

CLIENT ALERT

Mandatory Indian Merger Control: What You Need to Know

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Merger control is now mandatory, and suspensory, in India. Effective June 1, 2011, all transactions meeting the notification thresholds require filing with, and approval from, the Competition Commission of India ("CCI"). Parties to these transactions will have to suspend closing prior to receiving approval. The CCI in May 2011 issued the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ("Regulations"). A copy of the Regulations can be downloaded at the bottom of this page.

Substantive Test

Section 5 and 6 of the Competition Act, 2002 ("Act") prohibit a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and treat such combinations as void.

Applicability

For mergers and amalgamations, covered transactions are those approved on or after June 1 by the boards of directors of the entities involved in the amalgamation or merger. For acquisitions, notification will be required where binding documents have been entered into on or after June 1. For transactions in which binding documents were entered into or the merger/amalgamation had been approved by the board of directors prior to June 1, but which otherwise were scheduled to close after June 1, the parties will not be subject to the notification requirements.

Notification Thresholds

Section 5 sets out the thresholds that determine whether a transaction is notifiable. Notifications are required when either the acquirer, target or both exceed thresholds. On the whole, as compared to other merger notification regimes, these thresholds are quite high, and therefore fewer mergers lacking significant nexus with India are likely to be caught than in other jurisdictions.

Individual Parties in India	Individual Parties World-wide and Nexus with India	Group in India	Group World-wide and Nexus with India
<u>Assets</u> INR 15 Billion (USD 333 million approx.) (EUR 241 million approx)	<u>Assets</u> USD 750 million (EUR 543 million approx.)	<u>Assets</u> INR 60 Billion (USD 1.3 Billion approx.) (EUR 963 million approx.)	<u>Assets</u> USD 3 Billion (EUR 2.17 Billion approx.)
OR	OR	OR	OR
<u>Turnover</u>	<u>Turnover</u> USD 2250 million	<u>Turnover</u>	<u>Turnover</u> USD 9 Billion

INR 45 Billion (USD 1 Billion approx.) (EUR 723 million approx.)	(EUR 162 million approx.) AND In India <u>Assets</u> INR 7.5 Billion (USD 167 million approx.) (EUR 120 million approx.) OR <u>Turnover</u> INR 22.5 Billion (USD 500 million approx.) (EUR 361 million approx.)	INR 180 Billion (USD 4 Billion approx.) (EUR 2.9 Billion approx.)	(EUR 6.5 Billion approx.) AND In India <u>Assets</u> INR 7.5 Billion (USD 167 million approx.) (EUR 120 million approx.) OR <u>Turnover</u> INR 22.5 billion (USD 500 million approx.) (EUR 361 million approx.)
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Exemptions

The Regulations provide for exemptions from notification including in the following cases:

- i. De Minimis exemption: Where the target company has assets less than INR 2500 million (USD 55 million approx.) (EUR 40 million approx.), or a turnover of less than INR 7500 million (USD 166 million approx.) (EUR 120 million approx.);
- ii. Acquisition of current assets in the ordinary course of business;
- iii. Acquisition by a 50% stakeholder: Where an acquirer already has 50% or more shares/voting rights in an enterprise and wants to acquire further shares/voting rights except where such an acquisition results in transfer from joint control to sole control.

Filing Deadline, Triggering Events

Parties need to have certain approvals, or have executed certain agreements, before they are able to file the required notice. Further, unlike in the US, the Regulations require that notification must be filed within 30 calendar days of the following requisite triggering events:

- a. Merger/Amalgamation: Approval of the proposal relating to the merger or amalgamation by the boards of directors of the enterprises concerned.
- b. Acquisition: Execution of a definitive agreement or "other document" for acquisition or acquiring of control. "Other document" is defined to mean any binding document conveying an agreement or decision to acquire control, shares,

voting rights or assets (and would include, for example, a notice of intent to acquire shares pursuant to a hostile tender offer).

As in the US, it is possible to file on the basis of a non-binding MOU/LOI (e.g., where the only binding commitment may be a confidentiality obligation, but the acquiring party is not obligated to proceed). The execution of an MOU/LOI thus permits, but does not require, a filing to be made, unlike the triggering events noted above.

