VOLUNTARY REMEDY PROPOSALS - REMEDY TO COMBINATION UNDER COMPETITION ACT 2002

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INTRODUCTION

The Competition Act, 2002 (as amended), [the Act], pursues the idea of advanced competition laws and plans at promoting competition and safeguarding Indian markets against anti-competitivemethods. The Act forbids anti-competitive deals, exploitation of influential status and controls combinations (mergers and acquisitions) with a stance to make sure that there is no unfavorable impact on competition in India. The stipulations of the Act concerning the law/regulation of combinations have been implemented with effect from 1st June 2011[i]. Section 5 of the Act assertsthat acquisitions, mergers, and amalgamations crossing specific assets or turnover levels/thresholds (collectively referred to as 'combinations') must be informed prior to the Competition Commissionof India (CCI). Comprehensive stipulations on the management of notifications are covered in theProcedure regarding the Transaction of Business Relating to Combinations Regulations 2011, as last modified in October 2018 (the Combination Regulations).

COMBINATION UNDER COMPETITION ACT, 2002

WHAT IS COMBINATION?

Generally, combination under the Act[ii] indicates shares, voting rights, assets, or acquisition of control, by an individual over a business where such individual has direct or indirect authority overanother enterprise involved in contending businesses, and amalgamations and

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mergers between oramongst business when the merging parties surpass the thresholds set in the Act. The thresholds are listed in the Act in words of turnover or assets in India and overseas. The key words combination and merger are used interchangeably.

Involving into a combination which triggers or is likely to trigger an appreciable adverse effect on competition surrounded by the appropriate market in India is excluded and such combination shallbe invalid.

THRESHOLDS FOR COMBINATIONS UNDER THE ACT

India is one of the briskly developing countries in the world. The expansion method is propelled both by natural and unnatural (via mergers and acquisition route) growth of enterprises. It is neitherviable nor prudent to evaluate all the acquisitions and mergers. It is instinctive to suppose that in the issue of minor/small size combinations there is a reduced amount of probability of appreciableadverse effect on competition in markets in India. The Act delivers for appropriately elevated thresholds in words of assets/turnover, for compulsory notification to the Commission. The Act also delivers for review of the threshold constraints every two years by the government, in discussion with the Commission, through notification, centered on the variations in Wholesale Price Index (WPI) or instabilities in exchange rates of a rupee or foreign currencies. Vide notification S.O. 480 (E) dated 4th March 2011, the government has enhanced the value of assetsand turnover indicated in section 5, by fifty percent. The current limits for the combined assets/turnover of the combining sides are as follows:

Individual: Either the combined assets of the businesses would value more than (INR) 1,500 crores in India or the combined turnover of the business is more than (INR) 4,500 crores in India. In case either or both enterprises have assets/turnover out of India also, then the combined assets ofthe businesses worth more than 2 Sub-section (3) of section 20 of the Act.

US$ 750 million, comprising at least (INR) 750 crores in India, or turnover is additional than US$ 2250 million, plus at least (INR) 2,250 crores in India.

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Group: The group to which the business whose control, assets, voting rights or are being attained/acquired would have its place after the acquisition or the group to which the business remaining the amalgamation or merger would fit, has either assets of the value of more than (INR)6000 crores in India or turnover more than (INR) 18000 crores in India. Where the group has existed in India as well as out of India then the group has assets more than US$ 3 billion as well as at least INR 750 crores in India or turnover more than US$ 9 billion-plus at least INR 2250 crores in India.

The word Group has been clarified

Two enterprises belong to a "Group" if one is in arrangement to practice at least 26 percent voting rights or appoint at least 50 percent of the directors or monitors the management or matters in the other. Vide notification S.O. 481 (E) dated4th March 2011, the government has spared "Group" applying less than fifty percent of voting rights in another enterprise from the provisions of section5 of the Act for a period of five years.

The above thresholds are given in the form of a table below.

	APPLICABLE TO	**ASSETS**		**TURNOVER**	
In India	Individual	Rs. 1,500 cr.		Rs. 4,500 cr.	
	Group	Rs. 6,000 cr.		Rs. 18,000 cr.	
In India and outside		**ASSETS**		**TURNOVER**	
		Total	Minimum Indian Component	Total	Minimum Indian Component
	Individual parties	$ 750 m	` 750 cr	$ 2,250 m	Rs. 2,250 cr

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Group	$ 3 bn.	` 750 cr.	$ 9 bn.	Rs. 2,250 cr.

