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INTERNATIONAL DEVELOPMENTS

India's New Merger Control Regime: When Do You Need to File?

BY TONY REEVES AND DAN HARRISON

IT TOOK OVER EIGHT YEARS FOR THE merger control provisions contained in India's Competition Act, 2002[1] to be brought into force, on June 1, 2011. Notwithstanding significant changes in the weeks and days prior to implementation, there remain considerable uncertainties as to which mergers, acquisitions, and joint ventures affecting India are caught by the Act, and how they will be dealt with. In this article we focus on procedural and jurisdictional aspects of the new regime and highlights those uncertainties most likely to concern international antitrust practitioners and the international business community.

A Brief History

In October 1999, the Indian government appointed a high-level committee on Competition Policy and Law (the Raghavan Committee) to consider options for the formulation of a new competition law in India. Following the amendment in 1991 of the Monopolies and Restrictive Trade Practices Act 1969, merger control in India was principally governed by the Companies Act 1956, which applied only to a relatively small portion of the spectrum of transactions that could result in anticompetitive effects in India: namely those involving Indian public companies or Indian subsidiaries of a public company.

The merger control provisions of the Competition Act were therefore designed to allow the competition authorities created by the Act—the Competition Commission of India (CCI) and the office of the Director General—to intervene in a much wider scope of potentially harmful mergers and acquisitions. In practice, they overshot the mark by quite some margin. For example, the jurisdictional thresholds set out in the Competition Act caught any transaction entered into by parties which had combined worldwide turnover of more than USD 1.5 billion or worldwide assets of more than USD 500 million, regardless of the degree to which they had turnover, assets, or presence in India, and seemingly included situations in which they had no such nexus with India whatsoever. Moreover, there was seemingly no control or shareholding threshold, meaning that acquisitions of just a few shares could be caught. There were also no exceptions for intra-group transactions or corporate restructurings, or for acquisitions of assets in the ordinary course of business, such as stock-in-trade or raw materials.

At the time the Competition Act was passed, the intention was for the regime to be voluntary and non-suspensory, i.e., with no mandatory filing obligation and no "standstill obligation" prohibiting closing of a transaction prior to the receipt of a clearance decision. Under such a regime, defects in the framing of the jurisdictional scope would have been less serious. Parties to a transaction that clearly raised no competition concerns in India could close it and then deal with any queries from the authority at their leisure, safe in the knowledge that the CCI was unlikely to take issue with, for example, a purely intra-group reorganization. In 2007, however, the Competition Act was amended[2] to introduce, among other things, a mandatory filing requirement and a standstill obligation, applicable for up to 210 days from the date of notification. With that move, it became imperative that the flaws in the regime were addressed.

Since 2007, the Indian Government and the CCI have issued various orders and draft guidance seeking to remedy certain of these concerns, with varying levels of success. For example, the Government first sought to address concerns about the apparent lack of a requirement for an Indian nexus by adding an additional jurisdictional threshold requiring certain values of assets or turnover in India. However, the threshold could be met by the purchaser alone, meaning that the acquisition of a target with no connection to India could still be caught. A second attempt involved the introduction of de minimis thresholds, whereby a transaction involving a target having less than the specified levels of turnover or assets was excluded from the notification requirement.[3] The relevant order, however, omitted to specify whether it was worldwide turnover or assets that were to be taken into account, or only those in India, meaning that some transactions involving a target with no Indian presence were still seemingly notifiable. Finally, five days before the entry-into-force of the merger control laws, the de minimis order was amended to clarify that no notification is required if the target has assets or turnover *in India* below the relevant thresholds. As a result, the de minimis exemption now ensures that notifiable transactions must have some nexus with India, and will play a helpful and important role in multijurisdictional deals involving parties with activities in India.[4]

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The CCI, for its part, also issued a number of draft guidelines, which sought to address concerns raised by the legal community, again with varying degrees of success. Its March 2011 draft guidelines,[5] for example, allowed certain categories of transactions to be notified by way of a so-called short form (or Form I) filing. Unfortunately, many of these were transactions that under most other merger control regimes would not be notifiable at all: acquisitions of stock-in-trade, spare parts and raw materials in the ordinary course of business, minority interests of less than 15 percent; intra-group transactions etc. The final guidelines—the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations (Combination Guidelines), issued on May 11, 2011—remedied this by stating instead that such transactions were not, in the CCI's eyes, "normally" notifiable.[6]

These eleventh hour corrections notwithstanding, numerous uncertainties and potential concerns remain. The early signs are that the CCI is waiting until it has developed a body of decisional practice before it issues further guidance to clarify the outstanding ambiguities.

