



**INTERNATIONAL BAR ASSOCIATION ANTITRUST SECTION
MERGER WORKING GROUP'S SUGGESTIONS TO THE
COMPETITION COMMISSION OF INDIA REGARDING
PROPOSED AMENDMENTS TO THE COMBINATION REGULATIONS**

December 17, 2019

**INTERNATIONAL BAR ASSOCIATION ANTITRUST SECTION
MERGER WORKING GROUP'S SUGGESTIONS TO THE
COMPETITION COMMISSION OF INDIA REGARDING
PROPOSED AMENDMENTS TO THE COMPETITION REGULATIONS**

1. INTRODUCTION

- 1.1 On 25 November 2019, the Competition Commission of India (“CCI”) released a draft of proposed amendments to The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations), 2011 (“Combination Regulations”). In particular, the amendments provide a dispensation that would facilitate takeover bids and open market purchases of shares of publicly traded companies by allowing the CCI review process to be completed after, rather than before, such transactions are undertaken.
- 1.2 The following comments to this draft have been prepared by the Merger Working Group (“MWG”) of the Antitrust Section (“Section”) of the International Bar Association (“IBA”) to assist the CCI with its task.
- 1.3 The IBA is the world's leading international organisation of legal practitioners, bar associations and law societies. The IBA influences the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of more than 80,000 individual lawyers from across the world, including India, and it has considerable expertise in providing assistance to the global legal community.
- 1.4 The IBA’s Antitrust Section includes competition law practitioners with a wide range of jurisdictional backgrounds and professional experience. Such varied experience places it in a unique position to provide a comparative analysis for the development of competition laws.
- 1.5 The MWG has previously made submissions to the Ministry of Corporate Affairs and the CCI on eight separate occasions: (a) in February 2007, the MWG highlighted the concerns surrounding the Competition Amendment Bill, 2006, (b) in March 2008, the MWG provided comments and suggestions on the draft Competition Commission of India (Combination) Regulations, (c) in August 2013, the MWG provided comments on the Competition (Amendment) Bill, 2012, (d) in December 2014, the MWG submitted its comments and suggestions on trigger events for merger notification in India, (e) in April 2015, the MWG submitted comments on amendments to the Competition Commission of India (procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (“Combination Regulations”), (f) in February 2016, the MWG submitted comments on the *De Minimis* exemption in the Indian merger control regime; (g) in August 2018, the MWG submitted comments in relation to the proposed amendments to the Combination Regulations; and (h) in December 2018, the MWG submitted comments to the Competition Law Review Committee.
- 1.6 In the past, the Ministry of Corporate Affairs and the CCI have taken into consideration the MWG’s inputs, and we hope this submission will also prove useful to the CCI in accomplishing the task with which it has been entrusted.

2. SPECIAL DISPENSATION IN CASE OF PURCHASE OF SHARES PURSUANT TO A PUBLIC BID OR ON A STOCK EXCHANGE AND SUGGESTED MECHANISMS TO DO SO

- 2.1. The amendment aims to enhance ease of doing business in India and is a welcome move to align the Combination Regulations with the global best practices in merger control. It will enable purchases of shares pursuant to a public bid or through an open market acquisition of shares listed on a stock exchange (collectively, “Market Acquisitions”) to be put forward, where the CCI’s review process would otherwise make it unfeasible for an entity to secure clearance beforehand.

Position in India

- 2.2. Acquisitions (of control, shares, voting rights or assets), mergers, and amalgamations which meet the specified jurisdictional thresholds require prior approval from the CCI and are referred to as “combinations” under the *Competition Act, 2002* (as amended) (“Act”). All combinations need to be notified to the CCI for its approval unless otherwise exempted.
- 2.3. The Act is strictly suspensory in nature and, at present, does not permit entities to acquire any shares through any mechanism/platform pending clearance of a combination notified to the CCI. Any such acquisition during the standstill period may amount to “giving effect” to the combination and runs the risk of gun-jumping.
- 2.4. The current regime does not create any exceptions or offer any relaxation to this rule. The existing regime therefore makes it challenging for an entity to purchase shares through a Market Acquisition, if the transaction constitutes a combination, without securing the CCI’s prior approval. Obtaining approval of the CCI prior to the announcement of a Market Acquisition can be problematic, given that a disclosure of such intention could “spike up” the share price of the target entity. Unsolicited (sometimes referred to as “hostile”) bids are also difficult to undertake, where time is of the essence and the window of opportunity to undertake such transaction may not last long enough to secure approval of the CCI. These types of transactions can play an important role in enhancing the competitiveness of companies through the ability of owners to replace an underperforming management.
- 2.5. After a few cases where penalties were imposed on the parties by the CCI for consummating Market Acquisitions, the CCI has recognized the practical and commercial difficulties in having a blanket embargo on Market Acquisitions prior to the receipt of CCI approval. Accordingly, to address the special circumstances relating to Market Acquisitions, the CCI has proposed an amendment to the Combination Regulations to allow parties to a combination to purchase shares in the foregoing scenarios even before the CCI grants approval. The special dispensation is, however, subject to the acquirer (a) notifying the combination to the CCI under Regulations 5 or 5A of the Combination Regulations without delay; and (b) not exercising any rights attached to the shares and/or influencing the target entity in any manner (“Proposal”).¹

