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Merger Control in India: Partial Implementation of the ICN Recommended Practices

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I. DEVELOPMENT OF THE MERGER REGIME

India's new merger regime illustrates how the International Competition Network's *Recommended Practices for Merger Notification and Review Procedures*[2] can help to improve merger control processes. In this review, we focus on three areas of practical importance to merging parties that also have significant implications for the effectiveness and efficiency of the agency's merger control activities: local nexus, timelines, and information requirements.

The Indian *Competition Act, 2002* included provisions to establish a mandatory pre-merger review. The regulations implementing these provisions were not finalized until May 2011, and the merger notification regime came into force on June 1, 2011. In the intervening 9 years, the Indian government revised the *Competition Act* in 2007, and published 3 sets of draft implementing regulations (in 2008 and 2011).

The Competition Commission of India ("CCI") and the Indian Government publicly expressed their commitment to developing an effective modern regime that considered international best practices, and were willing to engage repeatedly with national and international stakeholders throughout the process. In the private sector, a wide range of stakeholders were actively involved and advocated changes, in large part based on international norms and experience. The high level of engagement from stakeholders such as bar associations and business/industry groups was likely motivated by a recognition that investment in this process was easily balanced against the costs and risks that could result from a non-conforming regime.

II. NEXUS TO REVIEWING JURISDICTION

Conformity with the jurisdictional nexus Recommended Practice was a focal point of advocacy throughout the development of the Indian merger control regime.

The first of the ICN Recommended Practices asserts the important principle that: "[j]urisdiction should be asserted only over those transactions that have an appropriate nexus with the jurisdiction concerned."[3] The Recommended Practices elaborate that determination of a transaction's nexus to the jurisdiction should be based on the activities of at least two parties in the local territory and/or on the activities of the target business in the local territory. The

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[2] *Available at*: www.internationalcompetitionnetwork.org.

[3] ICN Recommended Practice I-A.

rationale for this position is that transactions with no material connection to a jurisdiction are unlikely to raise competition concerns in that jurisdiction and, therefore, parties to such transactions (and agencies) should not be required to devote resources to the notification or review of such transactions, nor should the closing of transactions be delayed in such circumstances.

Where a jurisdiction lacks a material local nexus, companies with significant sales may find that they are required to notify almost all of their international transactions in that jurisdiction, whether or not the transaction is connected to the jurisdiction. For example, under the Indian merger control regime, as originally drafted, a company with worldwide turnover of approximately US$6 billion or more, including turnover of approximately US$375 million or more in India, would have been required to notify all its merger transactions anywhere in the world to the CCI.[4] This requirement would have applied even if the target company had no connection to India.

The time and cost implications of multi-jurisdictional notifications are significant. A 2003 study by PricewaterhouseCoopers found that the typical multi-jurisdictional deal required eight completed or considered filings and generated an average of EUR 3.3 million in merger clearance costs (excluding internal resources consumed). A number of major deals faced costs of EUR 10 million or more.[5] With the proliferation of merger control regimes over the past eight years, the number and costs of filings would be expected to be significantly higher today. Thus, the elimination of unnecessary filing requirements is an important step towards managing the cost burdens of mergers transactions.

Stakeholders including the International Bar Association ("IBA"), the American Bar Association ("ABA"), and industry groups such as the Merger Streamlining Group[6] and the Confederation of Indian Industry have made repeated submissions to the CCI and the Indian Ministry of Corporate Affairs regarding the importance of a local nexus threshold. For example, in 2007, the ABA argued for the introduction of a local nexus threshold on the basis that: (i) the lack of such a threshold would likely burden the Commission with reviewing and processing notifications of transactions with little relevance to India; (ii) the threshold appeared to be inconsistent with the ICN Recommended Practices; and (iii) the threshold was inconsistent with those adopted by many other jurisdictions. Similarly, the Merger Streamlining Group expressed concern that the lack of a local nexus requirement was inconsistent with the ICN Recommended Practices and that requiring notifications for transactions with no material connection to India would require an unproductive expenditure of resources both by the Commission and by merging parties.[7]

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[4] There were several alternative thresholds based on companies' assets and revenues. However, all the thresholds applied to the combined assets or sales of the parties to a transaction. Thus, even if one party alone exceeded the threshold and the other party had no assets or sales in India, the transaction would be subject to notification.

