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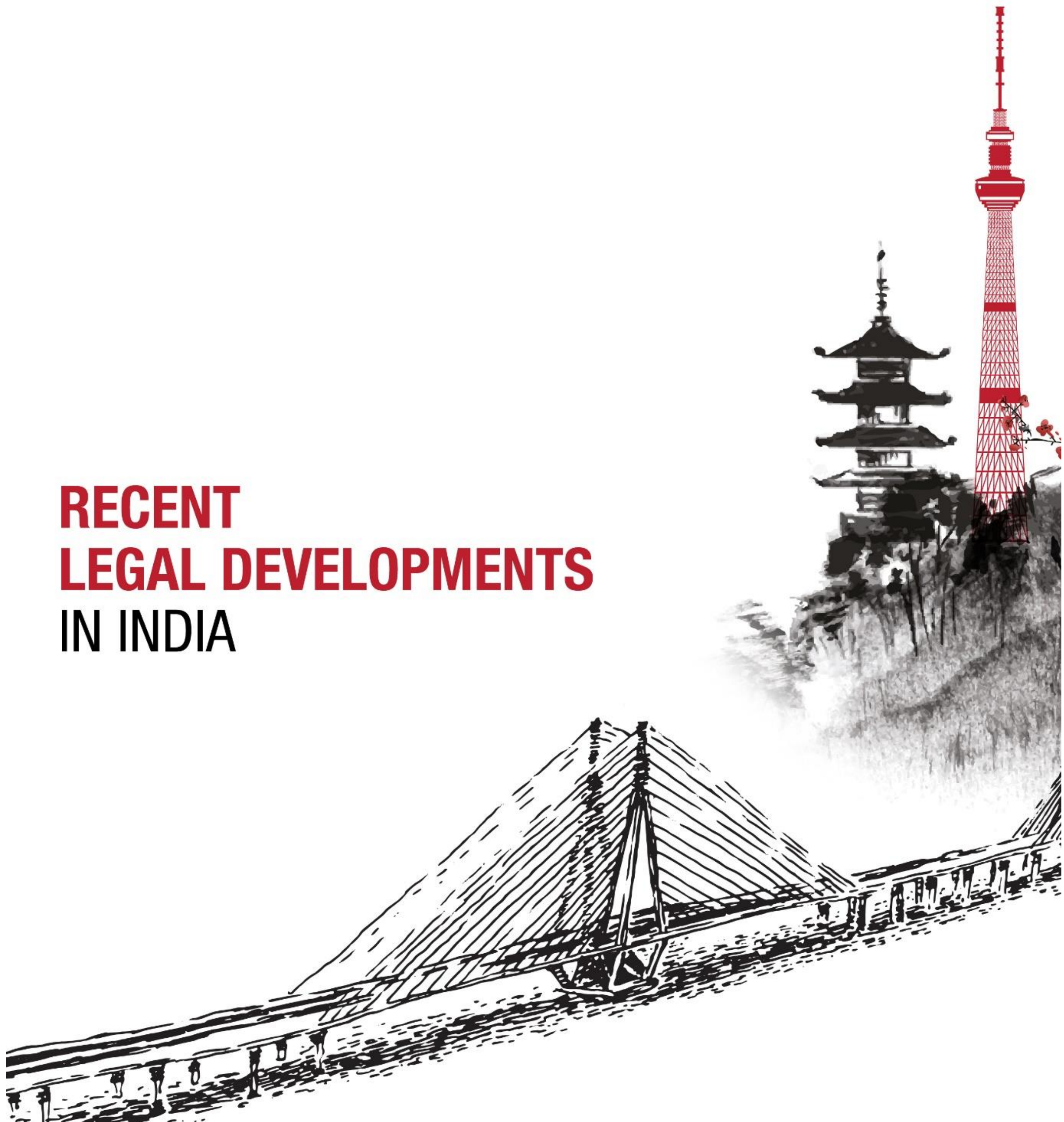

The IndusLaw 日本のニュースレター brings you the key regulatory and legal developments in various sectors in India.

