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## I. Introduction

The Competition (Amendment) Bill, 2023 received presidential assent on April 11, 2023 to become the Competition (Amendment) Act, 2023 (“Amendment Act”).<sup>2</sup> The provisions of the Amendment Act shall come into force as and when notified by the Central Government in the Official Gazette. The Amendment Act proposes significant amendments to the Competition Act, 2002 (“Act”) in respect of the merger control regime, provisions on behavioural issues as well as the enforcement framework under the Act.<sup>3</sup>

Amongst these is the insertion of Section 6A to the Act which permits acquirers to: (i) implement an open offer in accordance with the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (such offer, an “Open Offer”); or (ii) acquire shares or securities convertible into other securities, from various sellers, through a series of transactions on a regulated stock exchange (“Open Market Purchases”) ahead of any notification, and without penal consequences, under the Act, so long as: (a) notice of the acquisition is filed with the Competition Commission of India (“CCI”) within a time and manner specified by regulations; and (b) the acquirer does not exercise any ownership, beneficial rights or interest in such securities (including voting rights and receipt of dividends or any other distributions), until the CCI approves these transactions in accordance

with Section 6(2A), except as may be specified by regulations (“Open Market Amendment”).

Thus, the Open Market Amendment permits purchase of securities on a recognized stock exchange, through an Open Offer or Open Market Purchase, so long as the conditions specified above are met. Prior to the Open Market Amendment, the CCI typically penalised notifiable Open Offers or Open Market Purchases that were consummated (i.e. the securities had been purchased or an open offer was made) prior to procuring an approval from the CCI and there were no exceptions thereto. For a quasi-open developing economy such as India, this legislative and jurisprudential stance imposed significant difficulties for parties seeking to acquire strategic interests through such transactions in a timely manner. This concern can also be widely traced during the review and approval of mergers and acquisitions in the pharmaceutical sector<sup>4</sup> especially in relation to the entities engaged in developing, manufacturing and selling Active Pharmaceutical Ingredients (“APIs”). Typically, the Indian-developed APIs were made available to other stakeholders that may acquire rights through Open Market Purchases and prior to the introduction of the “Green Channel”<sup>5</sup> route, were subject to a long approval process by the CCI even if such transactions may not have any appreciable adverse effect on competition in India. Therefore, when viewed within this consolidated backdrop, the Open Market Amendment is a welcome change towards

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<sup>2</sup> *The Competition (Amendment) Bill, 2023*, Bill No. 185-C of 2022, 185 C.L.R.

<sup>3</sup> Aniruddha Majumdar et. al., *The Competition (Amendment) Act, 2023* (December 15, 2023), <https://nishithdesai.com/SectionCategory/33/Competition-Law-Hotline/12/63/CompetitionLawHotline/9599/1.html>.

<sup>4</sup> Combination Registration No. C-2014/05/170(CCI); Order under Section 31(7) dated December 5, 2014; Combination Registration No. C-2014/01/148(CCI); Order under Section 31(1) dated March 26, 2014 and Combination Registration No. C-2014/10/218(CCI); Order under Section 31(1) dated March 4, 2015.

<sup>5</sup> <https://www.cci.gov.in/combination/green-channel-view>.

balancing the interests of all stakeholders impacted by such transactions in India in the manner highlighted hereinbelow.

In this article, we delve into the rationale and need for this amendment, by examining jurisprudence and other related developments.

## II. Framework Prior to the Open Market Amendment

India has a suspensory merger regime, meaning any combinations exceeding the thresholds in Section 5 of the Act are subject to prior notification to CCI, and no step or transaction can be consummated unless CCI's clearance is obtained. The obligation to wait to consummate such transaction until receipt of clearance is called the "standstill obligation." This standstill obligation has led to a lot of challenges in transactions which involved Open Market Purchases.