REMEDIES/MODIFICATIONS UNDER REGULATIONS

In mergers, multi-jurisdictional mergers, the CCI is apprehensive of the competitive arrangementin India and may necessitate modification to the merger to India. Nevertheless, a multi- jurisdictional merger can still obtain consent from the CCI contemplating related or identical remedies to those in other jurisdictions as occurred in **Dow/DuPont.**

APPROPRIATENESS OF MERGER REMEDY

While a merger is under care of the CCI, the fundamental objective is to safeguard competitive market composition and that is when issues, like whether a remedy and particularly what kind of remedy is appropriate to reduce competition worries. Any modification to combinations by the CCI requires to be offered when they are a prerequisite and not simply intended as comparable remedies were incorporated in analogous preceding operations. The objective of any remedy must be proper, useful, and balanced while concentrating on circumstances designing the remedies.

PROCEDURE IN INDIA

Under the Competition Act and Combination Regulation, the CCI evaluates the compatibility of acombination on the foundation of its impact on composition of competition of India. The test, under section 6(1) of the Act, for compatibility of a combination whether it would affect or expected to affect an appreciable adverse effect on competition (AAEC concern) within the pertinent market of India especially development or improving of a leading position. When a combination presents AAEC concern, a combination may obtain approval if the parties pursue to alter it. But if the CCI is of view that such adverse effect can be eradicated

by appropriate modification, it may suggest suitable modification to the combination to the parties or inform the parties to frame modifications to a combination as stated under section 6(3) of the Act and Regulation 25 of Combination Regulation.

After seeing a combination has AAEC concern by the CCI, throughout Phase I, the parties can suggest remedies along with elaborated details/ information of the fillings of obligations and circumstances for their application while viewing appropriateness to eliminate AAEC concerns given under Regulations 19(2) and 19(3) of the Combination Regulation. Through this the parties prevent to go to Phase II. The CCI then assesses along with the modifications and appropriately, the CCI would revise modifications. Typically, consultations occur between the parties and the CCI before the CCI recognizes the plan.

What is permitted under the Act is that the CCI when offer modifications are subject to approval of the parties and expect to act within the time period given as per sections 31(4) and 25(3)of the Act. If the parties fail to do so AAEC is believed and the CCI might request that the combination is not to be given affect under section 31(9) of the Act read alongside with sections 31(2) & (10) of the Act and Regulation 25(4) of the Combination Regulation. Furthermore, the CCI can call out for additional material or recommend modifying the commitment and parties areasked to agree within 30 days under (statutory time limit under Section 31(6) of the Act) or any other stipulated time lengthened. In case the parties fail to agree the combination will be consideredto have AAECconcern and the combination be denied.

To make sure that the modifications are applied by the parties, under Regulation 26, parties are expected to hold the modification within the time as may be stipulated and require to file a compliance report before the CCI within 7 days of such closing. The CCI can also select an independent agency when the modification requires guidance on such stipulations and circumstances as may be determined by the CCI.

PHASE I REVIEW

In Phase I the parties may willingly submit modifications to prevent the deal progressing to a PhaseII review.[iii]The CCI will assess and, where suitable, necessitate the parties to agree the modification. There are typically debates between the parties and the CCI before the CCI agree tothe plans. Added time of up to 15 days required by the CCI to assess the proposed modification isnot encompassed in the 30-working-day time threshold for Phase I and the total 210-day period for the CCI to authorize or forbid a combination.

THE 'GREY ZONE'

There is a 'grey zone' between the creation of a prima facie opinion that a combination will havean AAEC and the verdict to initiate an inquiry/investigation. Under Section 29(1) of the Act, the CCI will publish a 'show cause' notice to the parties requesting them to answer why an investigation should not be performed. Up to October 2018, there were no exact provisions in theCombination Regulations addressing the creation of modification proposals in the answer; however, the CCI recognized that the parties could then offer modifications that could lead to consequence of approval minus the CCI proceeding to official publication and investigation. Thistranspired in Mumbai International Airport,[iv] Nippon Yusen Kabushiki[v] and China National Agrochemical Corporation.[vi] In PVR, commitments were presented in reply to the 'show cause' notice and a few of these commitments were recognized by the CCI in its final order. This prospectof proposing modifications was enacted in October 2018 when the Combination Regulations wererevised to permit the parties, along with their reply to the 'show cause' notice, to propose modifications. The extra time of up to 15 days required by the CCI to assess the proposed modification is barred from the statutory time intervals for the CCI to authorize or exclude a combination.

AMENDMENTS TO THE COMBINATION REGULATIONS

The sixth set of amendments to the Competition Commission of India (Procedure regarding the transaction of business relating to combinations) Regulations, 2011 ("Combination

Regulations")were notified by the Competition Commission of India ("CCI") on 9th October 2018.[8] This goes at a moment when the CCI and competition law in the nation are experiencing severe adjustments. The quantity of members in the CCI has been lowered to 4, and a "Competition Law Committee"has been established by the government, with the "objective of ensuring that legislation is in syncwith the needs of strong economic fundamentals". Though a whole disturbance is improbable, thecommittee is likely to mention variations with respect to the thresholds under section 5 of the Competition Act ("the Act"), recommend an outline to guarantee cooperation between different sectoral controllers and certify that the Act is in accordance with the Insolvency and Bankruptcy Code, 2016.