April 2017

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INDUSLAW

INDUSLAW is a multi-speciality Indian law firm with 19 partners and over 110 lawyers across four offices in Bangalore, Delhi, Hyderabad and Mumbai.

We advise foreign and domestic clients with respect to transactions, dispute resolution, business strategies and operations from the perspective of Indian laws and regulations.

Our clients are spread across several industry verticals and geographies. Our clients are typically financial institutions, investment funds, foreign multinationals operating in India, domestic corporations, growing Indian companies, start-ups, social enterprises and not-for-profit entities. These organizations usually look to us for sophisticated corporate & financial transactions and complex litigation & dispute resolution proceedings. We work with clients across various sectors including bio-tech, education, financial services, healthcare, hospitality, infrastructure, manufacturing, micro-finance, real estate & construction, rural services, retail including online retail, technology, travel & tourism, telecom and trading.

A. Foreign Direct Investment – Notifications by DIPP[1] and RBI[2]

1. RBI

Infrastructure Financing- Definition of 'Infrastructure Lending'

The RBI has issued a notification dated March 2, 2017 pursuant to which the RBI has updated the definition of "Infrastructure Lending" specified in Non-Banking Financial Company - Systemically Important Non-Deposit taking Company and Deposit taking Company (Reserve Bank) Directions, 2016 and Non-Banking Financial Company – Non-Systemically Important Non-Deposit taking Company (Reserve Bank) Directions, 2016.

The government of India has updated the Harmonised Master List of Infrastructure sub-sectors specified in the abovementioned directions vide Gazette Notifications dated October 13, 2014, April 8, 2016 and August 1, 2016. In this regard, it has been advised by the RBI that for the purpose of definition of 'Infrastructure Lending', Non-Banking Financial Company ("NBFCs")[3] may henceforth be guided by the Gazette Notifications issued by the Department of Economic Affairs, Ministry of Finance, Government of India, from time to time.

Taking the above into account, the RBI has released the updated versions of the Non-Banking Financial Company - Systemically Important Non-Deposit taking Company and Deposit taking Company (Reserve Bank) Directions, 2016 and Non-Banking Financial Company – Non-Systemically Important Non-Deposit taking Company (Reserve Bank) Directions.

Full text of the notification is available at: https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=10871&Mode=0.

Risk Management and Inter-bank Dealings: Operational flexibility for Indian subsidiaries of Non-resident Companies

With a view to providing operational flexibility to multinational entities and their Indian subsidiaries exposed to currency risk arising out of current account transactions emanating in India, the extant hedging guidelines have been amended.

Products: All FCY-INR derivatives, OTC as well exchange traded that the Indian subsidiary is eligible to undertake as per FEMA, 1999[4] and Regulations and Directions issued thereunder. The transactions under this facility will be covered under a tri-partite agreement involving the Indian subsidiary, its non-resident parent / treasury and the AD bank. This agreement will include the exact relationship of the Indian subsidiary or entity with its overseas related entity, relative roles and responsibilities of the parties and the procedure for the transactions, including settlement.

Full text of the notification is available at: https://rbidocs.rbi.org.in/rdocs/notification/PDFs/NT2548A0BC889089C4717A6DA42507281DF8B.PDF

Investment by Foreign Portfolio Investors in Government Securities

The limits for investment by foreign portfolio investors (FPIs) in Government securities were last increased in terms of Medium Term Framework (MTF) announced vide A.P. (DIR Series) Circular No. 4 dated September 30, 2016.

[1] Department of Industrial Policy and Promotion or **DIPP** is the nodal government authority having the primary responsibility to promote foreign direct investment in India.

[2] Reserve Bank of India or **RBI** is the central bank of India. Its primary responsibility is to regulate the monetary policy of the Indian economy.

