Kluwer Competition Law Blog

2023 Amendments to Indian Competition Law: Implications for M&A (Part 1)

Avaantika Kakkar, Kirthi Srinivas (Cyril Amarchand Mangaldas) · Tuesday, April 18th, 2023

The last few weeks have been momentous for Indian competition law – the Competition (Amendment) Act, 2023 (***Amendment***) received Presidential assent on 11 April 2023, after it was passed by both houses of the Indian Parliament.

The lead-up to this moment was almost five years in the making. The Amendments are a product of extensive deliberations of the Competition Law Review Committee (***CLRC***), the Parliamentary Standing Committee on Finance (***Standing Committee***), and inputs from various stakeholders.

In this **two-part** series, we bring perspective to the key changes made by the Amendment to the Competition Act, 2002 (***Act***). Part I addresses amendments to the merger control framework and Part II will address amendments to the enforcement framework.

Amendment not yet effective

The Amendment will take effect once the Central Government notifies its various provisions in the Gazette of India, possibly in a phased manner. Amendments that are to be clarified through regulations issued by the CCI (such as the deal value threshold) will only be effective once such regulations are published.

Introducing the 'deal value' threshold

The 'deal value' threshold (***DVT***) will trigger a notification to the CCI in cases where:

- The value of a transaction (i.e., acquisition, merger or amalgamation) exceeds INR 20 billion (c. USD 240 million / EUR 220 million / GBP 195 million / JPY 32 billion); (*the value of a transaction includes every valuable consideration, whether direct or indirect, or deferred)* and
- The target enterprise in question has "*substantial business operations in India*".

From its submissions before the Standing Committee (available here), the Ministry of Corporate Affairs clarified that DVT is primarily meant for digital and new-age markets, where the target entities may have minimal assets and turnover, but may possess significant potential in terms of

data, technology, innovation, etc. However, the text of the Amendment does not restrict the application of DVT to any sector. In Austria and Germany (where deal value/transaction size thresholds have been implemented), regulators have received notifications across pharma, real estate, and other sectors. Stakeholders in India have argued that such blanket application of DVT could increase the administrative burden for the CCI, and transaction costs for parties.

The *de minimis* or small target exemption (*which is an absolute exemption available to transactions where the asset value in India does not exceed INR 3.5 billion (c. USD 43 million / EUR 39 million / GBP 34 million / JPY 6 billion) or the revenue from India does not exceed INR 10 billion (c. USD 120 million / EUR 110 million / GBP 100 million / JPY 16 billion*)) will not apply where the DVT is breached. However, it remains unclear whether other exemptions under Schedule I of the CCI's combination regulations would continue to apply where the DVT is breached.

Some of the interpretational questions that the CCI will need to clarify are: (i) if it is the global transaction value (as opposed to India-specific transaction value) that would be considered; (ii) in case of a fundraising round with multiple investors, would the transaction value be determined basis the investment amount of each investor, or the total size of the investment round; and (iii) how will transactions that contemplate post-closing adjustments in the consideration value be dealt with. While the CCI may be able to pre-empt some of these queries and address them in its regulations, many of these issues are likely to be clarified through the CCI's decisional practice once the law comes into force. It is also likely that the regulations and clarifications issued by the CCI are similar in first principles to the guidelines for the calculation of DVT in jurisdictions such as Germany.

Aligning the definition of 'control'

The definition of 'control' under the Act is relevant for assessing whether a transaction is notifiable and for its substantive assessment by the CCI. The present definition of control is circular and vague (it refers to '*control over affairs and management of an enterprise or group*') and does not specify the type of rights that may amount to control.

Over the years, the CCI has interpreted 'control' to include 'material influence' (*which is considered to be the lowest degree of control*). Whether an entity exercises material influence is a question of fact, determined basis of an investor's board representation, special rights that it can exercise, etc. The Amendment replaces the existing definition of control, giving statutory recognition to this 'material influence' standard.

While the new definition aligns the Act with the CCI's decisional practice, it does not provide certainty as to when an entity is said to have 'material influence'. The report of the CLRC (available here) has recommended that the CCI provide an indicative list of rights to clarify what constitutes 'material influence'. In line with these recommendations, the CCI could soon introduce regulations identifying a limited set of rights that would amount to 'material influence' (although this is likely not a priority for the CCI).

