of the Act for a period of five years.

According to the **fourth** notification, issued under clause (a) of section 54 of the Act, from the definition of "group" appearing in the explanation (b) of section 5 of the Act, two or more enterprises exercising less than fifty one percent (51%) of voting rights in the other enterprise, have been exempted for a period of five years.

SPECIAL FEATURE

Are merger regulations effective?

*[This article by M M Sharma, Head Competition Law & Policy appeared in **"The Economic Times"** on March 12, 2011 and analyses the draft merger regulations]*

Both the merger control provisions of the Competition Act, 2002, notified by the ministry of corporate affairs (MCA) with relaxation to the thresholds and the draft merger regulations put out by the Competition Commission of India (CCI) are industry-friendly and allay some of the concerns of industry. Yet, worries remain.

The first concern was the long waiting period of 210 days, which, any legal expert would agree, cannot be reduced unless the relevant provisions of the Act are amended by Parliament.

The draft regulations, though, tend to assure that the commission shall endeavour to pass an order within 180 days of the filing of the notice.

This is, at best, a noble attempt, but it is doubtful whether it will actually reduce the period of 210 days in complicated cases, unless the Act is amended.

The next concern relates to the 'suspensory merger control regime' existing in the Act. After filing the notice, unlike a specific waiting period of 30 days in 'first phase' in the US, EU, China and Japan, one will still have to wait for 210 days for final orders on the proposed transaction, and this cannot be questioned.

This 'suspends' all further progress in the proposed M&A till the order and has not been addressed either in notifications or in draft regulations.

The International Competition Network ("ICN"), an association of over 104 competition agencies in 92 countries, including India, in their recommended practices for merger control has suggested that in suspensive jurisdictions, initial waiting period should expire within a specified period following notification.

Though the notifications issued under the Act are silent on this issue, the draft regulations mention that the commission shall form its prima facie opinion on whether the combination is likely to cause an appreciable adverse effect on competition in the relevant market within 30 days of the receipt of the notice. It is doubtful if such commitment can be made in a subordinate legislation overriding the substantive provisions of the Act.

The third concern was of an alleged bias against Indian companies in the definition of the combination itself. Whereas, even now, an Indian company with turnover of 4,500 crore cannot acquire another company without prior notice and approval of the CCI if the targeted company has turnover exceeding 750 crore, a foreign company with turnover outside India in excess of 4,500 crore (up to 1,01,250 crore) may acquire an Indian company with a turnover of 2,250 crore in India. This concern has not been addressed either in the notifications or in draft regulations.

Though a notification of the MCA exempts the target enterprise, with assets less than 250 crore or turnover less than 750 crore for five years from the application of the Act and the draft regulations, Schedule I also introduces a similar concept, yet it does not address the main concern of bias against foreign-based company.

Another area of concern is the conflict with the SEBI Takeover Code. The existing Sebi Takeover Code makes it compulsory for the acquirer to pay interest to shareholders for delay beyond 15 days required for statutory approvals if such non-receipt of the approval is due the any willful default or neglect. The Sebi code provides that where the acquirer fails to obtain approval within 15 days on account of willful default, etc, the entire amount deposited in an escrow account will be forfeited and the acquirer will also be liable for penalty.

Now, if the CCI after receipt of notice decides to refer the matter to director general for investigation or decides to invite objections from the public against the proposed acquisition, the approval cannot be clearly given within 15 days. This puts the acquirer that is a listed company in a disadvantageous position under the Sebi code and may lead to conflict between Sebi and CCI. This concern has been completely ignored both in the notifications as well as in draft regulations.

The last concern is how the joint ventures that are often used as a camouflage to mergers will be dealt with. There is no clarity, either in the Act or in the proposed draft regulations of this. In the EU, for instance, fully-functional joint ventures are treated benignly under the EU Merger Regulation, or the ECMR.

On the positive side, the notifications have modified the concept of a group by exempting subsidiary companies in which the parent company exercises less than 51% of voting rights, against 26% earlier. Similarly, the draft regulations have features like the pre-merger consultations, clarity on the other documents that trigger a notice, simpler notice for acquisition of assets for investment purposes, etc.

However, it is again doubtful whether these beneficial changes can be brought about through the proposed draft regulations without an amendment Bill.

