THE TARGET TEST EXEMPTION UNDER INDIA'S MERGER CONTROL REGIME TWEAKED

Introduction

The Competition Act, 2002 read with the Competition Commission of India (Procedure in Regard to the Transaction of Business relating to Combinations) Regulations, 2011, deal with the merger control regime in India. On March 27, 2017, the Indian government issued a notification (the " **Notification**") changing the target test exemption.

This update discusses the Notification and its implications.

Target test exemption tweaked

In March 2011, the Indian government issued a notification exempting from the requirement of obtaining a pre-merger clearance from the Competition Commission of India (the "**CCI**") any acquisition of control, shares, voting rights or assets of an enterprise whose asset value in India did not exceed INR2.5 billion (US$38.51 million) or turnover in India did not exceed INR7.5 billion (US$115.54). The foregoing test is commonly known as the *de minimis* test or the target test in India. Subsequently, in March 2016, the Indian government issued a notification revising the thresholds for the *de minimis* test. Under this notification, for five (5) years, i.e., until March 4, 2021, the asset threshold in India was increased to INR3.5 billion (US$53.92 million) and the turnover threshold in India was increased to INR10 billion (US$154.06 million).

The Notification has further tweaked the target test exemption as follows:

- Earlier, only an acquisition of shares, control or voting rights was exempted from the CCI's pre-merger clearance regime if it came under the target test exemption. Now, the types of transactions that can seek this exemption have been expanded, and mergers and amalgamations (including those under the Companies Act) will be able to take benefit of the target test exemption.

- Earlier, even if only a part of the business was being transferred, the assets and turnover of the entire enterprise were required to be taken into account to assess the target test exemption. As per the Notification, now, for the purposes of calculating the value of the Indian assets and turnover of the enterprise being acquired, taken control of, or being merged or amalgamated, only the assets and turnover of the division or specific business actually being acquired, merged or amalgamated will be taken into account. Therefore, if a particular acquisition involves hiving off one business division of an enterprise, the assets and turnover of only that business division will be taken into account (as opposed to the assets and turnover of the entire enterprise) to check if the target test is met.

Note that the asset and turnover thresholds remain the same as notified in March 2016.

Small changes with the potential for a great impact

The Indian merger control regime was implemented in the year 2011, and as such, the CCI is a fairly young regulator. Although the CCI relies heavily on merger control jurisprudence in the more developed overseas jurisdictions, Indian case law in this area has been evolving with each passing year. The CCI has been doing a commendable job of assessing the implications on competition of complex transactions in the Indian market.

Historically, the reason for not including mergers and amalgamations under the purview of the target test was because, in essence, such transactions resulted in acquisitions of assets, shares or voting rights through a different process (court approval in India). However, the Notification aims to provide a level playing field for all types of acquisition transactions, which was much needed.

Hive off transactions will be benefited immensely and may not even come within the purview of the target test, as parties seeking to sell only a division or a part of a diversified business will not have to take into account the assets and turnover of the entire business or enterprise. This reinforces the principle that the CCI is concerned with the capability of the acquirer group to affect only the relevant market in India.