

Competition News Alert

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CENTRAL GOVERNMENT REVISES METHOD OF CALCULATION OF THRESHOLDS FOR MERGER CONTROL AND EXTENDS TARGET EXEMPTION TO MERGERS AND AMALGAMATIONS

The Ministry of Corporate Affairs, through a Gazette notification dated March 27, 2017 has modified the method of calculation of assets and turnover for the purposes of filing of notice in cases of acquisition or acquiring control of or merger or amalgamation of a portion of an enterprise or division or business for the purpose of Section 5 of the Competition Act, 2002 (Act), without changing the thresholds of assets or turnover prescribed earlier vide Gazette Notification 674 (E) dated March 4, 2016. The notification dated March 4, 2016 has been rescinded with immediate effect.

The latest notification published in the Official Gazette on March 29, 2017 is applicable for a period of 5 years i.e. up to March 28, 2022. A brief note on the changes brought forth through the latest notification are mentioned below:

Calculation of thresholds under Section 5 of the Act

Where a portion of an enterprise or division or business is being acquired, taken control of, merged or amalgamated with another enterprise, the assets and turnover of the enterprise for the purposes of Section 5 of the Act shall be calculated on the basis of the relevant assets or turnover of the said portion of the enterprise, division or business being acquired.

Value of assets

The value of assets of the said portion of enterprise, division or business shall be determined by taking the book value of the assets shown in the audited books of accounts of the enterprise or as per statutory auditor's report where the financial statement have not yet become due to be filed, in the financial year immediately preceding the financial year in which the date of the proposed combination falls.

Value of turnover

The turnover of the portion or division or business being acquired, taken control of, merged or amalgamated shall be as certified by the statutory auditor on the basis of the last available audited accounts of the company.

Target Exemption extended to cover Mergers and Amalgamations

The latest notification has included mergers and amalgamations within the *De-Minimis* exemption (also known as "**Target Exemption**"). Earlier, only acquisitions were covered under the *De-Minimis* exemption.

Calculation of thresholds for application of De-Minimis Exemption

Further, the Government has also modified the method for calculating assets and turnover for applying *De Minimis* exemption. It shall no longer be required to seek approval of CCI for transactions where the value of assets being

acquired, taken control of, merged or amalgamated are not more than rupees three hundred and fifty Crores, or the turnover of the enterprises being parties to such acquisition is not more than rupees one thousand Crores.

How it impacts the Enterprises

Under the previous notification, for the purpose of determining applicability of *De Minimis* Exemption, the value of assets and turnover of the target enterprise (i.e. the entity whose control, shares, voting rights or assets are being acquired) was to be considered.¹ For instance, in the acquisition of global veterinary pharmaceuticals business of Novartis AG by Eli Lilly & Co. the CCI held that the *de-minimis* notification is applied on the basis of the assets or turnover of the enterprise whose assets were being acquired and not the assets and turnover of the relevant business which was acquired.²

Similarly, in acquisition of Pharma grade propellants business of El Du Pont De Nemours & Co. by SRF Ltd., the CCI held that assets and turnover of the enterprise whose control, shares, voting rights or assets are being acquired, be considered for the purposes of thresholds, as set out in *de-minimis* notification, and not of the value of assets and turnover of the segment / particular business division, being acquired.³

However, under the latest notification, the *de-minimis* exemption can be applied by taking into account the value of assets being acquired, without regard to the total value of the assets or turnover of the enterprise from whom such assets are being acquired.

For any further details and clarifications, please feel free to write to:

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1 CCI Order dated 13 January 2017 in Combination Registration No. C-2015/12/349 (Schulke & Mayr GmbH), Para 8.12.

2 CCI Order dated 14 July 2016 in Combination Registration No. C-2015/12/289 (Eli Lilly & Co.), Para 13.5.

3 CCI Order dated 16 August 2016 in Combination Registration No. C-2015/12/347 (SRF Ltd.), Para 8.2.



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