Timing of Merger Notification: Thumbs Down!

Introduction

Timely consummation of global M&A transactions is of critical essence and, to this end, securing the necessary approvals (if needed) in due time and with no or less risks is critical to a successful closing. Under the competition regime in India, any person or enterprise, who or which proposes to enter into a *combination*[1] is obligated to notify the regulator, Competition Commission of India (**"CCI"**) and disclose its details "within thirty days of execution of any agreement or other document" for an acquisition. Failure to notify within the statutory time empowers the CCI to impose penalties under Section 43A of the Competition Act, 2002 (**"Act"**). The timing for the filing has been debated enormously in various circles, both business and legal. The clear understanding has been that the trigger event for filing is the "date of the binding agreement to acquire." This would give the parties 30 days to file. In a recent case of Tesco, by imposing a hefty fine for delayed filing the CCI has sent out a different signal. It seems to have changed the dynamics. This newsletter discusses the impact of the Tesco case and whether it means, going forward, the trigger point(s) are going to be different for potential acquirers.

1. Facts

On March 31, 2014, Tesco Overseas Investments Limited (**"Acquirer"**), a subsidiary of Tesco PLC, filed a notice with the CCI for acquiring 50% of the paid-up equity share capital of Trent Hypermarket Limited (**"Trent"**), an Indian corporation engaged in multi-format retail trading including hypermarkets, supermarkets and smaller convenience stores for various merchandise including food and grocery. Trent operates through 16 retail stores at various locations across India. The Acquirer filed the notice pursuant to the execution of a JV and a share purchase agreement on March 21, 2014 with Trent and Trent Ltd. While analyzing the case and the likelihood of an adverse impact on competition, CCI relied upon an Indian retail industry report prepared by Indian Brand Equity Foundation which estimated the retail market (organized and unorganized) to be around US$ 450-500 billion in 2012, with only insignificant 8% share of organized retail and the balance 92% controlled by unorganized retail. Seeing the penetration through 16 outlets of Trent and absence of Acquirer's presence from Indian retail business, CCI came to a considered conclusion that there were no horizontal overlaps between their respective business activities in the Indian retail market. As a result, CCI felt that the proposed combination was <u>not</u> likely to have any appreciable adverse effect on competition in India and approved it under section 31(1) of the Act.

[1] A combination is defined as any acquisition or merger/amalgamations which cross prescribed financial thresholds.

2. 30 days or earlier

While ruling favorably on the substantive part, the CCI considered the timing of the notification. Pursuant to section 6(2) of the Act, the Acquirer ought to have issued the notice within 30 days from the date of execution of *any agreement or other document for acquisition*. While the statute is clear, CCI also considered regulation 5(8) of the Competition Commission of India (Procedure in regard to the Transaction of Business relating to Combinations) Regulations, 2011 ("**Combination Regulations**") which explains the nature of documents that would qualify as *other* document and is reproduced below:

> "The reference to the *other document* in clause (b) of sub-section (2) of section 6 of the Act shall mean any binding document, by whatever name called, conveying an agreement or decision to acquire control, shares, voting rights or assets:
>
> Provided that if the acquisition is without the consent of the enterprise being acquired, any document executed by the acquiring enterprise, by whatever name called, conveying a decision to acquire control, shares or voting rights shall be the 'other document'
>
> Provided further that where such a document has not been executed **but the intention to acquire is communicated to the Central Government or State Government or a Statutory Authority,** the date of such communication shall be deemed to be the date of execution of the other document for acquisition."

In this context, CCI considered that Tesco had submitted an application on December 17, 2013 to Department of Industrial Policy and Promotion (**"DIPP"**) and Foreign Investment and Promotion Board (**"FIPB"**) for the acquisition of 50% of the issued and paid-up equity share capital of Trent. It took a view that the Acquirer should have approached the CCI within 30 days of filing the application with a government body communicating its intention to acquire i.e., by January 16, 2014. Instead, the application was submitted on March 31, 2014 with a delay of 73 days. Accordingly, on April 4, 2014 CCI served a notice on the Acquirer to clarify as to why the notice was not issued within the prescribed 30 days. While the CCI elected to admit the belated notice, it chose to do so without prejudice to the potential penal action under section 43A of the Act and decided to initiate separate proceedings.[2]

