

Competition Law Hotline

September 10, 2019

CCI'S GREEN CHANNEL AMENDMENTS- ONE STEP FORWARD AND TWO STEPS BACK

- Green Channel route for merger notification introduced to enable the possibility of deemed approval in case there are no overlaps.
- Significant changes to Form I notification making the disclosures more onerous and analysis more detailed.

INTRODUCTION

In furtherance of the Government of India's ease of doing business initiatives, the Competition Commission of India ("Commission") introduced certain important amendments to its merger control regulations, i.e., the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ("Combination Regulations") on August 13, 2019 (2019 Amendment Regulations) with effect from August 15, 2019. These 2019 Amendment Regulations are the first to be notified amongst the slew of amendments proposed by the Competition Law Review Committee in their report submitted to the Union Minister of Finance and Corporate Affairs, Smt. Nirmala Sitharaman last Tuesday.

It is interesting to note that the Combination Regulations came into force on June 01, 2011 and in the eight years of its existence the Combination Regulations have already been amended six times and the 2019 Amendment Regulations are the seventh set of amendments to the Combination Regulations. The 2019 Amendment Regulations have introduced a mechanism for speedier approval of combinations by way of a 'Green Channel'. They have also made certain changes to the short form merger notification or Form I in order to enable deeper scrutiny and assessment of the combination by the Commission.

We have analysed the key changes below:

CHANGES AND ANALYSIS:

A. Green Channel:

The general structure of the provisions of the Competition Act, 2002 ("Competition Act") dealing with merger control require that the approval of the CCI be obtained prior to the consummation of the underlying notifiable transaction. The 2019 Amendment Regulations provide for a mechanism whereby parties that meet the criteria described below need not wait for the approval of the Commission to consummate a notifiable transaction. Once the acknowledgment of a Form I is filed under this Green Channel route and has been received by the parties, the transaction will be deemed approved and parties will be able to consummate the transaction immediately.

To avail of the benefit of the Green Channel route, the qualifying criteria is that the parties to the combination, their group entities and each of their, direct or indirect investee entities (even an investment of a single share in a company shall make such company an investee entity) should: (i) not produce/provide similar or identical or substitutable product or service or; (ii) not engage in any activity relating to production, supply, distribution, storage, sale and service or trade in product or service which are at different stage or level of production chain or; (iii) not engage in any activity relating to production, supply distribution, storage, sale and service or trade in product or service which are complementary to each other.

This analysis will also have to be undertaken while considering all plausible alternative market definitions. The acquirer would also be required to make a positive declaration confirming that the combination falls under the Green Channel (meaning there are no overlaps at any level as discussed above). If it is found that either such declaration or any other statement made by it in the Form I is found to be incorrect then the Form I and deemed approval of the Commission shall both be void ab initio. The parties will have an opportunity to be heard though before the commission renders the approval void ab initio.

Analysis:

Since 2011 till date the Commission has cleared a total of 666 cases.¹ Last year on an average it took 23 days to grant an approval to a combination.² While this speed of assessment maybe impressive, more often than not, parties to a combination have found themselves in situations where due to commercial or other regulatory reasons they needed to consummate a transaction at the earliest. In such cases, the only recourse available with the parties was to approach the Commission and request them to expedite the approval process. Therefore there is a desperate need for a 'Green Channel'. The 2019 Amendment Regulations appear to have been issued to address this concern. However, while the initiative is laudable, the devil lies in the details of the Green Channel to see whether they achieve the objective.

Our concerns are three-fold:

(i) Difficulty in meeting the qualifying criteria

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The qualifying criteria under the 2019 Amendment Regulations hinge on the acquirer, its group and their investee companies not conducting (a) businesses akin to that of the target company, its group and their investee companies or (b) businesses that are at a different stage or level of production chain to the business of the target company, its group and their investee companies and (c) businesses that are complementary to the business of target company, its group and their investee companies

The concern lies in testing these criteria against (i) the acquirer (ii) its group and (iii) investee companies of the acquirer and the acquirer's group (including those investee companies in which the acquirer or its group members hold a single share). While this may not be difficult for a contained group of companies, this does pose a problem for financial investors and funds whose business it is to invest.

Large global investors and large MNCs will have to trace the investee entities of their entire group and undertake an analysis of their activities of such investee entities as well. Practically, the entire process will be very time consuming and cumbersome which may defeat the purpose of the initiative itself. Large global investors would much rather make a notification and wait for the approval as it may take the same amount of time to undertake a conclusive analysis. This way they will also avoid the risk of the approval of the Commission becoming void ab initio due to any incorrect information, statement or error in assessment.

