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The Curious Case of Composite Combinations under the Indian Competition Law Regime

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Introduction

Sections 5 and 6 of the Competition Act, 2002 [**‘the Act’**] provide the basic statutory framework for merger control in India. The Report of the Raghavan Committee, which played an instrumental role in the formulation of the Act, contemplated the Indian Competition Law regime to be one of pre-notification in order to elude the high social costs of post-merger unscrambling. The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 [**‘Combination Regulations’**] were introduced in the Competition Law regime in order to streamline the mandatory procedure for filing of Combinations and their approval by the Competition Commission of India [**‘CCI’**].

One of the many provisions implemented to facilitate the goal conceived by the Raghavan Committee is Regulation 9(4) of the Combination Regulations. Regulation 9(4) deemed inter-connected or inter-dependent transactions to be composite combinations. This provision was enacted to extend the notification requirements to each transaction in a set of transactions even if only one of them was a Combination, thereby, requiring the parties involved to provide details of every single transaction which may otherwise be exempt from notification to the CCI. The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2016 [**‘2016 Amendment’**], however, omitted the words “*or inter-dependent on one another*” from Regulation 9(4). This article attempts to trace the jurisprudence surrounding composite combinations especially in light of the 2016 Amendment.

The Interpretation of Composite Combinations

In one of the earliest orders defining ‘composite combination’, which was reported as *SIIL/MALCO*,^[1] the CCI delved into the definition of a composite combination without referring to Regulation 9(4). The tribunal found that a series of inter-related and inter-dependent transactions shall be considered to be composite if the ultimate objective could only be achieved by the successful completion of all transactions comprising the series and all such transactions which formulate the composite must be notified to the CCI even if they were not notifiable on a standalone basis. While this test *prima facie* closely resembled the language of Regulation 9(4), the

use of the term “inter-related” instead of “inter-connected” and the use of the conjunctive ‘and’ instead of the disjunctive ‘or’ were major departures from the conditions contemplated under the Combination Regulations.

Shortly after, the *Tech Mahindra/C&S*[2] order documented a similar finding to the former. However, a glaring difference from the tribunal’s approach in *SIIL/MALCO* was the use of ‘or’ between the terms “inter-related” and “inter-dependent” and the same was in line with the Combination Regulations. In *CCI v. Zero Coupon Optionally Convertible Debentures*,[3] the CCI, while referring to Regulation 9(4), took a very different approach when it resorted to using “and/or” between “inter-connected” and “inter-dependent” while defining a composite combination.

Subsequently, in the gun-jumping proceedings against *Jet/Etihad*,[4] the CCI found that the relatedness between a series of transactions rendered them composite and, thus, the parties could not allude Regulation 9(4). While in *GlaxoSmithKline/Novartis*,[5] the CCI, while considering the notice u/s 6(2), considered the inter-conditional and inter-dependent nature of the transactions.

In the gun-jumping proceedings against *Piramal/Shriram*,[6] when the parties to the transaction referred to European Commission’s Consolidated Juridical Notice to argue that the acquisitions were not inter-related, the CCI found that the acquisitions were inter-related under the European law and were, thus, inter-connected in terms of Regulation 9(4).

The CCI’s order in *Thomas Cook/SHRIL*[7] discussed, in detail, the purpose behind Regulation 9(4), the tribunal was of the opinion that scrutinizing some parts of a Combination may not result in an accurate analysis of the effects it might have on the competition in a market. Parties could not be allowed to structure their transactions in a manner to avoid compliance with the requisites of the Act. In this matter, the tribunal found that, as the parties would not enter a certain transaction (say X) in the absence of another transaction (say Y), the former could not be perceived as isolated from the latter. In other words, the tribunal held that, if entering X was contingent upon the completion of Y, X and Y would form a composite Combination. Insofar as the parties’ reliance on the *Jet/Etihad* order was concerned, the tribunal stated that mutual interdependence was not the only test to determine a composite combination. The tribunal went on to find that – “...*considering two different transactions as one combination depends on the facts and circumstances of each case with due regard to the subject matter of the transactions; the business and entities involved; simultaneity in negotiation, execution and consummation of the transactions; and also, whether it is practical and reasonable to isolate and view the transactions separately.*”

The matter was appealed before the erstwhile Hon’ble CompAT and the tribunal observed that the objective of Regulation 9(4) was to facilitate filing of one notice for interconnected, interrelated, or interdependent transactions.[8] The tribunal upheld the CCI’s rejection of the inapplicability of the *SIIL/MALCO*, *Tech Mahindra/C&S* and *Jet/Etihad* orders.