The Thresholds for Notification

The Competition Act provides that a filing must be made if any one of the following eight filing thresholds is satisfied, unless the de minimis test described below is met.

Filing thresholds[7]

1. Post-merger, the group to which the parties will belong will have:[8]
   (a) assets in India of more than INR 60 billion (approx. USD 1.3 billion); OR
   (b) turnover in India of more than INR 180 billion (approx. USD 4.0 billion); OR
   (c) worldwide assets of more than USD 3 billion including at least INR 7.5 billion (approx. USD 167 million) in India; OR
   (d) worldwide turnover of more than USD 9 billion, including TO of at least INR 22.5 billion (approx. USD 500 million) in India; OR
2. The parties to the transaction (i.e. the buyer and the target) have:[9]
   (a) assets in India of more than INR 15 billion (approx. USD 333 million); OR
   (b) turnover in India of more than INR 45 billion (approx. USD 999 million); OR
   (c) worldwide assets of more than USD 750 million including at least INR 7.5 billion (approx. USD 167 million) in India; OR
   (d) worldwide turnover of more than USD 2.25 billion including at least INR 22.5 billion (approx. USD 500 million) in India.

De minimis test[10]

No filing is required if

1. The target has assets in India of INR 2.5 billion (approx. USD 56 million) or less; OR[11]
2. The target has turnover in India of INR 7.5 billion (approx. USD 167 million) or less.

At first sight, application of these thresholds may appear straightforward, but in practice there are many open questions.

Whose Assets and Turnover Should Be Taken into Account?

Two immediate questions arise:

- Are the tests set out in 1(a)–(d) above (the "group" thresholds) alternative to those in 2(a)–(d) (the "buyer/target" thresholds) or are they mutually exclusive; and
- What is the difference between these two sets of thresholds?

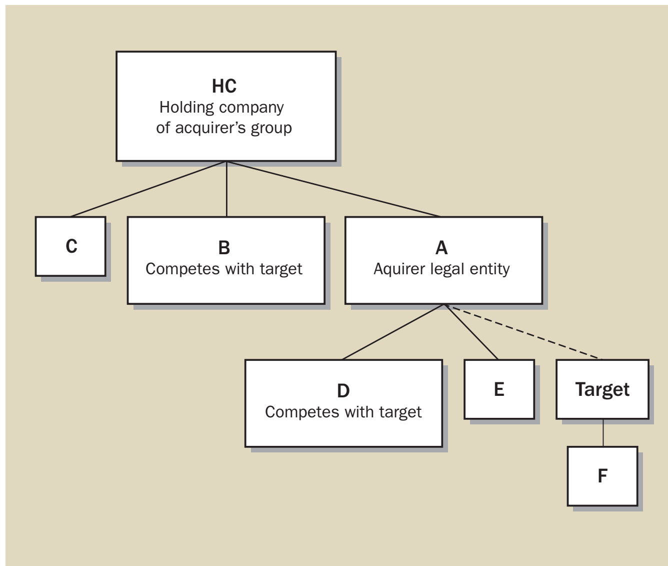
These are important questions, as one set of thresholds is materially lower than the other.