(ii) Absence of clear objective criteria and some inconsistencies

Acquirers will choose to use the Green Channel only if there is absolute clarity on what is expected of the acquirer when making this filing. However, the 2019 Amendment Regulations do not provide that clarity. Usage of undefined terms is one such example. The use of the term 'complementary' is seemingly vague as neither the Competition Act nor the Combination Regulations provides any objective criteria or guidance on what constitutes 'complementary'. Without any objective criteria, it will be left to lawyers and parties to determine by some yardstick whether a business is complementary to another business or not all while assuming the risk of gun jumping. Preliminary research suggests that activities such as operation of a book store and a coffee shop; manufacturing of gaming consoles and games; electronics and accessories, etc. are examples of complementary businesses/goods.³

In evaluating the Green Channel, the acquirer must also consider all plausible alternative market definitions. It seems that the inclusion of the word 'alternate' is deliberate. However there is no clarity as to what this specific term means. The definition of "relevant market" under the Competition Act in any event requires the parties to consider all the products which are considered substitutable or interchangeable hence the addition of the word 'alternative' is not entirely clear at the moment. Relevant market comprises of two components (i) relevant product market and (ii) relevant geographical market. It is against these two criteria that the assessment of '*appreciable adverse effect of competition*' is conducted for each notifiable transaction. So far, the relevant geographical has been limited to either India or jurisdiction within India. It is unlikely that the use of the words 'alternate' would want to expand on this definition. However, clarity on this aspect would be appreciated.

Assuming (keeping in mind previous jurisprudence), the 'alternate market' must be confined to the territory of India, it is also not entirely clear as to what will happen if a large foreign conglomerate acquires an equally large Indian competitor in its maiden foray in India. As per the qualifying criteria for the Green Channel route, if the large foreign conglomerate has no overlaps in India with the large Indian competitor, then the Green Channel route could be used for this acquisition. This would be counterintuitive as an entry of a global conglomerate would most likely impact competition in the market and should therefore be assessed before assuming an approval.

(iii) Onerous penalty provisions

If the Commission (after giving due opportunity to the parties to be heard) finds that the combination filed under the Green Channel route does not qualify under the eligibility criteria as laid out in Schedule III of the 2019 Amendment Regulations or if the declaration accompanying the Form I for Green Channel is incorrect, then the Form I filed and the deemed approval would be void ab initio. This means that the parties would need to refile the notification and if they have consummated the transaction in the meantime, will be guilty of "gun-jumping". However, There is no time period within which the Commission needs to make this assessment While the 2019 Amendment Regulations are silent on the consequences, Section 44 of the Competition Act provides that in case any party to a combination makes a false statement or omits to include anything material, then such person shall be liable to a penalty of a minimum of INR 5,000,0000 (Indian Rupees Five million). This will act as a deterrent to acquirers wanting to pursue this route.

Given this background, acquirers may be wary of approaching the Green Channel filing route.

Regardless of the above, if the parties to a combination wish to file the Form I under the Green Channel route, parties may opt to seek a pre filing consultation with the Commission to clear ambiguities prior to the filing. This has also been advised by the Commission in their press note under which the 2019 Amendment Regulations were introduced.⁴ However, it needs to be noted that such pre filing consultation is not binding on the Commission.⁵

B. CHANGES TO FORM I:

The 2019 Amendment Regulations have also made certain changes to and expanded the scope of Form I, All notifiable transactions must be notified to the Commission in either Form I or Form II. Form I is the defacto form and is typically referred to as the short form notification. Form II is the long form notification which must be filed where parties to the transaction collectively have high market shares in overlapping markets (i.e., >15% for horizontal overlap and > 25% for vertical overlap).

Please see the key changes and the implications/analysis below:

Sr. No.Change

Implications/Analysis

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| 1. Information previously only required of the parties, also required of the group and any investee company | Under this requirement, an analysis of the activities of parties, their group entities and the direct or indirect investee entities of their group entities will have to be undertaken and once a horizontal, vertical or complementary overlap has been identified then all plausible relevant market definitions for the horizontal, |
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upstream, downstream and complementary markets along with explanations for rejecting any plausible alternative definition of the relevant product and relevant geographic market will have to be provided in the Form I. The market data (market size and market shares) will also have to be provided for each of the plausible alternative relevant markets and that too for the last three years as against one previously.

Previously the analysis was limited to the acquirer and its group. The Group would typically include persons controlled by the acquirer. The new Form now requires the parties to consider indirect investments as well. This would mean that the parties and their groups will be required to undertake an analysis of the businesses of their indirect investments as well to check if there is any overlap for the purposes of the Green Channel or the new questions under the amended Form I.

This is a new requirement and will make the process cumbersome especially for large global investors who have private and public arms as the relevant market and overlap analysis explained above will have to be undertaken for each entity in which the investor entity, the target and their respective group entities hold even a single share.

In this regard, it is also pertinent to note that there is an ambiguity surrounding the word 'complementary' and to that extent there may be errors in analysis if each activity undertaken by the parties and their group entities is not considered carefully.

