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Client Briefing
May 2011

India's New Merger Control Regime: Final Regulations Published

The Competition Commission of India ("CCI") has published finalised regulations (the "Regulations") governing the new merger regime that will enter into force on 1 June 2011.

The Regulations correct many of the shortcomings of the draft regulations that were published for consultation by the CCI in March 2011 (the "Draft Regulations"). In particular, they clarify that:

- only transactions that are *agreed* on or after 1 June 2011 - by way of a binding agreement for acquisitions, or approval of the board of directors for mergers – will become notifiable;
- certain acquisitions of minority interests, intra-group reorganisations, and deals having insignificant nexus with India are now "normally" excluded from the notification requirement;
- filing fees have been substantially reduced. For most deals the fee will be around €800 / $1,100, as opposed to the fees of up to €64,000 / $88,000 that were previously proposed; and
- the short form for filing of transactions that are considered unlikely to give rise to concerns has been cut back considerably, reducing the burden for the majority of notifications.

In addition, the Government of India issued a corrigendum on 27 May 2011 clarifying that the *de minimis* target company thresholds are applicable to either assets or turnover in India (and not worldwide assets/turnover).

This briefing summarises the Indian merger control regime as updated by the new Regulations, and highlights a number of important ambiguities that remain.

Thresholds and obligation to notify

Under the Competition Act 2002 (the "CA"), the acquirer has an obligation to notify any acquisition that meets the relevant thresholds, as set out in the table below. In the case of a qualifying merger or joint venture, all parties to the transaction are required to make a joint filing to the CCI. Subject to certain limited exceptions, qualifying transactions cannot be completed unless and until the CCI has issued a clearance decision. The maximum penalty for failure to file within the required deadline is one per cent of the total turnover or assets of the combined undertaking.

Key Issues

Changes address most substantial concerns with the new regime

Transactions agreed before 1 June 2011 not caught

Acquisitions of certain minority shareholdings and intra-group reorganisations excepted

Filing fees and requirements reduced significantly for straightforward deals

Transactions involving target with limited assets or turnover in India no longer notifiable

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A filing will be required if any one of the following eight alternative thresholds is met, unless the target's turnover or assets fall below the de minimis thresholds at the end of the table.

	Entity	Threshold	Euro equivalent (approx.)	US Dollar equivalent (approx.)
1.	Group to which parties will belong post-transaction (see notes below)	Turnover in India of over INR 180 billion	€2,886 million	$3,996 million
2.		Assets in India of over INR 60 billion	€962 million	$1,332 million
3.		Worldwide turnover of over US$ 9 billion **including** INR 22.5 billion in India	€6,499 million **including** €361 million in India	$9 billion **including** US$500 million in India
4.		Worldwide assets of over US$ 3 billion **including** over INR 7.5 billion in India	€2,166 million **including** €120 million in India	$3 billion **including** US$167 million in India
5.	Acquirer and target alone or in combination (see notes below)	Turnover in India of over INR 45 billion	€722 million	$999 million
6.		Assets in India of more than INR 15 billion	€241 million	$333 million
7.		Worldwide turnover of more than US$ 2.25 billion including at least INR 22.5 billion in India.	€1,625 million including €361 million in India	$2,250 million including $500 million in India
8.		Worldwide assets of more than US$ 750 million **including** at least INR 7.5 billion in India	€542 million including €120 million in India	$750 million including $167 million in India
UNLESS either of the following *de minimis* thresholds is met				
(i)	Target	Turnover in India of less than INR 7.5 billion	€120 million	$167 million
(ii)		Assets in India of less than INR 2.5 billion	€40 million	$56 million

Euro and Dollar conversions are on the basis of average spot rates of the last 6 months of the Reserve Bank of India

