

Obtaining Green Channel Approval In India

Authored by:

Aditya Bhardwaj, Partner

Rinki Singh, Senior Associate

Introduction

The mechanism of green channel approval was introduced in India on August 13, 2019, aiming to foster ease of doing business by reducing time and cost of transactions. A green channel route is a fast-track mechanism or an automatic system of approval for certain combinations whereby parties receive a deemed approval of the Competition Commission of India (“**CCI/Commission**”) upon filing of the notice. Under a green channel route, the parties are not required to observe any standstill period or wait for an order of approval of the CCI/Commission. However, not all combinations are eligible for a green channel approval and only certain combinations that meet the specified criteria can avail the benefit of the said route. Since 2019, more than 100 combination notices have been filed under the green channel route. Recently, the already existent criteria for green channel approval have been codified with certain modifications under the Competition (Criteria of Combination) Rules, 2024 (“**Green Channel Rules**”). The Green Channel Rules have been enforced with effect from September 10, 2024, and discussed later in this article.

Filing of notification under green channel route

In terms of Section 6(4) of the Competition Act, 2002 (“**Act**”), a notification in Form - I notice¹ is required to be filed by the parties under the green channel route. As soon as the notice is filed and an acknowledgement thereto has been issued, a deemed approval of the CCI/Commission is granted to the parties.² Generally, the Act requires parties to observe a standstill obligation of 150 days from the date of filing or receipt of an order of approval of the CCI/Commission, however, under the green channel route no such required is applicable. Though, parties receive an instant deemed approval of the CCI/Commission upon filing the notice under green channel, but such deemed approval is not absolute and is subject to scrutiny of the CCI/Commission. In view of the powers under Section 20(1) of the Act, the CCI/ Commission may initiate an inquiry within one year from the date of filing of the notice, but not after that period.³ If the CCI/Commission finds that the combination does not meet the criteria for green channel approval, or that the information provided or declarations submitted by the parties are incomplete or incorrect, the notice filed will be declared *void ab initio* under Section 6(6) of the Act. The CCI/Commission may then issue an order as it deems appropriate. In previous decisions, the CCI/Commission has imposed penalties on acquirers under Section 43A and/or Section 44 of the Act for submitting incorrect notices.⁴ Therefore, it is crucial for the parties to submit accurate notices to the CCI/Commission

Criteria specified under Green Channel Rules

In terms of Section 6(4) of the Act, a green channel notification may be filed only if the combination satisfies the criteria stipulated under Rule 3 of the Green Channel Rules and is not otherwise exempted⁵ under the Act. Rule 3(1) of the Green Channel Rules provides that a combination may be filed under green channel route, if the parties to the combinations, their group entities, and their affiliates:

- i. do not produce or provide similar or identical or substitutable product or service (“**Horizontal Linkage**”):

¹ In terms of Regulation 5(5) of the Competition Commission of India (Combinations) Regulations, 2024, a Form I notice is to be filed under the green channel route.

² Section 6(5) of the Act

³ Section 20(1) of the Act

⁴ C-2023/04/1021 and C-2022/12/995

⁵ Exemptions are notified by the MCA under Section 54 of the Act, under Competition (Criteria for Exemption of Combinations) Rules, 2024, under *de minimis* exemption, etc.

- ii. they are not engaged in any activity relating to production, supply, distribution, storage, sale and service or trade in product or provision of service:
 - a) which are at different stage or level of production ("**Vertical Linkage**") ; or
 - b) which are complementary to each other ("**Complementary Linkage**").

Prior to introduction of the Green Channel Rules, the criteria mentioned above were outlined in Schedule III of the erstwhile Competition Commission of India (Procedure in Regard to the Transaction of Business Relating to Combinations) Regulations, 2011 ("**Old Regulations**")⁶, and were required to be analyzed "*considering all plausible alternative market definition*". However, no such stipulation is required under Rule 3(1) of the Green Channel Rules. Therefore, if the parties, their group entities, or their affiliate entities exhibit any degree of Horizontal, Vertical and Complementary Linkages, regardless of the market definition(s), the parties may not be eligible for the green channel benefit.

