# A COMPETITION CONUNDRUM BREWS

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***Rules on mergers and acquisitions have drastically improved, but are still hobbled by mindless lobbying. This article attempts to discuss contradictory measures present in merger control regime which came into effect on 1st June, 2011.***

The Competition Commission of India (CCI) has been the subject of trenchant criticism for its lack of expertise on mergers and acquisitions. CCI's capacity, or the lack thereof, has been manifest in past draft versions of merger control regulations. And Indian corporate houses have been crying hoarse over this yet another bureaucratic Rubicon that they are required to cross to consummate their transactions.

However, in its finalised regulations that were issued on 11th May and will be effective from 1st June, CCI has clearly buckled under intense pressure from business lobbies. This has unwittingly led to inherent contradictions in the regulations. Businesses' penchant to mindlessly lobby with the Ministry of Corporate Affairs (MCA) and CCI simultaneously has ensured that they have scored several self-goals.

The final regulations, for instance, provide for a safe harbour for acquisition of control or shares or voting rights or assets by another enterprise within the same "group". This means for acquisitions within their own group, enterprises will normally be exempt from seeking prior approval of CCI for the transaction unless an independent third party proves that there is an "appreciable adverse effect on competition within the relevant market in India". The rationale behind such a safe harbour for enterprises within a group is evidently hectic lobbying by the businesses, as many large Indian corporations traditionally belong to groups.

In this, the classification of enterprises as part of a "group" under Competition Act, 2002 is critical. All entities in a group — controlled, controlling and those under common control — are taken in aggregate while calculating the jurisdictional monetary threshold of assets or turnover. Only those enterprises (or groups) that breach the jurisdictional monetary thresholds based on assets or turnovers are classified as "combinations" under the legislation, and are subject to premerger notification requirements.

The competition legislation, as passed by Parliament, had suggested that two or more enterprises in a position to control 26 per cent or more of the voting rights in the other enterprise will constitute a "group". This was intended to ensure that while calculating the jurisdictional monetary thresholds of assets and turnovers, all entities within a group will be taken into account. This 26 per cent cap was evidently seen by the businesses as too low a bar. Interestingly, MCA issued a clarification a few months ago effectively amending the definition of "group" to ensure that the barometer of 26 per cent became 50 per cent, and a "group" exercising less than 50 per cent of voting rights was exempt from the calculation of jurisdictional monetary thresholds under competition law.

The foolhardy lobbying that went into effecting this change will come back to haunt businesses. The raising of the bar to 50 per cent also increases the threshold for claiming

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safe harbour for groups under CCI's merger control regulations. As mentioned above, CCI regulations exempt group transactions from premerger notification requirement. If the barometer for claiming the safe harbour is 50 per cent instead of 26 per cent, fewer transactions will be able to claim the safe harbour under regulations. The businesses, through their hectic lobbying endeavours aimed at having their cake and eating it too, appear to have shot themselves in the foot.

Besides the safe harbour for group companies, there is another effective exemption that CCI has conceded. An acquisition of shares or voting rights, where the acquirer already has 50 per cent or more of either in the acquired entity, will also fall within the safe harbour. The only exception to this will be cases that entail change in quality of control from "joint control" to "sole control". This exception contradicts the safe harbour envisaged for groups. It is unclear why enterprises that have prior control of 50 per cent of an enterprise would not claim the safe harbour and instead fall within the exception of notifying to CCI.

All of these contradictory measures will require clarification before 1st June, when the merger control regime comes into effect. Otherwise, the risk is cases that CCI regulations intended to exempt will end up requiring prior notification to the commission.

To be sure, the final merger control regulations are far better than the several earlier drafts that we have seen. It is perhaps unfair to place the blame squarely on the commission, which has, on the one hand, been hobbled by the "genetic defect" of the parent legislation, and on the other, by the myopic vision of corporate lobbying. In spite if this, it is commendable that CCI's final regulations have clarified that they will apply prospectively only to those transactions where binding documents are executed on or after 1st June (indeed, an earlier draft regulation had given the impression that past transactions will require CCI approval as well).

The sudden, drastic, qualitative improvement in its final regulations, as juxtaposed with the earlier drafts, appears to be a result of CCI's overdrive to recruit internal experts who gave shape to the regulations. Let the end game of incessant corporate lobbying at MCA and CCI (which has evidently led to the contradictions in the regulations) not take away from the promising, forward-looking regulations that the commission has managed to come up with.