Are the two sets of thresholds mutually exclusive in their application? Each set of thresholds could be construed as applying exclusively to a different type of transaction: the "group" thresholds applying only to acquisitions involving companies forming part of a corporate group; and the "buyer/target" thresholds applying only where both the buyer and target are "standalone" entities, with no subsidiaries or controlling shareholders. That interpretation would simplify jurisdictional issues under the Act enormously, as it would render the buyer/target thresholds irrelevant in almost every case: businesses with assets or turnover of the magnitude to satisfy the jurisdictional thresholds of the Act will almost invariably have at least two legal entities in their corporate structure. Unfortunately, the support for this interpretation in the Act is at best ambiguous,[12] so in the absence of any indication from the CCI that it shares this view of the jurisdictional thresholds, it would be prudent to assume that a transaction involving companies forming part of a group may be notifiable if it satisfies the "buyer/target" thresholds, even if it does not meet the higher "group" thresholds.

What is the difference between the "buyer/target" thresholds and the "group" thresholds? Under most merger control regimes, the turnover or assets of a given party—buyer or target—are taken to include those of the group of companies to which they belong (but excluding those retained by the seller). If that were the case, there would be no difference: the assets or turnover of the group to which the buyer and target belong post-merger would be identical to the combined turnover or assets of the buyer and target taken separately.

In practice, there are two potential differences, but both remain subject to the final say of the CCI. We will illustrate these by reference to the following hypothetical group structure in the accompanying diagram:[13]

First, unlike the "group" thresholds, the wording of the "buyer/target" thresholds refers to the concept of an "enter-



prise."[14] The term "enterprise" is defined in the Act as a "person"—defined as including, among other things, an individual, a company, a firm, or a body corporate incorporated under the laws of a country outside India—who is engaged in any of a broad range of commercial activities "either directly or through one or more of its units or divisions or subsidiaries . . . ."[15] This appears to suggest that the focus of the buyer/target thresholds is on individual legal entities.[16]

A literal interpretation of these provisions would indicate that it is *only* the legal entities directly involved in the acquisition—the purchasing vehicle (A in the diagram above) and the target holding company ("Target" in the diagram above)—that are relevant, as the definition of an enterprise simply stipulates that a given legal entity may be deemed an enterprise by reference to the market activities of its subsidiaries, but does not state that such legal entity should be taken to comprise its subsidiaries. However, that would lead to the odd result that, for most transactions of the magnitude caught by the thresholds, the turnover thresholds would be largely irrelevant—special purpose acquisition vehicles typically have none, nor do group holding companies—while the asset thresholds would often be determined by reference solely to the balance sheet valuations of the target holding company's shareholdings in its subsidiaries.

An interpretation that may be more in keeping with the purpose of the Competition Act would treat the reference to subsidiaries in the definition of an enterprise as sufficient to bring them within the scope of the entities to be taken into account for the purposes of determining that enterprise's turnover. By reference to the above diagram, the "buyer/target" thresholds would therefore be assessed by reference to the combined assets or turnover of A, D, E, Target, and F. Given that this "purposive" approach will result in higher asset and turnover valuations that are more likely to satisfy the thresholds, it would be prudent to assume, pending clarification of this point, that this is the interpretation most likely to be favored by the CCI.[17] If that is correct, the difference between the "buyer/target" and "group" thresholds would be that for the buyer/target thresholds, the turnover of legal entities which sit above the purchasing vehicle in the purchaser's group structure (in the above diagram, HC, B, and C) are excluded from the asset and turnover calculations.

An additional complication—and an exception to the above—lies in the existence of an additional variation of the buyer/target thresholds, which applies where the acquirer "has already direct or indirect control over another enterprise engaged in [the supply of similar or substitutable goods or services]."[18] In these circumstances, it is necessary to consider also whether the buyer/target thresholds are met by reference to the assets and turnover of the target and those of the competing enterprise(s) already controlled by the acquirer. The Competition Act is unclear as to whether the competing enterprises over which the acquirer already exercises control may include those which are under the common control of the acquirer's ultimate parent or holding company: i.e., whether, with reference to the diagram above, the asset/turnover calculation should be based on that of D, Target, and F, or should include also that of B. Given that the former interpretation would mean that these thresholds could be easily circumvented by the use of a special purpose acquisition vehicle (having no subsidiaries that could be viewed as competing with the target), it seems to us likely that the CCI will favor the latter interpretation.[19]

The second potential difference lies in the definition of the term "group" (which applies only to the group thresholds) as "two or more enterprises which, directly or indirectly, are in a position to: (i) exercise [fifty percent][20] or more of the voting rights in the other enterprise; or (ii) appoint more than fifty per cent of the board of directors of the other enterprise; or (iii) control the management or affairs of the other enterprise."[21]

For acquisitions of more than 50 percent of the voting rights of a target, or control over its board, management, or affairs, this test is reasonably clear: the calculation of turnover or assets must include all companies in which the ultimate parent company or companies[22] of the post-merger group is or are able to exercise the rights set out above (i.e., all of the legal entities portrayed in the diagram above).