2. Removal of the requirement of Summary under Regulation 13(1B) of the Combination Regulations and change in the format of the summary under Regulation 13(1A) of the Combination Regulations. Previously, the parties were required to submit two summaries of the combination- one of 500 words and the other of 2000 words. The 2019 Amendment Regulations have removed the requirement of a 500 word summary under Regulation 13(1B). Simultaneously, it has changed the format of the summary mentioned in Regulation 13(1A) and limited it to 1000 words.
3. Removal of the effects on the combination on competition. Previously, under the Regulation 13(1A) summary, the parties were required to provide an analysis of the likely impact of the combination on the state of the competition in the relevant market(s) in which the parties to the combination operate. This would typically be done by way of an appreciable adverse effect of competition analysis based on the factors mentioned under Section 20(4) of the Act. However, the new format the summary under Regulation 13(1A) has removed this requirement.

The Form now has no placeholder for the parties to debate or provide their views on the effects (or lack thereof) on competition that would ensue as a result of the combination. Perhaps it will be incumbent on the Commission now to do such analysis based on the extensive disclosures made by the parties and the factors mentioned under Section 20(4) of the Act.
4. Description of transactions that are inter-connected to be added in the Form I. This requirement has been roped in from Form II.

Under this requirement, the parties to a combination will now have to undertake an analysis of all the limbs of the transaction involving themselves or other acquirers or parties, as the case may be. It will be incumbent on the parties to undertake this analysis for the entire transaction so that they don't provide any incorrect information in the Form I. While the law always required inter-connected transactions to be disclosed to the CCI, there was no placeholder in the form I under which in this could be disclosed. It is pertinent to note here that the term 'interconnected' has not been defined in the Act or the Regulations. Clarity in this regard will be appreciated.
5. Rights acquired by the Parties or others under the inter-connected transactions to be disclosed in the Form I. This requirement has also been roped in from Form II.

Under this requirement, the Parties will have to disclose all the rights acquired by them under the transaction explicitly in the Form I. Details of the rights of other parties or acquirers under inter-connected transactions will also have to be provided by the filing parties

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| <p>6. Details of the amount of Foreign investment as a result of the combination (FDI, FPI, etc., if any, in INR) and country(ies) of origin</p> | <p>This requirement has also been roped in from Form II. The Parties will have to disclose the amount of foreign investment brought in as a result of the combination including the inter-connected transactions.</p> |
| . | |
| <p>7. Disclosure of the details of any proceedings before the Commission under or pursuant to any provision of the Act or before other competition authority(ies), during the last five years.</p> | <p>This requirement has also been roped in from Form II.</p> |

SHORTCOMINGS/RECOMMENDATIONS:

1. While the Green Channel route is a step in the right direction, it suffers from several shortcomings as described above. While under the Green Channel route the approval is rather instantaneous, there may be few takers given the onerous criteria required to be fulfilled to qualify to make this filing and the onerous penalties should there be an inadvertent error. A real and effective Green Channel would have been one which granted this benefit to standard form combinations (for example: Private equity investors that have limited rights) where the Commission, based on its past knowledge of transactions is of the opinion that these are not likely to cause appreciable adverse effect on competition.
2. While several Form II questions have been incorporated in the Form I through the 2019 Amendment Regulations, it would have helped if certain percentage thresholds were used for disclosing overlaps or undertaking relevant market analysis. It could also be restricted to non-controlling investments as control for the purposes of Commission is an all-encompassing definition and includes even negative control as per the decisional practice of the Commission. It needs to be noted that Form I is the preferred notification for transactions involving low market shares in overlapping markets (i.e., □15% for horizontal overlap and □25% for vertical overlap) .Therefore it would have made more sense to move towards a simpler regime for such combinations rather than borrowing Form II questions to make the filing for such combinations more cumbersome.
3. We are hoping that a lot of the concerns pointed out here will be taken care of by the Commission in the Notes to the amended Form I and the guidance note on the Green Channel, which we understand the Commission is likely to release.

CONCLUSION

In the last three years significant changes have taken place in the Indian merger control regime to enable ease of doing business in India- most notably removal of the 30 days deadline for the merger notification (*our hotline here*), extension and modification of the SME exemption (*our hotline here*) etc. The 2019 Amendment Regulations also seem to be in furtherance of the Government's intent to ensure ease of doing business in India. With the right tweaks perhaps this will be a useful route.

– Vinay Shukla & Simone Reis

You can direct your queries or comments to the authors

¹ https://www.cci.gov.in/sites/default/files/press_release/PR82019-20.pdf

² Page No 32, CCI's Annual Report 2017-2018

³ John Spacey, 11 Examples of Complimentary Goods, available at <https://simplicable.com/new/complementary-goods>

⁴ https://www.cci.gov.in/sites/default/files/press_release/PR82019-20.pdf

⁵ https://www.cci.gov.in/sites/default/files/cci_pdf/PFCguidancenote.pdf

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