



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2023 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

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Green Channel Route under Rule 5A of the Combination Regulations

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Received 20 April 2023; *Accepted* 10 May 2023; *Published* 15 May 2023

Mergers and acquisitions have become a huge prospect in the corporate world as the corporations would benefit from the combined resources of each other. Every merger or acquisitions has to happen with the approval of the Competition Commission of India ('CCI') (except those combinations that fall within the de minimis rule). The CCI's approval is moving at a snail's pace among other functions of it. In the high times, where the legal connotations around mergers and acquisitions have been the focus of corporate and competition law, CCI has introduced an amendment to the Competition Act, 2002 ('the Act') in the year 2019 which has brought forth a significant change in the legal provisions governing the approval of mergers and acquisitions. CCI amended the Combination Regulations and inserted Rule 5A. Rule 5A is a green channel mechanism which is simpler and hassle free for getting approval for combinations that do not cause Appreciable Adverse Effect on Competition ('AAEC'). It has also inserted Schedule III, which provides prohibition for particularly three kinds of combinations who cannot choose the Green Channel Route. This article is an attempt to elaborate on the legislative amendment and to demarcate the gray areas where there is a need for clarifications from CCI.¹ This article discusses the provisions of the Green Channel Mechanism and also Schedule III of Combination Regulations in detail.

Keywords: *competition law, green channel regulation, CCI, combinations.*

¹ Dr. Jayendra Kasture, 'Review of the CCI 'Green Channel' - Automatic Approval Route for Certain Combinations' (2021) 4(2) IJLMH <<http://doi.org/10.1732/IJLMH.26604>> accessed 15 April 2023

INTRODUCTION: COMBINATION REGULATIONS

Trade, commerce, marketplace, and business are essential for a country's development. For India, such broad trade and commercial relations started growing only after it opened its economy in the year 1990. Commercial units, companies, corporations, MNCs, and TNCs started to emerge. With added Governance of these commercial units and marketplaces was considered quintessential, which made India to rethink its corporate legislation. Thus, in the year 2002, The Act replaced the obsolete MRTP Act.² A commission named "The Competition Commission of India" was also set up to adjudicate the cases pertaining to unfair trade practices, abuse of dominance and other competition-related disputes among enterprises. Meanwhile, mergers and acquisitions have become increasingly significant in enhanced business agreements and commercial deals. These are collectively called as Combinations which are regulated by Section 5 of The Act.³ Generally during a combination, one enterprise acquires another enterprise or two enterprises merge with each other. It involves changes in control, voting rights, assets, board of directors and all significant arenas of an enterprise. Section 5 defines a Combination. Any acquisition or merger, which meets the thresholds⁴ mentioned therein, comes under the definition of being a Combination. Section 6 of The Act further mandates that the proposed combination should get approval from CCI before actually executing the combination. There are certain procedural limitations set out in Section 6 of the Act,⁵ which regulates the approval of Combinations.

THE DE MINIMIS RULE

But not all combinations need the approval of CCI. There is an exception under the *de minimis* rule where if the asset or turnover levels of the combinations are falling below the thresholds, they are exempted from notifying the same to CCI. The intent behind this rule is to exclude

² Monopolistic and Restrictive Trade Practices Act 1969

³ Competition Act 2002, s 5

⁴ 'Combination' (*Competition Commission of India*) <<https://www.cci.gov.in/combination/combination/filing-of-combination-notice/form>> accessed 15 April 2023

⁵ Competition Act 2002, s 6

combinations that are not likely to cause AAEC, primarily because they do not have the thresholds to do so, to not have to wait for CCI's approval. Essentially, any combination where the target company being acquired has an asset or turnover value below 350 crores or 1000 crores respectively, is within the purview of this exception.

But, CCI was also of the opinion that combinations that do not produce an Appreciable Adverse Effect on Competition (hereinafter AAEC) need not wait for CCI's nod. In the purview of this, the Competition Law Review Committee⁶ was set up under the chairmanship of Mr. Injeti Srinivas. The committee submitted a commendation dated 26th July 2019 to the Ministry of Corporate Affairs, Government of India to amend certain provisions of the Act. These recommendations proposed a new notion for approval of combinations—the Green Channel Route, to facilitate the speedy disposal of merger and acquisition cases where there is no underlying harm to anti-trust regimes and no appreciable adverse effect on competition.

