

Competition Law Hotline

July 13, 2017

MERGER CONTROL FILINGS GET A BREATHER!

- Enterprises no longer required to notify the Competition Commission of India within 30 days of the trigger event.
- Notification to happen any time before consummation of the transaction.

A. BACKGROUND

In terms of Section 5 of the Competition Act, 2002 ("**Act**"), every acquisition of control, shares, voting rights or assets of an enterprise or merger or amalgamation of enterprises, where the parties to such acquisition or merger or amalgamation cross the financial thresholds mentioned therein is a combination of such enterprises ("**Combination**"). The parties to the Combination have to provide a notice to the Competition Commission of India ("**CCI**") disclosing the details of the proposed Combination ("**Notice**") within 30 days of the following:

- approval of the proposal relating to merger or amalgamation by the board of directors of the enterprises of the Combination in case of a merger/amalgamation ("**Approval**").
- execution of any agreement or other document¹ for acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of that section ("**Execution**").

If the parties to the Combination fail to give a Notice to the CCI within 30 days of the Approval or Execution, Section 43 A of the Act empowers the CCI to impose a penalty on such parties extending up to one percent of the total turnover or the assets, whichever is higher.

In this regard, the Ministry of Corporate Affairs has recently published a notification on June 29, 2017 which has exempted parties to a Combination from the requirement of filing a Notice within 30 days from an Execution or Approval ("**Exemption**"). The Exemption will be in effect for a period of five years from the date of its publication. We have analysed this Exemption below:

B. CHANGES

The Exemption has exempted parties to a Combination from the requirement of filing a Notice within 30 days from the date of Execution or Approval. However, such exemption is subject to Section 6(2A) and 43A of the Act. While Section 43 A of the Act has been discussed above, Section 6(2A) stipulates that a Combination shall not come into effect before:

- two hundred and ten days from the date of Notice to CCI; or
- CCI passes an order under S. 31 of the Act², whichever is earlier.

This would mean that although the parties to the Combination are not required to file a Notice within 30 days, the merger or amalgamation or acquisition of control, shares, voting rights or assets as contemplated under the Combination should not be consummated before at least 210 days have passed from the date of filing the Notice or receipt of approval of the CCI in respect of such Notice.

C. ANALYSIS

The Exemption is in line with the ease of doing business in India narrative of the Government. Further, it puts to rest the long standing dilemma faced by parties to a Combination as to what would constitute a trigger document for the purposes of the commencement of 30 days for filing of a Notice. The Exemption has made the trigger document irrelevant and all that the parties need to ensure now is that the consummation or closing of the transaction contemplated under the Combination shouldn't take place before the approval of CCI ("**CCI Approval**") or expiry of 210 days from the date of filing the Notice by them ("**Deemed Approval**").

There have been various instances wherein the CCI has imposed penalty under S. 43A of the Act for delay in filing Notice with respect to the Combinations within 30 days of the trigger event either because the parties absolutely failed to file the Notice with the CCI within 30 days of the trigger event or parties considered a different trigger event for the filing the Notice. It is interesting to note that, even in the cases where a Notice was filed by the parties to a Combination on a later date based on their interpretation of the trigger event, the CCI has penalised the parties. Please see [Schedule I](#) for an analysis of these cases.

It is evident that the non-compliances in the above cases were merely procedural in nature and it can be argued that the penalising them was unnecessary as the Combination anyway didn't cause any appreciable adverse effect on competition in India. This has long been a cause of anxiety and confusion amongst the acquirers, as often due to complex nature or structure of transaction³, there would be uncertainties as to what would constitute the trigger document. In such cases, parties had the option of approaching the CCI through a pre-filing consultation however such consultation is informal and verbal and the views taken by CCI are not binding.

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Post the Exemption, all such issues will no longer hound the parties to a Combination since there will be no trigger date as such for the Notice to be filed. However, consummation of a transaction which is a Combination without CCI Approval or Deemed Approval, will still result in penalty proceedings.

If we were to consider the merger control notification processes in various jurisdictions, we can deduce that more and more nations are progressively moving towards removing such a deadline for merger notification. In 2004, European Commission abolished its one-week deadline for filing merger notification.⁴ They justified the move by saying that the strict enforcement of the following deadline was unrealistic and was not necessary. In 2012, Brazilian Competition Regulatory Agency- CADE abolished its 15-business day filing deadline⁵.

In fact, the International Competition Network (ICN) in its Recommended Practices for Merger Notification Procedures has stated that:

*"Jurisdictions that prohibit closing until there has been an opportunity for the competition agency to review the transaction should not impose a deadline upon the parties to file notification within a specified time ... Parties will have the incentive to file promptly after reaching an agreement because they know they will be unable to close their transaction until it has been reviewed."*⁶

D. CONCLUSION

The Exemption is the second step⁷ taken by the Government in 2017 to provide relaxations to parties in respect of the merger control filings in India. This move will definitely boost investor confidence and pave way for ease of doing business in India. These are exciting times for investors in India and we await more of such changes from the CCI to further relax merger control regime in India.

– Vinay Shukla & Simone Reis

You can direct your queries or comments to the authors

¹ 'Other document' has been defined under Regulation 5(8) of the CCI (Procedure in regard to the transaction of business relating to combinations) Regulation, 2011 ("**Combination Regulations**") as any binding document, by whatever name called, conveying an agreement or decision to acquire control, shares, voting rights or assets provided that if the acquisition is without the consent of the enterprise being acquired, any document executed by the acquiring enterprise, by whatever name called, conveying a decision to acquire control, shares or voting rights. Even a public announcement under Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 is deemed to be 'other document' for the purposes of Section 6 of the Act.

² Section 31 of the Act provides that if CCI is of the opinion that any Combination does not, or is not likely to, have an appreciable adverse effect on competition, it shall, by order, approve that Combination including the Combination in respect of which a notice has been given under sub-section (2) of section 6 of the Act.

³ For example, CCI has rejected a merger control filing in the past as being premature because the parties misconstrued the triggering event. (*Combination case no C-2012/07/69*).

⁴ http://ec.europa.eu/competition/speeches/text/sp2003_068_en.pdf

⁵ [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/AR\(2013\)19&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/AR(2013)19&docLanguage=En)

⁶ ICN Recommended Practices for Merger Notification and Review Procedures.

⁷ We have covered the first step in our earlier hotline [here](#).

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