[3] A Non-Banking Financial Company (NBFC) is a company registered under the Companies Act, 1956 engaged in the business of loans and advances, acquisition of shares/stocks/bonds/debentures/securities issued by Government or local authority or other marketable securities of a like nature, leasing, hire-purchase, insurance business, chit business but does not include any institution whose principal business is that of agriculture activity, industrial activity, purchase or sale of any goods (other than securities) or providing any services and sale/purchase/construction of immovable property. A non-banking institution which is a company and has principal business of receiving deposits under any scheme or arrangement in one lump sum or in installments by way of contributions or in any other manner, is also a non-banking financial company (Residuary non-banking company).

[4] Foreign Exchange Management Act, 1999

The limits for investment by FPIs in Central Government Securities and State Development Loans (SDLs) for the quarter April-June 2017 are proposed to be increased by INR 110 billion and INR 60 billion respectively.

Full text of the notification is available at: https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=10902&Mode=0.

2. FDI

Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) (Second Amendment) Regulations, 2017

By way of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) (Second Amendment) Regulations, 2017, the RBI has amended certain rules relating to FDI in Limited Liability Partnerships (“**LLPs**”). The arrangement of Schedule 9 of the principal Regulations has been changed, and paragraph 9 ('Other Conditions') of Schedule 9, has been omitted.

Key changes to Schedule 9 are summarised below:

- Qualified Foreign Investors (QFIs) are now allowed to invest in a LLP, which was earlier not permitted.
- A company having FDI can be converted into an LLP under automatic route, only if it is engaged in a sector where foreign investment upto 100% is permitted under automatic route and there are no FDI linked performance conditions.
- Reporting of foreign investment in LLPs and divestment/transfer of capital contribution or profit share to be made in a manner as prescribed by RBI.

Full text of the notification is available at: https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=10876&Mode=0

Foreign Exchange Management (Foreign Exchange Derivative Contracts) (Amendment) Regulations, 2017

Schedule II of the Foreign Exchange Management (Foreign Exchange Derivative Contracts) Regulations, 2000 has been amended to permit a non-resident to enter into a foreign exchange derivative contract with an Authorised Dealer bank in India to hedge an exposure to exchange risk of and on behalf of its Indian subsidiary in respect of the said subsidiary’s transactions subject to such terms and conditions as may be stipulated by the Reserve Bank from time to time.

Full text of the notification is available at: http://egazette.nic.in/WriteReadData/2017/174852.pdf.

B. Intellectual Property Law

1. Trademarks

The Trade Marks Rules, 2002 have been repealed and the new Trade Marks Rules, 2017 have been notified by the Trade Marks Registry on March 6, 2017.

The new Rules specify the process to determine a well-known trademark. Under Rule 124, any interested person may request the Trade Marks Registry to determine his trademark as a well-known trademark. While determining the trademark as a well-known mark, the Registrar may consider the provisions of section 11 of the Trade Marks Act, 1999, call for documents if necessary and also invite objections from third parties. In case the trademark is determined as well-known, the same shall be published and included in the list of well-known trademarks. The Registrar may also remove the same from the list if the registration is not justified at a future time.

Under the new Rules, the intention to expedite the trademark registration process is made clear. In order to speed up the process, the following changes have been made:

- Examination time for an application has been reduced.

- The process of expedited examinations will now extend up to the registration of a trademark.

- The new Rules have mandated the addition of an e-mail address in order to allow the Registry to serve notices and documents via emails.

- Hearings may also be held through video- conferencing or through any other audio-visual communication devices, in which cases the hearing shall be deemed to have taken place at the appropriate office.

Full text of the notification is available at: http://www.ipindia.nic.in/writereaddata/Portal/News/312_1_TRADE_MARKS_RULES_2017__English.pdf.

2. Patents

Case law: Cipla Limited V. Novartis Ag & Anr

A division bench of the High Court of Delhi (the "**Court**"), in its recent judgment in the matter of Cipla Limited v. Novartis AG & Another, has ruled that it is not necessary for a patentee to manufacture his patented product in India to prove the working of patent under the provisions of the Patents Act, 1970 (the "**Patents Act**") and that a patent can be worked in India even through imports.

