CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
October 2012 (1)

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I. INTRODUCTION

Although India enacted the Competition Act in 2002 ("Act"), various legal challenges delayed its implementation and the Competition Commission of India ("CCI") was not fully constituted until 2008. The Act came into force in phases, with the provisions regulating anticompetitive agreements and abuse of dominance coming into effect in May 2009, and the merger control provisions and the accompanying Combination Regulations[2] becoming effective in June 2011. Despite having been in effect for less than a year, the CCI has introduced significant substantive and procedural amendments to the Combination Regulations (in February 2012) responding partly to business concerns.[3]

The merger control regime was initially met with resistance from the domestic and international business community expressing apprehensions that the requirements of prior notification to the CCI of proposed transactions would lead to significant delays and adversely impact domestic and foreign investment in India. Also, if the CCI adopted an overly activist stance towards scrutinizing combination/M&A activity, it could prevent the efficient restructuring of the Indian economy—so vitally needed. It became critical for the CCI to demonstrate it would strike a balance between protecting competition and allaying industry's concerns of heavy regulatory burden due to time delays, information requests, and uncertainty. This review of recent transactions handled by the CCI suggests that many of the early apprehensions about implementation of India's merger control provisions were misplaced.

II. THE MERGER CONTROL PROVISIONS

Sections 5 and 6 of the Act are the operative provisions dealing with combinations.

Section 5 enumerates three types of transactions ("Combinations") that require prior notification to the CCI:

- acquisition of control, shares, voting rights, or assets;
- acquisition of control by a person over a competing enterprise; and

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[2] The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ("Combination Regulations").

[3] The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2012 ("Amendment Regulations").

- merger or amalgamation of enterprises.

Section 6 prohibits Combinations which cause or are likely to cause an appreciable adverse effect on competition ("AAEC") within the relevant market in India. Whether a Combination causes or is likely to cause an AAEC in India is analyzed based on various factors provided in Section 20(4) of the Act.

The asset and turnover thresholds are set out below:

Table-I

Jurisdictional Thresholds Under the Act

	Applicability	Assets	Turnover
In India	**For acquirer and target (combined)**	INR. 1,500 crores (USD 300 million)[4]	INR. 4,500 crores (USD 900 million)
	For "Group" (to which target belongs post-acquisition)	INR. 6,000 crores (USD 1.2 billion)	INR. 18,000 crores (USD 3.6 billion)

	Applicability	Assets		Turnover	
		Total	**Minimum in India**	**Total**	**Minimum in India**
In India and Outside India	**For acquirer and target (combined)**	USD 750 million	INR. 750 crores (USD 150 million)	USD 2.25 billion	INR. 2,250 crores (USD 450 million)
	For "Group" (to which target belongs post - acquisition)	USD 3 billion	INR. 750 crores (USD 150 million)	USD 9 billion	INR. 2,250 crores (USD 450 million)

As in most jurisdictions, the determination of the relevant market is critical to assessing the competition effects of a proposed Combination. The Act specifies factors relating to the "relevant product market" (i.e. markets comprising all products/services regarded as identical or similar and interchangeable or substitutable) and the "relevant geographic market" (i.e. markets comprising an area in which firms compete directly, taking into consideration demand-supply conditions).

[4] For ease of reference, the exchange rate used throughout this article is 1 USD = Rs. 50.

A. Exempt Transactions

In response to business concerns in March 2011, the Ministry of Corporate Affairs issued "Notifications" exempting Combinations (for five years) where the target enterprise, including its divisions, units, and subsidiaries has either:

- assets not exceeding Rs. 250 crores (USD 55 million) in India; or
- turnover not exceeding Rs. 750 crores (USD 150 million) in India.

The objective behind these exemptions is to exclude global transactions having "insignificant" local nexus with India. However, the term "insignificant" remains undefined, leaving scope for interpretation. The Notifications also exempt enterprises exercising less than 50 percent of voting rights in another enterprise from being treated as the part of same "Group" for computation of reporting thresholds.

The Amendment Regulations have effectively diluted the *de minimus* target-based threshold by providing for aggregation of thresholds in a series of inter-connected transactions, if certain assets of an enterprise (i.e. a business or a division) are transferred to another enterprise e.g., a special purpose vehicle ("SPV"), which is then acquired by a third party. Contrary to international practice, the value of the entire assets and turnover of the transferor enterprise are to be aggregated with those of the SPV for the purpose of the jurisdictional thresholds.

