Amendments to Combination Regulations under the Competition Act, 2002

Background

The Combination Regulations\(^1\) were originally issued by the Competition Commission of India (CCI) in May 2011. CCI has since then amended these regulations from time to time based on its experience derived consequent to the administration of the merger control provisions in the Competition Act, 2002 (the Act). CCI has now notified the fifth set of amendments to the original Combination Regulations by notification of the CCI (Procedure in regard to the transactions of business relating to combinations) Amendment Regulations with effect from 7 January 2016.

Key amendments notified

- Exemption under Schedule I - Acquisitions ‘solely for the purpose of investment’ clarified

  Acquisition of less than 25 per cent of the total shares or voting rights solely as an investment or in the ordinary course of business are exempt from the filings requirements as per Clause 1 of Schedule I of the Combination Regulations.

---

\(^1\) The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011

The interpretation of the words ‘solely for the purpose of investment’ has been under discussions in various CCI orders wherein it has adopted a view that even where the shares being acquired are less than 25 per cent, but the shareholders have affirmative voting rights or a right to nominate directors, such cases would not be considered exempt under Clause 1.

In this regard, CCI has added an explanation to Clause I of Schedule I to provide clarity regarding the term ‘solely for the purposes of investment’ in the Combination Regulations. The explanation provides that acquisition of shares below 10 per cent would be considered as solely for the purpose of investment as long as the following conditions are met with:

- (A) the acquirer has the same rights as are available to ordinary shareholders of the enterprise whose shares or voting rights are being acquired to the extent of their respective shareholding; and

- (B) the acquirer does not have a right or intention to nominate a director on the board to participate in the affairs or management of the enterprise.
• **Exemption under Schedule 1 – Share acquisition beyond 25 per cent and up to 50 per cent, exempted**

Clause 1A of Schedule 1 exempts the acquirer from filing requirements wherein such an acquirer already holds more than 25 per cent of the total shares and acquires not more than 5 per cent additional shares (akin to a creeping acquisition) in a financial year up to a post-acquisition shareholding of 50 per cent.

By omitting the words ‘not resulting in gross acquisition of more than five per cent (5 per cent) of the shares or voting rights of such enterprise in a financial year’ from Clause 1A, CCI has provided a relaxation whereby all share acquisitions beyond 25 per cent such that post acquisition the acquirer does not hold 50 per cent would be exempt.

• **‘Other document’ for notification trigger to CCI**

The proviso to Clause 8 of Regulation 5 of the Combination Regulations provided that where a binding document has not been executed but the intention to acquire is communicated to a statutory authority, the date of communication shall be deemed to be the date of execution of such ‘other document’ for the purposes of Section 6 of the Act.

This proviso has now been deleted. It may be highlighted that such an amendment is in line with industry demands and earlier formed part of the proposed amendments circulated for public comments in April 2015.

Additionally, CCI has inserted a new proviso to Clause 8 of Regulation 5 which provides that where a public announcement has been made in terms of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, for acquisition of shares, voting rights or control, such public announcement shall be deemed to be the ‘other document’.

---

**Other procedural amendments**

• **Single notice under Regulation 9 - Under Regulation 9(4) of the Combination Regulations, a single notice is required to be filed wherein a business transaction is achieved by way of a series of steps or smaller individual transactions which are inter-connected or interdependent on each other. CCI has amended the regulation by way of deletion of the words ‘or inter-dependent on each other’.

• **Signing authority for forms – CCI has amended the provisions of Regulation 9 which now permit any person duly authorised by the company to sign Form I or II as against any person duly authorised by the Board of Directors.**

• **‘Declaration’ to accompany forms -** The requirement for verification and notarisation for Form I, II and III has been done away with. Instead, a declaration in the prescribed format is to be filed by the notifying party confirming the completeness, accuracy and truthfulness of the contents filled in the form.

• **Opportunity to be heard prior to invalidation of notice -** New provisos have been inserted to Clause 2A under Regulation 14 which provide that CCI may give an opportunity of being heard to the parties to the combination in accordance with Regulation 24 of these regulations before deciding to invalidate a notice. Such a period is excluded while calculating the limitation period.

---

**Our comments**

CCI has been continuously updating these regulations in accordance with industry demands as well as based on its experience gained while dealing with combination filings over the last five years. By providing relaxations from filing requirements in a phased manner, CCI is working towards making the merger control regulations an enabler for the Merger and Acquisition (M&A) environment in the country. However, CCI’s view on ‘control’ vis-à-vis the minority shareholders with affirmative/veto rights and board representation is currently at variance with the position adopted by SEBI and does create some procedural impediments for private equity investments.
The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavour to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

© 2016 KPMG, an Indian Registered Partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative (“KPMG International”), a Swiss entity. All rights reserved.

The KPMG name and logo are registered trademarks or trademarks of KPMG International.

This document is meant for e-communications only.