[5] PricewaterhouseCoopers, "*A tax on mergers? Surveying the costs to business of multi-jurisdictional merger review*," commissioned by the International Bar Association and the American Bar Association, (June 2003), *available at*: http://www.pwcglobal.com/uk/eng/about/sucs/vs/pwc_mergers.pdf.

[6] The Merger Streamlining Group is a group of multinational companies focused on advocating for compliance with international best practices in merger control. Further information about the Group is *available at*: http://www.mcmillan.ca/merger-streamlining-group

[7] The IBA also argued that the lack of a local nexus requirement was inconsistent with the ICN Recommended Practices.

The CCI appeared to give particular consideration to compliance with the ICN Recommended Practices in preparing draft regulations. In public statements, the Commission pointed to the local nexus Recommended Practice and to provisions in the regulations that addressed this Recommended Practice—although, at the time of those statements, the proposed nexus requirements fell somewhat short of full compliance.[8] An eleventh hour amendment appears to have brought the regime largely into compliance: The Commission published a notice exempting from the notification requirements transactions involving target companies with assets in India of approximately US$56 million, or turnover in India of approximately US$167 million, or less.

The final revisions followed numerous pointed stakeholder submissions. The changes were a welcome development and should ensure that most transactions lacking a material connection to India will not be subject to the Indian notification regime. Two questions, however, remain outstanding. First, it is unclear whether the exemption applies to amalgamations or only to acquisitions. Second, there is some ambiguity as to whether the thresholds apply to the assets and turnover of the target company or of the seller group. Stakeholders had identified these issues during the consultation process and it is to be hoped that the CCI will provide sensible interpretations shortly.

III. MERGER REVIEW TIMELINES

A second source of significant concern for stakeholders was the timeframe for merger review under the Indian Competition Act. The Act establishes a 210-day no-close waiting period for merger review and does not establish any shorter initial waiting period for non-complex transactions. The potential for a seven-month delay in closing any transaction notified in India was particularly problematic prior to the introduction of a local nexus requirement, when it appeared that this waiting period would apply to many transactions with no material connection to India. It remains a cause of concern for any companies engaged in significant M&A activity in India. This concern is exacerbated by the fact that merger review is a new area of activity for the CCI. New agencies may face staffing shortages, which can delay reviews, and may also require some period of time to develop systems to expedite the identification and early clearance of non-problematic transactions.

ICN Recommended Practice IV provides three key standards for "no-close" waiting periods:

- Merger reviews should be completed within a reasonable period of time (IV-A)
- Merger review systems should incorporate procedures that provide for expedited review and clearance of notified transactions that do not raise material competitive concerns (IV-B)
- In suspensive jurisdictions, initial waiting periods should expire within a specified period following notification and any extended waiting periods should expire within a determinable time frame (IV-C)

The Commentary to Recommended Practice IV-C suggests that "initial waiting periods should be subject to definitive and readily-ascertainable deadlines to permit transactions that do not present material competitive concerns to proceed with minimal delay and disruption." The

[8] K.K. Sharma, *New Merger Control Regime of India*, (March 8, 2011), *available at*: http://www.cci.gov.in.

Commentary also suggests that initial waiting periods should expire in six weeks or less and that extended reviews should be completed within six months or less following the initial notification.

Stakeholder submissions regarding India's waiting period focused on two general arguments: its inconsistency with the ICN Recommended Practices[9] and its inconsistency with the waiting periods in other suspensive jurisdictions.[10] Of particular concern was the lack of a shorter initial waiting period that would assure merging parties that non-problematic transactions would not be subject to a seven-month delay.

The Indian Commission quickly adopted a proposal for initial 30-day and 60-day waiting periods. The 2008 Draft Regulations (which provided for alternative Form I and Form II notifications) provided that the Commission should form its *prima facie* opinion regarding a transaction notified on Form I (the more detailed notification form) within 30 days of notification and regarding a transaction notified on Form II (the simplified notification form) within 60 days of notification. Where the Commission formed a *prima facie* opinion that the combination was not likely to cause an adverse effect on competition, that opinion was to be communicated to the parties within three days of the decision. These proposals were followed by further submissions from stakeholders emphasizing concerns about ensuring that non-complex transactions would be subject to fewer information requirements and shorter review timeframes (ICN RP IV-B).[11] Stakeholders expressed particular concern about the fact that parties would be required to submit the longer notification form to benefit from the 30-day initial waiting period.

