

Competition Law Hotline

July 08, 2014

CCI APPROVES COMBINATION, BUT FINES TESCO FOR DELAYED NOTIFICATION

- CCI approves TOIL acquiring 50 per cent. share capital of THL due to absence of horizontal overlaps between the parties.
- Fines TOIL INR 30 million for delay in filing merger notification;
- Holds that trigger for filing a merger notification is the date on which the acquirer expresses its intention to acquire an enterprise to an Indian statutory authority.
- Transacting parties now need to be extra cautious concerning the initiation of the 30 day threshold prescribed by the Indian merger control regime

The Competition Commission of India (“CCI”) in its recent order¹ dated May 22, 2014 in the matter of Tesco Overseas Investment Limited (“TOIL”) and Trent Hypermarket Limited (“THL”) approved the combination under Section 31(1) of the Competition Act, 2002 (“Competition Act”). In the same matter the CCI in its order dated May 27, 2014 levied a penalty of INR 30 million (USD 0.5 million)² on TOIL under Section 43A³ of the Competition Act for its failure to notify the combination within 30 days of the trigger event⁴. On March 31, 2014, TOIL had filed a notice under sub-section (2) of Section 6⁵ of the Competition Act. The notice was given pursuant to the execution of a Share Purchase Agreement (“SPA”) and a Joint Venture Agreement (“JV Agreement”) between TOIL, THL and Trent Limited (“Trent”). The proposed combination (“Proposed Combination”) relates to TOIL’s acquisition of 50 per cent. of the issued and paid-up equity share capital of THL.

BACKGROUND

TOIL is a company incorporated in England and is a subsidiary of Tesco Plc, UK (“Tesco”). Tesco is also incorporated in England and is the parent entity of the Tesco group of companies (“Tesco Group”). TOIL is the holding company for several Tesco Group’s overseas retail businesses in various countries⁶, primarily engaged in the retail trading of grocery and general merchandise through various formats including hypermarkets, supermarkets, convenience stores and franchised stores. However, the Tesco Group was not engaged in retail business in India.

Trent is engaged in the business of retail of ready-made garments and accessories, footwear, cosmetics, gift items and household items in India along with retail operations through its subsidiaries. THL is a wholly owned subsidiary of Trent and is engaged in the business of multi-format retail trading in India including hypermarkets, supermarkets and smaller convenience stores for various merchandise including food and grocery, personal, home care and kitchen products, apparels, consumer durables and general merchandise. THL currently operates through 16 retail stores at various locations in India.

CCI’S ORDER APPROVING THE PROPOSED COMBINATION

In order to ascertain the overall size of the retail market, CCI referred to the Indian retail industry report prepared by the Indian Brand equity Foundation (“IBEF”)⁷. Based on IBEF report, the retail market size in India was estimated to be around USD 450-500 billion in the year 2012 with organized retail sector comprising a miniscule 8% share of the overall retail industry.

CCI also took note of the fact that THL operated only through sixteen (16) of its retail stores across various locations in India and its total revenue for the year 2012-2013 being INR 78.5 billion (USD 130.5 million) only, the CCI observed that it was an insignificant amount considering the overall size of the retail market as well as the organized retail market in India.

CCI further observed that while THL was engaged in the business of multi-format retail trading in India including hypermarkets, supermarkets and smaller convenience stores, TOIL was not present in the retail market in India. Therefore, there were no horizontal overlaps between the business activities of THL and TOIL in the retail market in India.

Keeping the facts on record in mind, the CCI was of the opinion that the Proposed Combination was not likely to have any *appreciable adverse effect on competition* in India and approved it under sub-section (1) of section 31⁸ of the Competition Act.

It is pertinent to note here that this order was issued without any prejudice to the proceeding under Section 43A of the Competition Act.

IMPOSITION OF PENALTY UNDER SECTION 43A

The proceedings under section 43A of the Competition Act are independent of the CCI’s evaluation of the pre-combination filing made by TOIL under Section 6 of the Competition Act.

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Following the CCI's order dated May 22, 2014 which approved the combination, the CCI through an order dated May 27, 2014, imposed a penalty of INR 30 million (USD 0.5 million) on TOIL for not notifying it about the Proposed Combination within 30 days of the trigger event. Interestingly, this has been the highest amount of penalty ever levied on any party by the CCI under Section 43A of the Competition Act.

Although the CCI approved the Proposed Combination stating that it is not likely to cause any *appreciable adverse effect on competition* in India, it observed that TOIL had applied to the Department of Industrial Policy and Promotion ("DIPP") and Foreign Investment Promotion Board ("FIPB") on December 17, 2013 to seek requisite approval with regard to the Proposed Combination. The CCI opined that the merger control provisions in relation to the Proposed Combination are triggered within 30 days of filing such an application with a government body communicating its intention to acquire. Thus, according to CCI, TOIL should have filed merger notification within thirty (30) days of filing such an application i.e. by January 16, 2014 and not within thirty (30) days of execution of the binding documents. Considering that the merger notification was filed on March 31, 2014, the CCI concluded that there was a delay of seventy-three (73) days in filing the merger notification resulting in TOIL to be penalized under Section 43A of the Competition Act.