¹ The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Third Amendment Regulations, 2019, available at: https://www.cci.gov.in/sites/default/files/whats_newdocument/Combination-Regulation-Market-Purchases-For-Public-Comments.pdf (last accessed on 2 December 2019).

- 2.6. The Proposal clarifies that if these two conditions are satisfied, the Market Acquisition would not amount to giving effect to the combination. Such a Market Acquisition would thus not amount to gun-jumping. This change would reverse the position taken in previous cases. For example, in *Deepak Fertilizers*,² the CCI held:

...decision to keep the acquired shares in an escrow account maintained with the escrow agent and to not exercise any beneficial interest, including voting rights, with respect to the Second Acquisition was that of the Acquirers and not due to any statutory requirement in this regard. Further, the Act and Combination Regulations do not exempt a situation wherein a buyer acquires shares but decides not to exercise legal/beneficial rights in them, from the purview of the provisions of the Act in general, and Section 43A of the Act, in particular. Therefore, the Acquirers' contention that the Second Acquisition was not consummated, as the shares were kept in an escrow account and they were not entitled to exercise any legal or beneficial rights over them till approvals of regulatory bodies are obtained, is not tenable under the law.

(emphasis added)

International best practices and position in certain foreign jurisdictions

- 2.7. Many merger control regimes have some type of mechanism to facilitate Market Acquisitions being put forward and are reviewed in a manner that recognizes the time-sensitivity of these transactions. For example:

2.7.1 In the European Union (“EU”), Article 7 of the European Union Merger Regulation (“EUMR”) provides for the suspension of transactions notified to the European Commission (“EC”). Article 7(2) of the EUMR provides an exception to the standstill obligation by allowing implementation of a public bid or of a series of transactions in securities, including those convertible to other securities admitted to trading on a market such as a stock exchange, provided (a) the transaction is notified to the EC without delay, and (b) the acquirer does not exercise voting rights attached to the relevant securities or does so only to maintain the full value of its investments based on a derogation granted by the EC.

2.7.2 German merger control rules follow a similar approach, which allows the German Federal Cartel Office (“FCO”) to grant a waiver from the obligation to suspend the closing of the transaction before clearance is obtained. Further, in cases of acquisition of shares pursuant to a public bid or on a stock exchange, the merger rules allow the acquirer to exercise the voting rights to the extent it is to preserve the full value of the investment and based on an exemption granted by the authority.³

2.7.3 In Brazil, Internal Regulation of the Administrative Council for Economic Defense (“CADE”) establishes that public offers for securities may be notified as from the time of their publication and are not subject to CADE’s prior approval (Article 107), but the exercise of the voting rights attached to the purchased interest by means of the public

² https://www.cci.gov.in/sites/default/files/C-2014-05-%20175-43A_0.pdf.

³ See Section 41 “Prohibition to Implement, Divestiture” of the Act against Restraints of Competition, available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/GWB.pdf?__blob=publicationFile&v=3 (last accessed on 12 December 2019)

offer is forbidden until final clearance (Article 107, paragraph 1). The acquirer may also request a derogation from CADE to exercise the voting rights attached to the acquired shares, if strictly necessary to protect the investment value (Article 107, paragraph 2), but authorization is discretionary to the authorities. Transactions carried out on the stock markets are subject to this same rule (Article 108). Similarly, Article 11, paragraph 2, of CADE's Resolution No. 2/2012 (as amended by CADE's Resolution No. 9/2014) provides that public offers for securities convertible into shares are not subject to CADE's prior approval, but the voting rights attached to the purchased interest is prohibited until final clearance.