However, as the CompAT set aside the penalty imposed on Thomas Cook, the CCI preferred an appeal before the Hon’ble Supreme Court [‘SC’]. The SC, while setting aside the impugned order, found that all the transactions of Thomas Cook were a part of the same transaction, and thus, they were held to be “*intrinsically connected and interdependent.*”[9] The SC also dictated that technical interpretation of transactions cannot be made the basis to isolate different steps of the composite transaction and the same would, in actuality, be contrary to the spirit of the Act.

The Issues Pertaining to the Interpretation Regulation 9(4)

Prior to the 2016 Amendment, as the test to determine the existence of a composite combination varied between the use of “and”, “or” or “and/or” to bridge “inter-connected” and “inter-dependent”, the CCI concluded findings that substantially deviated from the actual wordings of Regulation 9(4). Also, the usage of terms like “inter-related” and “inter-conditional” muddied the waters insofar as a standard test for determining a composite transaction is concerned.

Further, the foregoing doctrinal research interestingly reveals that no adjudicatory authority actually addressed the difference between ‘inter-connectedness’ and ‘inter-dependence’. This difference becomes especially important in light of the 2016 Amendment which omitted ‘inter-dependent’ from Regulation 9(4). Prior to the 2016 Amendment, the CCI’s enquiry would be to find inter-connectedness and inter-dependence.[10] On the flipside, after the 2016 Amendment, the CCI shifted to finding transactions to be inter-connected[11] without ever shedding light on the difference made by the omission of ‘inter-dependent’.

The gravity of the situation can only be fully appreciated upon visiting the definitions of the various terms used in the test to ascertain the existence of a composite combination. While Marriam-Webster defines ‘inter-connected’ as “*mutually joined or related*” and “*having internal connections between the parts and elements*”, Lexico (by Dictionary.com and Oxford University Press) defines it as “*having all constituent parts linked or connected*”. Further, Marriam-Webster defines ‘inter-dependent’ as “*dependent upon one another*” and Lexico defines the same as “*dependent on each other*”. Thus, as per the definitions of these terms, it can be said that they refer to different kinds of relationships two entities can have with one another even if the definitions do not constitute water-tight compartments per se.

The argument for there being a distinction between ‘inter-connected’ and ‘inter-dependent’ especially in the context of Regulation 9(4) is provided by a rule of Interpretation of Statutes – **the Legislature does not waste its words**. [12] Constitutional courts have time and again held that “*every word used by the Legislature must be given its due importance and significance*”. [13] Hence, it is evident that the two separate words used by the Legislature to determine the existence of composite combinations were to be given their due importance and significance. That being said, in practice, as can be seen in the aforementioned discusses, there doesn’t seem to be a palpable difference on account of the omission made by the 2016 Amendment.

Conclusion

Regulation 9(4) was introduced in the Combination Regulations to dictate the procedure of filing every composite combination for approval from the CCI, however, the understanding of Regulation 9(4) is obscured by various CCI orders wherein –

1. It has fluctuated between using disjunctive and conjunctive to bridge ‘inter-connected’ and ‘inter-related’, or
2. It has used terms alien to the Act and the Combination Regulations such as inter-related and inter-conditional.

When guidance was sought from the CompAT, it too added to the ambiguity by holding that the objective of Regulation 9(4) was to facilitate the filing of one notice for inter-related, inter-connected or inter-dependent transactions. Furthermore, while keeping in mind the legislative intent behind Regulation 9(4), the insignificance given to defining ‘inter-connected’ and ‘inter-dependent’ is another obstruction for its operationalisation. When the *Thomas Cook/SHRIL* case went up to the SC for adjudication, the Hon’ble court also did not delve into the definition of the two terms. Consequently, as the definitions have not been elucidated upon by any adjudicatory authority, the exact effect of the 2016 Amendment has been rendered unfathomable.