Where, however, the deal in question is an acquisition of a minority interest in the target, with no control over the management or affairs of the target, the Act is less clear, but it seems that the acquirer and its subsidiaries—entities HC, A, B, C, D, and E in the diagram—should be excluded from the calculation of "group" turnover and assets for the purposes of the group thresholds, as they do not form part of the group to which the target would belong, post-merger.[23] However, reliance on such an interpretation to avoid a filing obligation would be risky in the absence of prior confirmation that the CCI shares this interpretation, given the CCI's powers to investigate transactions up to one year after the date of their completion.[24]

How Should Turnover and Assets Be Valued?

Turnover and assets are defined and valued consistently with international accounting principles.[25] So, for example, turnover is defined as the "value of sale of goods or services" excluding "indirect" taxes, such as sales taxes and value added tax.[26] The Competition Act provides that assets shall be valued

> by taking the book value of the assets as shown, in the audited books of account of the enterprise, in the financial year immediately preceding the financial year in which the date of the proposed merger falls, as reduced by any depreciation, and the value of assets shall include the brand value, value of goodwill, or value of copyright, patent, permitted use, collective mark, registered proprietor, registered trade mark, registered user, homonymous geographic indications, design or layout design or similar other commercial rights, if any, [afforded under certain Indian intellectual property legislation].[27]

The CCI's long-form filing template (Form II) clarifies that it is total assets (not net assets) that are relevant for the purpose of assessing jurisdiction.

Where accounts are drawn up in a foreign currency, the relevant turnover and asset values are to be converted into Indian Rupees at a rate based on the average spot rate of the Reserve Bank of India for the six months preceding the date of notification.[28]

What Levels of Control Trigger a Filing?

While the Competition Act refers to a concept of control for the purpose of defining which entities are to be included in the calculation of group turnover and assets (see above), curiously it contains no clear thresholds for the level or degree of control that will trigger a filing. Indeed, the definition of a notifiable combination refers to an enterprise "whose control, shares, voting rights or assets" are being acquired.[29] That unfortunate use of the word "or" suggests that an acquisition of shares, voting rights, or assets may be notifiable, even if it entails no acquisition of control. If this interpretation were correct, it would be all but impossible to engage in a wide range of intra-group transactions and day-to-day dealings in listed shares in a way that is compliant with Indian merger control laws.

The CCI has, to some extent, pre-empted such problems by stating, in its Combination Guidelines, that it considers the following to be "normally" excluded from the notification requirement:[30]

- acquisitions resulting in the acquirer having less than 15 percent of the shares or voting rights of a target, provided they are made in the ordinary course of business or solely as an investment, and do not confer control over the target. This exclusion does not, however, apply if the acquirer already controls one or more competing enterprises which, together with the target, satisfy the "buyer/target" thresholds. Consequently, an acquisition of an insignificant shareholding in a target could be notifiable if competing activities are carried out within the buyer's group;
- intra-group reorganizations, provided the acquirer is part of a group that already owns 50 percent or more of the shares or voting rights of the target, except where the acquirer is buying out a third-party shareholder that had a (joint) controlling interest. However, the CCI has issued a clearance decision with respect to the "amalgamation" of two Indian sibsidiaries of the French group, Alstom.[31] This implies that the CCI views the intra-group exemption as inapplicable to transactions taking the form of mergers or amalgamations, as opposed to acquisitions of shares, assets, or voting rights. The policy rationale for this distinction is unclear—both forms of transaction appear equally incapable of giving rise to competition concerns, so it is hoped that the CCI will change its practice in this respect, or at least limit it to specific legal forms of amalgamation between Indian-registered companies;
- acquisitions of shares or voting rights pursuant to a bonus issue, stock split/consolidation, or rights issue, provided no control is acquired; and
- acquisitions of shares or voting rights by a person acting as a securities underwriter, in the ordinary course of business and in the process of underwriting or stock broking.

