

We're All in This Together: Analyzing “Interconnected Transactions” Under the Indian Competition Act, 2002

Article By:

Ratnadeep Roychowdhury

Khyati Dalal

Parina Muchhala

Introduction

“Interconnected transactions” broadly refer to multi-step transactions or a series of transactions, which are aggregated and viewed as a single transaction if undertaken by parties to achieve the same “ultimate intended effect”.

Sections 5 and 6 of the (Indian) Competition Act, 2002 (the “Act”), read with Regulation 9(4) of the Competition Commission of India (Procedure in regard to the transaction of business relating to Combinations) Regulations, 2011 (“Combination Regulations”), prescribe mandatory prior notification as a single transaction of a notifiable multi-step “interconnected transaction” to the Competition Commission of India (“CCI”) before the first step of such an inter connected transaction.

Regulation 9(4) of the Combination Regulations states that:

“Where the ultimate intended effect of a business transaction is achieved by way of a series of steps or smaller individual transactions which are inter-connected, one or more of which may amount to a combination, a single notice, covering all these transactions, shall be filed by the parties to the combination.”

The “ultimate intended effect” may be construed to be the final, broad and overarching end goal that will be achieved by the parties, cumulatively as a result of the occurrence of some or all of the steps / transactions / tranches involved. Accordingly, where one or more transactions in a series of transactions are exempt from CCI’s notification requirements, but are nevertheless interconnected to a notifiable transaction, parties need to: (i) file a composite notice with CCI with details of all

transactions, including 'exempt' but interconnected transactions; and (ii) ensure that no transaction is implemented, including the exempt transaction(s), prior to receipt of approval from CCI.

All notifiable interconnected transactions that do not obtain approval of the CCI are liable for gun-jumping penalties under Section 43A of the Act which may extend up to 1% of the total turnover or assets of such interconnected combination (whichever is higher).

Despite the importance of interconnected transactions to deal structuring, coupled with the heavy penalties leviable against parties, there is no statutory guidance available to ascertain the factors applied by the CCI while examining the interconnectedness of transactions. CCI's decisional practice has indicated some parameters that the CCI has been using to determine whether two or more transactions are 'interconnected'.

This article undertakes an analysis of interconnected transactions in India over the years as well as a comparative analysis of the concept in India and the European Union, and culls out some related key considerations for parties to evaluate during structuring deals that may be "interconnected". We also provide some insights into the manner in which interconnected transactions are assessed in the United Kingdom, Australia and Netherlands.

The Indian Position

Over the years, there are multiple cases where the CCI has undertaken an examination into the interconnectedness of transactions. However, the landmark judgment is Competition Commission of India v. Thomas Cook (India) Ltd. ("Thomas Cook" case), as it has been adjudicated by the CCI, the Competition Appellate Tribunal ("COMPAT") and the Supreme Court ("SC") separately. The transaction broadly involved a deliberation by the regulator in relation to the potential interconnectedness of the following two transactions: (i) a composite scheme between Thomas Cook Insurance Services India Ltd. ("TCISIL") and Sterling Holiday and Resorts India Ltd. ("SHRIL"), involving demerger of specified businesses of SHRIL, in exchange for equity shares of Thomas Cook India Ltd. ("TCIL") being provided to the shareholders of SHRIL, along with a parallel amalgamation of the residual businesses of SHRIL into TCIL, in exchange for equity shares of TCIL also being provided to the shareholders of SHRIL for this amalgamation (collectively, "Transaction 1"); and (ii) purchase of 9.93% shares of SHRIL by TCISIL through an open market purchase on the Bombay Stock Exchange, along with a fresh issuance and secondary purchase of shares separately occurring through relevant transaction documents ("Transaction 2"). While TCIL and SHRIL only notified Transaction 1 to the CCI, the CCI held that Transaction 2 was interconnected to Transaction 1 and was in the nature of a "composite combination", and accordingly required notification under the Act. The CCI imposed gun-jumping penalties under Section 43A of the Act.

The CCI noted that transactions may be interconnected depending on "the facts and circumstances of each case, with due regard to the subject matter of the transactions; the business and entities involved; simultaneity in negotiation, execution and consummation of the transactions; and also, whether it is practical and reasonable to isolate and view the transactions separately." However, this penalty was set aside by the COMPAT. In a subsequent appeal to the SC by the CCI against this order, which also affirmed the verdict of the CCI, the SC noted that Transaction 1 and Transaction 2 were both notifiable for being "intrinsically connected and interdependent with each other and form a part of one viable business transaction."