Allowing derogation from standstill obligations for time-sensitive market purchases on stock

exchanges

In case of notifiable transactions, the Act does not allow parties to acquire shares or securities (including those listed on stock exchanges) or pay any consideration, without prior approval of the CCI. This 'standstill' obligation impedes open market purchases, given price sensitivity and confidentiality concerns in such transactions (especially in case of block and bulk deals, and hostile takeovers).

The Amendment introduces much-needed derogation mechanisms allowing acquirers of listed companies to notify market purchases to the CCI *post facto* and within the prescribed time period. The acquirer must not exercise any ownership, beneficial rights or interest in the target until CCI's approval is received.

While the CCI's regulations are expected to lend further clarity to this new exemption, this is a positive step as it attempts to strike a balance between acquirers' legitimate right towards opportunistic purchases on the stock exchange, and the CCI's approval process.

Decreasing approval timelines

- Phase I / *prima facie* approval: The Amendment states that if the CCI does not form its *prima facie* opinion (Phase I review) within 30 calendar days, then the transaction shall be deemed to have been approved. At present, a transaction is deemed to be approved if it is not finally approved within the outer time limit of 210 calendar days.
- Phase II / cases requiring in-depth inquiry: The outer time limit for final approval (for complex cases including those that may move to a Phase II review) has been reduced from 210 days to 150 days. To account for this compressed timeline, corresponding reductions have been made in the time available for each step in the review process.

The Amendment aims to provide deal certainty and expedite the approval process. However, it is likely to prolong timelines and increase uncertainty. The CCI's case officers are expected to prepare detailed reports during their review. Given the truncated timelines, it is probable that overburdened case officers will issue more requests for information (***RFIs***) from parties to 'stop the clock' and buy time. This would, in turn, add to the burden of parties and may also result in some filings being invalidated, in situations where the parties need more time to respond to RFIs or in complex fact scenarios.

It would be advisable for parties to opt for the CCI's informal consultation process before filing notifications, as it would give case officers additional time to examine the parties' submissions before the statutory timeline begins.

Definition of "*turnover*"

Turnover is a key criterion for determining the applicability of the *de minimis* exemption and the jurisdictional thresholds. Basis the CCI's precedents and its FAQs, turnover is interpreted as the value of 'revenue from operations and includes export income and intra-group sales (which can be

excluded only in certain limited circumstances).

The Amendment states that turnover in India shall be determined by excluding intra-group sales, indirect taxes, trade discounts and all amounts generated through assets or customers located outside India. In essence, turnover in India will purely focus on sales made to third parties in India. It remains to be seen how the CCI interprets 'turnover' since the proposed definition is at variance with some of its decisional practice.

Other notable changes

- ***Withholding information and providing false information in merger assessment will cost more***: The Amendment proposes to increase the upper limit for applicable penalties in such cases from INR 10 million (approx. USD 120,000 / EUR 110,000 / GBP 100,000 / JPY 16 million) to INR 50 million (approx. USD 600,000 / EUR 550,000 / GBP 500,000 / JPY 80 million).
- ***Determination of gun-jumping penalties basis 1% of the* 'value of transaction'**: The maximum penalty that could be imposed for gun-jumping will now be the higher of 1% of the total turnover or assets of the parties or the transaction value

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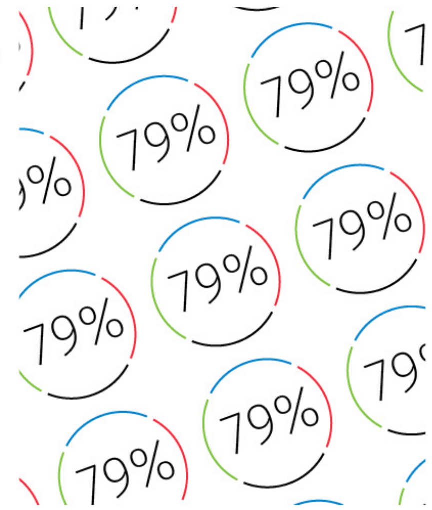

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