Subject to our comments above regarding intra-group transactions, it is encouraging that the CCI has been willing to clarify the provisions of the Act to introduce exemptions in this way,[32] both in terms of legal certainty for excluded transactions and as a sign that the same pragmatic approach may be taken towards other ambiguities in the Competition Act.

Moreover, the CCI's indication that there may be "abnormal" circumstances in which such transactions are notifiable should not be read as routinely necessitating precautionary notifications or guidance from the CCI with a view to confirming that a given transaction is indeed normal and therefore covered by the exclusion. The relevant categories of transactions have been excluded precisely because it would be almost impossible for them to give rise to competition concerns and ought therefore to be sufficiently reliable for practical purposes.

What Types of Asset Acquisitions Are Caught?

The Combination Guidelines provide that the following types of asset purchases will not normally be notifiable:[33]

- acquisitions of stock-in-trade, raw materials, stores, loose tools, spares, or current assets in the ordinary course of business; and
- acquisitions of certain assets that are unrelated to the business of the acquirer, which are made solely as an investment, or are in the ordinary course of business. This exemption will not, however, be available if the acquisition of assets would lead to control over the seller or if the assets being acquired represent substantial business operations in a particular location or for a particular product or service of the seller.

When acquiring assets—as opposed to an acquisition of a legal entity—purchasers should be aware of the possibility that they may not be able to benefit from the exception from the filing obligation for targets with de minimis turnover or assets in India. At the time of writing, the CCI has published two clearance decisions relating to asset (or "division") sales.[34] While not wholly evident from those decisions, there are indications that when assessing the applicability of the de minimis exemption, the CCI took into account not only the value of the target assets and the turnover attributable to those assets, but also the assets and turnover of the selling legal entity. While this approach appears to be permitted by the wording of the de minimis order,[35] it would undermine significantly the usefulness of that exception for asset deals. It would also bring the de minimis exception out of line with international best practice, under which local nexus thresholds should "be confined to the relevant entities or businesses that will be combined in the proposed transaction."[36]

Joint Ventures

The Competition Act contains no indication of how the jurisdictional thresholds are to be applied to joint ventures (i.e., to the creation of a new jointly controlled business, or the acquisition of joint control over an existing business). However, the CCI's first clearance decision related to a jointly controlled company,[37] so it is clear that joint ventures are caught by the merger control provisions of the Competition Act in the eyes of the CCI, even if the decision contains no information on how the jurisdictional thresholds were applied in that case.

As regards the thresholds that apply to the "group to which the parties will belong" post-transaction, the definition of "group" for these purposes suggests that the following should be taken into account: (i) turnover/assets of each parent company acquiring or retaining control over the management or affairs of the joint venture as a result of the transaction, along with all companies forming part of the same group as that parent; and (ii) the joint venture company and its direct and indirect subsidiaries.

As regards the thresholds that apply to the "parties to the transaction," and in line with the inclusive interpretation outlined above, it appears that the relevant entities to take into account for the purpose of calculating turnover and assets are: (i) the joint venture itself and its direct and indirect subsidiaries; and (ii) the legal entities that are acquiring shares in the joint venture as a result of the transaction in question and their direct and indirect subsidiaries.

In principle, there is no obvious reason why the exemptions described above for intra-group transactions and acquisitions of less than 15 percent of the shares or voting rights of a company, as well as the de minimis exemption for "targets" having less than the specified level of turnover or assets in India, should not be equally applicable in the context of joint ventures.

What If a Filing Is Required?

The most important features of the filing regime are summarized below.

