

2020] VODAFONE AND IDEA COMBINATION APPROVAL BY CCI, ETC. 25

the Competition Act¹. In 2011 the following asset and turnover threshold had been created :

	<i>Assets</i>	<i>Turnover</i>			
In India	No group	INR 1,500 crores (approximately USD 330 million)		INR 4,500 crores (approximately USD 1 billion)	
	Group	INR 6,000 crores (approximately USD 1,320 million)		INR 18,000 crores (approximately USD 4 billion)	
In India or outside		<i>Assets</i>		<i>Turnover</i>	
		<i>Total</i>	<i>India</i>	<i>Total</i>	<i>India</i>
	No group	USD 750 million	INR 750 crores (approximately USD 165 million)	USD 2.25 billion	INR 2,250 crores (approximately USD 500 million)
	Group	USD 3 billion	INR 750 crores (approximately USD 165 million)	USD 9 billion	INR 2,250 crores (approximately USD 500 million)

According to that regulation the value of assets include the brand value, goodwill, value of intellectual property, but not the depreciation. Highlighting the amendments made to Schedule 1 of the Combination Regulations, 2013 which describes categories of transactions not likely to have appreciable adverse effect on competition in India, the CII Press Release said the change exempting intra-group mergers and acquisitions of two or more enterprises where more than 50 per cent. shares or voting rights of the other enterprise are held by enterprise(s) within the same group is vital².

Conclusion

In conclusion it can be said that the step of Competition Commission of India, other regulators and National Company Law Tribunal, in approving the Vodafone Idea combination was very rational and with logical reasonings. The provisions of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007, were very well complied with. More number of combination reviews of this stature can create more confidence among stakeholders in India.

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1. It is called the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2011 and Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2013.
 2. CII Welcomes Amendments to Combination Regulations, April 9, 2013 <http://www.indiaonline.com/Markets/News/CII-welcomes-amendments-to-Combination-Regulations/5655558832>

AVOIDANCE TRANSACTIONS—ROLE OF RESOLUTION PROFESSIONAL AND LIQUIDATOR

DR. M. GOVINDARAJAN¹

Transaction

Section 3(33) of the Insolvency and Bankruptcy Code, 2016 (“Code” for short) defines the term “transaction” as including a agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor.

Avoidance transactions

The Code enumerates the duties of a resolution professional and a liquidator under section 25 and section 35 of the Code respectively. In addition to these duties they have to take certain actions in respect of avoidance transactions. Avoidance transactions may be—

- Preferential transactions ;
- Undervalued transactions ;
- Extortionate transactions ; and
- Fraudulent trading.

Preferential transaction

A resolution professional or a liquidator may come across in the course of corporate insolvency resolution process or liquidation that the corporate debtor has made certain preferential transaction. Such transactions are to be monitored by these resolutions professional and the liquidator and sorted out the same for taking further action at his end.

Deemed preferential transaction

Section 43(4) of the Code provides that a preference shall be deemed to be given at a relevant time, if—

- it is given to a related party (other than by reason only of being an employee), during the period of two years preceding the insolvency commencement date ; or
- a preference is given to a person other than a related party during the period of one year preceding the insolvency commencement date.

Section 43(2) of the Code provides that a corporate debtor shall be deemed to have given a preference, if—

- there is a transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor or a surety or a guarantor for or

1. Practising Company Secretary.

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on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor ; and

- the above transfer has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53.

Related party

Section 5(24A) of the Code defines the expression “related party” in relation to an individual, as—

- a person who is a relative of the individual or a relative of the spouse of the individual ;
- a partner of a limited liability partnership, or a limited liability partnership or a partnership firm, in which the individual is a partner ;
- a person who is a trustee of a trust in which the beneficiary of the trust includes the individual, or the terms of the trust confers a power on the trustee which may be exercised for the benefit of the individual ;
- a private company in which the individual is a director and holds along with his relatives, more than two per cent. of its share capital ;
- a public company in which the individual is a director and holds along with relatives, more than two per cent. of its paid-up share capital ;
- a body corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of the individual ;
- a limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, act on the advice, directions or instructions of the individual ;
- a person on whose advice, directions or instructions, the individual is accustomed to act ;
- a company, where the individual or the individual along with its related party, own more than 50 per cent. of the share capital of the company or controls the appointment of the board of directors of the company.

