

SAMVĀD: PARTNERS

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ENHANCED DISCLOSURE REQUIREMENTS UNDER NEW GUIDANCE NOTES UNDER THE COMPETITION ACT

Last year, the CCI introduced a revised 'Form 1' for notification of any combination under the Competition Act and the CCI (Procedure in regard to the transactions of business relating to Combinations) Regulations ('Combination Regulations'). The description of the combinations is now much more detailed than before in Part V of the revised Form 1. The parties to the combination are now required to disclose the nature of rights acquired by them, which was earlier a part of the second stage inquiry by the CCI i.e. Form-2. One change that is likely to raise a few eyebrows is that parties have been asked to disclose the strategic rationale and justification behind the transaction.

Any group entity of the parties to the transaction having direct or indirect shareholding or control over another enterprise engaged in similar or identical goods (horizontal overlaps) has to be disclosed. Similar disclosures of any activity that is at a different level of the production chain to the activity of another party to the transaction (vertical overlaps) also have to be made. Apart from horizontal and vertical overlaps, complimentary activities of the parties to the transaction also have to be disclosed. Perhaps the most important change was the introduction of a 'Green Channel' for deemed approval by the CCI, on self declaration basis, for cases where there are no horizontal, vertical or complimentary overlaps.

However, there was some ambiguity about the nature of disclosures to be made, as there were no new Guidance Notes to go along with the revised Form 1. Though issued separately, Guidance Notes are a part of the Combination Regulations under Regulation 5(3A). Guidance Notes to the new Form I have been recently issued on 28 March 2020, giving a truer picture of the disclosure requirements under the revised Form 1.

The first important clarification introduced by the new Guidance Notes is that where an acquisition is through a special purpose vehicle (SPV), the threshold limits under the Act will take into account the assets and turnover of the parent enterprise and not just the SPV. The Guidance

Notes also make it clear that the reason and justification for interconnected transactions have to be disclosed. If an acquisition is made in tranches, details of other tranches have to be disclosed, in addition to the tranche for which approval is sought.

Instead of disclosure of structural and financial links between the parties mandated by the earlier form, the disclosures are now broader, encompassing all agreements and documents relating to the transaction with relevant clauses. Through the Guidance Notes, the CCI has included observer rights as well as any commercial 'advantage' that the parties may gain, apart from veto rights, affirmative voting rights, and board appointment rights within the ambit of 'rights acquired' through the transaction.

The new Guidance Notes put a premium on obtaining sound legal advice while making declarations, and a D-I-Y approach is no longer possible for parties. One example is the need to cite all orders in similar cases, on a reasonable effort basis. This recurring theme is also found in the requirement to ensure *all* plausible alternate relevant markets are disclosed in Form – 1, which includes the reason for accepting or rejecting a particular market definition.

On the issue of valuation of a transaction, the Guidance Notes state that monetary benefits would include transfer of voting rights, securities, and tangible and intangible assets. An important addition made is that the valuation should include not merely the consideration paid by the acquirer, but also the consideration to be received through an open offer under the SEBI Takeover Code, if it is triggered by the deal.

In addition to the above, detailed guidance has been given regarding the groups to which the acquirer and the target belong. From the acquirer's perspective, the structure of the entire group, right up to the ultimate controlling entity and shareholders has to be shown. From the target's perspective, the group structure has to be disclosed with all affiliates 'downstream' of the target. The scope of 'complementary' services has been clarified as being products/services that enhance the value of the other product or service. The level of detail in Form-I has been increased, as the product/services overlaps and the relevant market analysis will have to be undertaken for each entity in which the acquirer entity, the target entity and their respective group entity(ies) hold even a single share!

Under Form 1, there is a requirement for furnishing market data for the last three years. This requirement has been waived in the Guidance Notes if the combined market share of the parties is less than 10%. However,

apart from this instance, the disclosure requirements have become much more onerous and detailed. It remains to be seen whether the enhanced disclosure requirements will deter transactions or lead to stricter compliance.

**This is an update for general information purposes only and does not constitute legal advice. Please contact us if you require further clarification on this subject.*



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