

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE****Suspensory Effects of Merger Notifications and Gun Jumping - Note by India****27 November 2018**

This document reproduces a written contribution from India submitted for Item 5 of the 130<sup>th</sup> OECD Competition committee meeting on 27-28 November 2018.

More documents related to this discussion can be found at

[www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm](http://www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm)

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**JT03438708**

## India

### 1. Combination Regulations

1. The Competition Act, 2002 [**Act**] establishes the Competition Commission of India [**CCI**] to prevent practices having appreciable adverse effect on competition. The provisions of the Act relating to regulation of combinations (acquisitions, mergers and amalgamations) were enforced with effect from 1<sup>st</sup> June, 2011. Section 5 of the Act describes the types of transactions that constitute combination and Section 6 of the Act requires filing of pre-merger notice to CCI in respect of a proposed combination. Towards the enforcement of the provisions relating to combinations, CCI has also issued the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 [**Regulations**], which have been subsequently amended from time to time.

2. In terms of Section 5 of the Act, the following transactions are combinations if the parties to such transactions meet the asset or turnover threshold mentioned therein.

- Acquisition of control, shares, voting rights or assets of an enterprise, and
- Merger or Amalgamation between enterprises.

3. The Act provides that the value of assets and turnover mentioned in Section 5 shall be enhanced or reduced by the Central Government, on the basis of the wholesale price index or fluctuations in the exchange rate<sup>1</sup>. The current threshold levels are as follows:

In India	Applicable to	Assets (INR Crore)		Turnover (INR Crore)	
	Individual*	2000		6000	
	Group**	8000		24000	
In India and outside	Assets		Turnover		
	Total (USD Mn)	Minimum in India (INR Crore)	Total (USD Mn)	Minimum in India (INR Crore)	
	Individual*	13.6	1000	40.8	3000
Group**	54.4	1000	163.2	3000	

\* *Individual* – Section 2 (h) of the Act defines enterprise as 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, defence and space.

\*\* *Group* - Explanation (b) to Section 5 of the Act explains group as two or more enterprises which, directly or indirectly, are in a position to (i) exercise twenty-six per cent. or more of the voting rights in the other enterprise; or (ii) appoint more than fifty per cent. of the members of the board of directors in the other enterprise; or (iii) control the management or affairs of the other enterprise.

<sup>1</sup> Section 20(3) of the Act

## 2. Ex ante regulatory framework

4. The Act, as enacted in 2003, envisaged voluntary merger notification regime. However, with the amendment to the Act in 2007, mandatory pre-merger notification was introduced in India. To enforce the same, CCI has also been empowered to penalise parties who fail to give notice. The extract of the relevant provision of the Act is as under:

### ***Regulation of combinations***

- 6 (1) *No person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.*
- (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...*
- (2A) *No combination shall come into effect until two hundred and ten days have passed from the day on which the notice has been given to the Commission under sub-section(2) or the Commission has passed orders under section 31, whichever is earlier...*

### ***Power to impose penalty for non-furnishing of information on combinations***

- 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 percent, of the total turnover or the assets, whichever is higher, of such a combination.*

5. The Act requires parties to the combination to give prior notice to CCI and the combination shall not come into effect for a period of 210 days or earlier approval by CCI. If no decision is taken by CCI within the said time period, the proposed combination would be deemed approved<sup>2</sup>. This contemplates a standstill obligation on the parties not to effect their merger proposal in whole or parts without the approval of the same under the Act. The extant regulatory framework envisages *ex ante* regulation of combinations with an opportunity to CCI to evaluate the likely effects of the proposed combination on competition and regulate them appropriately. If parties to the combination forfeit this statutory opportunity provided to CCI, the same would render them liable to be proceeded against under Section 43A of Act.

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<sup>2</sup> Section 31(11) of the Act

### 3. Gun jumping as a violation of law in India

6. Although the Indian merger control regime has only been in effect for half a decade, the CCI in a number of combination transactions has found the parties guilty of violating the standstill obligation imposed by competition law. The expression “gun-jumping” has not been defined anywhere in the Act or Regulations framed thereunder. It includes the instances relating to: (i) failure to notify<sup>3</sup> and (ii) violation of the standstill obligation. Till date, the Commission has found violations of Section 43A of the Act in 38 out of 599 combinations reviewed by the Commission.

#### 3.1. Failure to notify

7. In a large number of gun-jumping cases during the initial years of merger enforcement, it was found that the parties were unaware of the notification requirement. Some of these cases related to intra-group amalgamation for which no exemption was provided. The other cases of failure to notify related to computation of threshold at the level of business division or the assets being acquired<sup>4</sup> and not at the level of target enterprise and non-application of *De Minimis* exemption to mergers<sup>5</sup>.

#### 3.2. Violation of the standstill obligation.

8. In all the pre-merger coordination cases, CCI has been guided by the fundamental principle *i.e.* whether the parties have ceased to compete as they were competing earlier or whether they have ceased to act independently as regards their ordinary course activities pursuant to the combination transaction. In many of these cases, the main bone of contention was either that the alleged conduct was not likely to cause appreciable adverse effect on competition or that the impugned transaction did not attract notification requirement.

