

News monitored for: E&Y

THE HINDU BUSINESS LINE

New rules to spur M&A deals

The Regulations on mergers and acquisitions are bound to change the dynamics of doing transactions in India. While there are teething problems, a lot of speculation has been put to rest.

Narendra Rohira

The recently notified Regulations governing combinations clearly intend to govern only big ticket M&A transactions. A welcome move from the Government, as otherwise a situation could have arisen of quantity overshadowing quality. The Regulations have been modified after a long consultative process with industry experts, with their feedback largely accepted by Competition Commission of India.

Putting to rest the uncertainty of the applicability of the Regulations on transactions either under way or being initiated prior to June 1, 2011 has been adequately addressed.

Now, the Regulations clearly specify that filing is required only if the approval of the board of director to the merger or amalgamation is obtained or execution of binding documents for acquisition of asset

or control is done on or after June 1, 2011. One may see a spurt of announcements in the coming days of group mergers being taken to the board for their final decision or execution of binding agreements for acquisition prior to June 1.

Deviating from literal reading of the law, which seems to suggest that all combinations needs to be notified, Schedule I of the Regulations specify certain combinations not normally requiring filing, since they are ordinarily not likely to cause an appreciable adverse effect on competition. Subjectivity of the words used "normally" and "ordinarily", does not seem to provide a safe harbour for the transactions covered under Schedule I, but instead shifts the burden on the acquirer to determine the requirement of filing.

GREY AREAS

A closer look at the transactions covered under Schedule I bring to light certain areas that merit debate and deliberation.

The first one relates to no exemption being provided for creeping acquisition or acquisition of shares by a person holding in the range of 15-50 per cent stake and still exercising control over the enterprise. To illustrate this, a creeping acquisition of 5 per cent, which is normally executed on the stock exchange, may not practically be possible in view of the time lag in obtaining prior approval from CCI and possible im-



act on the price of the shares on the market. Further, approval from a regulatory body could act as a hindrance to increasing the investments, not resulting in change in control, made by PEs or promoters.

Considering this, it may be prudent to introduce the control test as an overarching requirement to trigger filing. While it is understood that practically a conclusive definition of "control" is not possible, the interpretation issues with regard to gamut of control whether positive or negative control would remain. The outcome of the Supreme Court judgment in the case of Subhkam Ventures under the takeover law should provide some clarity on this

The second one relates to caveat exemption for acquisition of assets not directly related to the

business activity of the party acquiring the asset. One fails to understand as to how acquisition of assets forming substantial part of the business of the seller could affect the competition scenario in the market place when the acquired assets are not directly related to the business activity carried on by the acquirer.

The language creates ambiguity on the exact situations intended to be kept out of CCI examination.

GROUP EXEMPTION

The third one is in relation to "group" exemption. While "combination" is defined to cover both "acquisition" as well as "merger" transaction, the exemption granted for group transactions seems to be restricted only to acquisitions. Exclusion of group mergers and de-

mergers defeats logic. Also, while granting a safe harbour for acquisition of relatively small assets or enterprise for initial period of five years (assets less than Rs 250 crore or turnover less than Rs 750 crore), the Regulations have chosen to cover only "acquisitions" as against covering both "acquisitions" as well as "mergers".

Some of the other areas that needs deliberation include the need to make open offer process and CCI clearance sacrosanct to reduce the financial burden on acquirer in the form of interest payable to shareholders tendering shares in open offer, clarify the meaning of "insignificant local nexus" in the context of outbound acquisitions.

Having stated that, there are certain welcome changes, which include increase in threshold limits of assets or turnover, reduction of filing fees, simplification of forms, etc.

In summary, the Regulations are bound to change the dynamics of doing transactions in India. While there are teething problems to be addressed, one should admit that a lot of speculation has been put to rest. Whilst the intention of CCI is clearly not to derail the growth of corporate India, some impediments are likely to be witnessed in the coming days before the Competition law in India matures.

(The author is Tax Partner, Ernst & Young.)