The CCI adopted this approach in the *Mitsui/Sanyo* (C-2011/12/14) and *Saint Gobain* (C-2012/01/19) notifications, even prior to the Amendment Regulations, with a view to ensure that such transactions do not escape notification by effectively structuring deals where relevant assets/divisions are hived off into a low-value target/SPV to qualify for the target exemption. Moreover, green field joint ventures will not be able to avail themselves of the target exemption, as the assets and turnover of the parent companies (transferring assets to the new joint venture company) would be aggregated with those of the target company.

The Combination Regulations exempting various transactions also had other anomalies relating to notification of intra-group reorganizations through mergers and amalgamations. This resulted in notifications of a large number of transactions even though they had no effect on market structure or cause AAEC. These have been partly addressed by the Amendment Regulations, which now provide for a limited exemption to intra-group reorganizations of an enterprise through mergers or amalgamations of a parent and its wholly-owned subsidiary or subsidiaries wholly-owned by enterprises within the same group.

Further, acquisitions of shares or voting rights not resulting in control, pursuant to subscriptions of rights issues in excess of the acquirer's entitlement or buy-backs, are also exempt as these are unlikely to have an effect on the competitive landscape. Additionally, acquisition of shares or voting rights, solely as an investment or in the ordinary course of business and not resulting in control of 25 percent or more of the total shares or voting rights of the target company are exempt, aligning the merger control thresholds with Indian takeover laws.

However, the inconsistency between merger control and Indian takeover laws continues as options and convertibles are computed in the 25 percent limit for merger control purposes but not for takeover laws.

B. Trigger Events for Notification

Parties are required to file a notification and mandatorily submit to the CCI within 30 days of:

- approval of the proposed merger or amalgamation by the boards of directors of the enterprises concerned; or
- execution of any binding agreement or other document(s) relating to the decision to acquire control.

It may be noted that the 30-day deadline for notification is not in accordance with the International Competition Network's *Recommended Practices for Merger Notification and Review Procedures*).[5]

C. Forms

The Combination Regulations provide for three types of forms:

- *Form I*: This is the default option, requiring details of the transacting parties and information to determine the "relevant market" and estimates of market shares. Parties must provide the names of their five largest competitors, customers, and suppliers, among other factors. Thus far all notified transactions have been Form I filings. The CCI has dispensed with a previous facility of filing a truncated Form I (for transactions where there was no real competition impact) and now requires filing of Form I in its entirety, thereby increasing the regulatory burden on parties. The Amendment Regulations have increased the filing fees to INR 1,000,000 (USD 20,000), contrary to many other jurisdictions which do not have a filing fee or link filing fees with the turnover of the transacting parties.
- *Form II*: Parties may opt to file Form II, which is fairly detailed and requires extensive details regarding the proposed Combination, including information on distribution facilities, transportation costs, all the goods and services provided by the parties and their groups, reports and surveys on the relevant market, ownership details, concentration levels, market shares, etc. Thus far, there have been no Form II filings. The Amendment Regulations provide some clarifications on when a Form II should "preferably" be filed for transactions, namely when:
    1. parties are competitors and have a combined market share in the same relevant market of more than 15 percent; or
    2. parties are active in vertically linked markets and the individual or combined market share in any of those relevant markets is greater than 25 percent.

  The Form II filing fee has been increased to INR 4,000,000 (USD 80,000).
- Form III: This is a post-facto intimation form which is required to be filed in case of share subscription or financing facility or any acquisition by public financial institutions, foreign institutional investors, banks, and venture capital funds, pursuant to any covenant

[5] *See* www.internationalcompetitionnetwork.com.

of a loan agreement or investment agreement. The Amendment Regulations allow the CCI to accept late Form III filings (i.e. beyond the prescribed 7-day period) and make it mandatory to submit a copy of the loan or investment agreement along with Form III. There is no filing fee.

D. Time Periods for Review

The Act provides for a 210-day period for the CCI to reach to a final decision, failing which the transaction is deemed to be approved. Given the mandatory prior approval suspensory regime, notified transactions cannot be completed before the CCI grants approval.

However, the CCI must form a *prima facie* opinion on whether a Combination is likely to cause an AAEC within 30 days from notification. The 30-day timeline is not absolute as the CCI can "stop the clock" for further information. As discussed below, a review of 56 filings indicates that the CCI has approved all cases within the 30-day period, but the incidence of "clock stops" requiring additional information seems high.

If the CCI forms a *prima facie* opinion that a Combination is likely to cause an AAEC, a more detailed investigation will be conducted which may take up to 180 days. Additionally, if the CCI requires Form II to be filed where the parties had previously filed Form I, the statutory time period of 210 days would re-start from the date of filing of Form II, increasing transaction time and costs while potentially giving the CCI greater time to review.

