PENALTIES IN COMPETITION LAW VIOLATIONS IN INDIA

In June 2011, the Indian government implemented the merger control regime under the Competition Act, 2002 (the "**Act**") and the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (the " **Regulations**"). While the Competition Commission of India (the "**CCI**") is a fairly young regulator, over the years, the jurisprudence on Indian competition law and the merger control regime has developed substantially.

The Act prescribes asset and turnover thresholds and if a transaction crosses any of these thresholds, the parties are required to seek approval of the CCI prior to effecting the transaction. The Act and the Regulations also provide certain exemptions, such as the target test exemption and exemptions based on the nature of the transaction. This update highlights some of the recent orders of the CCI in respect of a failure to notify a transaction.

Acquisition of Alstom's power and grid business by GE

In May 2014, GE Energy Europe B.V., General Electric Company and GE Industrial France SAS (together referred to as "**GE**") issued two (2) public announcements under the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (the "**Takeover Code**") in respect of a binding offer to acquire the power and grid business of Alstom S.A. resulting in an indirect acquisition of 68.56% of the equity share capital of Alstom India Limited and 75% of the equity share capital of Alstom T&D Limited. In October 2014, the CCI noted that the proposed acquisition exceeded the thresholds specified under the Act and directed GE to file a notice to seek CCI approval for the proposed transaction. The CCI also initiated proceedings for imposition of penalty for failure to notify the proposed transaction by June 2014, i.e., within thirty (30) days from the date of the public announcement.

During the proceedings for imposition of the penalty, the main argument taken by GE was that public announcements made under the Takeover Code did not constitute "any agreement or other documents" under the Act, and therefore, the requirement of notifying the proposed transaction to the CCI within thirty (30) days from the date of the public announcement did not arise. However, the CCI held that a public announcement constituted a communication of the intention to acquire to a statutory authority, i.e., the Securities and Exchange Board of India in this case, and would be considered as "other documents" for the purposes of the Act.

The Act also empowers the CCI to impose a penalty of up to 1% of combined value of worldwide assets or turnover of the parties to the acquisition (whichever is higher) in case of failure to notify an acquisition (in this case US$6.9 billion). However, as GE had informally sought a clarification from the CCI in relation to the applicability of the pre-merger notification requirements and had *bona fide* cooperated with the CCI in course of the inquiry, the CCI imposed a reduced penalty of INR50 million (approx. US$735,295). Subsequently, the Regulations were revised to explicitly provide that a public announcement under the Takeover Code would constitute as "other documents" and trigger the pre-merger notification requirements.

Investment by Piramal Enterprises in the Shriram group

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Piramal Enterprises Limited ("**Piramal Enterprises**") acquired 9.96% of Shriram Transport Finance Company ("**STFC** ") on May 10, 2013, 20% of Shriram Capital Limited ("**SCL**") on April 17, 2014, and 9.99% of Shriram City Union Finance Limited (" **SCUFL**") on June 3, 2014. In October 2014, the CCI noted that these investments exceeded the thresholds specified under the Act and directed Piramal Enterprises to file a notice to seek approval of the CCI for these investments. The CCI also initiated penalty proceedings.

Piramal Enterprises' main arguments were that: (i) the investments in SCL, STFC and SCUF were not interconnected and should be assessed separately; (ii) the investments in SCL, STFC and SCUF were not strategic and were minority, non-controlling investments and were, therefore, exempt under the Regulations; and (iii) the CCI had initiated proceedings after the expiry of the one (1) year limitation period.

The CCI noted that the investment in SCL had resulted in Piramal Enterprises getting certain affirmative voting rights and Mr. Ajay Piramal being appointed as the chairman of SCL. Further, the annual report of Piramal Enterprises for the financial year 2014-15 clearly specified that the investments in SCL, STFC and SCUF were strategic investments and merely to extend the business portfolio of Piramal Enterprises. Further, the annual report also reflected an interconnection between these investments. Lastly, the CCI noted that the investment in SCUFL was completed on June 3, 2014 and the inquiry was initiated by the CCI in October 2014. Therefore, the CCI was well within the limitation period of one (1) year. The CCI took into consideration the fact that Piramal Enterprise did not have any *mala fide*intention and was otherwise a competition law compliant entity, and, therefore, imposed a penalty of INR50 million (approx. US$735,295). This order was also upheld by the Competition Appellate Tribunal in an appeal made by Piramal Enterprises.

Acquisition of Royal Sundaram Insurance by Sundaram Finance

Sundaram Finance Limited ("**Sundaram Finance**"), a non-banking finance company, held 49.9% equity of Royal Sundaram Alliance Insurance Company Limited ("**Royal Sundaram Insurance**"). Royal & Sun Alliance Insurance plc ("**RSA**") held 26% equity of Royal Sundaram Insurance. Sundaram Finance learnt that RSA was proposing to exit from its investment in Royal Sundaram Insurance. Sundaram Finance, being a non-banking financial company, was permitted to hold up to 50% equity in an insurance company and required permission of the Reserve Bank of India (the "**RBI**") to invest further, which was forthcoming on a selective basis. Sundaram Finance was interested in purchasing the stake held by RSA in Royal Sundaram, and as a precursor, approached the RBI seeking approval for increasing its stake from 49.9% to 75.9% in October 2014, which was approved by the RBI in January 2015. In February 2015, Sundaram Finance and RSA executed a share purchase agreement to effect this transaction and filed a notice seeking approval of the CCI for undertaking this transaction in March 2015, i.e., within thirty (30) days of executing the share purchase agreement.

The CCI initiated penalty proceedings for failure by Sundaram Finance to notify the proposed transaction within thirty (30) days of filing the application with the RBI in October 2014.

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Sundaram Finance's main argument was that the application to the RBI was merely a precursor to understand whether the proposal to increase the stake would be permitted by the RBI, as such approvals were at the discretion of the RBI. Also, at the time of making the application there was no understanding, binding or otherwise, between Sundaram Finance and RSA in respect of the acquisition. While the application filed by Sundaram Finance with the RBI was a communication to a statutory authority, it did not reflect a binding understanding between Sundaram Finance and RSA to effect the transaction, and therefore, did not trigger the requirements of making a notification. The CCI eventually accepted this argument and set aside the penalty proceedings.

Importance of merger control assessments in deal making

CCI's recent orders on the failure to notify transactions under the Act show that the CCI is actively scrutinizing M&A transactions reported in the media, but not notified under the Act, to assess whether such transactions require approval. The penalty of INR50 million (approx. US$735,295) imposed by the CCI in 2016 for failure to notify a transaction is the highest since 2011. With the competition law jurisprudence in India growing every year, the CCI expects deal makers to take the merger control regime and the procedural requirements there under seriously. In view of the foregoing, we feel that parties to a transaction and their advisors must assess the competition law implications of a transaction at the initial stages and give this aspect as much importance as drafting the transaction documents. Advisors on global deals taking place outside India with less significant India-related aspects should also assess competition law implications in India. If deal timelines permit, we recommend the parties to seek a pre-merger consultation from the CCI on the requirement to notify a transaction, as also the CCI's interpretation of exemptions under the Act and the Regulations.

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