In a patent infringement suit filed by Switzerland-based Novartis Ag ("**Novartis**"), manufacturer of 'INDACATEROL' [a bronchodilator that provides symptomatic relief to patients suffering from chronic obstructive pulmonary disease (COPD)] along with its Indian importer and seller of the drug, Lupin Limited ("**Lupin**"), a permanent injunction was sought restraining Cipla Limited ("**Cipla**") from infringing patent no. 222346 of Novartis on INDACATEROL. A Single Judge of the Court found the patent rights of Novartis to be valid and restrained Cipla from inter alia, using, manufacturing, importing, selling any pharmaceutical products etc. containing 'INDACATEROL' or 'INDACATEROL Maleate', alone or in combination with any other compound or an Active Pharmaceutical Ingredients, till the pendency of the suit and also till the time Cipla is granted a Compulsory License, if it prefers to obtain, by making an application before a competent authority.

Cipla appealed before the Division Bench contending that the patent was not worked in India, as the patented product was imported and sold, and not actually manufactured in India. Cipla also contended that the injunction granted against it was against the public interest, as the imported quantities of the drug were not sufficient for the Indian demand and Cipla's version of the patented product was better able to address the needs of Indian COPD patients.

The Court, however, found merit in the claims of Novartis - that the working of a patent in India includes importing as well. With regard to the 'limited quantities' defence taken by Cipla, the Court again agreed with the arguments of Novartis – that Cipla did not have a compulsory license, the subject patent was valid and had to be enforced against infringers under the Patents Act. The Court held that Section 48 of the Patents Act (that describes rights of patentees) is not subject to the provisions of the Section 83 of the Act that provides general principles applicable to working of patents in India. The Court noted that INDACATEROL was not a life-saving medicine and available in sufficient quantities for Indian patients. Relying on F. Hoffmann La Roche Limited and Another v. Cipla Limited: 2009 (40) PTC 125 (Del) (DB), the Court observed that 'public interest' is the fourth factor, and not the sole factor, to consider for grant of injunction in cases of patent infringement, besides a plaintiff establishing a prima facie case, balance of convenience and irreparable losses. As Novartis was able to make out a valid case for grant of the temporary injunction, the Court dismissed the appeal and upheld the order passed by the Single Judge.

Full text of the order is available at: http://lobis.nic.in/ddir/dhc/BDA/judgement/09-03-2017/BDA09032017FAOOS212015.pdf.

3. Designs

Case law: Kent RO Systems Ltd & Anr v Amit Kotak & Ors (Delhi HC)

A single-judge bench of the High Court of Delhi (the "**Court**"), in its recent judgment *Kent RO Systems Ltd & Anr v Amit Kotak & Ors* recently ruled that e-commerce portals are not bound to screen information for potential infringement of intellectual property rights before posting the same on their websites.

Background:

Kent RO Systems Ltd ("**Plaintiff**"), a well-known manufacturer of water purifiers, filed a suit against Mr. Amit Kotak ("**Defendant 1**") and eBay India Private Limited ("**Defendant 2**") alleging infringement and piracy under the Designs Act, 2000 ("**Designs Act**"). Defendant 1 had advertised and offered for sale on Defendant 2's website, certain water purifiers whose shape, look and appearance were deceptively similar to purifiers sold by Plaintiff and for which Plaintiff had obtained registration under the Designs Act.

Plaintiff had previously brought to the attention of Defendant 2 that Defendant 1 was offering and selling water purifiers which infringed Plaintiff's design rights. In line with its obligations as an intermediary under the Information Technology Act, 2002 ("**IT Act**") read with the Information Technology (Intermediaries guidelines) Rules, 2011 ("**IT Rules**"), Defendant 2 had taken down the listings for such products from its website. However, the Plaintiff thereafter found that a large number of other infringing products continued to be advertised and sold on Defendant 2's website by Defendant 1 among others.