CCI passes orders for closure of certain matters

CCI has displayed on its website the full text of its orders on closure of 24 cases of Information's filed under the Act and 18 cases of pending investigations transferred from the Director General of Investigation & Registration (DGIR) and the COMPAT.

MEDIA UPDATES

CCI faces fresh challenge on jurisdiction issue

CCI is encountering a new challenge after being stopped by Delhi High Court from investigating alleged anti-competitive practices in aviation fuel supply case. Earlier Reliance Industries Ltd. had filed a complaint with CCI, alleging that the Indian Oil Corp. Ltd., Bharat Petroleum Corp. Ltd. and Hindustan Petroleum Corp. Ltd. had formed a cartel to supply aviation turbine fuel to Air India. Since the case was being investigated by CCI, the Oil PSU's approached the Delhi High Court challenging CCI's jurisdiction, stating that the case fell under the jurisdiction of the Petroleum and Natural Gas Regulatory Board.

(Source: The Live MINT, January 23, 2011)

CCI investigating sugar cartel

CCI has suo motu started an investigation into alleged cartelization in the sugar industry. The investigation took place after Maharashtra

Cooperative Sugar Association decided not to sell sugar below a price of ₹ 2,700 a quintal in July 2010. The Director-General (DG) of the CCI has called heads of sugar industry associations to appear personally, after which a report will be given to the commission. CCI also sought detailed replies of some queries from leading companies i.e. Bajaj Hindustan, Renuka Sugars and Balrampur Chini, although they do not individually face inquiry.

(Source: The Business Standard, February 8, 2011).

CCI clears differential loan rates

CCI has accepted the ongoing practice of banks offering dual rates in home loans as legal though Reserve Bank of India (RBI) had opposed such schemes. CCI had received complaints from customers over the differential rates offered by the banks in home loans and had conducted an elaborate inquiry to find out whether banks are violating the norms of CCI. The customers were aggrieved as the benefit of declining floating interest rate was not transferred to them. Further, to avail the benefit of prevailing lower rates the borrower has to pay a switch over/processing fee which defeats the very purpose of availing the floating rate of interest option.

(Source: The Financial Express, February 5, 2011).

Competition Appellate Tribunal (COMPAT) allows CCI to continue enquiry against DLF

COMPAT has rejected the petition of DLF Ltd. and allowed CCI to continue with its inquiry against the company, which is under the scanner for allegedly misusing its dominant market position. DLF had moved the COMPAT against CCI for initiating a probe without hearing the accused. DLF had appealed under Section 33 of the Act saying that no enquiry can be initiated unless reasons are recorded to arrive at an 'opinion' that a 'prima-facie case' exists.

(Source: The Financial Express, January 27, 2011).

International airlines cleared of cartelization charge by the DG

The DG has cleared nine foreign airlines of carteli-zation and abuse of dominant position charges, pressed by the Travel Agents Assoc-iation of India (TAAI). DG submitted its investigation report on January 27, 2011. TAAI had approached CCI in December 2009 after the airlines — Lufthansa German Airlines, Continental Airlines, KLM Royal Dutch Airlines, Swiss International Airlines, Singapore Airlines, Air Canada, Air France and North West Airlines announced their decision to end the practice of giving commissions to travel agents for ticketing services. After investigating the matter for over a year, the DG concluded that- (i) Airlines hold only 17 to 20 percent of the market share; (ii) Airlines do not enjoy any commercial advantage over their competitors; and (iii) Airlines have not acquired any monopoly. The inquiry is still pending before CCI.

(Source: The Business Standard, February 17, 2011).

CIL moves CCI against explosive producers

State-owned Coal India Ltd. (CIL) has moved the CCI against explosive manufacturers, alleging the players were forming a cartel while quoting bids floated by the coal PSU, thereby, killing its right to procure products at fair prices. CIL's complaint comes within months of a similar complaint filed by the Explosives Manufacturers Association of India (EMAI), reported by us earlier. The association had alleged that CIL was procuring 20-22 per cent of its requirement from a single explosives manufacturer without inviting bids. If explosive manufacturers were indeed forming a cartel by quoting similar prices, CIL's decision to procure products without inviting bids would be justified, sources said. "CIL has filed its complaint against the explosive manufacturers under Sections 3 and 4 of the Act, 2002. They have alleged that EMAI has formed a cartel. Gulf Oil, Indian Oil and Indian Explosives are some of the main suppliers of mining explosives to CIL.

