



Regulatory Alert Stay Ahead...

Exemption to enterprises for Combination under Section 5 of the Competition Act, 2002

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Background

- The Competition Commission of India (CCI) is the regulator set up under the Competition Act, 2002 (the Act). The objectives of the Act, amongst other things, is to prevent practices that have adverse impact on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets in India.
- Section 5 of the Act contains provisions relating to Combination which are classified as under:
 - any *acquisition* by a *person* of control, *shares*, voting rights or *assets* of an *enterprise*
 - acquiring of control by a person over an *enterprise*, where such a *person* already has direct / indirect *control* over another *enterprise* engaged in production, distribution or trading of a similar or identical or substitutable *goods* or *services*
 - any merger or amalgamation

Any person entering into a proposed Combination exceeding specified value of assets and / or turnover in and outside India is required to obtain prior approval of CCI.

- The Ministry of Corporate Affairs (MCA), Government of India (GOI) has been exempting from time to time, certain enterprises from application of Combination regulations under section 5 of the Act.

The previous notification issued on 4 March 2016 (2016 Notification), exempted acquisition of an enterprise whose control, shares, voting rights or assets being acquired and meeting the following thresholds:

- a) assets of the value of not more than ₹ 3.50 billion in India; or
- b) turnover of not more than ₹ 10 billion in India

from the provisions of Section 5 of the Act for a period of 5 years.

However, the 2016 Notification did not provide clarity on the following:

- a) Availability of exemption to mergers and amalgamations and acquisition of control and;
 - b) Applicability of the exemption where only a portion / division / business was being acquired, taken control of, merged or amalgamated.
- In keeping with GOI's principle of the ease of doing business in India, on 27 March 2017, GOI issued a notification (2017 Notification) and 2016 Notification has been rescinded.
 - This Alert provide highlights of 2017 Notification.

Highlights

- GOI has exempted enterprises being parties to the following Combinations, from the applicability of Section 5 of the Act for a period of 5 years:
 - a) acquisition of an enterprise whose control, shares, voting rights or assets are being acquired;
 - b) acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods and / or service; and
 - c) any merger or amalgamation

meeting following thresholds

- assets of value not more than ₹ 3.50 billion in India; or
- turnover of not more than ₹ 10 billion in India

Accordingly, Combination falling within the above threshold limits will not require any approval of CCI under Section 5 of the Act.

- GOI has also clarified that:
 - a) In cases where only a portion / division / business of an enterprise is being acquired, taken control of, merged or amalgamated with another enterprise, the value of assets of the said portion / division / business attributable to it would be the relevant asset/turnover limit to be taken into account for the purpose of calculating the threshold limit instead of transferor's total assets or turnover to be considered for determining the exemption.
 - b) The value of the portion/division/business is to be determined by taking the book value of the assets as shown in the audited books of accounts of the enterprise or as per statutory auditor's report (where the financial statement has not yet become due to be filed), in the financial year immediately preceding the financial year in which the date of the proposed combination falls, as reduced by any depreciation. The value of assets shall include the brand value, value of goodwill, value of copyright, patent, permitted use, collective mark, registered proprietor, registered trade mark, registered user, homonymous geographical indication, geographical indications, design or layout design or similar other commercial rights, if any.

The turnover of the said portion / division / business shall be determined on the basis of certificate by the statutory auditor as per last available audited accounts of the company.

Conclusion

2017 Notification issued by GOI gives much needed clarity on the applicability of the exemption from Combination regulations and the same will result in ease of doing business in India for small ticket M&A transactions.

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