Chapter 7
Case Study I

7.1 Introduction

This case is regarding PVR / DUL – Combination No. C-2015/07/288[79] which entailed the acquisition by PVR Ltd. ("PVR / Acquirer") of the multiplexes and single screen cinema theatres of DT Cinemas from DLF Utilities Limited ("DUL / Seller") in Delhi National capital region ("NCR") and Chandigarh. PVR is India's leading multiplex theatre company, which is engaged in the business of developing, operating and managing cinema theaters/multiplexes across India. At the time of the proposed combination, PVR had a total of 467 screens in 43 cities across India. DUL is a part of the DLF Group and is engaged *inter alia* in the business of providing and maintaining commercial office retail properties and operating and maintaining cinema theatres/multiplexes in Delhi NCR and Chandigarh. DUL operated its cinema business through DT Cinemas, which was to be acquired by PVR. DT Cinemas had a total of 29 screens in Delhi, Gurgaon and Chandigarh and was developing two additional properties in NOIDA and Delhi. Thus, the parties to this case were PVR and DUL. The relevant product market (RPM) in this case was ascertained as the market for exhibition of films in multiplex theatres and high-end single screens (where applicable) and the relevant geographic market (RGM) included the markets of: (i) Gurgaon, (ii) South Delhi, (iii) NOIDA, (iv) North, West, and Central Delhi, and (v) Chandigarh

7.2 Brief Description of the Case

In this case, overlaps existed between the two parties in all the above-mentioned geographic markets. The Commission noted that PVR /Acquirer post-Combination would have significant market power in terms of the total number of screens (multiplex screens and high-end screens) in each of the RGMs. The Commission issued show cause notice under Section 29(1) of the Act to PVR. Subsequent to receipt of response from PVR and the public (under Section 29(2)), the Commission decided that there are no likely AAEC

[79] Copy of order available at Appendix III.

concerns in the RGMs of Chandigarh and North, West, and Central Delhi as the incremental market share was insignificant and on account of the presence of significant competitors.

However, for the remaining RGMs, there were competition concerns. Thus, (i) In the RGM of NOIDA, the incremental market share post-combination was 10.1%, increasing the combined market share of PVR beyond 50%. In comparison, competitors would, even after taking into account imminent entry of new cinema halls, have relatively low market shares below 15% each; (ii) In the RGM of Gurgaon, the incremental market share was again significant at 13.1% post-Combination, taking the combined market share of PVR above 50%. Once again, after taking into account imminent entry of new cinema halls, competitors would continue to have very low market shares of below 10% each. Further, for this market, the Commission received fair amount of public/stakeholder comments highlighting competitive concerns by way of reduction of choice / quality and increase in prices. Further, distributors also pointed out the likelihood of PVR exercising monopoly power in the relevant product market; and (iii) In the RGM of South Delhi, the Commission noted that the incremental market share was as high as 42.5%, which is competitively very significant and the combined market share of PVR post-combination would be around 80%. The Commission noted that in this RGM, PVR was acquiring its closest competitor. Further, even after taking into account imminent entry of new cinema halls, competitors would have very low market shares of less than 5% each. Apart from the above, the scope for new entry was limited in this RGM on account of limited availability of real estate. Further, for this RGM also, similar concerns as in the case of Gurgaon had been raised by stakeholders including distributors.

PVR voluntarily offered the below-mentioned modification thereby addressing the competition concerns in the RGMs of NOIDA and Gurgaon, which were accepted by the Commission as satisfactorily alleviating likely AAEC concerns. Thus, (i) In the case of NOIDA, PVR offered to restrict other inorganic growth by way of termination of its agreement regarding the acquisition of a 15-screen multiplex from a third-party (which had been taken into consideration by the Commission for competition analysis, as this was

entry was imminent); (ii) Similarly, in the case of the RGM of Gurgaon, PVR offered to restrict other inorganic growth by way of termination of its agreement regarding the acquisition of a 7-screen multiplex from a third-party (which had been taken into consideration by the Commission for competition analysis, as this was entry was also imminent); and (iii) In both RGMs, PVR also committed to not expand, either organically or inorganically for a period of 3 years in each of the two RGMs of NOIDA and Gurgaon.

As regards the RGM of South Delhi, the Commission issued a proposal for modification requiring PVR to divest at least 7 screens belonging to various cinema halls belonging to DUL as the Commission felt that this would alleviate the likely AAEC concerns in this RGM. PVR offered an amendment to the Commission's proposal for modification whereby they agreed not to acquire 6 screens and not to expand organically or inorganically in South Delhi, for a period of 5 years. This was accepted by the Commission and the Combination was therefore approved with modification.

7.3 Issues Emerging from this Case

This case presented some unique issues vis-à-vis the legal framework for merger review which are therefore pertinent to the study.

7.3.1 Target Business to be considered for assessing Local nexus thresholds in consonance with ICN RPs

In this case, the target business being acquired, namely, DT Cinemas had assets and / or turnover in India which were below the local nexus thresholds. However, as per Indian statutory requirements, jurisdictional thresholds must be determined by reference to the enterprise whose assets are being acquired. Since DUL's financials exceeded the jurisdictional thresholds (in contrast to its business DT Cinemas whose financials fell below the *De Minimis* exemption), the transaction was notified to the Commission. However, if ICN RP I was to be followed, the transaction would escape Commission's review.