Regulation 9(4) of the Competition Commission of India (Procedure in regard to the transaction of business relating to Combinations) Regulations, 2011 ("Combination Regulations") states that in respect of inter-connected transactions i.e. 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," parties must file a composite notice with the CCI stating details of all transactions. Additionally, they must ensure that no transaction is implemented (including any exempt but inter-connected transaction), prior to receipt of approval from the CCI.<sup>6</sup> Accordingly, prior to the Open Market Amendment, if an Open Offer or Open Market Purchases were a part of an inter-connected transaction, they would fall within the ambit of the standstill obligations and CCI's approval would be required before consummating such

transaction(s). Additionally, if such transaction(s) were consummated prior to the approval, the parties would face the risk of exorbitant gun-jumping penalties under Section 43A of the Act.

Due to this, multiple issues were faced by parties when engaging in such inter-connected transactions. For instance, the parties in *Competition Commission of India v. Thomas Cook (India) Ltd. & Anr.*<sup>7</sup> had two transactions that were assessed against the touchstone of "interconnectedness." One of the transactions involved an Open Market Purchase which was consummated prior to the notification of the other inter-connected and notified transactions. The notified transactions involved 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"), 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. Accordingly, when the Open Market Purchase was consummated, the parties did not have clarity whether the composite scheme would receive approvals to be consummated. Additionally, the Open Market Purchase was argued to be exempt under the *de minimis* target based exemptions of the CCI.<sup>8</sup> Despite this, gun-jumping penalties were imposed as the "ultimate intended effect" of the transactions was one, and therefore the notice under Regulation 9(4) was to be provided prior to Open Market Purchase of securities.<sup>9</sup>

Conversely, the *SCM Soilfert Limited / Mangalore Fertilizers and Chemicals Limited* case ("SCM Case")<sup>10</sup> involved an Open Market Purchase and an Open Offer. The parties (viz.

<sup>6</sup> Ratnadeep Roychowdhury et. Al., *We're all in this together: Analyzing "interconnected transactions" under the Indian Competition Act, 2002*, The National Law Review (December 15, 2023), <https://www.natlawreview.com/article/we-re-all-together-analyzing-interconnected-transactions-under-indian-competition>.

<sup>7</sup> *Competition Commission of India v. Thomas Cook (India) Ltd. & Anr.* Combination Registration No. C-2014/02/153 (CCI); Appeal No. 48 of 2014, (2018) 6 SCC 549 (Supreme Court of India).

<sup>8</sup> *Id.* at ¶6.

<sup>9</sup> *Id.* at ¶18 & 19.

<sup>10</sup> Combination Registration No. C-2014/05/175 (CCI); Order under Section 43A, Act in Combination Registration No. C-2014/05/175 (CCI); and *SCM Soilfert Limited and Another v. Competition Commission of India*, (2018) 6 SCC 631 (Supreme Court of India).

SCM Soilfert Limited and Deepak Fertilizers and Petrochemicals Corporation Limited (“DFPCL”), as persons acting in concert) approached the CCI for notification of: (i) the acquisition of 0.8 percent equity share capital of Mangalore Fertilizers and Chemicals Limited (“MCFL”) through Open Market Purchases, and (ii) the acquisition of 26 percent equity share capital of MCFL through an Open Offer. Interestingly, however, a day prior to this notification, SCM Soilfert Limited and DFPCL had already acquired 24.46 percent of the equity share capital of MCFL through multiple bulk Open Market Purchases on the Bombay Stock Exchange (“Initial Purchases”). While the parties had already consummated the Initial Purchases, the underlying securities acquired through the subsequent Open Market Purchases notified to the CCI had been placed in escrow. Additionally, the terms of the escrow agreement specified that the rights arising from the securities would be operable only on instructions of the escrow manager.<sup>11</sup> The parties argued that this was to ensure that the legal and beneficial rights accruing through these securities would not be exercised prior to CCI’s approval.<sup>12</sup> Nevertheless, this argument was rejected on grounds that the consummation of the notifiable transaction occurred when the securities were purchased on the Open Market. The fact that the escrow agreement had a restriction on exercise of rights was not relevant to this examination, since the wording of Section 6(2) does not provide for an *ex post facto* notice.<sup>13</sup> Accordingly, gun-jumping penalties were also levied in this case.

