

## **MERGER CONTROL REGULATIONS AMENDED**

### **SALIENT FEATURES AND THE IMPLICATIONS THEREOF**



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The Competition Commission of India (“CCI”) has amended the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (**Combination Regulations**). A notification in respect was issued by the CCI on March 28, 2014.

Whilst the latest amendment has various interesting changes from a practical and commercial perspective, the biggest and most important amendment that the notification specifies is the fact that the CCI has tightened its rules to ensure that companies do not escape its scrutiny through innovative structuring of mergers and acquisitions.

Set out below is an overview of the aforementioned amendment, along with the other amendments envisaged under the amended Combination Regulations:

**(a) Filing of a combination notification to be determined by the substance / intent of transactions**

The CCI has clarified that the requirement for the filing of a combination notification shall be determined by the substance / intent of transaction, thereby rendering the structuring of the transaction moot. This amendment seeks to ensure that the parties to a combination do not avoid seeking mandatory premerger approval by adopting innovative and complex structures to their transactions. Accordingly, howsoever a transaction may be structured, the CCI has clarified that as long as the proposed combination exceeds the applicable thresholds, the parties will need to take prior approval from the CCI, before consummating such transaction.

**(b) Notification in relation to transactions taking place outside of India**

The Combination Regulations, under Schedule I thereof, provide a list of transactions that normally do not require prior notification and approval from the CCI since the same are treated as not having an appreciable adverse effect on

competition in India. One such transaction that is viewed '*not having an appreciable adverse effect on competition in India*' is a transaction that takes place entirely outside India with insignificant local nexus and effect on markets in India. Per the notification, this clause has been deleted.

The said clause had been a bone of contention for quite a while since both, section 5 of the Competition Act, 2002 ('Act') as well as the Target Exemption (introduced by the Central Government vide section 54(a) of the Act), provided for local nexus – i.e. minimum assets or turnover that the parties should have in India before they are subjected to the requirement of prior approval from the CCI. Thus, there was some confusion as to what additional criteria was sought under the (now deleted) clause in the Combination Regulations. In fact, this lack of clarity was a point of contention in the case of *Tata Chemicals Limited – Wyoming* (Combination Registration No. C-2011/12/12), where the CCI opined that "*the parties to the proposed combination meet the thresholds relating to assets and turnover in India as mentioned in Section 5(c) of the Act, and one of the parties to the proposed transaction is in India*".

**(c) Amendment to Form I and Form II**

- (i) Form I (short form filing): Per the notification, the CCI now requires wider disclosure of any horizontal overlap or vertical relationships between the businesses of the parties to the transaction. Moreover, the parties will now be required to provide details of merger filings made by the parties in other jurisdictions, along with the status report of such filings.
- (ii) Form II (long form filing): Per the notification, the CCI will now require the parties to provide the details, in terms of value of assets and aggregate of turnover, as per the audited annual accounts of immediately preceding two (2) financial years, instead of the immediately preceding financial year.

**(d) Increase in filing fee**

The fee for filing forms by enterprises has been increased. The fee for filing Form I under various combinations has been hiked to INR 15,500,000 (approximately USD 25,000) from INR 1,000,000. Further, the fee for submitting Form II has also been increased to INR 5,000,000 (approximately USD 83,000) from INR 4,000,000.

**(e) Right of appeal**

The CCI has now deleted Regulation 29 (of the Combination Regulations). The erstwhile Regulation 29 allowed parties to the proceedings to prefer an appeal against an order of the CCI relating to combinations to the Competition Appellate Tribunal ('COMPAT'). The CCI has clarified that Regulation 29 was unnecessary given the statutory right to appeal provided under section 53B of the Act.

Whereas Regulation 29 only allowed a "party to the proceedings" to prefer an appeal, Section 53B of the Act confers a right on "*any person*" to appeal against an order of the CCI in respect of combinations.

Having said that, however, the COMPAT has, vide its Order dated March 27, 2014<sup>1</sup>, reviewed the issue of locus standi in some detail and has limited the scope of this right.

**Final Words**

The amendments will have significant impact on the manner in which combinations would be structured in India, going forward as the 'substance over form' amendment would mean that in any transaction where there is a change of control or one party is able to influence the strategic decisions of the other through contract or otherwise, such transactions will have to be notified to the CCI.

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<sup>1</sup> *Jitender Bhargava v CCI & Ors*, Appeal 44 / 2013

Additionally, with the deletion of the “local nexus” entry, there will be a lesser chance of transactions going unreported to the CCI with the parties being under the mistaken belief that their transaction could benefit from the exemption in relation to the ‘local nexus’ provision.

*The contents of the above article are intended to provide a general guide to the subject-matter and should not be treated as a substitute for specific professional advice for any particular course of action as the information above may not necessarily suit your specific business and operational requirements. It is to your advantage to seek legal advice for your specific situation. The firm has a team of lawyers with knowledge and experience in this area, and who are able to help analyse the clients’ competition law queries, conduct competition compliance audits as well as draft competition law compliance manuals for the clients’ internal purposes.*

### **About the author**



Piyush Gupta is a partner at Kochhar & Co. and heads the competition advisory practice group of the firm.

Piyush has close to decade of trans-national experience in the competition law regimes across India and Singapore. Piyush is well-versed with the complexities of this relatively new entrant in the Indian legal arena and has drafted the competition law compliance manuals and guidelines for companies across various industries. Piyush has also conducted competition law compliance audits for various corporates, in addition to providing training and holding workshops on identification of issues pertaining to competition laws for the purposes of various companies’ in-house legal counsels, as well as for various operational personnel, such that competition law issues can be highlighted and dealt with on an immediate basis. In this regard, you may contact Piyush Gupta at +91.124.454.5222 or email him at [piyush.gupta@kochhar.com](mailto:piyush.gupta@kochhar.com); [corporate@kochhar.com](mailto:corporate@kochhar.com)