WITHDRAWAL AND REFILLING OF NOTICE.

The parties can now 'withdraw' a notice which has already been filed, before the CCI issues a Show Cause notice ("SCN") and can refile the notice after producing proper alterations. It has bynow been explained that the fees already given shall be modified against the fees payable in regardof the new notice if the latest notification is provided within three months from the date of withdrawal. While the CCI has been pursuing this procedure in the earlier period, the amendmentvalidates the same.

VOLUNTARY MODIFICATIONS

The amendment now provides the parties an alternative to propose voluntary modifications beforea SCN is released by the CCI under section 29(1) of the Act. Even after the SCN is issued, the amendment offers the parties with an alternative to offer modifications along with the response tothe SCN. The chance to offer modifications at this phase guarantees that the parties can prevent the in-depth inquiry under phase-II by allaying any possible interests of the commission. This procedure, parallel to the earlier one, was already being pursued by the CCI.

DIFFERENT REMEDIES PROPOSED

DIVESTURE COMMITMENTS

In Dow/DuPont, the CCI recognized remedies presented by the parties as a component of a globaldivesture package, agreed by the European Commission, for research and development (R&D) ofcrop protection and material science addressing AAEC concerns in India. Further, offered modifications in the appropriate market of fungicide and asked DuPont to revoke its trademark under the brand 'NUSTAR' in India and assumed not to advertise or trade fungicide in India as well as through its affiliates. Additionally, the CCI also recommended that Dow to divest its business of supplying MAH graft polyethylene and build a fresh trademark only for India while sell its assets, business, and inventories to an independent buyer. To guarantee conformity, the parties were required to give details to the Monitoring agency.

ACCESS TO INFRASTRUCTURE

The CCI in Mumbai International Airport[vii]noted limitation on share transfer to competitors suggested an objective of the parties to merger to manage management and operations of Joint Venture all time. The CCI believed such limitation in the Shareholders agreement underlined the probability of competition of interest and likelihood of foreclosure owing to twin function of Oil public sector activities as aviation turbine fuel supplier and holder of the integrated fuel farm facility. Subsequently, it instructed the parties to eliminate such restrictive clauses from shareholders agreement and not lessen storage volume because non-availability of storage capacityis expected to change level playing field for other fuel suppliers.

In Sun Pharma/Ranbaxy Merger[viii], the CCI discovered that the combination raised AAEC concernsin regard of applicable market of seven intersecting products owing to removal of a significant competitor. The CCI noted that the combination would end in close monopoly in two markets andbolster their market status. Planned modifications would keep competition in

the market in India by establishing a feasible, long term, and autonomous and guaranteeing the required provisional backing plans to compete efficiently with the merged individual.

BEHAVIORAL REMEDIES IN BAYER/MONSANTO

In Bayer/Monsanto Merger[ix], the CCI recognized behavioral remedies to focus on a range of matters. The CCI noticed horizontal concerns in 3 markets- Firstly, in the authorizing/licensing ofherbicide-tolerant traits technology. Bayer and Monsanto are main competitors and because of the combination, Monsanto would have fewer enticement to transform. Secondly, in the market for theauthorizing/licensing of Bt. trait for cotton seeds in India and Monsanto has a solid marketplace. Thirdly, in the market for authorizing/licensing of hybrids for corn seeds regarding merging of twomajor players.

The CCI requested Bayer to authorize/license on non-exclusive licensing of traits for 7 years afterfinishing on a fair, reasonable, and non-discriminatory (FRAND) term with qualified licensees. The CCI also raised up concerns about portfolio effects that would eliminate competitors, and Bayer assumed that the combined entity would not present its farmers, distribution channels clients, and commercial partners bundled goods. Additionally, it would abideby a strategy of non-exclusive licensing on a FRAND basis of non-selective herbicides or their effective elements for 7 years. The CCI was also concerned about cornering the developing digitalfarming space and discounting competitors and necessitated the joint entity to deliver access through licenses on FRAND terms to their digital platforms, information of existing Indian agro- climatic and subscriptions to their digital farming harvests and stages for 7 years.

CASE STUDY

Acquisition of Metso Oyj's ("Metso") minerals business by Outotec Oyj ("Outotec")

CCI favors the acquisition of Metso Oyj's ("Metso") minerals industry by Outotec Oyj ("Outotec")

The Competition Commission of India (CCI) authorizes the acquisition of Metso Oyj's ("Metso") minerals business by Outotec Oyj ("Outotec") under Section 31(1) of the Competition Act, 2002.