Notes to the thresholds

- For the purpose of the thresholds relating to the "Group" to which the parties will belong post-merger (thresholds 1-4 above), the calculation of turnover or assets must include all companies in which the ultimate parent company of the group is able to: (i) exercise 50% or more of the voting rights; (ii) appoint more than half of the board of directors, or (iii) "control the management or affairs" of the company in question. Where the deal in question is an acquisition of a minority interest, it may therefore be necessary for these purposes to exclude the turnover or assets of the target from that of the "group".
- For the purpose of the thresholds relating to the acquirer and target (thresholds 5-8 above), it remains unclear which entities should be taken into account, but the consensus among Indian practitioners appears to be that they refer to the acquirer and target legal entities *only*. This implies that the turnover component of these thresholds will often be irrelevant. For example, where the acquiring legal entity has been created to act as the acquisition vehicle, and the target is a holding company that does not itself engage in sales to third parties, neither party will have any turnover for the purpose of these thresholds (although they may have of course have sufficient assets to satisfy them). If the transaction is a merger or some other form of "amalgamation", the relevant entity to take into account for thresholds 5-8 is the legal entity remaining after merger or the enterprise created as a result of the amalgamation.

- In principle, where the main jurisdictional thresholds (1-8 in the table above) refer to turnover or assets in India, these can be met by either of the acquirer or target alone, i.e. even if the other party has little or no turnover or assets in India. However, following a Government clarification on 27 May, it is now clear that the *de minimis* thresholds apply only to assets or turnover in India (and not worldwide). Consequently, transactions involving a target with limited turnover or assets in India are not required to be notified. If the target exceeds both of the *de minimis* thresholds, it may still be possible to avoid a notification through application of the "local nexus" test described below, although it is also possible that the Government's clarification of the *de minimis* thresholds has rendered the local nexus test otiose.

Excluded transactions

The Regulations now provide that the following transactions are "normally" excluded from the notification obligation:

- acquisitions of less than 15% of the shares *or* voting rights of a target, provided no other controlling rights are acquired. While very low by international standards, this threshold is a huge improvement on the position under the earlier Draft Regulations, which suggested that an acquisition of any shareholding, no matter how small, triggered a filing obligation;
- intra-group reorganisations, provided the acquirer is part of a group that already owns 50% 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;
- deals "*taking place entirely outside India with insignificant local nexus and effects on markets in India*". Now that the Indian Government has clarified that the *de minimis* thresholds exclude from the filing obligation transactions involving targets with limited turnover or assets in India (see above), it remains to be seen whether this local nexus test will be applied by the CCI in practice;
- acquisitions of stock-in-trade, raw materials, stores, spares or current assets in the ordinary course of business;
- acquisitions of shares or voting rights pursuant to a bonus issue, stock split/consolidation, or rights issue, provided no control is acquired (there is no clear definition of "control" for the purposes of applying the exceptions - the CA specifies only that "control" includes "*controlling the affairs or management*" of an enterprise or group);
- acquisitions of assets that are "*not directly related to the business activity of the party of the acquiring the asset or made solely as an investment or in the ordinary course of business, not leading to control of the [seller] except where the assets being acquired represent substantial business operations in a particular location or for a particular product or service of [the seller]*". There are several ways in which this exception could be interpreted, so clarification by the CCI will be necessary before it can be relied on; 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; and

Many of these exclusions will be difficult to apply in practice without further guidance or clarification from the CCI, e.g. in relation to the concepts of control and local nexus. The statement that the listed transactions are "normally" excepted from the filing obligation is also concerning, given the lack of guidance on when the CCI might abnormally require them to be notified.

In addition, the merger control law provides for an exemption from the prohibition on completion for share subscriptions, financing facilities or any acquisition by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant of a loan agreement or investment agreement, provided a post-closing (Form III) filing is made.

Pre-merger consultation

While the Regulations no longer contain any provisions for informal and confidential pre-notification consultation, the CCI has indicated that it will soon issue for consultation separate guidelines on this issue. It is hoped that these will, at minimum, allow parties to seek clarification regarding the application of the jurisdictional tests, and to secure from the CCI a provisional view as to whether a proposed filing is complete, so that parties can minimise the risk of delays caused by omissions that are identified during the subsequent review period.