The regulations that came into force on June 1, 2011 provide that the Commission shall form its *prima facie* opinion regarding the competitive effects of a transaction within 30 days of notification. The regulations also provide that the Commission shall endeavor to pass an order or issue a direction with respect to a combination within 180 days of notification. The introduction of these requirements is a welcome development and may help to ensure that non-problematic transactions are not subject to extended waiting periods and to somewhat reduce the waiting period for complex transactions.

However, it is not clear how this system will work in practice. Neither the Act, nor the Regulations, provide for parties to complete a transaction prior to receiving notice of the Commission's opinion. Parties will be barred from closing a transaction until they actually receive an opinion from the Commission, or the 210-day waiting period established under the Act expires. This remaining uncertainty could be resolved for non-complex transactions by amending the Act or the Regulations to provide that where the Commission does not

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[9] *See,* American Bar Association, *Joint Comments of the American Bar Association's Section of Antitrust Law, Section of Business Law and Section of International Law on Implementing Regulations for and Amendments to the Merger Control Provisions of India's Competition (Amendment) Act, 2007* (November 2007), *available at* http://www.americanbar.org/groups/antitrust law ("ABA 2007 Submission"); International Bar Association Antitrust Committee Working Group on India's Proposed Mandatory Merger Notification Regime, *Submission Regarding the Proposed Indian Merger Notification Regime and Implementing Regulations* (November 2007) at ¶ 4.4, *available at*: http://www.ibanet.org; and Merger Streamlining Group, *Letter to the Competition Commission of India regarding recent amendments to the Indian Competition Act* (October 2007), *available at*: http://www.mcmillan.ca/Files/WRowley_Letter_CompetitionCommission_India_1007.pdf.

[10] ABA 2007 Submission at p. 6.

[11] International Bar Association Antitrust Committee Working Group on India's Proposed Mandatory Merger Notification Regime, *Submission Regarding the Indian merger Notification Regime and Necessary Implementing Regulations* (March 2008); American Bar Association, *Joint Comments of the American Bar Association's Section of Antitrust Law, Section of Business Law and Section of International Law on Proposed Draft of the Competition Commission of India (Combination) Regulations, 200_"*, at p. 5 (2008); and Merger Streamlining Group, *Letter to the Indian Ministry of Corporate Affairs and the Competition Commission of India regarding the Competition Act and the Draft Regulations*, at p. 8 (March 2008).

communicate an opinion to the contrary to the parties within 30 days of notification, the Commission is deemed to have approved the transaction.

A second remaining issue with respect to the waiting periods is the provision in the regulations that, whenever the CCI seeks additional information or clarification, the waiting period will be suspended pending the parties' response to the CCI's request. Depending on the nature and frequency of such requests from the CCI, these suspensions could significantly extend an already lengthy waiting period.

Finally, another source of concern for stakeholders was the requirement under the Act that parties notify a transaction within 30 days of either approval by the board of a proposal related to the transaction or execution of an agreement. Stakeholders made multiple submissions expressing concern about the imposition of a deadline for notification (contrary to Recommended Practice III-B) and the possibility that notification could be required prior to the execution of a final merger agreement. The regulations enacted in 2011 provide that the "agreement" triggering the notification requirement is a final agreement. This amendment addressed one significant concern of stakeholders; however, the 30-day deadline for notification remains problematic, especially given the extent of the information requirements.

IV. NOTIFICATION INFORMATION REQUIREMENTS

- One continuing source of concern for merging parties is the extensive list of information requirements for a merger notification. There are two notification forms:
- a short form to be used in connection with non-complex transactions (for example, where none of the parties produce, distribute, or sell identical or substitutable products, the parties are primarily engaged in the export of goods from India, and the parties have combined share of less than 15 percent in the relevant market in India or the acquisition is by a liquidator, administrator, or receiver appointed through court proceedings (a list prescribed by regulation)); and
- a long-form notification to be used in connection with all other notifiable transactions.

Earlier draft regulations had proposed that parties be allowed to select whether to file short or long forms (with a longer-initial waiting period for short-form filings). In the March 2011 draft, short-form filings were prescribed for a list of transactions that included many ordinary course transactions. The requirement that ordinary course transactions be notified using the short-form filing resulted in widespread concern both within and outside India and was abandoned in the final version of the regulations.

