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Market purchase conundrum: How the amendments to CCI rules affect M&A deals

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The CCI's proposal to allow open market purchases for minority investments without prior approval is being cheered by the industry.

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Mergers and acquisitions – the mere mention of the expression usually brings to the minds of India Inc, thoughts of long drawn out processes, elusive approvals and cumbersome paperwork. However, India’s antitrust watchdog, the Competition Commission of India (CCI) has been taking bold steps to streamline the process for approving mergers and acquisitions with a view to improve the ease of doing business here. The latest addition to the list of these steps is the CCI’s proposal to allow open market purchases for minority investments without prior approval.

While the move is being welcomed by the industry, there are still some questions that need to be answered. But first, let us understand the importance of this development.

The background

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Presently, the Competition Act, 2002 (Competition Act) does not allow acquisition of any shares pending CCI clearance, for transactions that are reportable. This effectively rules out any acquisition of shares listed on the stock exchange, including potential hostile acquisitions, where the execution and completion are instantaneous.

Even arrangements that enable the purchaser to surrender beneficial rights including voting rights and place the purchased shares in an escrow pending CCI approval have not passed muster with the CCI.

As one would imagine, industry insiders lamented this onerous stance of the CCI which made such class of transactions almost unviable. This was more so given that this position defeated the entire purpose of a market purchase as stock prices fluctuate and the element of spontaneity is taken away. Thus, the 'market purchase' conundrum was born; and it continued to act as a speedbump for acquisitions that had an element of a block deal involved until the Competition Law Review Committee (CLRC), in its recommendations earlier this year, suggested that there should be a derogation for such market purchases so that they can go ahead sans prior approval.

The turning point

Recently (towards the end of November), the CCI proposed certain amendments to the CCI (Procedure in regard to the transaction of Business relating to Combinations) Regulations, 2011 (Combination Regulations), among which was the creation of a concession for public bids and market purchases. It proposes that parties be allowed to approach the CCI for approval after the purchase provided that the beneficial rights (voting or economic) attached to the shares are kept in abeyance until approval; and the target entity is not influenced.

The amendment, once effective, promises to be immensely beneficial for companies who often like to structure deals with a leg involving a market purchase. To that extent, escrow arrangements forged in reportable transactions may be seen to be kosher as well. This is a welcome move as it eases the burden on stakeholders looking to close a deal at the most attractive price and protects the element of spontaneity that is the essence of a market transaction.

Grey areas

“In the past, companies like Thomas Cook, Zuari Agro and Deepak Fertilisers have had to face significant penalties for carrying out market transactions sans prior approval. However, it remains

to be seen if the regulator will take a relaxed view on recent market transactions that are currently under the CCI's lens by extending the benefits of the amendment retrospectively.

Another interesting point of law for consideration by the CCI will be the recent transactions that fall in the 'no man's land', i.e. which were executed between the CLRC's recommendations being made public and the CCI proposing amendments to the Combination Regulations.

Will the antitrust watchdog opt for a more liberal stance when it comes to such transactions? Only time will tell. But in the meantime, it is worth celebrating this development as a major obstacle in the M&A landscape is finally being addressed.

Anisha Chand is Partner at Khaitan & Co, one of India's oldest and largest law firms. The views of the author are personal and do not constitute legal / professional advice of Khaitan & Co.

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