Plaintiff argued that as per the IT Rules, Defendant 2 was expected to (i) notify its users that they were not permitted to post information that violated or infringed the intellectual property rights of any other person (ii) take down any infringing material within 36 (thirty six) hours of being informed of the same; and (iii) ensure that thereafter no other infringing material would be uploaded or displayed on its website. Defendant 2's failure to abide by these requirements would cause it to lose safe harbour protection granted to intermediaries under the IT Act, and therefore be liable under Section 19 of the Designs Act for permitting Defendant 1 to sell infringing items on its website.

Defendant 2 countered that as an intermediary under Section 79 of the IT Act, as long it observed due diligence and other compliances as required under the IT Act, it would not be liable for any third party information, data or communication posted on its website and could avail safe harbour protection, as its function was limited to providing access to such information, and not selection or modification of such information. Additionally, Defendant 2 informed the Court that immediately upon the receipt of complaint from Plaintiff in relation to infringing content, it removed such content from its website. Defendant 2 also assured the Court that it would follow the same practice in future as well in relation to any further complaints received.

Findings:

The Court was of the view that as per the IT Act, the obligation of an intermediary to remove or disable information hosted on its portal arises only upon receipt of a complaint. The intermediary would not be required to screen all information prior to posting of the same, as this would have the effect of making the intermediary a body to determine if there was any infringement of intellectual property rights. Any expectation to do so would unreasonably interfere with the rights of the intermediary to carry on its business. The Court was of the opinion that under the IT Rules, the intention of the legislature was only to require intermediaries, to declare their policy against infringement, advise users not to post infringing material, and remove any such material only after receipt of a complaint. In this regard, the Court drew a parallel to a publisher of a newspaper and observed that such publisher is not required to screen advertisement for infringement of intellectual property rights prior to publishing of such advertisements, and an intermediary would be treated similarly. Accordingly, an intermediary would not lose its safe harbour protection for failing to screen products prior to their posting.

Full text of the order is available at: http://www.livelaw.in/ecommerce-websites-not-obligated-screen-products-ip-infringement-posting-website-delhi-hc-read-judgment/.

C. Insurance Regulatory Updates

1. Guidelines on insurance e-commerce

The Insurance Regulatory and Development Authority of India (IRDAI) issued guidelines under Section 34 of the Insurance Act, 1938 and Section 14 of the IRDA Act, 1999 to promote e-commerce in the insurance space, which is expected to lower the cost of transacting insurance business and bring in higher efficiencies and greater reach. The guidelines will promote the selling and servicing of insurance policies through e-commerce platforms with a view to increase insurance penetration in the country in a cost-effective manner.

Full text of the notification is available at: https://www.irdai.gov.in/ADMINCMS/cms/whatsNew_Layout.aspx?page=PageNo3089&flag=1.

2. Investment in Units of "Real Estate Investment Trusts (REIT) & Infrastructure Investment Trusts (InvIT)"

Pursuant to Section 14 (2) (k) of IRDA Act, 1999 IRDA has now permitted Insurers to invest in Units of REITs / InvITs which conform to the following:

- The REIT /InvIT rated not less than "AA" shall form part of Approved Investments.
- An Insurer can invest not more than 3% of respective fund size of the Insurer or not more than 5% of the Units issued by a single REIT / InvIT, whichever is lower.
- No investment shall be made in REIT /InvIT where the Sponsor is under the Promoter Group of the Insurer.
- Investment in Units of InvIT will form part of "Infrastructure Investments", for the purpose of Pattern of Investments under IRDAI (Investment) Regulations.
- Investment in Units of REIT will form part of "Investment property" as per Note 6 to the Regulation 9 of IRDAI (Investment) Regulations, 2016

Full text of the notification is available at: https://www.irdai.gov.in/ADMINCMS/cms/Circulars_Layout.aspx?page=PageNo3092.

D. Employment Law

The Maternity Benefit (Amendment) Act, 2017

The Maternity Benefit Act, 1961 (the "**Act**") has been recently subject to certain significant amendments. Women employees are now entitled to additional maternity leave and employers with a certain number of employees are required to provide crèche facilities.