While this remains the defining pronouncement on this topic, additional considerations that have emerged from the jurisprudence over the years include: (i) whether the ultimate objective can be

achieved only on successful completion of all transactions (i.e. conditionality); (ii) whether transactions are in pursuance to the same transaction documents; (iii) cross-references within transaction documents of one transaction to the consummation / potential occurrence of another transaction; and (iv) correspondences between parties evidencing an intent that these transactions are commercially connected; (v) the transaction documents are authorized at the same board meeting; and (vi) the deal is structured as a multi-stage process, but expected to close by a certain common date.

While the general consequence of non-notification of such transactions attracts penalties under Section 43A, if binding documents have not been executed for all tranches / steps, the CCI may ask parties to re-file a notification once these documents are executed. For example, in the SVF Doorbell/Delhivery case, the CCI noted that amongst the two proposed interconnected transactions, only an MOU was executed for the second transaction. Accordingly, the CCI held that the term “other document” under Regulation 5(8) of the Combination Regulations is intended to cover binding documents only, parties were directed to re-file the application with the CCI once definitive, binding documents are executed. This might mean that parties will not be able to conclude any part of an interconnected transaction unless the binding documents for all parts are executed. This is a potential limitation on the structuring of transactions.

Interestingly, the CCI in the order under Section 43A in respect of Piramal Enterprises and Shriram Transport Finance Company has referred to the EU’s Jurisdictional Notice (as defined below) to hold that transactions occurring within a two-year look back period, between the same persons / undertakings, can be considered interconnected. That being said, there is currently no provision within the Act or the Combination Regulations indicating clear presence of a look back period / timelines within which transactions can be presumed interconnected. A detailed analysis of the EU’s legislative position (and the Jurisdictional Notice) has been provided within the subsequent section of this article.

Since there are no additional guidance notes or documents indicating legislative intent towards delineation of the scope of “interconnected transactions”, jurisprudence continues to be the primary guiding factor for parties when structuring deals to evaluate the anti-trust applicability and requirement of notification.

Interconnected Transactions in the European Union (“EU”)

EU competition law makes a broad reference to the concept of interconnected transactions, which is further augmented by guidance notes and member state-specific jurisprudence.

Merger control, and the identification of notifiable “concentrations” is governed broadly by the Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (“EUMR”). The concept of “interconnected transactions” can be primarily traced from Recital 20 of the EUMR, which states that “It is expedient to define the concept of concentration in such a manner as to cover operations bringing about a lasting change in the control of the undertakings concerned and therefore in the structure of the market. It is therefore appropriate to include, within the scope of this Regulation, all joint ventures performing on a lasting basis all the functions of an autonomous economic entity. It is moreover appropriate to treat as a single concentration transactions that are closely connected in that they are linked by condition or take the form of a series of transactions in securities taking place within a reasonably short period of time.” (emphasis added)

The relevant substantive provisions of the EUMR governing notifiable transactions are Article 3 and Article 5(2), which respectively deal with the identification of a “concentration” and the manner of calculation of turnover for determination of the notifiability of transactions.

Article 5(2) clarifies the method for determination of turnover which is to be resorted to by the EU Commission for determination of the existence of such “concentration”. Of particular importance is the second paragraph to Article 5(2), as per which “two or more transactions within the meaning of the first subparagraph which take place within a two-year period between the same persons or undertakings shall be treated as one and the same concentration arising on the date of the last transaction.” Accordingly, it appears that any “concentration” that is achieved through a series of transactions occurring within a two-year look-back period shall be considered as a concentration i.e. interconnected transactions, for which the turnover will also be assessed similarly.

In terms of the combined applicability of these Articles, as clarified by the “Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings” (“Jurisdictional Notice”), the analysis of the existence of a “concentration” under Article 3 precedes the analysis under Article 5(2). It is likely that in practice, once the EU Commission determines that a concentration exists under Article 3 having an effect on the European Community, the EU Commission may examine all transactions undertaken by these parties and undertakings during the preceding two years and will consider them to be “interrelated”.