The CCI has circulated the order authorizing the acquisition of Metso's minerals business ("MetsoMinerals") by Outotec. All such liabilities, debts, assets, and rights of Metso that connect to, or mainly provide, its minerals business (including the aggregates, consumables, minerals, pumps, mineral services mining, and recycling businesses) will be acquired by Outotec. The approval is issue of modifications that are targeted at reducing the expected anti-competitive impacts of the offered combination.

The overhead order was a consequence of an exhaustive investigation commenced pursuant to the notice provided by Metso and Outotec under sub-section (2) of Section 6 of the Competition Act, 2002 (Act) on 12th March 2020. The Commission discovered that the Proposed Combination is anassimilation of two solid and close-fisted competitors in the market for Iron Ore Palletization (IOP)Equipment Island in India and seems to:

- Restrict the quantity of suppliers accessible to consumer in this market in India.
- lessen the strength of modernization in the technology for pelletizing technology andequipment.
- preserve the significant market position of the Parties in the market; and reduce or eliminate the competitive burden that would succeed in the lack of Proposed Combination.
- lessen the scope of countervailing bargaining power that the consumers relish on account of the competition exerted by autonomous existence of Metso and Outotec.
- boost the price of the competitors and opponents to contend and expand their existence inthe market if there is no likelihood of an appropriate and necessary access that could perform as a competitive limitation to the combined entity, result in formation of arobust combined competitor.

Thus, the CCI was of the point of view that the recommended combination would lessen competition and discuss the combined entity, the capability to improve price etc.

To tackle the competition matters occurring because of the recommended combination, the Parties offered voluntary remedies / modifications (VRP). The Commission saidthat VRP provided by Parties removes the connection between the Parties in the IOP segment in India and would successfully move Metso Mineral's Indian Straight Grate (SG) IOP capital equipment industry to an appropriate purchaser, thus maintaining the competition.

The modification fundamentally entails moving a right to completely utilize and develop the SG IOP capital equipment drawings, as well as the associated recorded IP by means of an exclusive and binding license, matter of a chunk aggregate direct fee and no continuing royalties. VRP willpermit the development of a brand-new competitor, thus settling any apprehensions whatsoever inrelation to this division.[x]

CONCLUSION

The provisions of the Competition Act, 2002 ("Act") concerning to the regulation of combinationsas well as the Combination Regulations have been in power with effect from 1st June 2011.

A crucial shift carried about by the current changes is that the parties to combinations can now propose remedies voluntarily in reply to the notice issued under Section 29(1) of the Act. If such remedies are deemed sufficient to address the perceived competition harm, the combination can be approved. This amendment is expected to expedite disposal of such combination cases.

In conclusion, the justification for competition authorities to permit a merger as it has both advantageous and unfavorable impacts on market composition and arrangement of competition. Holding this in opinion, the CCI has approved combinations rather stop them owing to AAEC concerns; the CCI is ready to contemplate remedies to obtain clearances. In

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the current period, theCCI has availed a wide assortment of fundamental and non-fundamental remedies, though in substantial horizontal overlaps, a clear-cut preference for structural over behavioral remedies is noted. What is also noted that the CCI averts *'one size fits all'* attitude; it involves in thorough consultations with the parties to guarantee that modifications reduce the recognized competitive damage. Lastly, the parties can help the CCI while proposing suitable modifications in Phase I, though parties may choose to wait until the start of Phase II. Any later than usual, the CCI may have an upper hand where a combination may raise AAEC concerns, hence, the parties should consider about remedies much in advance. At last, if remedies are considered sufficient to address the perceived competition harm, the combination can be approved.

As an enthusiastic participant of the International Competition Network, the CCI gets from and adds to the safest methods established by that body. Though not explicitly mentioned to, components of the 2016 Merger Remedies Guide are evidently manifested in the approval orders. In trading with the Indian element of global mergers, the CCI is enthusiastically connecting with other antitrust authorities to decide the remedies acceptable in India.

ENDNOTES

[i] See, Central Government notification S.O. 479(E) dated 4th March, 2011

[ii] CCI to act as nodal agency to check anti-competitive practices'". The Hindu Business Line.

[iii] See Regulation 19(2) of the Combination Regulations

[iv] Cases C-2012/11/88 GSPC Distribution Networks (8 January 2013), C-2014/04/164 Mumbai International Airport(29 September 2014.

[v] Case C-2016/11/459 Nippon Yusen Kabushiki (29 June 2017) and C-2018/09/601 Northern TK Venture (29 October 2018).

[vi] C-2016/08/424 China National Agrochemical Corporation (16 May 2017.

[vii] C-2014/04/164

[viii] C-2014/05/170

[ix] C-2017/08/523

[x] https://www.pib.gov.in/PressReleasePage.aspx?PRID=1651385