Therefore, with the view to accelerate the process of approval of combinations that do not pose a threat to competition in the market, CCI introduced the Green Channel Approval route following the recommendations of the committee. The CCI viz a gazette notification dated 13th August 2019, brought in certain amendments to the Act, especially regarding the transaction of business relating to combinations. The newly amended Combination Regulation of 2011 contained the Green Channel Regulation under Rule.

THE GREEN CHANNEL ROUTE

The Green Channel route has been introduced with the view to ease the doing of business in India. By the amendment, if the parties to a combination opt for Green Channel Mechanism, their combinations are deemed to be approved by the CCI. It is no longer necessary for them to wait for thirty days for CCI's approval. But Schedule III of the Combination Regulation lists

⁶ Committee reports' (PRS Legislative Research, 2023)

<<https://prsindia.org/policy/reportssummaries/report-competition-law-review-committee>> accessed 15 April 2023

three criteria, which should be met by the proposed combination, to get deemed approval under Rule 5A of the Combination Regulations.⁷

Schedule III of the Regulation restricts, horizontal, vertical and complementary agreements based on the assessment as mentioned below.

“Considering all plausible alternative market definitions, the parties to the combination, their respective group entities and/or any entity in which they, directly or indirectly, hold shares and/or control:-

- a) do not produce/provide similar or identical or substitutable product(s) or service(s);*
- b) are not engaged in any activity relating to production, supply, distribution, storage, sale and service or trade in product(s) or provision of service(s) which are at different stage or level of production chain; and*
- c) are not engaged in any activity relating to production, supply, distribution, storage, sale and service or trade in product(s) or provision of service(s) which are complementary to each other.”*

If the combination complies with the aforementioned criteria then the parties to the combination are mandated to fill and submit the amended Form I⁸(Form I which contains the Green Channel section) as well as a declaration (as prescribed in Schedule IV of amended regulations) that the proposed combination will not cause or is not likely to cause any appreciable adverse effect on competition. The declaration must substantiate that:

- The proposed combination does not have any horizontal, vertical or complementary overlaps.
- There will not be any appreciable adverse effect on competition if this combination is executed.

⁷ Competition Commission of India 2011, R 5A

⁸ ‘Combination’ (Competition Commission of India) <<https://www.cci.gov.in/combination/combination/filing-of-combination-notice/form>> accessed 15 April 2023

- The details disclosed in the application are not false or misleading and are true to the best of the parties' knowledge.⁹

The filing fee of INR 20,00,000 is required to be deposited while submitting the application for the combination as prescribed in Regulation 11 of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011. Once the application is received by the CCI, an acknowledgement notice certifying the deemed approval of the proposed combination is issued provided the CCI is of the opinion that the combination is valid according to Green Channel Route. This approval is an order by CCI under Section 31(1) of the Competition Act 2002.¹⁰

If the CCI is of the opinion that the parties to the combination have violated the procedures set out in Form 1 or they do not fit under Schedule III, the combination is void ab initio in the eyes of the law. However, the CCI gives the parties to the combination an opportunity of being heard, prior to declaring the combination as void. In case the parties to the combination are aggrieved by the decision of the CCI, in lieu of Section 53 B of the Act¹¹. The aggrieved party can file an appeal to the appellate tribunal-NCLAT.

HORIZONTAL COMBINATIONS

Schedule III clause (a) primarily restricts the combination of enterprises that produce/provide similar or identical or substitutable product(s) or service(s). Combinations of enterprises that produce/provide similar or identical goods or services often have the tendency to form a monopoly in providing such services or goods. Hence, two enterprises that produce similar goods or provide similar services are not eligible to opt for the Green Channel Route. Horizontal combinations also have the highest possibility to produce AAEC in the market as they have the capability of becoming the monopoly and dominating the market by adopting price-fixing practices. It might work at the prejudice of other competitors in the same market, or a different

⁹ *Ibid*

¹⁰ Competition Act 2002, s 31(2)

¹¹ Competition Act 2002, s 53B

market, so much so, it may even work to the prejudice of consumers. It is to be noted that, horizontal agreements are prima facie presumed to cause AAEC under Section 3(3) of the Act.