Jurisprudence

In terms of EU antitrust jurisprudence, an important case which lays down the general framework of the concept of inter connectedness is the European Court of First Instance’s verdict in *Cementbouw Handel & Industrie BV v. Commission of the European Communities*. It was held that the following can help assess whether a transaction is inter connected: (i) transactions having occurred within a narrow time frame and bearing resemblance to one another; (ii) transaction documents and negotiations indicating that the parties want to wait for consummation of one transaction for initiation of the other; (iii) economic interdependence; (iv) conclusion of documentation at the same time before the same notary; and (v) postponement of one transaction for the other. However, the EU Commission in the *Mytilineos/Motoroil/Corinthos Power* case held that in case control may be acquired through a series of transactions (wherein there is no definitive timeline foreseen for the consummation of the second transaction), such transactions will not be treated as a “concentration” under the EUMR.

Key differences from the Indian regime

Three prima facie differences emerge in relation to the treatment of interconnected transactions under the Act and the EUMR:

- While the concept of “interconnected transactions” in India is derived from the procedural Combination Regulations, the EUMR is a more substantive regulation and is therefore limited to transactions that involve the “lasting change in control”. Thus, Indian parties must follow the Combination Regulations even when there is no change in control or an appreciable adverse effect on competition, so long as the thresholds under Section 5 are met.
- Article 5(2) of the EUMR prescribes that a “concentration” is deemed to arise on the date of occurrence of the last transaction. On the other hand, Regulation 9(4) of the Combination Regulations specifies that the interconnection is deemed to have arisen on the date of

occurrence of the first tranche / step / transaction of the multi-step transaction that is presumed to be interconnected.

- The EU Jurisdictional Notice clarifies that different transactions that are linked only by conditionality may not be considered to be interrelated if only some of them lead to a change of control of the target undertaking. On the other hand, Indian competition law considers conditionality to be a key determining factor for interconnectedness.

Interconnected transactions in other jurisdictions

United Kingdom (“UK”)

According to the Enterprise Act 2002 (“EA 2002”), any merger is to be referred to the Competition and Markets Authority (“CMA”) in the event that a merger substantially lessens competition in the UK’s market for goods and / or services or is a “relevant merger” (i.e. in case enterprises cease to be distinct enterprises at a point of time, or in case their combined turnover exceeds a specified threshold). In order to determine whether a merger is a relevant merger under the EA 2002, the CMA is empowered to consider successive events occurring within two years, that have the ultimate impact of two distinct enterprises ceasing to have independent existence, as simultaneous events. Accordingly, it can be stated that such transactions are seen as “interconnected” and will trigger the referral requirement under the EA 2002 on the date of occurrence of the last such event. The section particularly prescribes that due importance will be laid upon the persons substantially concerned in the engagements or transactions. Further, the CMA has clarified that it also possesses the discretion to consider ‘arrangements that are in progress or in contemplation’ in case of a public announcement has been made by parties to the proposed merger.

Similarly, “control” may also be sought through a series of transactions within two years that may have the impact of enabling persons to directly or indirectly control / materially influence the policy of any other person carrying on an enterprise, and shall be simultaneous events. The approval requirement under the EA 2002 shall also be triggered on the date of occurrence of the last such event leading to receipt of control.

Australia

In Australia, mergers are to be notified to the Australian Competition and Consumer Commission (“ACCC”) under Section 50 of the Competition and Consumer Act 2010 (Cth) (“CCA”). Merger notification under the CCA is voluntary, and a contravention arises only when a merger is otherwise in breach of Section 50 of the CCA. While the concept of interconnected transactions does not exist in a manner similar to India, the ACCC is generally empowered to assess a series of transactions, made by the same acquirer, over a period of time, as a singular transaction in the event that it constitutes a “creeping acquisition” within the scope of Section 50. Creeping acquisitions refer to a series of small-scale acquisitions, which, while individually do not have the effect of substantially reducing competition so as to breach Section 50 of the CCA, may collectively have that effect with the passage of time. Pursuant to discussions papers released by the ACCC in 2008 and 2009, a proposal to enact a bill that captures the ability of the ACCC to assess such acquisitions was passed vide the Competition and Consumer Legislation Amendment Act 2011.

Netherlands

In Netherlands, the domestic regulator has recognized “economic interdependence” as an additional criterion over and above the EUMR, for determining whether two separate transactions could constitute a “concentration”.