(Source: The Business Standard, February 21, 2011).

COMPAT decides pending MRTP matters

COMPAT continues to decide the pending cases under the repealed MRTP Act. As per information received from the record keeping office of COMPAT, it had disposed of 771 cases till February, 2011 so far as per details below:

RTP cases	125
UTP cases	362
Compensation cases	284
MTP cases	0

INTERNATIONAL NEWS

European Union

EC Conducts unannounced inspections in the truck sector

The European Commission on January 18, 2011 raided the premises of companies active in the truck industry in several Member States. The Commission has reason to believe that the companies concerned may have violated EU antitrust rules that prohibit cartels and restrictive business practices and/or the abuse of a dominant market position (Articles 101 and 102 respectively of the Treaty on the Functioning of the EU). Daimler AG and Volvo AB, the world's two largest truck makers, were raided by European Union investigators over possible antitrust violations. It is to be noted that both European Union and British competition authorities are working closely together on separate probes into possible cartel activities among some of the world's biggest truck makers.

(Source: European Commission website, January 18, 2011- http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/29&format=HTML&aged=0&language=EN&guiLanguage=en)

Commission investigates co-operation between Telefónica and Portugal Telecom on Iberian markets

The EC has opened a formal investigation to ascertain whether the Spanish and Portuguese telecoms incumbents Telefónica S.A. and Portugal Telecom SGPS S.A. have breached EU rules by agreeing not to compete with each other in their respective home markets. The agreement being investigated under Article 101 of the EU Treaty, which bans restrictive business practices, was concluded last year when Telefónica acquired sole control over their previously-held Brazilian joint venture Vivo. The Commission will also investigate whether the non-compete agreement pre-dates the Vivo deal, which is not concerned by this probe. Opening antitrust proceedings means that the Commission will treat the case as a priority. It does not prejudge the outcome of the investigation.

(Source: European Commission website, January 24, 2011- http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/58&format=HTML&aged=0&language=EN&guiLanguage=en)

Commission clears Intel's proposed acquisition of McAfee subject to conditions

The EC has approved under the EU Merger Regulation the proposed acquisition of McAfee by Intel, both of the US. The approval is conditional upon a set of commitments ensuring fair competition between the parties and their competitors in the field of computer security, a growing concern due to the exponential rise in the number of malware such as viruses. Intel committed to ensuring the interoperability of the merged entity's products with those of competitors. Intel committed, among other things, to ensure that vendors of rival security solutions will have access to all necessary information to use functionalities of Intel's CPUs and chipsets in the same way as those functionalities used by McAfee. Intel also committed not to actively impede competitors' security solutions from running on Intel CPUs or chipsets.

(Source: European Commission website, January 26, 2011 http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/70&format=HTML&aged=0&language=EN&guiLanguage=en)

Commission blocks proposed merger between Aegean Airlines and Olympic Air

The EC has prohibited the merger between Aegean Airlines and Olympic Air. The deal was notified to the Commission for regulatory clearance under the European Union's Merger Regulation. The merger was blocked as; it would have resulted in a quasi-monopoly on the Greek air transport market. According to Commission, this would have led to higher fares for four out of six million Greek and European consumers travelling on routes to and from Athens each year. Together the two carriers control more than 90% of the Greek domestic air transport market and the Commission's investigation showed no realistic prospects that a new airline of a sufficient size would enter the routes and restrain the merged entity's pricing.

(Source: European Commission website, January 26, 2011 http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/68&format=HTML&aged=0&language=EN&guiLanguage=en)

Commission investigates certain co-operation agreements between Lufthansa and Turkish Airlines and between Brussels Airlines and TAP Air Portugal

The EC has opened two own initiative investigations, to verify whether code-share agreements - a particular form of co-operation on ticket sales, implemented, in one case, between Deutsche Lufthansa (Germany) and Turkish Airlines (Turkey) and, in the second case, between TAP Portugal (Portugal) and Brussels Airlines (Belgium), is in breach of EU rules on anti-competitive agreements (Article 101 of the Treaty on the Functioning of the European Union). While code-share agreements can provide substantial benefits to passengers, some types of such agreements may also produce anti-competitive effects. These investigations focus on a particular type of code sharing arrangement where these airlines have agreed to sell seats on each others' flights on the Germany-Turkey routes and on the Belgium-Portugal routes, where both companies already operate their own flights between their own hubs ("parallel hub-to-hub code-sharing") and should, in principle, be competing with each other.