This position has also been reiterated in recent jurisprudence concerning Open Market Purchases. For instance, in the *SABIC International Holdings B.V* case,<sup>14</sup> the acquirer SABIC International Holdings B.V (“SABIC”) undertook the following transaction: (i) it acquired approximately 24.99 percent shareholding in the target (Clariant A.G) pursuant to the execution of a share purchase agreement in January 2018 (“Initial

Transaction”); and (ii) acquired an additional 6.51 percent in the target through open market purchases that were followed by the deposit of such acquired shares into an escrow arrangement that did not permit SABIC to exercise any rights in respect of the underlying securities (“Second Transaction”). When SABIC sought approval from the CCI for the Second Transaction (believing that the Initial Transaction was exempt under the Schedule 1 exemptions of the Combination Regulations), the CCI held that: (a) the Initial Transaction could not fall under the Schedule 1 exemption as SABIC was provided with the right to nominate members to the board of the target; and (b) according to the provisions of the Act, the Second Transaction could not have been consummated (regardless of the presence of an escrow that prohibits an exercise of rights in respect of the securities) without the prior approval of the CCI.

This was not a favourable position, as Open Market Purchases are undertaken at a specific time (and often, the quantity of shares to be purchased is fixed) due to the time and price sensitivity of securities publicly traded on a stock exchange. Further, in case of a hostile takeover triggering an Open Offer, acting fast is key to ensure that the acquirer can consummate the intended transaction. The imposition of standstill obligations on Open Offers and Open Market Purchases leads to the undesirable circumstance wherein parties would have to wait to obtain prior approval of the CCI. This would delay timelines, constitute an indirect disclosure of the intended transaction in the public domain, and cause a speculation in prices, each of which is detrimental for parties.

In light of these developments, the Competition Law Review Committee (“CLRC”) released a report in July 2019<sup>15</sup> noting that the merger control regime should dilute the standstill obligations for Open Offers and Open Market Purchases, since their imposition hampers the

<sup>11</sup> *Id.* at ¶7.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at ¶19.

<sup>14</sup> Combination Registration No. C-2020/05/746 (CCI); Orders under Section 43A dated July 15, 2022 and July 19, 2022.

<sup>15</sup> Ministry of Corporate Affairs of the Government of India, *Report of the Competition Law Review Committee-2018* (July, 2019).

viability of these transactions.<sup>16</sup> CLRC made reference to competition laws in European Union and Brazil to advocate for relaxations to be granted to these transactions, so that acquirers can purchase shares from stock exchanges and retain them without exercising beneficial rights of dividend and voting, till approval is received (similar to the approach adopted by the parties for the subsequent Open Market Purchases in the *SCM Case*). Additionally, in exceptional cases, CCI should have the powers to permit derogation of and modification to the standstill obligations, through an analysis of their effect on enterprises or third parties, the extent and nature of damage caused to parties, nature of the relevant market of the enterprises involved, and the effect of the proposed combination on competition.<sup>17</sup>

This was followed by release of the draft Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Third Amendment Regulations, 2019 (“Third Amendment Regulations”), which proposed to amend the Combination Regulations. It proposed insertion of Regulation 5B to the Combination Regulations, which would allow open market purchases, so long as the acquirer of shares from a public bid or a stock exchange: (i) provides a notice under Regulation 5 or 5A without delay; and (ii) does not exercise rights attached to the shares and/or influences the target in any manner.<sup>18</sup>

However, the Third Amendment Regulations were not passed and the Competition (Amendment) Bill 2020 was released instead.<sup>19</sup> Within this bill, an exemption from the standstill obligations was provided in respect of an Open Offer and Open Market Purchases, if: (i) CCI is notified within a specified timeline and manner; (ii) securities are maintained in a specified manner; and (iii) the acquirer does not exercise any ownership, beneficial rights or interest in such securities (including voting rights and

receipt of dividends or any other distributions), until CCI’s approval is received.<sup>20</sup>

