Kluwer Competition Law Blog

Clean up the Deal Team! Indian competition law perspective

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Competition law (especially merger control regime) is a relatively new area of law in India, and the Competition Commission of India (***CCI*)** has been tasked with the duty of its enforcement in India. Similar to most other jurisdictions, the merger control regime in India is suspensory in nature, i.e. the parties to a combination (transactions that exceed the prescribed jurisdictional thresholds) are not permitted to consummate any step of a proposed combination, before a formal approval is received from the CCI.

The "*Compliance manual for enterprises*" released by the CCI in May 2017 explains that parties to a proposed combination have to remain independent competitors under competition law until a transaction is closed. Failure to do so (*also commonly referred to* as '*gun-jumping'*) may result in consequences under the Competition Act, 2002 (***Competition Act***), including significant monetary penalties, and the possibility of 'unscrambling' of a combination.

Broadly, gun-jumping may either be procedural or substantive. Procedural gun-jumping occurs when the parties implement any step of a combination prior to CCI approval.

Substantive gun-jumping occurs when parties to a combination coordinate/integrate their conduct prior to the actual closing of the transaction (including CCI approval). This is of particular concern where the parties to a combination are competitors, since pre-closing joint conduct, such as the sharing of commercially sensitive information between the parties, is impermissible both under merger control provisions as well as provisions on anti-competitive agreements or cartelisation. Under Section 3(3) of the Competition Act, an agreement or arrangement which causes appreciable adverse effect on competition (***AAEC***) in India (for example, through price coordination, rationalising supply, market division or bid coordination) prior to the actual consummation of a proposed combination or in the guise of a proposed combination, would still be considered as a violation of the law. This is because, in case a transaction falls through (for any reason, whether CCI approval related or otherwise), competitors can use the commercially sensitive information they have obtained to reduce competitive uncertainty in the market.

There have been several instances of gun-jumping in the Indian regime where the CCI has imposed penalties on parties to a combination for failure to notify; the highest amount of penalty imposed being INR 5 crore. Even though procedural gun-jumping has reduced with the development in the antitrust regime, parties remain unaware of substantive gun-jumping concerns.

The inevitable conclusion that flows from the above legal regime is that parties to a proposed combination should not ideally share any commercially sensitive information prior to closing of

the transaction. However, in reality, this may not be practical, as most combinations (specifically involving competitors) require a pre-combination due diligence (usually commercial and legal), where certain commercial information is exchanged between parties to the combination. Further, a certain level of integration planning is also required at the pre-signing stage of a proposed combination, especially in transactions which have a long gap between signing and closing. Additionally, post-signing of a proposed combination, there may be need for exchange of information between the parties for regulatory approvals including for a CCI approval.

One of the practical solutions to mitigate gun-jumping concerns while exchanging information for transaction purpose involves constitution of a "**clean team**". This solution, although used extensively in international jurisdictions, is only slowly gaining a foothold in India. A "clean team" in essence consists of a limited team of individuals, who are **not** (directly or indirectly) involved in day to day business of the parties to the combination, including in pricing, marketing, procurement or sales decisions. Ideally, a clean team should comprise of members who are not involved in day to day management of the business such as retired employees, in house legal team and third party consultants. External legal counsels may also be part of a clean team. Exchange of commercially sensitive information should only be through the clean teams, whether through a separate data room (physical or virtual) or bilateral electronic exchanges. It should be kept in mind that such exchange is limited to information which is absolutely necessary for the purposes of the diligence, regulatory approval process or integration planning (subject to scope of the clean team agreement negotiated between the parties).

The rationale for a clean team dictates that an individual who takes strategic or market-facing decisions (including but not limited to pricing, sales/marketing strategy or policy making) should not be influenced by commercially sensitive information he/she receives in his/her capacity as the representative of a party to a proposed combination, especially if the transaction falls through. To reinforce this rationale in such circumstance, the clean team arrangement usually also requires that such a person is subjected to a 'cooling off' period during which the individual may not return to his/her role in the day to day management of the company involving strategic decisions (as discussed above) for a period of one-two years. However, sometimes an individual may be allowed to return to a new set of responsibilities which prevent him/her from using commercially and competitively sensitive information gained through the clean team.

To alleviate similar concerns, for the first time in a case (C-2016/11/459), the CCI recently accepted parties' voluntary commitments that they would introduce a "*rule of information control*" at the time of closing of the transaction. The transaction envisaged merger of certain businesses of the parties' through a wholly owned subsidiary. The proposed control measures included commitments to the effect that (a) sensitive information of non-integrated business of the parties will not be received by the wholly owned subsidiary being set up (b) the officers/representative directors of the parties who shall be on the board of directors of the subsidiary shall not be those who are directly in the chain of command of any of the non-integrated businesses of the parties; and (c) in case of commonality of some of the directors / officers, such directors/officers will be required to comply with strict confidentiality obligations with severe consequences.

In conclusion, it is recommended that any exchange of commercially and competitively sensitive information *qua* parties to a proposed combination (specifically involving competitors) should be undertaken carefully, and ideally pursuant to a well-documented clean team arrangement, to ameliorate antitrust concerns. If the clean team arrangement is not a feasible option for the parties, the parties need to consider other solutions/tools to mitigate antitrust concerns involved (for

example, confidentiality agreements or sharing any competitively sensitive information through only external advisors on a de-sensitised basis). However, it all boils down to parties taking a commercial call (depending on the size, scope and overlaps of a combination), whether the added logistical concerns of forming (and implementing) a clean team outweigh the potential antitrust concerns.

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