Competition Law Hotline

September 08, 2012

TRIGGERING THE COMBINATION REGULATIONS

The Competition Commission of India ("**CCI**") vide its order dated August 14, 2012 ("**Order**") held that the notice filed by Aditya Birla Nuvo and Pantaloon Retail notifying the CCI about the proposed acquisition under Section 6(2)[1] of the Competition Act, 2002 ("**Act**") was invalid in terms of Regulation 14[2] read with Regulation 5[3] of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ("**Combination Regulations**").

FACTS

Parties to the proposed transaction:

- Aditya Birla Nuvo Limited ("**ABNL**"),
- Peter England Fashions and Retail Limited ("**PEFRL**"),
- Indigold Trade and Services Limited ("**ITSL**"),
- Pantaloon Retail (India) Limited ("**PRIL**") and
- Future Value Fashion Retail Limited ("**FVFRL**")

All the parties together filed a notice under Section 6(2) of the Act with the CCI with details about the proposed combination to be entered into between the parties above ("**Notice**") pursuant to Memorandum of Understanding ("**MOU**") executed on June 14, 2012.

The Notice stated that ABNL, through its wholly owned subsidiary PEFRL proposed to acquire the Pantaloons format business of PRIL by way of a demerger on a going concern basis; and merger of FVFRL into PEFRL, pursuant to a scheme of demerger and merger under Sections 391-394 of the Companies Act, 1956 ("**Scheme of Arrangement**"), for which the parties have signed the said MOU.

The MOU also contemplated a series of other transactions to be consummated alongside the Scheme of Arrangement namely: (i) ITSL and/or its affiliates may make a voluntary open offer in accordance with the Securities and Exchange Board of India ("**SEBI**") (Substantial Acquisition of Shares and Takeovers) Regulations 2011 ("**Takeover Code**") and acquire further shares of another entity if required; (ii) A wholly owned subsidiary of ABNL would invest an amount of INR 800 crores in PRIL by way of optionally fully convertible debentures ("**OFCD**") convertible into approximately 13.15% of the equity share capital of PRIL, unless such OFCDs are cancelled upon completion of demerger or redeemed earlier.

At the time of the filing of the Notice the scheme was still under finalization and was yet to be approved by the Board of Directors of the parties and that negotiations were currently underway. The share entitlement ratio, the valuation reports and fairness opinion were also all under preparation.

KEY ISSUE

Whether the Notice filed by the entities before the CCI were in compliance with the requirements of Section 6 (2) of the Act and Regulation 31 of the Combination Regulations.

SUBMISSIONS BY THE PARTIES

The parties vide their responses submitted that their duty/obligation to notify the CCI was triggered upon signing of the MOU and the subscription and investor rights agreement, although there were several inter-connected steps and individual transactions to be completed pursuant to the signing of the MOU. The parties submitted that since signing of the MOU was the first step towards the proposed combination, a detailed and composite notice was filed with CCI within the 30 day time period prescribed in the Act and the Regulations.

ORDER OF THE CCI

CCI rejected the Notice filed by the parties and held that the argument regarding the applicability of Section 6 of the Act being triggered on signing of the MOU could not be accepted as signing of the MOU was only the first step towards negotiations between the parties in relation to the finalization of the scheme, valuation, exact scope of the assets to be acquired, share entitlement ratio and also approval of the same by the Board of Directors of the respective parties.

The CCI was also of the view that the MOU entered into between the parties was an interim arrangement and could not be considered as a binding agreement due to the terms and conditions prescribed therein. Further the same would be terminated upon execution of definitive agreements or failure to get approval from Board of Directors of respective parties or rejection of scheme by the Courts under Sections 391-394 of the Companies Act, 1956. The resolution(s) of the Board of Directors of the parties submitted along with the Notice, did not pertain to the approval of the proposal relating to demerger or merger pursuant to a Court sanctioned scheme under Sections 391-394 of the Companies Act, 1956, as provided under sub-section (2) of Section 6 of the Act.

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In addition to the above, the CCI also observed that the Notice filed by the parties failed to adhere to the guidelines provided in Regulation 31[4] of the Combination Regulations as the same did not contain the final decision of the Board of Directors of the respective parties to the proposal of demerger and merger.

In view of the above, CCI held that Notice filed by the parties was invalid as done prior to triggering of relevant provisions of the Act and in violation of the Regulations.