(Source: European Commission website, January 26, 2011 http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/147&format=HTML&aged=0&language=EN&guiLanguage=en)

Others

United States: FTC announces revised thresholds for Clayton Act antitrust reviews

The Federal Trade Commission has revised the thresholds that determine whether companies are required to notify federal antitrust authorities about a transaction under the Hart-Scott-Rodino Antitrust Improvements Act. The HSR Act requires companies to notify authorities if – among other things – the value of a transaction exceeds the filing thresholds. The FTC is required to revise those thresholds annually, based on the change in gross national product. This year, the threshold for reporting proposed mergers and acquisitions under Section 7 of the Act increased from $63.4 million to $66.0 million. The FTC also announced revisions to the thresholds that trigger a prohibition preventing companies from having interlocking memberships on their corporate boards of directors under Section 8 of the Clayton Act.

(Source- Federal Trade Commission's Website, January 21, 2011- http://www.ftc.gov/opa/2011/01/claytonsimon.shtm)

United Kingdom: OFT issues decision in loan pricing case

The OFT has issued a decision that Royal Bank of Scotland (RBS) and Barclays engaged in anti-competitive practices in relation to the pricing of loan products to large professional services firms, and has imposed a fine of £28.59 million on RBS. The fine was the subject of an earlier agreement between the OFT and RBS, under which RBS admitted to certain breaches of competition law between October 2007 and March 2008 and agreed to co-operate with the OFT. RBS agrees to pay £28.5 million penalty for disclosing pricing information to competitor. Barclays brought the matter to the OFT's attention and, under the OFT's leniency policy, has not been fined.

(Source- Office of Fair Trading's Website, January 20, 2011- http://www.oft.gov.uk/news-and-updates/press/2011/05-11)

Latvia - Samsung admits cartel activity and reaches agreement with Competition Council

Competition Council initiated an investigation into possible cartel activity among Samsung television distributors in Latvia on its own initiative. In October 2009 the council adopted a decision which was remarkable for a number of reasons. In the decision the council simultaneously applied Article 11(1)(i) and (iii) of the Competition Law and Article 81, Part 1 of the EC Treaty, thereby exercising its obligation under EU Modernisation Regulation (1/2003/EC), and found violations of both norms. The resultant fines were the highest that the council has ever imposed. SIA Samsung Electronics Baltics, which is the main representative of Samsung Electronics Co, was fined Lats4 099 942.75 (€5,833 692.96).

The decision was appealed to the Administrative Court. During the proceedings Samsung Electronics Baltics and Proks concluded administrative agreements with the council. By concluding administrative agreements both undertakings admitted the existence of the cartel. Also, due to the signing of these agreements, the council decided to decrease the fines from Lats4, 099,942.75 (€5,833,692.96) to Lats2, 459,965.65 (€3,500,215.78) for Samsung.

(Source: International Law Office Competition Newsletter –February 10, 2011 available at www.internationallawoffice.com)

Netherlands: Competition Authority imposes its first personal cartel fines

After imposing a total fine of €3 million on construction companies Janssen de Jong Infra and Aannemers-en Wegenbouwbedrijf Limburg (WBL) for a cover pricing cartel, the Dutch Competition Authority recently imposed personal fines of between €10,000 and €250,000 on three executives of the companies for their involvement in the cartel. It is the first time that the authority has used its power to impose personal fines on individuals for a cartel infringement. Unlike the Competition Authority, the European Commission is not authorized to impose personal fines.

(Source: International Law Office Competition Newsletter – January 20, 2011 available at www.internationallawoffice.com)

France : Google Hit with another antitrust complaint

French Internet Company 1plusV filed a complaint with the European Commission claiming Google Inc. is abusing its dominant market position. 1plusV, which creates thematic Internet search engines, alleged that Google is using its dominant position to prevent the development of alternative technologies and is prioritizing its own searches over those of competitors. It further alleged that the, Google forced thematic search engines to adopt its own technology if they wanted to use its advertising service, thus limiting the development of alternative technologies.

(Source: The Financial Times – February 22, 2011 http://www.ft.com/cms/s/2/ba017b7e-3e02-11e0-99ac-00144feabdc0.html#axzz1EmdCPtLj)

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