Filing fees and deadlines

The Regulations provide for filing fees that are well below those proposed in the earlier draft. In addition, the level of the fee no longer depends on the size of the transaction, but rather on whether the transaction is filed using:

- Form I (available for transactions considered unlikely to give rise to concerns), in which case the fee is INR 50,000 (approximately €800 / $1,100); or
- the considerably more burdensome Form II - which is reserved for transactions having greater potential for anticompetitive harm - in which case the fee is INR 1 million (approximately €16,000 / $22,000).

The parties are required to notify the CCI within 30 calendar days of:

- for acquisitions, the execution of any *binding* agreement or document conveying an agreement or decision to acquire the relevant control, shares, voting rights or assets;
- for hostile takeovers, any document executed by the acquirer conveying a decision to acquire such control, shares or voting rights; and
- for mergers or amalgamations, approval of the proposed merger or amalgamation by the boards of directors of the enterprises concerned.

Where such documents are not executed, but the intention to acquire is communicated to the State/central government or a statutory authority, the date of such communication will set the 30 day filing deadline running.

Notification forms

The list of transactions for which a simplified short form (Form I) may be used is now targeted much more precisely on those that are unlikely to give rise to concerns. This list includes transactions:

- where the parties are not competitors (i.e. they have no "horizontal overlaps" between their respective products and/or services), or where they are competitors but have a combined market share of less than 15% in the relevant market. While the Regulations do not specify whether overlaps and markets outside India are to be taken into account, it seems reasonable to assume that the affected market must at least include all or part of India;
- the parties are not active at different levels of the supply chain (i.e. they are not "vertically" related), or where they are so active but do not have an individual or combined share of any vertically-related market of 25% or more. Again, it seems reasonable to assume that the relevant market should include all or part of India;
- the parties derive at least 75% of their revenues from exports of goods or services from India, and will continue to do so post-merger, provided that they have a combined share of less than 15% of the relevant market in India;
- acquisitions resulting from gifts or inheritance; and
- acquisitions by certain liquidators, administrators and receivers.

The scope of Form I has been considerably pared back. It no longer requires a wide range of corporate, financial and regulatory documents, but instead requests concise details of the transaction itself, a description of the parties' products or services, and information on any markets in which the parties compete (market shares, market size and contact details of large customers, competitors and suppliers). The current Chairman of CCI has stated that he expects that nearly 95% of cases will be dealt with using Form I.

For transactions falling outside the scope of Schedule I, notifying parties will be required to notify using a long form (Form II) which requires much more detailed information on market definition, efficiencies and structure compared to Form I. It also requires submission of a wide range of supporting documents, including transaction documents, all reports and analyses prepared for the purpose of assessing the competitive effects of the transaction (this is not limited to board documents),corporate and financial documents and filings in other countries and before other Indian authorities . The CCI also reserves the right to require parties to use Form II for the notification, even if the transaction falls within the list of transactions qualifying for a short form filing.

The Regulations also include Form III, which is used for post-closing notifications in the circumstances set out above. Notifications using Form III, which are exempt from the payment of filing fees, must be filed within 7 days of completion of the transaction.

The Regulations recognise the practical difficulties in obtaining information in the context of a hostile acquisition. They allow the acquirer in a hostile acquisition to limit the initial information provided in the notification only to that currently available to the acquirer, provided that all information is provided to the CCI as soon as possible. The CCI also has the power to direct the target to furnish the required information as it deems fit.

Review periods

The review period clock starts on receipt of a valid notification. If a notification contains defects or is incomplete, the parties will be given a deadline to correct the relevant defect or omission. Failure to meet the deadline will result in the filing being deemed invalid.