ANALYSIS

The Act requires the CCI to be notified of a 'combination' in terms of the Section 6(2) thereof prior to its taking effect and within 30 days of, an 'agreement' having been entered into between the parties to combination, in cases of acquisitions and approval of the Board of Directors in cases of mergers or amalgamations. The Act makes a distinction between the trigger events for mergers/amalgamations and acquisitions where combination filings are concerned primarily because mergers and amalgamations in India are governed by the provisions of Sections 391-394 of the Companies Act 1956 and the process for undergoing a merger /amalgamation is structured and statutorily prescribed. The statute does not require for the amalgamating companies to enter into an 'agreement' to kick start the process but typically recognizes a board meeting at which the proposal to merge is accepted by the board for onward recommendation to the shareholders as the starting point of the amalgamation process.

Although the Order passed by the CCI seems to deal only with limited issue of premature filing, it raises pertinent questions and many interesting inferences can be drawn therefrom, as discussed below.

Binding Agreements

MoUs and term sheets that are meant to be interim arrangements may not qualify as 'binding agreements' triggering the combination notification provisions under the Act. The term 'agreement' is broadly defined under the Act to include any formal or informal arrangement whether legally enforceable or not. Although Regulation 31 of the Combination Regulations refers to a 'binding document' to trigger the filing requirements under the Act, given the broad definition of the term 'agreement' under the Act there was no clarity as to what this meant.

Final board approval

The Order as well as the Regulations make reference to a 'final' board approval to trigger combination notifications where mergers and amalgamations are concerned. The Order seems to suggest that 'final' board approval would be the one where the swap ratio, the draft scheme, the valuation and the assets to be transferred amongst other things, are approved by the board. However, the Order does not clarify whether the 30 day time limit begins from the date of the last of the merging companies' boards approving the merger or the first of such merging companies' board of directors approving the merger.

Multi-tier transactions

Regulation 9(4)[5] of the Combination Regulations permits a single notice to be filed in cases where a business transaction is sought to be achieved by way of a series of steps or smaller individual transactions which are inter-connected or inter-dependent on each other. However, what the Order seems to suggest is that each of these steps must at the time of making such filing independently meet the criteria for making the filing. Therefore unless each inter-connected step involving an acquisition is part of a binding agreement and in the case of a merger and amalgamation, has been approved by the Board of Directors of such companies, the single notice with respect to all such steps may be premature.

In conclusion, it may be said that the CCI cannot be approached at an interim stage for seeking an approval for a combination under the Act. Further, a premature filing unnecessarily reveals confidential information before the public at a time where the transaction itself is not ripe and filing fees paid along with the premature filing are also foregone.

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You can direct your queries or comments to the authors

[1] Subject to the provisions contained in sub-section (1), any person or enterprise, who or which proposes to enter into a combination, shall give notice to the Commission, in the form as may be specified, and the fee which may be determined, by regulations, disclosing the details of the proposed combination, within thirty days of-
(a) approval of the proposal relating to merger or amalgamation, referred to in clause (c) of section 5, by the board of directors of the enterprises concerned with such merger or amalgamation, as the case may be;
(b) execution of any agreement or other document for acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of that section.

[2] Regulation 14(1) - The notice filed under regulation 5 or regulation 8 of these regulations shall not be valid and complete unless it is in conformity with these regulations.

[3] Regulation 5(1) - Any enterprise which proposes to enter into a combination shall give notice of such combination to the Commission in accordance with sub-section (2) of section 6 of the Act and these regulations

[4] Regulation 31- The notice referred to in sub-section (2) of section 6 of the Act would be applicable as follows:
(a) for mergers or amalgamations referred to in clause (c) of section 5 of the Act, notice to be filed only in regard to proposals approved by the board of directors on or after the 1st day of June , 2011; and
(b) for acquisitions referred to in clause (a) of section 5 of the Act or acquiring of control referred to in clause (b) of section 5 of the Act, notice need to be filed only, where binding document(s) is executed, on or after the 1st day of June, 2011
Explanation- Approval of board of directors under clause (a) of this regulation refers to the final decision of the board of directors.

[5] Where the ultimate intended effect of a business transaction is achieved by way of a series of steps or smaller individual transactions which are inter-connected or inter-dependent on each other, one or more of which may amount to a combination, a single notice, covering all these transactions, may be filed by the parties to the combination.

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DISCLAIMER

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