In the Dutch Case No. 6693, *Informele zienswijze [A] – [B]* decided on June 19 2009, we understand from public sources that the regulator has held that a reading of the EUMR along with local Dutch antitrust law indicates that in the event that transactions are not “legally interdependent” on each other, “economic interdependence” may also be assessed to determine whether two transactions constitute a single “concentration”. The indicators of economic interdependence may include: (i) significant combined use of the parts of parties for the production and distribution of goods and services; (ii) mutual supply relationships existing between the undertakings; (iii) physical or logistical connection between the parties; or (iv) use of key business assets commonly by the parties.

Potential Considerations for parties when evaluating India deals

In the absence of formal guidance and uncertainty surrounding the factors to determine whether a series of transaction could be considered an “interconnected transaction”, parties must, at the stage of structuring and documentation, ensure that the following factors are considered in order to avoid a potentially disadvantageous verdict by CCI:

Timing for undertaking an antitrust analysis of potential interconnected transactions

Parties should generally consider undertaking an antitrust analysis at the inception of the negotiations for a transaction to determine the notifiability of the deal before the CCI. It is imperative to ensure that such analysis accounts for all the steps of a multi-step transaction that may be considered to be “interconnected”. In the absence of formal guidance on this point from the CCI, parties may consider erring on the side of caution specifically for transactions which have similar businesses and parties, subject matter, timelines for negotiation, conditionalities, and for which it may not be easy to commercially isolate one transaction from another. Accordingly, for interconnected transactions, parties should notify the CCI prior to consummation of the first step / tranche, even if such step is exempt, if the thresholds set out under Section 5 of the Act might be breached for any of the future steps. Alternatively, parties could seek a pre-filing consultation to obtain greater clarity from the CCI.

Contents of transaction documents

In the event that the commercial intent of the separate transactions is not intended to have the same ultimate objective, the parties should ensure that the transaction documentation suitably reflects the commercial understanding and parties avoid the tests usually applied by CCI to hold that the separate transactions are a single inter-connected transaction. In line with the decisional practice of the CCI, some factors that parties should keep in mind and considering incorporating within transaction documents include: (i) ensuring that there are no conditionalities or contingencies within transaction documents and their negotiations (such as conditions precedent, references to documents of other transactions, events of default linked to execution of documents of the other transactions, correspondences between parties indicating an intent to tie up these transactions, such as e-mails or press releases); (ii) public announcements by each party in relation to one transaction does not indicate reliance on the other for its completion; (iii) if applicable, there is an identified different goal that will be achieved by the parties to each transaction, which is abundantly captured within the recitals and operative provisions of transaction documents.

Lastly, as a general caveat, parties must account for the time taken by the CCI in providing an approval while assessing the timing of their transaction. In the event that such transaction is interconnected, given the uncertainty of the approach that may be adopted by the CCI, this may impact deal timelines for all subsequent steps / tranches of such transaction.

Economic interdependence

If the criterion of economic interdependence (similar to the Dutch case specified above) were applicable in the Indian context, the CCI may possibly have widened scope of scrutiny of transactions. However, it is interesting to note that the amendment dated October 7, 2016 to the Combination Regulations amended Regulation 9(4) to remove “or interdependent on each other”. Be that as it may, jurisprudence has continued to indicate that transactions are “interconnected” and “interdependent” when a common aim is achieved (indicating a synonymous use of the two terms). Accordingly, parties may adopt a cautious approach in respect of the potential applicability of this criterion to their transactions as well.

Conclusion

As highlighted above, parties must be cautious when undertaking an analysis for the “interconnectedness” of multi-step transactions at an early stage. Parties must be mindful of the manner in which the discussions and modalities of their deals (both at the negotiation and documentation stage) to evaluate if there is a direct or indirect indication of an intention to achieve a single intended effect as per the above mentioned indicative factors.

Separately, a clarification or a formal guidance in terms of the scope and manner to determine “interconnected”, “interdependent”, “interrelated”, and “inter-conditional” is long awaited from the CCI for parties to deduce the intended legislative effect of these provisions for structuring their transactions according to the spirit of the law. We hope we are all together on this.

1. As per the Competition (Amendment) Act, 2023, the penalty under Section 43A of the Act for non-furnishing of information on combinations has been amended as per the Amendment Act and may be at least 1% of the higher of assets, total turnover or the deal value. This amendment is now effective as per the latest Gazette Notification of the Ministry of Corporate Affairs notified on May 18, 2023, in respect of the effectiveness of certain provisions of the Act, which is available at:

<https://egazette.gov.in/WriteReadData/2023/245953.pdf>.