Transactions—as non-preferential transactions

Section 43(3) of the Code that the preference shall not include the following transfers—

- transfer made in the ordinary course of the business or financial affairs of the corporate debtor or the transferee ;
- any transfer creating a security interest in property acquired by the corporate debtor to the extent that—

➤ such security interest secures new value and was given at the time of or after the signing of a security agreement that contains a description of such property as security interest, and was used by corporate debtor to acquire such property ; and

➤ such transfer was registered with an information utility on or before 30 days after the corporate debtor receives possession of such property.

Further any transfer made in pursuance of the order of a court shall not, preclude such transfer to be deemed as giving of preference by the corporate debtor.

New value

The *Explanation* to section 43(3) defines the expression “new value” as money or its worth in goods, services, or new credit, or release by the transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the liquidator or the resolution professional under this Code, including proceeds of such property, but does not include a financial debt or operational debt substituted for existing financial debt or operational debt.

Application to Adjudicating Authority

Section 43(1) of the Code provides that where the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has at a relevant time given a preference in transactions to any persons (related party or other than related party) he shall apply to the Adjudicating Authority for avoidance of preferential transactions.

Order of Adjudicating Authority

Section 44 of the Code provides that the Adjudicating Authority may, on an application made by the resolution professional or liquidator, by an order—

- require any property transferred in connection with the giving of the preference to be vested in the corporate debtor ;
- require any property to be so vested if it represents the application either of the proceeds of sale of property so transferred or of money so transferred ;
- release or discharge, in whole or in part, of any security interest created by the corporate debtor ;
- require any person to pay such sums in respect of benefits received by him from the corporate debtor, such sums to the liquidator or the resolution professional, as the Adjudicating Authority may direct ;

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- direct any guarantor, whose financial debts or operational debts owed to any person were released or discharged (in whole or in part) by the giving of the preference, to be under such new or revived financial debts or operational debts to that person as the Adjudicating Authority deems appropriate ;

- direct for providing security or charge on any property for the discharge of any financial debt or operational debt under the order, and such security or charge to have the same priority as a security or charge released or discharged wholly or in part by the giving of the preference ; and

- direct for providing the extent to which any person whose property is so vested in the corporate debtor, or on whom financial debts or operational debts are imposed by the order, are to be proved in the liquidation or the corporate insolvency resolution process for financial debts or operational debts which arose from, or were released or discharged wholly or in part by the giving of the preference.

The above said order shall not—

- affect any interest in property which was acquired from a person other than the corporate debtor or any interest derived from such interest and was acquired in good faith and for value ;

- require a person, who received a benefit from the preferential transaction in good faith and for value to pay a sum to the liquidator or the resolution professional.

Undervalued transactions

Section 45(2) of the Code provides that a transaction shall be considered undervalued where the corporate debtor—

- makes a gift to a person ; or

- enters into a transaction with a person which involves the transfer of one or more assets by the corporate debtor for a consideration the value of which is significantly less than the value of the consideration provided by the corporate debtor,

and such transaction has not taken place in the ordinary course of business of the corporate debtor.

Relevant period

Section 46 provides the relevant period of undervalued transactions—

- such transaction was made with any person within the period of one year preceding the insolvency commencement date ; or

- such transaction was made with a related party within the period of two years preceding the insolvency commencement date.

Application to Adjudicating Authority

Section 45(1) of the Code provides that if the liquidator or the resolution professional, as the case may be, on an examination of the transactions of the corporate debtor determines that certain transactions were made during the relevant period, which were undervalued, he shall make an application to the Adjudicating Authority to declare such transactions as void and reverse the effect of such transaction.