AMENDMENT

The Maternity Benefit (Amendment) Act, 2017 (the "**Amendment Act**") received the assent of the President of India on March 28, 2017. Subsequently, the Ministry of Labour and Employment issued a notification dated March 31, 2017, stating that all the provisions (except the provision pertaining to work from home) of the Amendment Act will come into force from April 1, 2017. The provision pertaining to work from home will come into force on July 1, 2017.

The provisions of the Amendment Act are summarized below:

- Maternity leave has been increased from twelve (12) weeks to twenty-six (26) weeks for the first two surviving children. Out of these twenty-six (26) weeks, not more than eight (8) weeks shall precede the expected date of delivery.

- A woman having two (2) or more than two (2) surviving children shall be entitled to twelve (12) weeks' maternity leave, of which not more than six (6) weeks shall precede the expected date of delivery.

- The term "commissioning mother" has been defined as a biological mother who uses her egg to create an embryo implanted in any other woman. A commissioning mother is entitled to maternity leave for a period of twelve (12) weeks from the date the child is handed over to such commissioning mother.

- A woman who legally adopts a child below the age of three (3) months is also entitled to maternity leave for a period of twelve (12) weeks from the date the child is handed over to the adopting mother.

- An employer may permit a woman to work from home on mutually agreed terms and conditions in cases where the nature of work assigned to a woman is of such nature that she may work from home.

- Every establishment with more than fifty (50) employees is required to provide crèche facilities within such distance as may be prescribed, either separately or along with common facilities. Further, the employer shall permit women employees, four (4) visits a day to the crèche, which shall also include the interval of rest allowed to such woman.

- The employer is required to inform all women employees in writing and electronically at the time of their initial appointment, details of rights available under the Act.

INDUSLAW VIEW

The swift notification of the Amendment Act is extremely significant. Given that women are often underrepresented in the formal workforce, it is expected that this Amendment Act will go a long way towards restoring gender balance at the workplace.

It also echoes international standards set by the International Labour Organization (ILO). Countries that have ratified the Maternity Protection Convention, 2000 are required to provide at least fourteen (14) weeks of maternity leave. By virtue of the Amendment Act, India is now far ahead of the curve, and ahead of countries such as France, Singapore, Germany and Japan.

Also, the Amendment Act incorporates other laudable provisions such as providing leave for adoptive and commissioning mothers and allowing a 'work from home' option wherever possible.

However, as with any major legislative amendment, it's likely that the Amendment Act will throw up a few questions and may require clarifications. An obvious one relates to companies with more than fifty (50) employees which are required to provide crèche facilities under the Amendment Act. It is currently not quite clear as to how an employer is to discharge this obligation. At the moment, it is unclear as to who will bear the costs of such a facility and how far the crèche should be located from the office. Further nuances, such as the age group for crèche admissions and age until which the facility must be provided, have also been left unanswered.

Also, since the Amendment Act is prospective (it comes into effect from April 1, 2017), employers are likely to ascertain whether the beneficial provisions also apply to women employees who are currently on maternity leave or those who have just returned to work after a twelve (12) week leave.

Full text of the notification is available at: http://egazette.nic.in/WriteReadData/2017/175036.pdf.

E. Competition Law Updates

Combinations under Competition Law: De-Minimis Exemptions

The Ministry of Corporate Affairs (the "**MCA**") has clarified the scope of the de-minimis exemptions, which exempt certain enterprises from the applicability of section 5 of the Competition Act, 2002 (the "**Act**"), by issuing notification numbers. S.O. 988 (E) (the "**2017 Notification**") and S.O. 989 (E) (the "**Repeal Notification**"), both dated March 27, 2017.

Pursuant to a notification issued by the MCA in March, 2016 (the "**2016 Notification**"), enterprises (whose control, shares, voting rights or assets were being acquired) having assets of a value less than INR 3.5 billion (approximately USD 54 million) or with turnover less than INR 10 billion (approximately USD 154 million) were exempted from qualifying as a 'combination' under Section 5 of the Act (the "**De-Minimis Exemption**").

