

Merger Remedies in India: Having an Upper Hand

Kluwer Competition Law Blog

April 1, 2019

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Please refer to this post as: Shilpa Singh J., 'Merger Remedies in India: Having an Upper Hand', *Kluwer Competition Law Blog*, April 1, 2019, <http://competitionlawblog.kluwercompetitionlaw.com/2019/04/01/merger-remedies-in-india-having-an-upper-hand/>

Combinations, in the form of acquisitions, merger and amalgamations crossing specified assets or turnover thresholds in India are subject to review by the Competition Commission of India (CCI). Most combinations, however, do not raise competition concerns and even if they do, a combination can still be approved subject to modification made to the combination. As per section 6 of the Competition Act a combination is prohibited that causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India. Such combinations are void under the Competition Act. Provisions on combinations are found in the Competition Act ('the Act') and procedure under Procedure in Regard to the Transaction of Business Relating to Combinations 2011 ('the Combination Regulation'). In mergers, multi-jurisdictional mergers in particular, the CCI is concerned of the competitive structure in India and may require modification to the merger to India. Nonetheless, a multi-jurisdictional merger can still gain approval from the CCI considering similar or same remedies to those in other jurisdictions as happened in Dow/DuPont.

Appropriateness of merger remedy

While a merger is under consideration of the CCI, the basic aim is to ensure competitive market structure and that is when questions, like whether a remedy and especially what type of remedy is suitable to eliminate competition concerns. Any modification to combinations by the CCI need to be proposed when they are a necessity and not merely proposed because similar remedies were included in similar previous transactions. The purpose of any remedy must be appropriate, effective, and proportionate while focusing on specific facts tailoring the remedies.

Procedure in India

Under the Competition Act and Combination Regulation, the CCI assesses the compatibility of a combination on the basis of its effect on structure of competition of India. The test, under section 6(1) of the Act, for compatibility of a combination whether it would cause or likely to cause an appreciable adverse effect on competition (AAEC concern) within the relevant market of India particularly formation or strengthening of a dominant position. When a combination raises AAEC concern, a combination may gain clearance if the parties seek to modify it. But if the CCI is of opinion that such adverse effect can be eliminated by suitable modification, it may propose appropriate modification to the combination to the parties or communicate the parties to formulate modifications to a combination as mentioned under section 6(3) of the Act and Regulation 25 of Combination Regulation.

After considering a combination has AAEC concern by the CCI, during Phase I, the parties can propose remedies along with detail information of the contents of commitments and conditions for their implementation while showing suitability to remove AAEC concerns given under Regulations 19(2) and 19(3) of the Combination Regulation. By doing this the parties avoid to move to Phase II. The CCI then evaluates along with the modifications and accordingly, the CCI would amend modifications. Usually, discussions happen between the parties and the CCI before the CCI accepts the proposal.

What is allowed under the Act is that the CCI when propose modifications are subject to acceptance of the parties and ask to act within the time given as per sections 31(4) and 25(3) of the Act. If the parties fail to do so AAEC is assumed and the CCI may order that the combination is not to be given affect under section 31(9) of the Act read along with sections 31(2) & (10) of the Act and Regulation 25(4) of the Combination Regulation. Moreover, the CCI can call for more information or propose to modify the commitment and parties are invited to accept within 30 days under (statutory time limit under Section 31(6) of the Act) or any other specified time extended. In case the parties fail to accept the combination will be deemed to have AAEC concern and the combination be rejected.

To ensure that the modifications are implemented by the parties, under Regulation 26, parties are required to carry out the modification within the period as may be specified and need to file a compliance report before the CCI within 7 days of such completion. The CCI can also appoint an independent agency when the modification needs supervision on such terms and conditions as may be decided by the CCI.

Different remedies proposed

Divesture commitments

In *Dow/DuPont*^[1], the CCI accepted remedies offered by the parties as a part of a global divesture package, accepted by the European Commission, for research and development (R&D) of crop protection and material science addressing AAEC concerns in India. In addition to this, proposed modifications in the relevant market of fungicide and asked DuPont to cancel its trademark under the brand 'NUSTAR' in India and undertook not to sell or export fungicide in India including through its affiliates. Further, the CCI also proposed that Dow to divest its business of supplying MAH graft polyethylene and create a new trademark only for India while sell its business, inventories and assets to an independent purchaser. To ensure compliance, the parties were asked to report to the Monitoring agency.

Access to infrastructure

The CCI in *Mumbai International Airport*^[2] observed restriction on share transfer to competitors indicated an intention of the parties to merger to control operations and management of Joint Venture in perpetuity. The CCI was of the view that such restriction in the Shareholders agreement reinforced the likelihood of conflict of interest and possibility of foreclosure due to dual role of Oil public sector undertakings as aviation turbine fuel supplier and owner of the integrated fuel farm facility. Consequently, it directed the parties to remove such restrictive clauses from shareholders agreement and not reduce storage capacity since non-availability of storage capacity is likely to distort level playing field for other fuel suppliers.

In *SunPharma/Ranbaxy Merger*^[3], the CCI found that the combination raised AAEC concerns in respect of relevant market of seven overlapping products due to elimination of a significant competitor. The CCI observed that the combination would result in near monopoly in two markets and strengthen their market position. Proposed modifications would maintain competition in the market in India by creating a viable, independent and long-term competitor and ensuring the necessary transitional support arrangements to compete effectively with the merged entity.

Behavioural remedies in Bayer/Monsanto

In *Bayer/Monsanto Merger*^[4], the CCI accepted behavioural remedies to address a variety of concerns. The CCI observed horizontal concerns in 3 markets- First, in the licensing of herbicide-tolerant traits technology. Bayer and Monsanto are major competitors and as a result of the combination, Monsanto would have less incentive to innovate. Second, in the market for the licensing of Bt. trait for cotton seeds in India and Monsanto has a strong market position. Third, in the market for licensing of hybrids for corn seeds concerning consolidation of two major players.

The CCI asked Bayer to license on non-exclusive licensing of traits for 7 years after closing on a fair, reasonable and non-discriminatory (FRAND) terms with eligible licensees. The CCI also raised concerns regarding portfolio effects that would exclude competitors, and Bayer undertook that the combined entity would not offer its clients, farmers, distribution channels and commercial partners bundled products. Also, it would follow a policy of non-exclusive licensing on a FRAND basis of non-selective herbicides or their active ingredients for 7 years. The CCI was also concerned about cornering the emerging digital farming space and excluding competitors and required the combined entity to provide access through licences on FRAND terms to their digital platforms, data of existing Indian agro-climatic and subscriptions to their digital farming products and platforms for 7 years.

Conclusion

In conclusion, the reason for competition authorities to allow a merger as it has both desirable and undesirable effects on market structure and structure of competition. Keeping this in mind, the CCI has approved combinations rather block them due to AAEC concerns; the CCI is prepared to consider remedies to secure clearances. In the recent times, the CCI has availed a broad range of structural and non-structural remedies, though in significant horizontal overlaps, a clear preference for structural over behavioural remedies are observed. What is also observed that the CCI avoids 'one size fits all' approach; it engages in detailed discussions with the parties to ensure that modifications eliminate the identified competitive harm. Finally, the parties can help the CCI while proposing appropriate modifications in Phase I, though parties may prefer to wait until the beginning of Phase II. Any later, the CCI may have an upper hand where a combination may raise AAEC concerns, therefore, the parties should think about remedies far in advance.

[1] C-2016/05/400

[2] C-2014/04/164

[3] C-2014/05/170

[4] C-2017/08/523