3. Acquirer's contentions and CCI's view

The Acquirer relied upon the second proviso of regulation 5(8) which specifies that the communication conveys an intention or decision to acquire control, shares, voting rights or assets. It took a stand that, according to its analysis, submitting a proposal to DIPP and FIPB did not constitute a communication of its intent to acquire the shares as the respective boards of the two companies had only given an "in-principle" approval to submit the application and not a final approval to go ahead and the execution of definitive agreements was only authorized on March 21, 2014. As a result, it **(a)** did **not** communicate its intention of acquiring shares of Trent, **(b)** no communication was sent to the central or state government(s) or any statutory

[2] These proceedings were launched under Regulation 48 of Competition Commission of India (General) Regulations, 2009, which prescribe the procedure regarding imposition of penalty.

authority conveying its intention to acquire control, shares, voting rights or assets, **(c)** commercial details were frozen only after it received the FIPB approval. Relying upon an earlier judgment of the CCI, it stated that the application submitted to the DIPP and FIPB constituted an interim arrangement and a step towards negotiations which did not trigger the filing requirement. Furthermore, it did not have the complete factual information required for the form and, as a consequence, it could only approach the CCI when the definitive agreement(s) were signed else the filing would be untimely.

Based on the clarifications and materials provided, CCI took the following stand:

- It relied on the Acquirer's board resolution of December 3, 2013 which referred to the Acquirer's discussions to subscribe and acquire equity shares from Trent for the purpose of undertaking multi-brand retail trading business in India;
- It also relied on Trent's board resolution of December 17, 2013, from which it was evident that Trent had agreed to the Acquirer's proposal of acquiring 50% of its issued and paid up equity share capital;
- It also felt that the Acquirer had provided sufficient details about the proposed combination in its application to DIPP and FIBP and both parties were fully cognizant of the type, nature and purpose of the proposed combination at the time of making the said application.

Therefore, the Acquirer's claim that no intention or decision to acquire the shares was formed at the time of making application to DIPP and FIPB was baseless and incorrect. Accordingly, it imposed a fine of INR 30 million (about $500,000) which is the highest sum it has done so far. The maximum permissible pecuniary penalty prescribed under section 43A of the Act is 1% of the transaction value which, if imposed, would amount to INR 6 billion (about $100 million). However, CCI took somewhat of a lenient view due to the subsequent "voluntary filing" despite the 73 days delay, imposed a "nominal" penalty of INR 30 million. A time period of 60 days was given to pay this sum.

The Implications

This ruling evidences an extremely strict approach of the regulator in its interpretation of regulation 5(8) of the Combination Regulations and, in our opinion, instead of clarifying, does cause confusion regarding the timing of a merger control filing. Until this order, the unambiguous position for the trigger and consequential filing has been 30 calendar days from the "date of the binding agreement to acquire." Now, CCI has effectively held that submission of an application for any government approval tantamounts to an **expression of intent to acquire** which is the trigger and, therefore, the filing must be done within 30 days of such application and not execution of a definitive agreement. This means that where the transaction requires any other regulatory clearance other than from CCI (like the DIPP and FIPB in this case), that will constitute the trigger for a CCI filing. There is no clarity as to what will happen if the other regulator fails to give the necessary transaction approval and CCI approves the transaction. Needless to say, this outcome will enhance the costs of the acquisition as the fees of filing of the two forms, I and II, are INR 1 million (about $16,000) and INR 4 million (about $ 66,000) respectively. Form II is a more detailed form and even if it is not required, at the very least, the fees of Form I will have to be paid, apart from fees to counsels. Furthermore, parties in discussions will need to exercise extreme caution in the timing of passing their respective Board resolutions as in the present case CCI examined the contents of their internal approvals and relied on them to draw a distinction in this matter with others.

The subjectivity on the timing created by this case is not at all in sync with the growing need of India to bring its competition enforcement at par with the rest of the world. There should be no ambiguity on the filing timing for a qualifying transaction which is the case in most non-Indian jurisdictions. However, with this judgment the usually pragmatic CCI has sent out a mixed signal to the business (domestic and foreign) and has indeed changed the parameters for combination filings. We hope that in times to come the regulator will pay heed to the practical difficulties faced by the industry and clear the muddy waters.

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