The liquidator or the resolution professional, as the case may be, shall demonstrate that the undervalued transactions were made in the relevant period.

The Adjudicating Authority may require an independent expert to assess evidence relating to the value of the transactions.

Order of Adjudicating Authority

Section 48 of the Code provides that the order of the Adjudicating Authority may provide for the following—

- require any property transferred as part of the transaction, to be vested in the corporate debtor ;
- release or discharge (in whole or in part) any security interest granted by the corporate debtor ;
- require any person to pay such sums, in respect of benefits received by such person, to the liquidator or the resolution professional as the case may be, as the Adjudicating Authority may direct ; or
- require the payment of such consideration for the transaction as may be determined by an independent expert.

Application by creditors to the Adjudicating Authority

Section 47(1) of the Code provides that where an undervalued transaction has taken place and the liquidator or the resolution professional has not reported it to the Adjudicating Authority, a creditor, member or a partner of a corporate debtor, may make an application to the Adjudicating Authority to declare such transactions void and reverse their effect.

Order of Adjudicating Authority

Section 47(2) provides that where the Adjudicating Authority, after examination of the application is satisfied that—

- undervalued transactions had occurred ; and
- liquidator or the resolution professional after having sufficient information or opportunity to avail information of such transactions did not report such transaction to the Adjudicating Authority,

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the Adjudicating Authority shall pass an order—

- restoring the position as it existed before such transactions and reversing the effects ;
- requiring the Board to initiate disciplinary proceedings against the liquidator or the resolution professional as the case may be.

Transactions defrauding creditors

Section 49(1) provides that where the corporate debtor has entered into an undervalued transaction and the Adjudicating Authority is satisfied that such transaction was deliberately entered into by such corporate debtor—

- or keeping assets of the corporate debtor beyond the reach of any person who is entitled to make a claim against the corporate debtor ; or
- in order to adversely affect the interests of such a person in relation to the claim,

the Adjudicating Authority shall make an order—

- restoring the position as it existed before such transaction as if the transaction had not been entered into ; and
- protecting the interests of persons who are victims of such transactions.

The above said order shall not affect any interest in property which was acquired from a person other than the corporate debtor and was acquired in good faith, for value and without notice of the relevant circumstances, or affect any interest deriving from such an interest, and shall not require a person who received a benefit from the transaction in good faith, for value and without notice of the relevant circumstances to pay any sum unless he was a party to the transaction.

Extortionate credit transactions

An extortionate credit transaction is a transaction by which credit is provided on terms that are exorbitant or grossly unfair compared with the risk accepted by the creditor. Such a transaction may be challenged by an administrator, a liquidator or a trustee in bankruptcy.

It is clarified that any debt extended by any person providing financial services which is in compliance with any law for the time being in force in relation to such debt shall in no event be considered as an extortionate credit transaction. The Board may specify the circumstances in which a transactions which shall be covered under extortionate credit transaction.

Section 50(1) of the Code provides that where the corporate debtor has been a party to an extortionate credit transaction involving the receipt of financial or operational debt during the period within two years preceding

the insolvency commencement date, the liquidator or the resolution professional as the case may be, may make an application for avoidance of such transaction to the Adjudicating Authority if the terms of such transaction required exorbitant payments to be made by the corporate debtor.

Orders of Adjudicating Authority

Section 51 of the Code provides that where the Adjudicating Authority after examining the application is satisfied that the terms of a credit transaction required exorbitant payments to be made by the corporate debtor, it shall, by an order—

- restore the position as it existed prior to such transaction ;
- set aside the whole or part of the debt created on account of the extortionate credit transaction ;
- modify the terms of the transaction ;
- require any person who is, or was, a party to the transaction to repay any amount received by such person ; or
- require any security interest that was created as part of the extortionate credit transaction to be relinquished in favour of the liquidator or the resolution professional, as the case may be.

