

‘Waiting Period’ for mergers: too long for comfort



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From 21 May 2009, India’s *Competition Act, 2002* (CA) finally became effective, albeit partially. While the provisions relating to prohibition of anti-competitive agreements and abuse of dominant position by enterprises are now operational, the merger control regime is yet to come into effect.

The CA provides a 210 day waiting period under the merger control provisions. This is very long when compared to international best practices – in most jurisdictions the waiting period normally varies between 30 and 120 business days, with around 90 percent of applications approved in the first 30 business days. Enterprises are apparently worried about the long statutory waiting period in India under the CA and have voiced their concerns in both national and international forums.

The Competition Commission of India (CCI) is mandated under Section 64 of the CA to formulate its own regulations. In a few regulations, the CCI has defined ‘working day’ as the days on which it shall function, which does not include public holidays, Saturdays and Sundays. Coupled with this, the Competition Appellate Tribunal (CAT) – the first appellate tribunal – is also only required to work on ‘working days’ and closes for vacation for about six weeks during summer and for about ten days during winter. Under the CA, an appeal lies from every order of the CCI to the CAT. The CAT must endeavour to dispose of such appeals within a period of six months.

Where a merger is blocked by an Order of the CCI on the 210th day (which is in reality about 300 calendar days) and an appeal is subsequently lodged with the CAT on the last working day before the summer vacation, then it is feasible the final order may not be passed by the CAT until the expiry of six months after the CAT resumes work after vacation. This could potentially delay a transaction by eighteen months. Can parties, especially in cross-border transactions, wait this long? The anomaly does not end

here. The inquiry procedure for mergers under section 29 of the CA stipulates both ‘days’ and ‘working days’, thereby making the situation more difficult for enterprises.

Section 64 of the CA does not require the CCI to formulate comprehensive merger regulations, but merely to prescribe ‘filing fee’ and ‘forms’ for merger control. It will be interesting to see how the CCI overcomes concerns such as “waiting period” within the restricted statutory ambit of its own regulations. The CA also requires the CAT to formulate its own regulations – unless the CCI and the CAT work in tandem, any such merger regulations may cause additional concerns for enterprises before the CAT.

Furthermore, while most mergers enhance economic efficiencies in the market, a long waiting period for merger approval could jeopardise the commercial rationale for such mergers and affect consumers which the CA hopes to protect.

Conclusion

Irrespective of the CCI’s working days, the waiting period of 210 days should be read as ‘calendar days’ so that merging parties do not suffer on account of the CCI’s official holidays. Upon finding that filing formalities have been complied with, the CCI should – in order to implement legislative intent – specify the 210 day waiting period and communicate such specification in writing to the party. For example, if finding an application is in order on 1 April 2010, the CCI must communicate to the party in writing that the ‘waiting period’ of 210 days ends on 27 October 2010, unless additional time has been requested and allowed. We are hopeful that as and when the merger control provisions are notified by the Government of India, the CCI will – as intended by the amended legislation – proactively and expeditiously dispose merger applications as a non-adversarial *ex ante* process.

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