7.3.2 Voluntary Modifications and Remedies

In this case, PVR submitted voluntarily modifications to the Combination post the Phase I stage (i.e., after the 29(1) SCN was issued) by way of an additional submission, which is not strictly provided under the provisions of the Act (On the other hand, ICN RP XI provides for consulting merging parties on remedies which includes allowing parties to offer modification). In fact, this modification was offered by PVR 17 days before the Commission issued its proposal for modification under Section 31(3) of the Act.

7.3.3 Remedies

As mentioned above, ultimately the Combination was approved with the commitment from PVR to not acquire 6 screens from DUL, which amounted to a remedy proposed by the parties. However, there is no statutory or regulatory provision to this effect in the legal framework for merger review in India even though ICN's RP XI recommends that there should be enough time built into the merger review process to discuss remedies with the parties.

7.3.4 Interface with Parties

In this case, PVR sought and was granted hearings on two different occasions, apart from inspection of case records. While this interface was allowed as a part of due process and in the interest of transparency (ICN RP VIII) and natural justice and international best practices in the conduct of merger review (ICN RP VI), the fact remains that the timelines available with CCI are already very tight (Appendix V). Further, accommodating such processes would have been very difficult for the case team, which has to process such requests for the Commission's consideration along with assessing and processing the case as per the requirements of the Act.

7.3.5 Multiple Submissions by Parties throughout the Proceedings

Apart from formally responding to the show cause notice as per Section 29(1) of the Act, PVR made multiple submissions in support of their case, including bringing fresh facts to

the knowledge of the Commission[80], which required the Commission to take action to verify the same from concerned third parties. As has been mentioned in the Commission Order[81], responses were received as late as up to 10th February 2016, two weeks before the issue of the Proposal for Modification. Further, based on the additional submissions of the Acquirer as late as 11th April 2016, the Commission continued to verify the additional evidence up to as late as 27nd April 2016, which is a mere 9 days before CCI issued its order. As per ICN RP VI, conduct of merger investigation should be focused and timely and allow for communication and coordination between the agencies and the parties which would imply allowing the parties to make submissions.

7.4 Analysis of the Issues in terms of Legal Framework for Merger Review

The issues highlighted in section 7.3 merit analysis in terms of present legal framework and possible amendments thereof.

7.4.1 Target Business to be Considered for Assessing Local Nexus Thresholds in Consonance with ICN RPs

This is a case where following the ICN RPs (RP I) would lead to a situation where a competitively significant transaction would escape scrutiny. However, if the legal framework followed a combination of RP I, along with a legal provision to review non-notifiable mergers, there is a very good chance that this transaction would have been brought to the notice of the Commission as it was clearly a matter of public concern, as may be gauged by the number of objections received from the public. (Please see Chapter 5 wherein RP VIII has been discussed from the viewpoint of CCI's website and public feedback.)

[80] *PVR / DUL*, Combination No. C-2015/07/288, para. 8.

[81] *PVR / DUL, Combination No. C-2015/07/288*, footnote 2 to para. 8.

7.4.2 Voluntary Modifications / Remedies

As has been discussed in Chapter 5, it would be appropriate for the legal framework to provide for remedies being offered by the parties themselves in consonance with ICN RP XI. Apart from broader remedies that may be offered in Phase I under Regulation 19(2) of the Combination Regulations, had a provision existed, the parties in this case could have offered these remedies at the stage of Section 29(3A) of the Act, which would have afforded the Commission adequate time to appreciate the same. According to such a provision, any remedies would be proposed by the parties by the 117th calendar day (Appendix III) while actually in this case, remedies were proposed as late as 11th April, much beyond the 117th day.

7.4.3 Interface with Parties

While communication and coordination between the competition agencies and the parties is recommended *vide* RP VI, the fact remains that the Act has no leeway for the same. As has already been brought out in Appendix V, there is barely enough time to complete the various formalities laid down in Section 29 and 31. Given that the Act does not specifically provide for multiple interactions with the parties during the course of the proceedings which must terminate in 210 calendar days, it would be appropriate to introduce regulations which allow the parties to extend the timelines as provided under Section 31(12) of the Act. This has been discussed in detail in Chapter 5 and would imply that if parties require hearings and inspections, they must also provide the Commission with additional time through voluntarily agreements on extensions of timeline.

7.4.4 Multiple submissions by Parties Throughout the Proceedings

In this case, the Acquirer / PVR continued to bring fresh facts to the notice of the Commission throughout the case, even after the formal opportunity to do so by way of response to show cause notice under Section 29(1) of the Act or responses under Section 29(5) of the Act had already been given to them. It would seem that the Commission would

have found it very difficult to continue to appreciate and verify fresh evidence, at a time when it should have been finalizing modifications to the Combination and issuing the order. As has been mentioned above, in this case, fresh facts were considered by the Commission as late as 9 days before it issued its order approving the Combination with modification. This implies that while CCI should follow ICN RPs (RP VI), as well principles of natural justice, if parties wish to prolong proceedings through additional submissions, they should be required to facilitate the investigation by providing the Commission with additional time through voluntarily agreements on extensions of timeline and this should be built into the regulatory framework[82].

7.5 Conclusion

This case highlights the potential pitfalls of defining thresholds based upon the size of the business being acquired alone. In the Indian scenario where CCI cannot review non notifiable mergers, this may lead to anti-competitive transactions escaping the scrutiny of the competition regulator. It also underlines the need for greater flexibility in the timelines for review to allow for interface between parties especially in cases where the parties seek intensive engagement with CCI on multiple occasions. Finally, it demonstrates the need to allow parties to suggest remedies to alleviate AAEC concerns. The implication of these findings in terms of recommendations for amendments in the regulatory framework for merger review in India are further discussed in Chapter 9.

[82] Please see the discussion in in Chapter 5.