The Regulations require the CCI to reach a "prima facie opinion" of whether a combination is likely to cause an appreciable adverse effect on competition ("**AAEC**") within a relevant market in India, within 30 calendar days of receiving a valid notification (the "Phase 1" review period), regardless of whether the information has been filed in Form I or Form II. It remains unclear whether parties to a transaction will receive formal permission to implement their transaction at the same time as the Phase 1 clearance opinion, or whether there will be an additional delay before this is issued.

If the CCI finds that the combination may give rise to an AAEC and merits further investigation, then the time limit for the CCI's final determination is extended to the maximum of 210 days from filing of the notification under the CA, regardless of whether the notification is filed in Form I or Form II (the "Phase 2" review period). While the Regulations provide that the CCI shall endeavour to make its final determination within 180 days from the date of filing the notification, this target is not binding on the CCI.

The time taken by the parties to provide information further to additional information requests by the CCI is not included in the relevant review period (i.e. the clock is stopped for this period). As a result, it is possible that the CCI may take longer than the 30 day Phase 1 period or 210 day Phase 2 period, as applicable.

Should there be any change in the information provided after the parties to a proposed transaction have filed the notification, and if in the CCI's view such change has a bearing on the factors that are likely to cause an AAEC, it may treat the notification as not valid. In such a situation, the parties would have to make a fresh filing and the review clock would restart.

Public announcement of the transaction
Where the CCI is of the preliminary opinion that the combination has caused or is likely to cause an AAEC, the CCI will, within four days of its decision, direct the parties to the combination to publish the details of the combination within 10 working days of the date of the CCI's direction. The details of the combination should be published in all India editions of four leading daily newspapers, including at least two business newspapers, as may be specified by the CCI.

Appointment of monitoring agencies
The Regulations provide that, if the CCI is of the opinion that an undertaking or commitment (referred to as a modification) accepted by the parties requires independent supervision, it may appoint independent agencies such as an accounting firm, a management consultancy or any other professional organisation to oversee the modification on terms and conditions decided by the CCI. The parties to the combination are required to pay the fees of such monitoring agencies.

Information exchange with other competition authorities
The CCI is required by the CA to maintain the confidentiality of the notification. In addition, the Regulations specify that any confidentiality requests by the parties will be applicable only in relation to disclosure to the public.

The Regulations afford the CCI a broad discretion to seek the opinion of "any other agency or statutory authority" in relation to a notified transaction, but this does not expressly permit the CCI to share the parties' confidential information with another authority without their consent.

Conclusion
The CCI has revised its regulations enough to avert the sizeable business disruption that would have been wrought by the March 2011 draft. However, there remain numerous ambiguities, so the regime may yet create significant difficulties for mergers and acquisitions that involve Indian markets. Much will depend on whether the rules are implemented and interpreted in a transparent and commercially rational way, and whether sufficient resources and expertise are placed at the CCI's disposal. It will be of particular importance that merging parties are able to secure clarity in respect of a number of outstanding issues, including:

- the application of the jurisdictional thresholds and, in particular: (i) the concepts of "local nexus" and "control" as they are applied to transactions that are now excepted from the filing requirement; (ii) the circumstances in which the CCI might require notification of a transaction that is "normally" excepted from the filing requirement; and (iii) the calculation of turnover and assets when applying the relevant thresholds;
- the likely timeframe for review of transactions. Even the CCI's non-binding target of 180 days is long, by international standards (and the binding 210 day period even more so), so it is to be hoped that the CCI will make sparing use of its broad powers to stop the clock while seeking additional information from the parties;
- whether it will be possible to "carve out" the acquisition of Indian assets or companies from a wider, global transaction, so that a prolonged review by the CCI need not delay or frustrate the wider deal;
- the approach that the CCI will take to assessing whether a transaction is likely to give rise to an appreciable adverse effect on competition; and
- the possibilities for pre-notification consultation with the CCI on jurisdictional and substantive issues.

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