9. Although in comparison to the procedural gun-jumping, it is relatively difficult to define or determine what constitutes substantive gun jumping, as many forms of pre-merger dealings between the merging parties may be reasonable and necessary. The combining parties need to maintain the fine distinction between planning activities, which may be permissible, and integrating activities, which tantamount to step towards consummation and therefore, are prohibited. Further, given that most combinations, require a pre-combination due diligence as well as a certain level of post-signing integration planning, parties need to be extremely cautious that such actions are not seen as substantive ‘gun-jumping’. Therefore, it is incumbent on the combining parties to maintain a fine distinction between planning activities and activities leading to integration.

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<sup>3</sup> Baxter/Baxalta [Combination Registration No.C-2015/07/297], Diasys Diagnostics Systems / Piramal [Combination Registration No.C-2015/09/313] and EMC/MBECL [Combination Registration No.C-2015/07/293].

<sup>4</sup> Eli Lilly/Novartis [Combination Registration No.C-2015/07/289]

<sup>5</sup> Subsequently, the Government through its notification extended the scope of *De Minimis* exemption to mergers and amalgamation as well as to assets/ divisions. Through another notification, the Government has also done away with the requirement of filing notice with CCI within 30 days of execution of the trigger document and has now allowed notification any time prior to the consummation of the combination.

#### 4. Guidance on gun jumping issues

10. CCI has always endeavored to clarify its views and fundamental principles governing determination of gun jumping through its reasoned orders and by bringing in appropriate changes to the Regulations. It has also endeavored to be lenient in imposition of penalties when the violation is not deliberate or arising out of interpretational issues.

11. The Regulations, since its inception, provided that notice need not be filed in respect of certain categories of combinations. Such relaxation has been provided on the basis that those categories of combinations are ordinarily not likely to raise any competition concern. Most of these categories do not involve change in control. However, all such instances have not been excluded from notification. For instance, many parties did not give notice in respect of intra-group mergers and amalgamations under the impression that they were exempted but upon clarification in a case, CCI received several belated notice(s) of intra-group amalgamations. Considering the nascency of the regime, no penalty was levied during the first year of enforcement. CCI further expanded the scope of exemptions by amending its regulations from time to time to include intra-group consolidations and acquisitions of minority stake solely as an investment or made during the ordinary course of business.

12. Subsequently, CCI observed that transactions could be engineered in such a way that parties could claim exemption from notification. CCI took cognizance of such issue in *Thomas Cook/ Sterling Holidays*<sup>6</sup> where the parties claimed exemption for market purchases, under the pretext of it being independent of other transactions contemplated between the same parties and on a standalone basis, market purchases alone were not notifiable. CCI, however, held that economic sense of the composite combination do not warrant market purchases to be considered independent of the other transactions. It was further held that considering two different transactions as one combination depends on the facts and circumstances of each case with due regard to the subject matter of the transactions; the business and entities involved; simultaneity in negotiation, execution and consummation of the transactions; and also, whether it is practical and reasonable to isolate and view the transactions separately. CCI further brought changes to its Regulations to clarify that *“The requirement of filing notice under regulation 5 of these regulations shall be determined with respect to the substance of the transaction and any structure of the transaction(s), comprising a combination, that has the effect of avoiding notice in respect of the whole or a part of the combination shall be disregarded”*.

13. The CCI decision in *Thomas Cook/ Sterling Holidays* was upheld by the Supreme Court<sup>8</sup> wherein the Apex Court noted that “Technical interpretation to isolate two different steps of transactions of a composite combination would be against the spirit and provision of the Act. Market purchases were not independent and could not be used in isolation for the purpose of any exemption. .... That would be defeating the intent and purpose of the Act and in particular section 5 and 6 thereof.”

14. The other series of cases related to acquisitions being claimed to be in the ordinary course of business, which does not require notification to CCI. In *Etihad Airways/Jet*

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<sup>6</sup> Combination Registration No. C-2014/02/153

<sup>7</sup> Regulation 9(5) of the Regulations

<sup>8</sup> Judgment dated 17<sup>th</sup> April, 2018 in Civil Appeal No. 13578 of 2015

*Airways*<sup>9</sup>, CCI clarified that Etihad's acquisition of all landing/ take-off slots of Jet at London Heathrow Airport cannot be regarded as acquisitions made during ordinary course of business as they effectively formed the basis of entire operations of Jet between India and London. In a recent series of decisions<sup>10</sup> relating to spectrum trading, CCI noted that acquisitions in ordinary course of business are transactions of routine and usual nature, which only impact the existing state of operations and do not change the operating potential. On the other hand, strategic acquisitions of economic and competitive significance such as acquisition of spectrum, which forms the basis of offering mobile telecom services was regarded as capital transactions capable of changing the operating potential and thus were regarded as not in ordinary course of business.