There is no expedited procedure for transactions that are not likely to cause an AAEC in India. Further, there is no two-stage notification process under the Act, as a result of which even non-complex transactions could require a Form II filing, if the relevant market-share thresholds are crossed.

The time periods for review are longer and the information required from transacting parties is more onerous when compared with other major jurisdictions.

E. Penalties

Where a notifiable Combination has not been notified, the CCI can impose a penalty of up to 1 percent of the total turnover or assets, whichever is higher, of such Combination. The CCI can also impose a penalty in cases of late filings and, in two instances, has initiated parallel proceedings to determine such penalty, despite approving the Combinations. In one instance, no penalty was levied on account of the fact that it is the first year of implementation of the Combination Regulations and the transaction was an intra-group reorganization. A Combination can be completely voided by the CCI if it has, or is likely to have, an AAEC.

III. RECENT MERGER CONTROL TRENDS

Table II provides a summary of the type of transactions and the time periods taken by the CCI to review the fifty-six cases filed until June 2012. The data on time periods includes/excludes clock stoppages for further information requests. This was required in thirty-one of the fifty-six (55 percent) filings. This may reflect both the CCI's relative inexperience or cautious approach and the regulatory burden being imposed on the transacting parties. However, it may also reflect the incomplete filings and/or delays in providing additional information on part of the

transacting parties. With a new merger control regime, there is a learning process on part of both the competition authority and business.

Thirty-five transactions relate to *intra-group* reorganizations through mergers or amalgamations, with no changes in control or market structure or impact on existing competition. Nonetheless, these transactions required notification and the review period ranged between seven to seventy-six days, with an average of thirty-one days to clear the transaction. Eight transactions were conglomerate and required between eleven to twenty-four days, or an average of seventeen days for clearance. Expectedly, the ten horizontal transactions required more time (twenty days, on average) for clearance, with one case (steel industry) taking twenty-nine days (excluding clock stops). Other transactions were in such industries as entertainment, banking, mutual funds, insurance, and automotives and did not result in large market shares.

The notification requirement for *intra-group* reorganizations through mergers or amalgamations resulted in widespread criticism from the business community. The CCI's initial pedantic interpretation of Schedule I to the Combination Regulations, expressed in *Alstom Holdings/Alstom Projects* (C-2011/10/06), was that the exemption was applicable only to acquisitions and not to mergers or amalgamations, even though intra-group reorganizations of any kind do not affect the competitive landscape and should not come under the purview of competition law. As a result, twenty other intra-group reorganizations were notified to the CCI, even though no distinction is drawn between an acquisition, merger, or amalgamation as a mode of corporate re-organization. To CCI's credit, it took note of this and provided for a partial exemption.

TABLE-II

Transactions Reviewed By CCi, June 2011 - June 2012

Type of Transaction	Number	Days required for Review (excluding clock stops)	Days required for Clock Stops	Days for Review including Clock Stops
		Range/Average	Range/Average	Range/Average
Conglomerate	8	11-24/17	4-58/31	19-78/59
Horizontal	10	11-29/20	6-51/28	17-77/47
Intra-group re-organizations	35	7-31/19	5-45/25	7-76/31
Vertical	3	19-25/22	25-15/20	19-45/32

IV. PRINCIPAL LESSONS

Between June 2011 and June 2012, CCI has cleared fifty-six merger filings within the statutory time period, even though very often the clock has been stopped, and the time taken to pass a *prima facie* order was often greater than thirty days. However, the CCI has been

reasonably transparent and has provided fairly detailed orders in all cases, which many other jurisdictions do not.

Although a Form I filing is shorter than a Form II filing, it essentially still requires defining the relevant market, and a "competition assessment," especially in Combinations having some product overlap. It is advisable that transacting parties address these issues in filings of not only Form II but also Form I by submitting a detailed competition assessment report involving inputs from economists, as it would significantly expedite the review process, reduce time delays, and lower financing costs for the transacting parties.

Notifying parties presently face several interpretational issues due to ambiguity on the treatment of routine asset acquisitions, treatment of joint ventures under Section 5, and the insignificant local nexus exemption. However, the CCI provides for informal non-binding pre-merger consultations but only on procedural issues. While the Amendment Regulations demonstrate that the CCI is receptive to feedback from industry, and has partly allayed its concerns, some of the amendments have resulted in further ambiguity.

The CCI, being one of the newest regulators among developing economies, still has several challenges to overcome in establishing an effective merger control regime.