[1] SIIL/MALCO, Combination Registration No. C-2012/03/45, order dated 12th April 2012, https://www.cci.gov.in/sites/default/files/C-2012-03-45_0.pdf

[2] Tech Mahindra/C&S, Combination Registration No. C-2012/03/48, order dated 26th April 2012, https://www.cci.gov.in/sites/default/files/C-2012-03-48_0.pdf

[3] CCI v. Zero Coupon Optionally Convertible Debentures, Combination Registration No. C-2012/03/47, order dated 28th May 2012, <https://www.cci.gov.in/sites/default/files/faq/C-2012-03-47.pdf>

[4] Jet/Etihad, Combination Registration No. C-2013/05/122, order dated 12th December 2013, <https://www.cci.gov.in/sites/default/files/faq/Order%20191213.pdf>

[5] GlaxoSmithKline/Novartis, Combination Registration No. C-2014/07/188, order dated 12th December 2014, https://www.cci.gov.in/sites/default/files/C-2014-07-188_0.pdf

[6] Priamal/Shriram, Combination Registration No. C-2015/02/249, order dated 2nd May 2016, <https://www.cci.gov.in/sites/default/files/Order%20under%20Section%2043A-%20.pdf>

[7] Thomas Cook/SHRIL, Combination Registration No. C-2014/02/153, order dated 21st May 2014, <https://www.cci.gov.in/sites/default/files/C-2014-02-153R.pdf>

[8] Thomas Cook (India) Ltd. v. Competition Commission of India, Appeal No. 48 of 2014, <https://www.casemine.com/judgement/in/587f39554a9326336e216f57>

[9] Competition Commission of India v. Thomas Cook (India) Ltd., Civil Appeal No. 13578 of 2015, <https://indiankanoon.org/doc/84791944/>

[10] Cairnhill/Mankind, Combination Registration No. C-2015/05/276, order dated 25th June 2015, https://www.cci.gov.in/sites/default/files/Notice_order_document/C-2015-05-276.pdf

[11] FMC/Dow Chemical, Combination Registration No. C-2017/06/519, order dated 18th September 2017, https://www.cci.gov.in/sites/default/files/Notice_order_document/Order%20-31_519-Public%20Version-Final.pdf; Chalet/Genext, Combination Registration No. C-2017/02/478, order dated 16th March 2017,

https://www.cci.gov.in/sites/default/files/Notice_order_document/Order%20C-2017-02-478.pdf

[12] Ku. Sonia Bhatia v. State of UP, 1981 SCR (3) 239, <https://indiankanoon.org/doc/1631108/>

[13] Mohd. Jainul Ansari v. Mohd. Khalil, 1991 (1) BLJR 12, <https://indiankanoon.org/doc/1901852/>; Indiabulls Housing Finance Ltd v. Vaibhav Jhavar, W.P.(c) 4237/2018, <https://indiankanoon.org/doc/131479500/>; Ramulu Ammal v. Ramachandra Reddy, 2009 (3) LW 622, <https://indiankanoon.org/doc/637701/>

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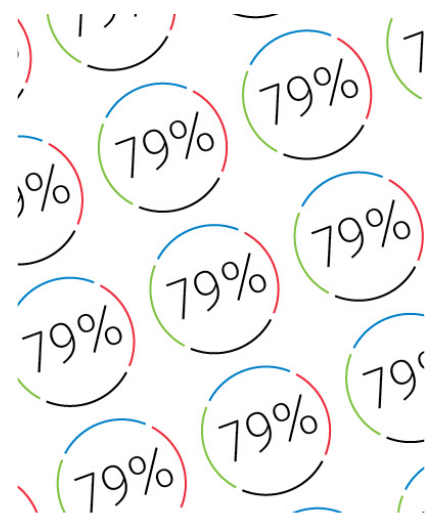
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