Timing of the Notification. Filings must in most cases be made within thirty calendar days of the execution of the sale and purchase agreement or, for mergers or amalgamations, approval of the proposed transaction by the boards of directors of the enterprises concerned.[38] There are limited categories of transaction for which only a post-closing filing is required within seven days of completion of the transaction.[39]

The maximum penalty for failure to file within this timeframe is 1 percent of the total group worldwide turnover or assets (whichever is the higher).[40] The CCI also has powers to impose these penalties on certain individuals employed by or in charge of the party in breach.[41]

Standstill Obligations. Unless a post-closing filing is required, closing prior to clearance (or 210 days from notification, if no clearance or prohibition decision has been issued by then) is prohibited.[42] The Competition Act does not provide for a penalty for breach of this prohibition, but does confer powers on the CCI to issue interim orders to restrain the parties from "carrying on" implementation of a transaction, breaches of which can result in third-party damages claims and daily fines of INR 100,000 (approximately USD 2,000), up to a maximum of INR 10 million (approximately USD 200,000).[43] In addition, transactions which cause or are likely to cause an appreciable adverse effect on competition in India are void.[44]

Duration of the Review. The Combination Regulations provide that the CCI must issue a Phase I opinion—in effect, a decision to clear the transaction or carry out a detailed Phase II investigation—within thirty calendar days of receiving a valid notification.[45] At the time of writing, there have been five merger control clearances issued by the CCI: one (involving an intra-group transaction) cleared in an admirably quick seven calendar days from notification, the others taking between eighteen and twenty-four days, including time during which the review clock was stopped pending the supply of additional information by the notifying parties. This indicates that the CCI may be prepared to fast-track cases where the absence of competition concerns can be readily ascertained.

If the CCI finds that the combination may give rise to competition concerns and so merits a Phase II investigation, then the time limit for the CCI's final determination is extended to a maximum of 210 calendar days from filing of the original notification, although the Combination Regulations provide that the CCI shall endeavor to make its final determination within 180 calendar days.[46]

Both the Phase I and Phase II review periods can be suspended—e.g., when the CCI seeks additional information from the parties—and, in certain circumstances, reset.[47]

Filing Requirements. The Combination Regulations provide that filings should ordinarily be made using Form I—

the CCI's short form notification template—in particular, where certain criteria are met which would ordinarily suggest an absence of competition concerns.[48] However, the CCI has the power to require the parties to notify using the substantially more onerous Form II, and will "stop the clock" for the period in which it takes the parties to provide this additional information.[49] For that reason, if a transaction is likely to give rise to actual or potential competition concerns, notifying parties should consider carefully whether to file using Form II in the first instance, taking into account the considerable cost and time that is likely to be required to gather and provide the information required for Form II.

Form I must be accompanied by a filing fee of INR 50,000 (approximately USD 1,100), while a fee of INR 1 million (approximately USD 22,000) applies for Form II and there is no fee for Form III filings.[50]

Conclusion

Significant and welcome clarifications of the Indian regime have been made over recent years and months. However, for deals involving firms with substantial operations in India, the existing legal provisions remain unclear in a number of important respects, and it remains uncertain when or how further clarification will be forthcoming.

It is understandable that the CCI should wish to develop its approach to certain issues in the context of "live" cases. The European Commission, for example, took some four years to issue jurisdictional guidance after the entry into force of the EU Merger Regulation. However, from the outset the European Commission did include in its published decisions the reasons why it had accepted (or rejected) jurisdiction over the transaction in question, whereas such explanation has been absent from the CCI's decisions to date. Given the apparent willingness of the CCI to take a reasonable and pragmatic approach, we hope that the remaining open jurisdictional uncertainties will be resolved for the benefit of all, without undue delay. ■

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[1] A consolidated version of the Act is available from the Competition Commission of India's (CCI) website, http://www.cci.gov.in/index.php?option=com_content&task=view&id=18.

[2] The Competition (Amendment) Act, 2007.

[3] Notification S.O. 482(E), Gazette of India (Mar. 4, 2011). This de minimis exemption expires on March 4, 2016.

[4] Corrigendum S.O. 1218(E), Gazette of India (May 27, 2011). Note, however, that acquisitions involving a purchaser with no competitive presence in India may still be notifiable.