Fraudulent trading

Section 66(1) of the Code provides that if during the corporate insolvency resolution process or a liquidation process, it is found that any business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose, the Adjudicating Authority may on the application of the resolution professional pass an order that any persons who were knowingly parties to the carrying on of the business in such manner shall be liable to make such contributions to the assets of the corporate debtor as it may deem fit.

Order of Adjudicating Authority

Section 66(2) of the Code provides that on an application made by a resolution professional during the corporate insolvency resolution process, the Adjudicating Authority may by an order direct that a director or partner of the corporate debtor, as the case may be, shall be liable to make such contribution to the assets of the corporate debtor as it may deem fit, if—

- before the insolvency commencement date, such director or partner knew or ought to have known that there was no reasonable prospect of avoiding the commencement of a corporate insolvency resolution process in respect of such corporate debtor ; and

■ such director or partner did not exercise due diligence in minimizing the potential loss to the creditors of the corporate debtor.

Time frame to identify avoidance transactions

Regulation 35A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides the time frame for a resolution professional or a liquidator to identify the avoidance transactions and apply to the Adjudicating Authority for redressal.

On or before the 75th day of the insolvency commencement date, the resolution professional shall form an opinion whether the corporate debtor has been subjected to any avoid transaction. Where the resolution professional is of the opinion that the corporate debtor has been subjected to any avoidance transaction, he shall make a determination on or before the 115th day of the insolvency commencement date, under intimation to the Board. Where the resolution professional makes a determination, he shall apply to the Adjudicating Authority for appropriate relief on or before the 135th day of the insolvency commencement date.

Case laws

In *Ram Ratan Kanoongo v. Sunil Kathuria* (M. A. No. 436 of 2018 in C.P. No. 172/IBC/NCLT/MB/MAH/2017, decided on May 7, 2019) [2020] 10 Comp Cas-OL 423 (NCLT), during the course of corporate insolvency resolution process, the resolution professional noticed certain transactions which appeared to be fraudulent or preferential in nature, therefore, this application was filed by the resolution professional during the period of corporate insolvency resolution process. The company could not be revived, therefore, liquidation order was passed for the corporate debtor and the liquidator was appointed.

The applicant, in the present application, gave the details of the amount siphoned off by the respondents from the corporate debtor by various means—

- Rs. 135 lakhs being preferential transaction and Rs. 132.50 lakhs being loan taken by the corporate debtor diverted into the accounts of respondent No. 1 ;
- Due to gross negligence and wilful conspiracy of respondent No. 1, the overall loss due to fire incident, caused to the lenders being SBI is approx. Rs. 1,141 lakhs as claimed in the audited financial statements ought to be vested back to the lenders ;
- The total amount recoverable from respondent No. 5 is Rs. 985.14 lakhs ;

- The total amount recoverable from respondent No. 6 is Rs. 459.26 lakhs ;
- The amount recoverable from respondent No. 3 is Rs. 75.65 lakhs ;
- The amount recoverable from respondent No. 4 is Rs. 191 lakhs ;
- The amount recoverable from respondent No. 7 is Rs. 331 lakhs.

The applicant prayed that the above said amount involved in avoidance transactions ought to be vested back to the corporate debtor.

The Adjudicating Authority observed that the transactions stated above are not made in the ordinary course of business or financial affairs of the corporate debtor and satisfy the criteria of section 43 of the I and B Code to be labelled as preferential transactions. Therefore, the prayers of the applicant are also allowed being preferential transactions and the power is exercised under section 44(1)(d) of the I and B Code to require the aforesaid respondents to pay such sums in respect of the benefits received by them from the corporate debtor. The Adjudicating Authority further directed the respondents to return the siphoned sums as stated above in this order. The respondents are also directed to revert back an equal amount of benefits received by them from the corporate debtor. Failure to comply with this order will push this Bench to take penal actions under sections 70-73 of the Code.