2. Pursuant to the Thomas Cook case, the Competition Amendment Act, 2023 has permitted implementation of (a) an open offer; or (b) an acquisition of shares or securities, through a series of transactions on a regulated stock exchange forming part of a combination prior to the approval by CCI, if: (i) the notice of the acquisition is filed with the CCI in the manner set out in the Act, and (ii) the acquirer, in the aforesaid case, will not exercise any ownership / beneficial rights / voting rights or receive dividends / any other distributions, till receipt of approval from CCI. We have analysed the other updates brought about by the Competition Amendment Act 2023 in our recent updates, available at: <https://www.nishithdesai.com/NewsDetails/9599>. However, this amendment is not yet effective as per the latest Gazette Notification of the Ministry of Corporate Affairs notified on May 18, 2023, in respect of the effectiveness of certain provisions of the Act, which is available at:

<https://egazette.gov.in/WriteReadData/2023/245953.pdf>.

3. Paragraph 8, Thomas Cook/SHRIL, Combination Registration No. C-2014/02/153.

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4. See generally, Appeal No. 48 of 2014, order dated 26.08.2015 (COMPAT).
 5. Paragraph 26, Competition Commission of India v. Thomas Cook (India) Ltd. & Anr., (2018) 6 SCC 549.
 6. Vedanta/Sterlite, Combination Registration No. C-2012/03/45
 7. AXA India Holdings/Société Beaujon, Combination Registration No. C-2015/04/267.
 8. Jet Airways/Etihad, Combination Registration No. C-2013/05/122.
 9. Order under Section 43A and 44 of the Competition Act, CPPIB/ReNew Power, dated November 21, 2019.
 10. Paragraph 5.1, supra note 3.
 11. Paragraph 8, supra note 3.
 12. SVF Doorbell/Delhivery, Combination Registration No. C-2019/01/633.
 13. Paragraph 6, ibid.
 14. Paragraph 7 (e), Combination Registration No. C-2015/02/249.
 15. Available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32004R0139>.
 16. Recital 20, EUMR.
 17. Article 5(2), EUMR.
 18. Available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:095:0001:0048:EN:PDF>.
 19. Case T-282/02.
 20. Paragraph 131, 132 (referencing decision of the lower court), Cementbouw Handel & Industrie BV v. Commission of the European Communities, Case T-282/02.
 21. Paragraph 133, Cementbouw Handel & Industrie BV v. Commission of the European Communities, Case T-282/02.
 22. Paragraph 7, Mytilneos/ Motoroil/Corinthos Power, Commission Decision, Case No COMP/M.5445.
 23. Paragraph 44, Jurisdictional Notice.
 24. Section 22, Enterprise Act 2002 (UK).
 25. Section 23, Enterprise Act 2002 (UK).

26. Section 27(5), Enterprise Act 2002 (UK).

27. Section 27(8), Enterprise Act 2002 (UK).

28. Competition and Markets Authority, “Mergers: Guidance on the CMA’s jurisdiction and procedure” (January 4, 2022), available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1044636/CMA2_guidance.pdf

29. Section 29(1) and (2), Enterprise Act 2002 (UK)

30. Anticipated acquisition by Cavendish Square Partners (General Partner) Limited of a controlling interest in each of Lakeside 1 Limited (Keepmoat) and Apollo Group Holdings Limited (Apollo) (24 November 2011)

31. Available at: <https://www.legislation.gov.au/Details/C2011C00003>

32. See generally, the text of Section 50 as amended by the Competition and Consumer Legislation Amendment Act 2011, available at: <http://www.australiancompetitionlaw.org/legislation/2011ccla.html>

33. See generally, Explanatory Memoranda to Section 50 of the CCA, available at: <http://www.australiancompetitionlaw.org/legislation/2011ccla.html>.

34. Available at: <http://www.australiancompetitionlaw.org/legislation/2011ccla.html>.

35. “Two for One: Advice on Interrelated Transactions”, Lexology (September 17, 2009), available at:

<https://www.lexology.com/commentary/competition-antitrust/netherlands/de-brauw-blackstone-westbroek/two-for-one-advice-on-interrelated-transactions>

36. Ibid.

37. Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2016.

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