Timing for Review

The CCI has a relatively long time to review merger filings, and merging parties will need to be aware of these:

- i. Within thirty days from the receipt of the notice the CCI has to form a *prima facie* opinion whether the "Combination" has or would have an appreciable adverse affect on competition within the relevant market in India.
- ii. The Competition Act provides for a 210-day waiting period. However, the CCI will "endeavour" to decide in 180 days. The 180-day time period is not binding on the CCI.
- iii. All waiting periods are to be tolled when information requests by the CCI are pending. Thus, the 210 day waiting period can be much longer than that if the CCI has issued information requests.

Pre-notification Consultation with CCI

The Regulations do not provide for a pre-notification consultation with the CCI. However, the CCI has separately provided for a mechanism whereby there will be a facility for an informal and verbal pre-notification consultation process with the staff of the CCI prior to the filing of the notice regarding the proposed combination. Our present understanding is that this facility is limited to assisting parties with respect to questions/clarifications regarding completion of the relevant "Forms." Thus, the staff would not, in this pre-notification process, entertain questions about whether a particular transaction is "covered" (in contrast to the review available from the FTC's Premerger Notification Office). Further, any advice given during such consultation would not be deemed to be the opinion of, or binding on, the CCI. If the parties wish to discuss with the staff any confidential information, we advise that they formally request confidential treatment of such information. There is no specific provision on confidentiality of these consultations, but we understand that written requests for confidential treatment will be honored.

Confidentiality

Under the Regulations, confidentiality of the information filed with the CCI is not presumed. Although, confidentiality may be claimed with respect to such information, the CCI has been given the power to seek advice from other statutory authorities in relation to a combination. Further, the Regulations do not prevent sharing of information with other statutory authorities under applicable law. Thus, for example, a filing with the CCI could be shared with the Indian taxing authorities, which could, in turn, use the information as part of its tax enforcement powers. A notification filed with the CCI is not made public until after the *prima facie* stage when publication of combination details are required. However, the CCI may require dealers/customers to provide information during the *prima facie* stage.

Filing Fees and Forms

The Regulations also provide for the form of the notice for the proposed combinations, and filing fees. The filing fees are provided below.

Transaction Type	Fee
Form I (Shorter Form)	INR 50,000 (USD 1,150 approx.)
Form II (Longer Form)	INR 1 million (USD 22,000 approx.) (EUR 16,000 approx.)
Form III (Post facto filing by public financial institution, registered foreign institutional investor("FII"), bank or registered venture capital fund)	No Fee

Penalties

Failure to file may result in penalties up to 1% of the combined assets, or turnover of the combined entity, whichever is higher.

CCI

The Regulations have undergone several rounds of revisions before being notified. The CCI had consulted with industry and law firms, and has also received input from international organizations like the ABA and the ICN. The ex-CCI Chairman (retired recently) has time and again reiterated that the regulations have been framed with a view to being investor-friendly, and that the CCI would be making best efforts to match the "speed" of other jurisdictions in clearing transactions.

Approximately 175 cases have been filed with the CCI, of which 68 have been decided. There have been 46 appeals filed against the decisions of the CCI, out of which 45 have affirmed the CCI's decision. As regards capacity building, the CCI understands the need to build out its capacity. It has already hired a staff of over 100 people, including lawyers and economists who have undergone training US and Europe.

The CCI is also very keen on developing its knowledge and expertise. To that end, there have been several workshops organized for the staff of the CCI, including by the US FTC and European Commission, on planning and conducting merger reviews and investigations.

With the coming into force of the merger control regime in India, it would be advisable to add to standard deal documents representations/warranties, condition precedents, and carve-outs for regulatory approval by antitrust regulators on a timeline that will accommodate the lengthy suspensory review process of the CCI. In that regard, our experience has shown that the CCI

has the potential to investigate into cases with little competitive impact, and that merging parties should account for this in their timing analysis.

DOWNLOAD: [Competition Commission of India \(Procedure in regard to the transaction of business relating to combinations\) Regulations, 2011 \("Regulations"\) \[PDF\]](#)

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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