
CCI REVISES GUIDANCE NOTE FOR MERGER CONTROL NOTIFICATIONS**1. INTRODUCTION**

While the entire world is swarmed in critical updates pertaining to redressal during times of COVID-19; the Competition Commission of India (“CCI”) has issued Revised Guidance Notes to Form I (“**Revised Notes**”) to align the earlier guidance notes with the amended Form I and facilitate parties for filing the notice before the CCI.

Under the Competition Act, 2002 (“**Competition Act**”); the CCI has the mandate to regulate merger, acquisition, amalgamation, among others (herein referred as “**combinations**”). Section 5 and 6 of the Competition Act regulate combinations and the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (“**Combination Regulations**”) is the principal regulation governing the notice of combination with the CCI.

In order to streamline the combination process, the CCI on August 15, 2019, introduced a latest set of amendments (“**Amendment Regulations**”) to the Combination Regulations. The Amendment Regulations among others, introduced the Green Channel for deemed approval of combinations, its criteria for eligibility (Schedule III) and amended the Form I provided under Schedule II (“**Amended Form I**”).

With the introduction of the Amended Form I, the earlier guidance notes to Form I was ill-equipped to address practical aspects of availing the Green Channel before the CCI.

2. REVISED GUIDANCE NOTES

As mentioned in the introductory remarks, the CCI by its Press Release No. 49/2019-20 dated March 27, 2020, issued comprehensive Revised Notes to Form I (“**Revised Notes**”) to align the guidance notes with Amended Form I and to facilitate parties for filing the notice before the CCI.

As compared to the old guidance notes to Form I, the Revised Notes are more detailed and practical. The Revised Notes give a comprehensive guidance for sub-parts of each of the VIII parts of the Form I. Even though most of the information that is required to be filed under the Amended Form I remains the same, the Revised Notes simplify the understanding of the information required to be filed in the Amended Form I. Some of the key points made in the Revised Notes are as under:

2.1. Basic Information

For Part I of the Amended Form I (that is, “**Basic Information**”) – The Revised Notes, necessitates role of a party to the combination to be clearly identified (that is, whether a party is an acquirer or a target or a party to merger/

amalgamation (transferor and transferee). Similarly, in case an acquisition is proposed through a group company or affiliate (existing or to be created); then the complete details of acquiring entity is required. In terms of a joint venture (“JV”); one is required to indicate if one or more parties is/are transferring business/assets to JV.

2.2. Meeting the Thresholds

For Part IV of the Amended Form I (that is, “**Meeting the thresholds**”) – The determination of assets and/or turnover in India, one is required to also provide the assets/turnover of companies registered in India and those incorporated in foreign jurisdictions. It is also clarified that while checking the thresholds on company or group basis, the assets and turnover are to be considered in accordance *with substance of the transaction* and not merely by their form. The Revised Notes also urge the parties to rely upon the FAQs available on the website of the CCI for additional guidance.

2.3. Description of the Combination

For Part V of the Amended Form I (that is, “**Description of the combination**”) – This mainly includes guidance on (a) explaining the scope of the proposed combination, (b) rights arising from the proposed combination (such as veto rights, affirmative voting right; any other rights or advantage of commercial nature; right to appoint board of director; information sharing rights); (c) constituents of value of proposed combination and (d) certified copy of the orders/decisions passed in other jurisdictions relating to the proposed combination to be attached.

In terms of “*any other relevant information related to the combination*” the CCI in the form of Revised Notes has clarified that it may include information that “*has a bearing*” or “*is material for assessment of the proposed combination*”, such as: (a) regulatory approvals from government authorities and other regulators; (b) proceedings that may have a bearing on the proposed combination and (c) provide similar orders of CCI or other jurisdictions with respect to market definitions, industries, among others.

2.4. Activities of parties to the combination and sector overview

For Part VI of the Amended Form I (that is, “**Activities of parties to the combination and sector overview**”):

- (a) The Revised Notes provide a format for providing details of Parties to the proposed combination including their affiliates and also guide on the extent of information to be provided about groups separately for acquirer side and target side.
- (b) Even though in the previous guidance notes, the parties were required to give details of horizontal overlaps, vertical and complimentary activities, however, in the Revised Notes this information is simplified and streamlined. It provides for separate follow up questions in case there is (i) horizontal overlaps, (ii) vertical activities and (iii) complementary activities of the parties. Further, for the purpose of defining of relevant market, the Revised Notes also suggest that all plausible alternatives for relevant product market and the relevant geographic market should be taken into account.
- (c) The Revised Notes also take into consideration direct or indirect shareholding and/or control by the parties or their group companies over the other company (in case of horizontal overlaps or vertical activities or complementary activities). Accordingly, two types of entities may be considered: (i) affiliates of the parties and

- (ii) entities mentioned in Schedule III of the Combination Regulations, where the party has a shareholding of 10% or more, a right or ability to exercise any right that is not available to an ordinary shareholder; or a right or ability to nominate a director or observer in another enterprise.
- (d) The Revised Notes further provide guidance on the information to be included for giving an overview of the sector/ industry (broadly similar to the old guidance notes).
- (e) The parties to the proposed combination are required to provide information on pendency of any proceedings over the last 5 years. This information is to be about - nature of proceedings, name of authority (CCI or foreign), and status of proceedings.

2.5. Green Channel

For Part VII of the Amended Form I (that is, “**Green Channel**”) – the eligibility criteria for Green Channel is laid down in Schedule III introduced in the Amendment Regulations. Green Channel is applicable wherein the parties, 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.

Although, in the Amended Form I, the notifying party was required to indicate the applicability of Green Channel (simpliciter); the Revised Notes clarify that the notifying party shall tick the applicability of appropriate box (as Yes/No).

2.6. Attachments

For Part VIII of the Amended Form I (that is, “**Attachments**”) – In this part, apart from other things, the Revised Notes clarify that the documents, material (including reports, studies) among others, considered by and/or presented to the board of directors of the parties to the combination are to be attached only in cases where the overlaps exist.

INDUSLAW VIEW

With a view to standardize the M&A review process, the Revised Notes is issued to render practical and user-friendly approach. It provides the scope of information and documents that a party is required to file (going-forward) along with the Form I. The guidelines provided are crucial for consideration by parties before filing the notice before the CCI.

With regard to Green Channel that was introduced by the Amendment Regulations, ten notices (under Green Channel) got automatic approval from the CCI. The Revised Notes provide more clarity regarding eligibility criterion for green channel which will help parties to ensure that the notice is not considered invalid.

Also, vide a separate circular/ notice dated March 30, 2020, the CCI has allowed filing of combination notices under Green Channel through email and making the payment of the fee electronically.

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