VERTICAL COMBINATIONS

Schedule III clause(b) restricts the combination of enterprises are engaged in any activity relating to production, supply, distribution, storage, sale and service or trade in the product(s) or provision of service(s) which are at different stages or level of the production chain; This prohibits the combination among enterprises that are in vertical relation to one another. In this sense, there cannot be a combination when the parties to the combination are acting in the same line of the production chain. The production chain essentially purports to producers, distributors and suppliers. Hence, it is restricted in the Schedule for a producer and a supplier of the same production chain to enter into a combination.

COMPLEMENTARY COMBINATIONS

Complementary combinations are combinations between enterprises that derive complementary benefits from each other. In the revised Guidance note issued, the CCI clarified that complementary combinations are combinations where by virtue of the combination, the value of the services offered or the goods produced is further enhanced. CCI also cited the simple example of good ink and cartridge. When an entity producing ink combines with the entity producing cartridge, they are said to be deriving complementary benefits from each other as the value of the ink is enhanced by the quality of the cartridge provided.

DRAWBACKS IN THE GREEN CHANNEL MECHANISM

The Green Channel Route has been enacted with the purview to ensure unnecessary delays in seeking approval for combinations and to promote the ease of doing business, it is important to remember that every coin has two sides. The plain reading of the first few lines of Schedule III is sufficient to understand that the process of self-assessing whether the combination fits or not, is a mind-wrecking process. It specifically says "*Considering all plausible alternative market*

definitions”;¹² the parties to the combination have to first identify various relevant markets in which they operate and the overlaps mentioned in Schedule III should not occur in all of such markets identified to be relevant. This is a time-consuming process. Even if there is a negligible or nanoscopic overlap the parties cannot opt for this route. It further goes on to say “*their respective group entities and/or any entity in which they, directly or indirectly, hold shares and/or control*.”;¹³ Therefore, the overlaps are not restricted to the particularity of the combination but the entirety of it. Thus, large corporations may find it difficult to opt for this route as their investments are diverse and given the market situation, there might be an overlap somewhere somehow.

Another drawback is the third restriction which prohibits complementary overlaps. Complementary overlaps are a new insertion to competition law. The Act by itself recognises only two overlaps – horizontal and vertical. Thus, the term complementary is vague and is not clearly defined anywhere in the statute or the Combination Regulations. It is difficult for advocates to interpret the term complementarily and assist their clients with respect to the same. Though the CCI has issued a clarification in this regard, there still seems to be much ambiguity in understanding the same. The example of ink and cartridge is extremely simple and vague and the parties to the combination do not have such simpler areas of operation. It is upon the CCI to further clarify how the term complementary should be construed in the arena of complex business interactions.

Furthermore, the amendment has not mentioned any specific time within which the CCI has the right to declare a combination to be void ab initio. By virtue of this, the parties to the combination cannot carry on their operations to the full extent as there might always be a fear of declaration of the combination to be void ab initio which might lead to the offence of gun-jumping in certain situations under Section 44 of the Act. Parties to the combination cannot be expected to take this risk. There is a high chance that parties may be reluctant to opt for Green Channel considering this hazard.

¹² Competition Act 2002

¹³ *Ibid*

CONCLUSION

It is a very plausible and commendable amendment to introduce a Green Channel Route which, no doubt, will benefit combinations that fall under the mentioned criteria. It sure has become a hassle-free and speedy process to get approvals for combinations that do not cause AAEC. It is highly welcomed. But every coin has two sides. When there is an attempt to include newer types of agreements, it is important and needful of the commission to make adequate clarifications on the same. Since there are no established precedents on this particular piece of legislation, it is expected of the CCI to aid the parties to the combination who seek to opt for the Green Channel Route, lest, they might be subjected to the offence of gun-jumping as elaborated above. It is also to be noted that in The Competition Law Review Committee, it has been mentioned that, the Green Channel Route can include cases of combinations under the Insolvency and Bankruptcy Code. It is all the more confusing now as to whether any special inferences have to be made for combinations proposed under this Code. Therefore, the amendment is welcomed and with the CCI's regular clarifications and judicial interpretations, the legislation will get more form and substance in the coming years of