[5] The draft Competition Commission of India (Procedure in Regard to Transaction of Business Relation to Combination) Regulations.

[6] The Combination Guidelines are available on the CCI's website at http://www.cci.gov.in/index.php?option=com_content&task=view&id=62.

[7] Section 20, Competition Act, with values as increased by 50 percent by S.O. 480(E), Gazette of India (Mar. 4, 2011).

[8] In the context of mergers and amalgamations, these thresholds are framed in Section 5(c)(ii) of the Competition Act in terms of "the group to which the enterprise remaining after the merger, or the enterprise created as a result of the amalgamation, would belong after the merger or amalgamation . . . ."

[9] In the context of mergers and amalgamations, these thresholds are framed in Section 5(c)(i) of the Competition Act in terms of "the enterprise remaining after the merger, or the enterprise created as a result of the amalgamation . . . . "

[10] Notification S.O. 482(E), Gazette of India (Mar. 4, 2011), amended by Corrigendum S.O. 1218(E), Gazette of India (May 27, 2011).

[11] The alternative nature of the de minimis thresholds means, for example, that the acquisition of a target having assets in India of less than INR 2.5 billion will not be notifiable *even if* the target has a very high amount of turnover in India and the buyer has very high levels of turnover and/or assets in India. Note that if the target exceeds both of the de minimis thresholds, it may still be possible to avoid a notification through application of an exemption that is set out in Schedule I of the CCI's Combination Guidelines for transactions taking place entirely outside India, with insignificant local nexus and effects on markets in India. However, as this local nexus test was put in place by the CCI before the Government of India clarified the scope of the de minimis test, it appears that it is now effectively redundant. In particular, if the target exceeds both de minimis thresholds, it will be difficult to argue the absence of a nexus with India. However, the nexus test may continue to be relevant in relation to certain asset sales if the CCI takes into account the assets and turnover of the seller (discussed in the main body of this article) and renders the de minimis exemption unavailable notwithstanding the limited presence of the target business assets in India.

[12] The various limbs of the jurisdictional thresholds in Section 5 of the Act are all separated by the word "or," suggesting that each can be satisfied independently of the others.

[13] This structure is used purely to draw out some of the differences in the jurisdictional tests. It is unrepresentative of many transactions, in that the acquiring legal entity is not a special purpose acquisition vehicle, but rather has two existing active subsidiaries.

[14] Competition Act, Sections 5(a)(i) and 5(b)(i).

[15] Competition Act, Section 2(h).

[16] This is reinforced by the distinction, in Sections 5(c)(i) and 5(c)(ii), which relate to mergers and amalgamations, between "the enterprise remaining after the merger" and the "group, to which the enterprise remaining after the merger . . . would belong after the merger." *See supra* notes 8 and 9.

[17] Similarly, for the purpose of the de minimis thresholds, it should be assumed that the assets and turnover of the target include those of its direct and indirect subsidiaries.

[18] Competition Act, Section 5(b).

[19] Under this interpretation, the reference to competing enterprises over which the acquirer has "indirect" control would include those falling under the common control of a direct or indirect parent company of the acquiring legal entity (i.e., on the basis that the acquiring legal entity can exercise indirect control over an affiliate via such a parent company). While this would be an unusual construction of the concept of indirect control, it is preferable to maintaining that the word "acquirer" has two different meanings within Section 5 of the Act.

[20] The 2002 Act sets a figure of 26 percent of voting rights. However, by an order (S.O. 481(E), Gazette of India (Mar. 4, 2011)), the Indian Government exempted "the 'Group' exercising less than fifty per cent of the voting rights in other enterprise from the provisions of Section 5 of the Act [which contains the merger control thresholds] for a period of five years." While the drafting is imprecise, this appears to amend the definition of "group" so that shareholdings of less than 50 percent are excluded.

[21] Competition Act, Section 5, Explanation (b).

[22] Where, for example, the acquirer is ultimately jointly controlled by two parent companies, each able to exercise 50 percent of the voting rights in the acquirer, then all subsidiaries in which each of those parent companies has the relevant degree of control must also be included in the turnover and asset calculations.