In *Anuj Jain, Interim Resolution Professional for Jaypee Infratech Ltd. v. Axis Bank Ltd.* (Civil Appeals Nos. 8512-8527 of 2019, decided on February 26, 2020) [2020] 221 Comp Cas 625 (SC), the Supreme Court indicated the duties and responsibilities of the resolution professional in the matter of avoidance transactions in detail.

The Supreme Court held that looking to the legal fictions created by section 43 and looking to the duties and responsibilities per section 25, for the purpose of application of section 43 of the Code in any insolvency resolution process, what a resolution professional is ordinarily required to do could be illustrated as follows :

- In the first place, the resolution professional shall have to take two major but distinct steps. One shall be of sifting through the entire cargo of transactions relating to the property or an interest thereof of the corporate debtor backwards from the date of commencement of insolvency and up to the preceding two years. The other distinct step shall be of identifying the persons involved in such transactions and of putting them in two categories ; one being of the persons who fall within the definition of “related party” in terms of section 5(24) of the Code and another of the remaining persons.

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• In the next step, the resolution professional ought to identify as to in which of the said transactions of preceding two years, the beneficiary is a related party of the corporate debtor and in which the beneficiary is not a related party. It would lead to bifurcation of the identified transactions into two sub-sets—

- one concerning related party/parties ; and
- other concerning unrelated party/parties with each sub-set requiring different analysis.

The sub-set concerning unrelated party/parties shall further be trimmed to include only the transactions of preceding one year from the date of commencement of insolvency.

• Having thus obtained two sub-sets of transactions to scan, the steps thereafter would be to examine every transaction in each of these sub-sets to find—

(i) as to whether the transaction is of transfer of property or an interest thereof of the corporate debtor ; and

(ii) as to whether the beneficiary involved in the transaction stands in the capacity of creditor or surety or guarantor qua the corporate debtor.

These steps shall lead to short listing of such transactions which carry the potential of being preferential.

• In the next step, the said shortlisted transactions would be scrutinized to find if the transfer in question is made for or on account of an antecedent financial debt or operational debt or other liability owed by the corporate debtor. The transactions which are so found would be answering to clause (a) of sub-section (2) of section 43.

• In yet further step, such of the scanned and scrutinized transactions that are found covered by clause (a) of sub-section (2) of section 43 shall have to be examined on another touchstone as to whether the transfer in question has the effect of putting such creditor or surety or guarantor in a beneficial position than it would have been in the event of distribution of assets per section 53 of the Code. If answer to this question is in the affirmative, the transaction under examination shall be deemed to be of preference within a relevant time, provided it does not fall within the exclusion provided by sub-section (3) of section 43.

• In the next and equally necessary step, the transaction which otherwise is to be of deemed preference, will have to pass through another filtration to find if it does not answer to either of the clauses (a) and (b) of sub-section (3) of section 43.

- After the resolution professional has carried out the aforesaid volumetric as also gravimetric analysis of the transactions on the defined co-ordinates, he shall be required to apply to the Adjudicating Authority for necessary order/s in relation to the transaction/s that had passed through all the positive tests of sub-section (4) and sub-section (2) as also negative test of sub-section (3).

On a motion made by the resolution professional after and in terms of the exercise aforesaid, the Adjudicating Authority, in its turn, shall have to examine if the referred transaction answers to all the descriptions noted above and shall then decide as to what order is required to be passed, for avoidance of the impugned transaction or otherwise.

Conclusion

It is the foremost duty of the resolution professional or liquidator to monitor the avoidance transaction in the course of corporate insolvency resolution process or liquidation proceedings, identify the same, confirm the transactions and apply to the Adjudicating Authority for directions to recover the amount involved in avoidance transactions which may be vest on the corporate debtor which will be helpful for the revival of corporate debtor or more distribution to the creditors in case of liquidation.

These provisions aim to claw back the value lost through avoidance transactions, in sync with objective of maximization of value of the assets of the corporate debtor.

End of Volume 221

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