Assessment to be undertaken by the parties

For accessing the green channel route in India, the parties to the combination are required to ensure that all the criteria stipulated at Rule 3 of the Green Channel Rules are met. Thus, the onus of determining whether a proposed combination qualify for a green channel approval or not is upon the parties. Such an assessment encapsulates an extensive exercise of mapping vertical, horizontal and complimentary linkages of the activities carried out by the parties, their group entities, and their affiliates in the following steps:

- The *first step* involves identification of all the group entities and affiliates of all the parties (acquirer as well as target) in accordance with Rule 3(2)(a) and Rule 3(2)(b) of the Green Channel Rules.
- The *second step* involves determining if there exist any Horizontal, Vertical and Complementary Linkages between the parties, their group entities, and their affiliates.

What constitute group entities: As per Rule 3(2)(b) of Green Channel Rules, the parties to the combination and their group entities would include – the ultimate controlling person of the acquirer and other entities forming part of the same group; the target entity and its downstream entities forming part of its group; and the enterprises being merged or amalgamated, and their controlling persons, and entities forming part of their group.

What constitute affiliate entities: As per Rule 3(2)(b) of the Green Channel Rules, an affiliate of a party would include all those enterprises wherein the party has –

- i. 10% or more of the shareholding or voting rights; **or**
- ii. right or ability to have a representation on the board of directors either as a director or as an observer; **or**
- iii. right or ability to access commercially sensitive information of the enterprise.

Earlier, affiliate entities of the parties were determined in view of the 'materiality thresholds' defined at Item 6.6 of the Notes to Form – I. The tests therein included – i) direct or indirect shareholding of 10% or more; **or** ii) right to nominate a director or observer to the board; **or** iii) right or ability to exercise any special right (including any advantage of commercial nature with any of the party or its affiliates) that is not available to an ordinary shareholder. But, under the Green Channel Rules, the third criteria regarding any special rights not available to an ordinary shareholder has been replaced with a right or ability to access commercially sensitive information. However, what entails 'commercially sensitive information' has not been defined under the Green Channel Rules,

⁶ 'Green Channel' route was introduced by the CCI/Commission vide Notification dated 13.08.2019 as a result Regulation 5A and Schedule III were inserted in the Old Regulations.

the Act, or any other related regulations. In view of the said replacement, the scope of the assessment of the parties for determining an affiliate entity has widened and requires utmost caution as there is no jurisprudence on what would constitute a 'commercially sensitive information'.

Conclusion: Implications of filing incorrect form

The parties need to be cautious with their assessment before filing a notice under the green channel route as the deemed approval under green channel route is not absolute and may attract penalties under the Act if the information filed therein is inconsistent or incorrect. Further in view of the shift in the definition of an 'affiliate' under the Green Channel Rules, the parties would have to closely analyze what may or may not constitute as a right or ability to access commercially sensitive information. The parties need to be mindful of their strategic investments and rights acquired as a minority investor as the likelihood of the term 'commercially sensitive information' being interpreted broadly may not be ruled out. Be that as it may, the parties in any case will have an option of pre-filing consultation with the CCI/Commission before filing a notice.

Key Contacts



Nusrat Hassan
Managing Partner, India
D: +91 9892742700
[nusrat.hassan@
dentonslinklegal.com](mailto:nusrat.hassan@dentonslinklegal.com)



Milind Jha
Partner
D: +91 9958861811
[milind.jha@
dentonslinklegal.com](mailto:milind.jha@dentonslinklegal.com)



Abhishek Sharma
Partner
D: +91 9818438336
[abhishek.sharma@
dentonslinklegal.com](mailto:abhishek.sharma@dentonslinklegal.com)



Aditya Bhardwaj
Partner
D: +91 8828339099
[aditya.bhardwaj@
dentonslinklegal.com](mailto:aditya.bhardwaj@dentonslinklegal.com)



Ambuj Sonal
Partner
D: +91 8652060925
[ambuj.sonal@
dentonslinklegal.com](mailto:ambuj.sonal@dentonslinklegal.com)



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