[23] Moreover, if the seller or other shareholders of the target retain a controlling interest, such that they remain part of the target's "group," then it would

appear necessary to include also the turnover/assets of the groups to which they belong.

[24] Competition Act, Section 20.

[25] The Combination Guidelines also provide that "for the purpose of figures in this Form the accounting standards, as notified by the Government of India, from time to time, or the International Reporting Standards, or the US Generally Accepted Accounting Principles shall be followed" (Combination Guidelines, Schedule II, Form II, note 4). It therefore appears that the CCI will accept figures contained in accounts prepared on any of these bases as acceptable for the purpose of determining whether the jurisdictional thresholds are met.

[26] Competition Act, Section 2(y); and Combination Guidelines, Schedule II, Form II, note 6.

[27] Competition Act, Section 5, Explanation (c).

[28] Combination Guidelines, Schedule II, Form II, note 7.

[29] Competition Act, Sections 5(a)(i) and 5(a)(ii).

[30] Combination Guidelines, Regulation 4 and Schedule I.

[31] Notice for merger filed by AHIL and APIL, Combination Registration No. C-2011/10/06 (cleared on Oct. 19, 2011).

[32] Legal certainty would be further reinforced if the Indian government were to enact these exclusions in the form of an order under Section 54(a) of the Competition Act.

[33] Combination Guidelines, Regulation 4 and Schedule I.

[34] Notice for Acquisition filed by AICA Kogyo Company Limited and Aica Laminates Indian Private Limited, Combination Registration No. C-2011/09/04 (cleared on Sept. 30, 2011); and Notice for Acquisition filed by G&K Baby Care Private Limited, Combination Registration No. C-2011/08/03 (cleared on Sept. 15, 2011).

[35] The Order (see *supra* note 3) states that the relevant assets and turnover are those of the "enterprise whose control, shares, voting rights or assets are being acquired." This appears to allow for the seller's retained assets and turnover to be taken into account where the target is not, itself, an "enterprise" (which is defined in the Competition Act as denoting a legal person).

[36] International Competition Network: Recommended Practices for Merger Notification Procedures (2002), http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf. These go on to say that "the relevant sales and/or assets of the acquired party should generally be limited to the sales and/or assets of the business(es) being acquired."

[37] Notice for Acquisition filed by Reliance Industries Limited and Reliance Industrial Infrastructure Limited, Combination Registration No. C-2011/07/01 (cleared on July 27, 2011).

[38] Competition Act, Section 6(2); and Combination Regulations, Regulations 5(7) and 5(8). For hostile takeovers, the trigger is the execution of any document by the acquirer conveying a decision to acquire control, shares, or voting rights.

[39] Post-closing filings are to be made using the CCI's Form III template (Competition Act, Sections 6(4) and 6(5); Combination Guidelines, Schedule II and Regulation 6). These transactions are, broadly, transactions in the form of share subscriptions, financing facilities or any acquisitions that are entered into by certain types of foreign institutional investor, Indian public financial institution, bank or venture capital fund, pursuant to any covenant of a loan agreement or investment agreement. Note, however, that such transactions will rarely satisfy the criteria for notification in the first place.

[40] Competition Act, Section 43A.

[41] *Id.* Section 48.

[42] *Id.* Section 31(11).

[43] *Id.* Sections 33, 42(2) and 42A.

[44] *Id.* Section 6(1).

[45] Combination Regulations, Regulation 19(1).

[46] Competition Act, Section 6(2A); and Combination Regulations, Regulation 82(6).

[47] Combination Regulations, Regulations 5(4), 14(5), and 16(4).

[48] *Id.* Regulation 5(2). For example, where the parties are not competitors (i.e., they have no "horizontal overlaps" between their respective products and/or services), and are not active at different levels of the supply chain (i.e., there are no "vertical overlaps") or where they do have horizontally or vertically overlapping activities but have a combined market share of less than 15 percent in any horizontally overlapping market and less than 25 percent in any vertically overlapping market.

[49] *Id.* Regulation 5(4).

[50] *Id.* Regulation 11.