- 2.7.4 In the United States of America ("US"), the Federal Trade Commission ("FTC") has the power to exempt certain transactions that are not likely to violate antitrust laws from the requirement of mandatory filing under Section 7A of the *Clayton Antitrust Act*. For example, if the acquirer does not have a board seat on the target and, among other things, will hold 10% or less of its voting securities following the share acquisition, does not hold at least 10% of the voting shares (or have the right to appoint a director) of a competitor to the target, and has the subjective intent to be a passive investor and not influence management of the target, it could qualify for the "solely for the purpose of investment" exemption.⁴ Further, for cash tender offers that are subject to notification, the initial no-close waiting period is reduced to 15 days instead of the usual 30 days. The FTC may also grant early termination of the waiting period and allow the parties to consummate the transaction.⁵

Suggestions/Recommendations

- 2.8. The MWG believes that the Proposal is a welcome step and will facilitate Market Acquisitions where time is of the essence.
- 2.9. The MWG considers that certain clarifications on investment protection rights would further boost this objective. An acquirer may consider it necessary or prudent to take steps to protect the value of its investment during the interim period when the Market Acquisition has been made but CCI clearance is pending (i.e. before the acquirer is allowed to exercise voting rights under the proposed amendments). Actions by the target to dilute the value of the investment during the standstill period would be problematic for a purchaser, and the ability of a target to do so without restriction may discourage the acquirer from investing at all.
- 2.10. The Proposal does not address if and how the purchaser could restrict the target from acting in detriment to the value of the investment. It would be helpful for the CCI to clarify that the acquirer can put reasonable conditions on the target while making Market Acquisitions, to protect the value of its investment, without engaging in activity that would contravene the no-influence restriction. These types of restrictions normally do not undermine the value or the competitiveness of the target, while providing legitimate protection to the investor. This could be

⁴ Similarly, if the acquirer's percentage of the target's outstanding voting securities would not increase at all as a result of the acquisition, another exemption would apply. Also, if the target holds HSR exempt assets, the acquirer would not have to report its acquisition of voting securities of the target if the fair market value of any non-exempt assets held directly or indirectly by the target (as determined by the board of directors (or its delegee) of the ultimate parent entity of the acquiring person within 60 days of the closing) is less than the relevant threshold. Finally, if the investor is acquiring shares that do not have present rights to vote for directors (even if they are convertible into shares that do have such rights), an HSR filing is not required unless and until such shares are converted (and assuming threshold tests would be satisfied at that time and no exemption would apply). See the Exemption Rules of the *Rules, Regulations, Statements and Interpretations Under the Hart-Scott-Rodino Antitrust Improvement Act of 1976*.

⁵ See *Clayton Act § 7A (Hart-Scott-Rodino Antitrust Improvements Act of 1976)* 15 U.S. Code § 18a (b)(2)

accomplished by adding a proviso in the Proposal that “an acquirer may exercise voting rights only to maintain the full value of its investments”.

- 2.11. If the CCI considers it important to be aware of such steps, it could require notification be made by the acquirer to the CCI regarding any such restrictions. Alternatively, it could develop a derogation process similar to EUMR Article 7(2), which allows the acquirer to exercise voting rights “only to maintain the full value of its investments based on a derogation granted by the Commission” and the similar mechanisms used in countries, such as Germany and Brazil.

- 2.12. The MWG also believes that the CCI should be able to grant derogations from standstill obligations and allow parties to fully or partially implement a combination in advance of final CCI approval in appropriate cases of urgency.⁶ Derogations may be warranted where the target is in an immediate need of financial liquidity or undergoing insolvency or seeking to avoid bankruptcy. For example, in the EU, derogations have been allowed in situations where early implementation would allow the target to be taken over as a going concern and avoid an impending insolvency⁷ or where speedy clearances were needed in the aftermath of the financial crisis in 2008. Similar derogation provisions exist in many EU countries as well as Brazil.⁸

- 2.13. Providing the CCI with a discretionary power to allow derogations in suitable cases after balancing the interests of the target or any other party and any anticompetitive harm by imposing reasonable conditions will potentially further ease the conduct of business, consistent with the objectives stated in the Competition Law Review Committee Report.⁹

- 2.14. It is not explicit from the Proposal whether the consideration can be paid simultaneously while acquiring shares, whether it has to be deposited in an escrow account, or whether it can be paid only after the CCI approves the transaction. The MWG expects that upfront payment of consideration in a Market Acquisition will generally be unlikely to raise concerns of control or undue influence. Accordingly, it recommends that the CCI confirm in the Proposal that the consideration can be paid upfront without having to await CCI approval of the transaction.

- 2.15. Given the significance of the Proposal for easing business, the MWG encourages the CCI to consider amendments to the Proposal and/or publish guidelines or rules, or examples be provided to avoid the ambiguities pointed out above and ensure effective implementation of the Proposal.



⁶ See Article 7(3) of the EUMR.
⁷ EC Decision Case M.8633 – Lufthansa/Certain Air Berlin Assets, 27.10.2017; Case T-1/18, Official Journal, 18.2.2018.
⁸ For example, France, Lithuania, Germany, Portugal, and Romania.
⁹ Section 7 of Chapter 7, Report of the Competition Law Review Committee, July 2019, available at: http://www.mca.gov.in/Ministry/pdf/ReportCLRC_14082019.pdf (last accessed 14 December 2019)