### III. Competition (Amendment) Bill 2022 and Draft Combination Regulations

Subsequently, the Competition (Amendment) Bill 2022 was released, specifying the draft Open Market Amendment, and this was eventually passed as the Amendment Act. The detailed regulations reflecting the procedure and conditions is awaited. One distinction between the Amendment Act and the Competition (Amendment) Bill 2020 was the deletion of criteria (ii) of the bill, viz. securities should be *maintained in a specified manner*.

The Amendment Act also required the CCI to make regulations in respect of the Open Market Amendment. In light of the same, the CCI released the draft Competition Commission of India (Combinations) Regulations, 2023 for the purpose of seeking stakeholder input through a consultation process on September 5, 2023 (“Draft Combination Regulations”).<sup>21</sup> Contrary to the Amendment Act, the Draft Combination Regulations have proposed that prior to obtaining the CCI’s approval, the acquirer can undertake the following actions: (i) avail economic benefits; (ii) dispose shares or securities acquired; and (iii) exercise voting rights in matters related to liquidation or insolvency proceedings. However, the acquirer or any of its affiliates shall not, directly or indirectly, influence the enterprise whose shares or securities are being acquired, in any manner whatsoever. Further, the acquirer shall give a notice along with a declaration as specified in the Draft Regulations within 30 days from the date of acquiring the first lot of shares/securities.

Given that CCI has already considered “material influence” as the lowest level of control, clarity is awaited on the intended scope envisaged through the use of the term “*influence...in any*

<sup>16</sup> *Id.* at ¶7.1.

<sup>17</sup> *Id.* at ¶7.8.

<sup>18</sup> *The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Third Amendment Regulations, 2019*, F.No. CCI/CD/Amend/Comb. Regl./2019(3), The Competition Commission Of India (December, 2019).

<sup>19</sup> *The Competition (Amendment) Bill, 2020*, Bill No. 185 of 2022.

<sup>20</sup> *Id.*

<sup>21</sup> Palomita Sharma et. al., *Analysis of the Competition Commission of India (Combination) Regulations, 2023*, Nishith Desai Associates- News Details (December 15, 2023), <https://www.nishithdesai.com/NewsDetails/10776>.

*manner whatsoever,*” as in the absence of specific guidance, it may become ambiguous and broad. This is pertinent given that the parties are required to now provide a declaration (at the time of applying to the CCI for approval) that they have not “influenced” the affairs of the enterprise in a manner that is prevented by the regulations.

On a conjoint perusal of Section 6A of the Amendment Act, Regulation 6 and Schedule II of the Draft Combination Regulations, on the face of it there is a contradiction and corresponding inconsistency on the rights available with an acquirer as well as the timeline and conditions on availability of such rights with the acquirer. One way to resolve this contradiction, is that acquirers can continue to obtain the benefits of any economic distributions and dividends during the standstill period and vote in any insolvency proceedings, but will not be able to exercise any other rights attached to the shares (other than disposal).

#### **IV. Conclusion**

The Open Market Amendment was passed in the backdrop of the aforesaid developments and is indeed a welcome move. It restores an acquirer’s right to obtain shares pursuant to Open Offers or Open Market Purchases, protects the commercial sensitivity of these transactions, and preserves CCI’s right to assess combinations under the Act.

The Amendment Act when read with the Draft Combination Regulations prescribe the consolidated framework for the Open Market Amendment. However, despite the release of the Draft Combination Regulations as the procedural framework, there continues to remain some ambiguity on: (i) the eligibility of parties to economic benefits (such as dividends) during the standstill period; (ii) the scope of the “influence” that they are barred from exercising on the affairs of the target during such standstill period; and (iii) the treatment of these securities in case of a rejection by the CCI.

However, all things considered, this is an excellent step towards development and maturing of the competition regime in India .