As the regulations developed, the information requirements were reduced somewhat. However, they remain extensive, particularly for long-form filings. Information requirements that have raised particular concerns include: information about distribution facilities including the location of all distribution facilities; modes and costs of transportation; the manner in which the parties produce, price, and sell products; the costs of entry including any regulatory, IP, or other barriers to entry; and any obligations the parties face to comply with language requirements anywhere in India (e.g. in user manuals).

Stakeholder advocacy with respect to the information requirements included general references to the ICN Recommended Practices. However, it is notable that the Recommended

Practices with respect to information requirements are, perhaps necessarily,[12] less specific than the Recommended Practices with respect to local nexus requirements or waiting periods:

- Initial notification requirements should be limited to the information needed to verify that the transaction exceeds jurisdictional thresholds, to determine whether the transaction raises competitive issues meriting further investigation, and to take steps necessary to terminate the review of transactions that do not merit further investigation (RP V-A).
- Initial notification requirements and/or practices should be implemented so as to avoid imposing unnecessary burdens on parties to transactions that do not present material competitive concerns (RP V-B).

The Indian merger regime does not provide for two-stage notifications; rather, transactions are subject to either short- or long-form notification at the outset. As a result, even non-problematic transactions may be subject to the extensive Form 2 information requirements. It is worth noting that the regulations do contemplate that the CCI may issue additional information requests. The fact that the CCI would not be limited in its review to the information provided in the initial notification is a further reason for avoiding unnecessarily burdensome requirements in the initial filings.

Commentators have relied on the ICN Recommended Practices to argue that both forms require more information than is necessary to determine whether a transaction raises competitive issues meriting further review[13] and have raised concerns about various specific information requirements on this basis.[14] However, the Recommended Practices appear to have been less central to advocacy on this point and many comments have focused instead on the utility of particular information requirements and on comparisons to the processes in other jurisdictions.

In explaining India's approach to information requirements, the CCI asserted that ICN Recommended Practice V had been taken into account, and noted that comparatively less information is required in the short-form notification.[15] Unfortunately, these statements have not addressed the underlying concern that any transaction not specifically designated as a Form 1 transaction will be subject to notification on Form 2. Advocacy in this area has generated some improvements; for example, the information requirements in Form 1 in the final regulations were more limited than the requirements in the 2011 draft, and certain requirements in Form 2 were limited to overlapping products where they had previously applied to all of the parties' products. Nevertheless, in our view, the information requirements continue to diverge from international best practices. The practical implications of this divergence should become clearer in the next few months.

[12] While the ICN has conducted a survey on information requirements for merger notification, it has not developed recommendations with respect to specific information requirements for initial notification.

[13] *See*, for example, American Bar Association, *Joint Comments of the American Bar Association's Section of Antitrust Law and Section of International Law on the Draft CCI (Procedure in Regard to the Transaction of Business Relating to Combination) Regulations*, at p. 3 (March 21, 2011).

[14] For example, in its March 2008 comments, the IBA suggested that information requirements in Form 1 relating to non-overlapping products, and information requirements in Form 2 with respect to total Indian capacity for all group enterprises, would not be necessary for the analysis of the competitive effects of the transaction.

[15] K.K. Sharma, *supra* note 8.

V. CONCLUSION

The new Indian merger control regime is the product of an extensive process of consultation and revision. The regime reflects substantial changes from early proposals, many of which appear to reflect efforts to conform with international best practices as advocated by various stakeholders.

Certain issues do remain, notably: (i) the extensive Form 2 information requirements; (ii) the ambiguity regarding whether the local nexus threshold applies to mergers as well as acquisitions; (iii) the uncertainty regarding whether the local nexus threshold is calculated solely based on the assets and revenues of the target company rather than its parent group; (iv) the absence of automatic clearance for non-problematic transactions after an initial 30-day waiting period; and (v) the requirement that mergers be notified within 30 days of either approval by the board of the proposed transaction or execution of a final agreement. ICN Recommended Practice VII-A suggests, "Jurisdictions should periodically review their merger control provisions to seek continual improvement in the merger review process." It is to be hoped that, as the CCI gains experience in reviewing mergers, it will refine the merger control regime, taking into account the experience both of the agency and of merging parties. As this process unfolds, there may well be an ongoing role for stakeholders to continue to advocate for conformity with international best practices.