It is important to note that the CCI noted that the maximum permissible pecuniary penalty prescribed under Section 43A (i.e. 1 per cent. of the transaction value) would amount to INR 6 billion (USD 100 million). However, in light of TOIL's subsequent voluntary filing, CCI took a relatively lenient view and imposed a nominal penalty of INR 30 million (USD 0.5 million).

Further, TOIL specifically relied on the orders of the CCI in the cases of *Aditya Birla Nuvo Limited/ Pantaloon Retail (India) Limited/ Peter England Fashion and Retail Limited*⁹ and *Exide/ING Vyasya Life*¹⁰ in order to substantiate its arguments and prove to the CCI that the application to DIPP and FIPB was merely an interim arrangement and a mere step towards negotiation of the proposed transaction.

However, the CCI rejected the arguments stating that TOIL had given adequate information about the proposed transaction in its application to FIPB and DIPP for it to qualify as a communication of 'intention to acquire'. Thus, the CCI while interpreting Section 6(2) of the Competition Act took note of Regulation 5(8)¹¹ of the Competition Commission (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ("**Combination Regulations**"), and considered the following to be the trigger event in case of an acquisition: (a) execution of any agreement; (b) any binding document, by whatever name called, conveying an agreement or decision to acquire (not being a binding term sheet/memorandum of understanding); or (c) any communication made to the central government or state government or any statutory authority conveying its intention to acquire.

Further, the CCI observed that TOIL's reliance on *Aditya Birla Nuvo Limited/ Pantaloon Retail (India) Limited/ Peter England Fashion and Retail Limited* and *Exide/ING Vyasya Life* was also misplaced. The CCI re-iterated its position taken in the *Exide* case wherein it had held that the date of filing of the application with IRDA for approval of the combination would qualify as the trigger event for the purpose of filing the combination notification. Therefore, CCI was of the opinion that TOIL should have filed its combination notification within 30 days of filing its application with the DIPP and FIPB.

ANALYSIS

One of the significant consequences of this order will be that henceforth parties would have to exercise greater caution while making combination notification. A potential acquirer will have to ensure that it files combination notification within 30 days of communicating its intention to acquire an enterprise¹² to any statutory authority (such as Reserve Bank of India, Insurance Regulatory and Development Authority, FIPB, DIPP etc.) or the Central or the State Government.

While CCI has strictly interpreted and enforced Regulation 5(8) of the Combination Regulations, by holding that the trigger event in case of an acquisition is the date on which the enterprise communicates its intention to acquire to any statutory body, this position is likely to add to the cost of evaluating and making acquisitions for an acquirer whose acquisition requires a pre-combination notification under Section 6 of the Competition Act.

A potential acquirer would now be required to make combination notification even when it is in pre-merger negotiations but has communicated its intention to make an acquisition to a regulator or statutory body due to the need for pre-transaction regulatory clearance. Thus, a CCI pre-merger investigation would be conducted even if parties are unable to get the regulatory clearance to proceed with the transaction.

This is also likely to lead to commercially absurd situations when such an acquirer is in negotiations with multiple sellers where each of them requires a pre-sale clearance from its regulator or another statutory body. In such a situation, the potential acquirer will be required to make a notification in respect of each of the potential transactions when it is fully aware that it will proceed with only of the transactions in question.

The CCI's order while being an instance of good law enforcement has resulted in creating a situation that may lead to poor market economics. The potentially higher costs of acquiring an Indian enterprise when compared to similarly placed targets in other jurisdictions may well create a disincentive for a potential acquirer to consider Indian targets.

– **Rahul Rishi & Shinoj Koshy**

You can direct your queries or comments to the authors

¹ C-2014/03/162

² As per the exchange rate on June 1, 2014.

³ **Section 43A.** If any person or enterprise who fails to give notice to the Commission under sub-section (2) of section 6, the Commission shall impose on such person or enterprise a penalty which may extend to one per cent. of the total turnover or the assets, whichever is higher, of such a combination.

⁴ Under the provisions of the Competition Act, the trigger event in case of an acquisition is the execution of any binding agreement or 'other document' and in the case of a merger or amalgamation, is the final board resolution passed by the board of directors of the enterprise concerned.

⁵ **Section 6(2).** 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 30 [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

⁶ Countries such as United Kingdom, India, China, Malaysia and South Korea etc.

⁷ Report found at <http://www.ibef.org/industry/retail-india.aspx> accessed on May 6, 2014.

⁸ **Section 31(1)**. Where the Commission is of the opinion that any combination does not, or is not likely to, have an appreciable adverse effect on competition, it shall, by order, approve that combination including the combination in respect of which a notice has been given under sub-section (2) of section 6.

⁹ C-2012/07/69. The CCI in this order held that the notification was premature as the scheme in relation to the proposed combination was yet to be accepted by the board of directors to the parties to the combination.

¹⁰ C-2013/01/1108 – TOIL argued that the notice given to the CCI by the parties within 30 days of their application to the relevant statutory body i.e. the Insurance Regulatory and Development Authority ("IRDA") comprised finalized definitive agreements, drafts of which had been initialed and submitted along with the notification.

¹¹ **Regulation 5(8)**. 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.

¹² "enterprise" means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relating to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defense and space.

Explanation.—For the purposes of this clause,—

(a) "activity" includes profession or occupation;

(b) "article" includes a new article and "service" includes a new service;

(c) "unit" or "division", in relation to an enterprise, includes—

(i) a plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods;

(ii) any branch or office established for the provision of any service;

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