Consequently, combinations involving such exempted enterprises did not require notification to the Competition Commission of India (the "**CCI**") under section 6(2) of the Act.

Despite the De-Minimis Exemption:

- mergers and amalgamations of enterprises (referred in clause 5(c) of the Act), which are merely a legal structure for combinations, were not provided the benefit of the De-Minimis Exemption, leading to the anomaly that any merger or amalgamation falling within the ambit of section 5(c) of the Act required notification to the CCI; and
- where only an asset or business division of an enterprise was being acquired by another entity, the assets and turnover value of the entire enterprise was taken into account for calculation of thresholds for the De-Minimis Exemption, without regard to the value of the asset or the assets and turnover attributable to only such business division.

This created significant stress in the mergers and acquisitions market as the asset or turnover value of the entire enterprise would often lead to such enterprises breaching the threshold limit prescribed under the De-Minimis Exemption even though the subject matter of the transaction would indeed be de-minimis.

The intent of the De-Minimis Exemption was therefore lost in such cases

KEY DEVELOPMENTS

While the 2017 Notification has retained the threshold limits under the De-Minimis Exemption it has expanded its scope.

Mergers or Amalgamations

The 2017 Notification has significantly expanded the scope of the 2016 Notification by categorically providing an exemption to all enterprises being parties to transactions covered under section 5(a) (acquisition of assets, shares), 5(b) (acquisition of control) and 5(c) (mergers and amalgamations) of the Act.

Recalibrating the target

The 2017 Notification clarifies that only the value of the assets (in India) being acquired, taken control of, merged or amalgamated shall be considered for calculation of the asset threshold for the purpose of the De-Minimis Exemption. Under the 2016 Notification, the assets of the entire enterprise (whose control, shares, voting rights or assets were being acquired) were to be considered for this purpose.

Transfer of business division of an enterprise

The 2017 Notification categorically provides that in the event of a transaction, where a portion of an enterprise or division or business is being acquired, taken control of, merged or amalgamated with another enterprise, then only the relevant assets and turnover (i.e. those relating to the portion or division or business being transferred and not the enterprise itself) shall be taken into account for the purpose of calculating the thresholds under section 5 of the Act.

The 2017 Notification also details the method of valuation of assets in such cases.

INDUSLAW VIEW

The 2017 Notification has brought much needed clarity by resolving anomalies in the scope of the De-Minimis Exemption. Parties can now plan transactions taking into account the subject matter of the transaction and the.
CCI is relieved of the burden of reviewing those transactions which are unlikely to cause an appreciable adverse effect of competition in the relevant market

It is also heartening to see the MCA update and clarify the exemption notification promptly in order to remove difficulties. This approach to delegated legislation is indeed an important step towards fulfilling the aims of the government's ease of doing business campaign.

While the initiative of the government is admirable, the language of the 2017 Notification may still need further clarification. For instance, the language creates ambiguity as to which turnover is relevant for the purpose of share acquisitions. A purposive interpretation would suggest that only the turnover of the target enterprise is relevant and we hope that the CCI follows a holistic approach in order to give full effect to the intent of the 2017 Notification.

Full text of the notification is available at:
http://www.egazette.nic.in/WriteReadData/2017/175056.pdf.

INDUSLAW JAPAN TEAM KEY CONTACTS

Gaurav Dani, Partner
Delhi office
Admitted to practice in India and New York
LLB, University of Buckingham (1999)
LLM, Boston University (2001)

gaurav.dani@induslaw.com

Suneeth Katarki, Partner
Bangalore Office
Admitted to practice in India
B.A., LL.B (Hons.), National Law School of India University, Bangalore (1996)

suneeth.katarki@induslaw.com

Ray Vikram Nath, Principal Associate
Delhi Office
Admitted to practice in India
B.S.L., LL.B Symbiosis Law School (2003)
LLM, University of Pennsylvania Law School (2009)

rayvikram.nath@induslaw.com