

APRIL 2017

## COMBINATIONS UNDER COMPETITION LAW: *DE-MINIMIS* EXEMPTIONS

### 1. INTRODUCTION

The Ministry of Corporate Affairs (the “MCA”) has clarified the scope of the *de-minimis* exemptions, which exempt certain enterprises from the applicability of section 5 of the Competition Act, 2002 (the “Act”), by issuing notification numbers. S.O. 988 (E) (the “2017 Notification”) and S.O. 989 (E) (the “Repeal Notification”), both dated March 27, 2017.

### 2. BACKGROUND

Pursuant to a notification issued by the MCA in March, 2016<sup>1</sup> (the “2016 Notification”), enterprises (whose control, shares, voting rights or assets were being acquired) having assets of a value less than INR 3.5 billion (approximately USD 54 million) or with turnover less than INR 10 billion (approximately USD 154 million)<sup>2</sup> were exempted from qualifying as a ‘combination’ under Section 5 of the Act (the “De-Minimis Exemption”).

Consequently, combinations involving such exempted enterprises did not require notification to the Competition Commission of India (the “CCI”) under section 6(2) of the Act.

Despite the De-Minimis Exemption:

- mergers and amalgamations of enterprises (referred in clause 5(c) of the Act), which are merely a legal structure for combinations, were not provided the benefit of the De-Minimis Exemption, leading to the anomaly that any merger or amalgamation falling within the ambit of section 5(c) of the Act required notification to the CCI; and
- where only an asset or business division of an enterprise was being acquired by another entity, the assets and turnover value of the *entire* enterprise was taken into account for calculation of thresholds for the De-Minimis Exemption, without regard to the value of the asset or the assets and turnover attributable to only such business division.<sup>3</sup>

<sup>1</sup> Notification number S.O. 674(E) dated March, 4 2016.

<sup>2</sup> In 2011, the MCA had issued notified the de-minimis thresholds as INR 2.5 billion for assets and INR 7.5 billion for turnover. The 2016 Notification was intended to enlarge the thresholds provided under the previous notification issued by the MCA.

<sup>3</sup> *Novartis and Eli-Lilly*, order dated July 14, 2016 under Section 43A of the Competition Act, 2002 in relation to combination registration no. C-2015/07/289.

This created significant stress in the mergers and acquisitions market as the asset or turnover value of the *entire* enterprise would often lead to such enterprises breaching the threshold limit prescribed under the De-Minimis Exemption even though the subject matter of the transaction would indeed be *de-minimis*.

The intent of the De-Minimis Exemption was therefore lost in such cases.

### 3. KEY DEVELOPMENTS

While the 2017 Notification has retained the threshold limits under the De-Minimis Exemption it has expanded its scope.

#### 3.1 Mergers or Amalgamations

The 2017 Notification has significantly expanded the scope of the 2016 Notification by categorically providing an exemption to *all* enterprises being parties to transactions covered under section 5(a) (*acquisition of assets, shares*), 5(b) (*acquisition of control*) and 5(c) (*mergers and amalgamations*) of the Act.

#### 3.2 Recalibrating the *target*

The 2017 Notification clarifies that only the value of the assets (in India) being acquired, taken control of, merged or amalgamated shall be considered for calculation of the asset threshold for the purpose of the De-Minimis Exemption. Under the 2016 Notification, the assets of the *entire* enterprise (whose control, shares, voting rights or assets were being acquired) were to be considered for this purpose.

#### 3.3 Transfer of business division of an enterprise

The 2017 Notification categorically provides that in the event of a transaction, where a portion of an enterprise or division or business is being acquired, taken control of, merged or amalgamated with another enterprise, then only the *relevant* assets and turnover (i.e. those relating to the portion or division or business being transferred and not the enterprise itself) shall be taken into account for the purpose of calculating the thresholds under section 5 of the Act.

The 2017 Notification also details the method of valuation of assets in such cases.

#### IndusLaw View:

The 2017 Notification has brought much needed clarity by resolving anomalies in the scope of the De-Minimis Exemption.

Parties can now plan transactions taking into account the subject matter of the transaction and the CCI is relieved of the burden of reviewing those transactions which are unlikely to cause an appreciable adverse effect of competition in the relevant market.

It is also heartening to see the MCA update and clarify the exemption notification promptly in order to remove difficulties. This approach to delegated legislation is indeed an important step towards fulfilling the aims of the government's ease of doing business campaign.

While the initiative of the government is admirable, the language of the 2017 Notification may still need further clarification. For instance, the language creates ambiguity as to *which* turnover is relevant for the purpose of share acquisitions. A purposive

interpretation would suggest that *only* the turnover of the target enterprise is relevant and we hope that the CCI follows a holistic approach in order to give full effect to the intent of the 2017 Notification.

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