15. CCI has also found gun jumping in respect of inter-corporate loans. In *Hindustan Colas/ Shell India Markets Private Limited*<sup>11</sup>, CCI observed that pre-payment of price (whether refundable/nonrefundable) may have a number of competition distorting effects viz., (i) it may lead to a strategic advantage for the Acquirer; (ii) it may reduce the incentive and will of 'target' to compete; and (iii) it may become a reason/basis to access the confidential information of the 'target'. It was further observed that pre-payment of consideration may have the impact of creating a tacit collusion which may cause an adverse effect on competition even before consummation of the combination.

16. In a more recent decision in *Bharti Airtel Ltd*<sup>12</sup>, CCI found an anteriority clause to be gun jumping as it predated assumption of economic responsibility by the acquirer before the closing of the transaction. It was observed that such clause have the effect of the parties ceasing to act independently as the target would have no incentive to continue to compete as before. Further, such a clause could allow acquirer to influence the affairs of the target leading to a situation similar to a tacit collusion.

17. Towards guidance, CCI has also issued FAQs and "*Compliance manual for enterprises*". The manual explains that parties to a proposed combination have to remain independent competitors under competition law until a transaction is closed. Failure to do so (*also commonly referred to as 'gun-jumping'*) may result in consequences under the Act, including significant monetary penalties, and the possibility of 'unscrambling' of a combination. The manual further states that to mitigate such risks, it is recommended that while conducting due diligence / integration planning, parties constitute a limited team of individuals, comprising preferably members of the senior management, internal legal team as well as external legal counsel [**Clean Team**]. Commercially sensitive information of the other party should only be accessible to such Clean Teams. The Clean Teams should not include personnel who are involved in pricing, marketing, sales, etc. in order to ensure that such personnel are not (consciously or unconsciously) influenced by any competitively sensitive information in the course of the day-to-day operations of the business (such as determining pricing, pricing strategy, sales quantity, marketing strategy, terms of consumer contracts, etc.).

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<sup>9</sup> Combination Registration No.C-2013/05/122

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<sup>11</sup> Combination Registration No.C-2015/08/299. Also see the decision of CCI in Combination Registration No.C-2018/01/547 (Adani Transmission Ltd.)

<sup>12</sup> Combination Registration No.C-2017/10/531

## 5. Uncovering of Gun Jumping Cases

18. If parties fail to give notice in respect of a combination, CCI can initiate an inquiry into such combination upon its own knowledge or on the basis of an information received to ascertain whether the combination has caused or is likely to cause an appreciable adverse effect on competition in India. Such an inquiry has to be initiated within a period of one year from the consummation of the combination. However, there is no bar for initiating penalty proceedings even after the expiry of one year. The extract of the relevant provision is as under:

### ***Inquiry into combination by Commission***

20 (1) *The Commission may, upon its own knowledge or information relating to acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of section 5 or merger or amalgamation referred to in clause (c) of that section, inquire into whether such a combination has caused or is likely to cause an appreciable adverse effect on competition in India:*

*Provided that the Commission shall not initiate any inquiry under this subsection after the expiry of one year from the date on which such combination has taken effect...*

19. A large no of gun-jumping cases before CCI were *suo motu* enquiries, primarily based on information gathered through media and market intelligence. Several procedural gun-jumping were unearthed on the basis of voluntary belated filings by the parties or information provided in combination notices regarding other transactions pursued by the parties.

## 6. Legal Consequences and fining of Gun Jumping

20. Section 43(A) of the Act gives discretion to CCI to impose penalty in case a person or enterprise fails to give notice to the Commission or failure to observe the standstill obligation. This penalty can extend up to 1% of the total turnover or the assets of such a combination, whichever is higher. The Commission may impose penalty of only a token amount or up to 1% of the turnover or assets of the combination. While exercising this discretion, CCI considers the conduct of the parties and the circumstances under which the parties failed to give notice or to observe the standstill obligation.

21. In *Jet/Etihad*<sup>13</sup>, the Commission noted that there was no effort on the part of the parties to conceal the transactions and consummation of the said agreements therein had come to the knowledge of CCI only from the filings made by the parties. This was taken as a mitigating factor and a nominal penalty of Rupees One Crore was imposed on Etihad. However, the contention of the parties was that they were under an impression that the impugned transaction was an independent transaction was not acceded to as a mitigating

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<sup>13</sup> Supra 5

factor. In *Piramal Enterprises Ltd*<sup>14</sup>, CCI observed that there was no *mala fide* intention to evade compliance of the provisions of the Act and the Acquirer had given full cooperation to CCI in its inquiry under sub-section (1) of Section 20 of the Act, were regarded as mitigating factors. Parties being based outside India and the compliance requirement is in respect of an acquisition of foreign enterprise by another foreign enterprise, both based outside India; and voluntary and belated filing of notice are some of the other factors considered as mitigating circumstances in imposition of penalty.

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<sup>14</sup> Combination Registration No. C-2015/02/249