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India's new merger control regime

31 May 2011

Tomorrow, 1 June 2011, the merger control provisions of the Indian Competition Act 2002 will finally enter into force. If you are contemplating M&A activity with binding agreements being signed as of tomorrow, you will need to carefully consider this new merger control regime.

The Competition Act is broad in the types of transactions it deems to constitute notifiable mergers. Fortunately, the Competition Commission of India ("CCI") has published Regulations this month which narrow the application of the new Act. This is a welcome development, particularly the requirement for the target to have at least some Indian assets and turnover for a filing to be triggered. Nonetheless, we expect to see a significant number of transactions being notified to the CCI as a result of the new law coming into force.

The **key points** you need to know about this new competition regime are:

- For a transaction to be notifiable, the Act requires the target to have a moderate amount of assets and turnover in India
  AND
  Either the parties' assets/turnover in India exceeds certain primary thresholds;
  Or the parties' assets/turnover worldwide exceeds secondary thresholds, and there is a nexus to India.

- Parties to a transaction only need INR 7.5 billion (approximately EUR 120 million) of combined assets or INR 22.5 billion (approximately EUR 360m) of combined turnover in India to trigger a filing, assuming they also meet certain worldwide turnover/asset value thresholds, and the target has more than *de minimis* Indian assets and turnover.

- A filing must be made within 30 days of board approval of any merger, or the execution of any agreement for acquisition (assuming the filing thresholds are met by the parties).

- The clearance timeframe may be very long – while a *prima facie* opinion is supposed to be issued within 30 calendar days, the clock may be stopped and the clearance timeframe could take up to 210 calendar days.

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The new filing thresholds

The Indian thresholds are a complex mix of 7 different thresholds, covering the following:

- Domestic and worldwide turnover;
- Domestic and worldwide assets;
- Of both the parties to the transaction – the acquirer(s) and the target - and the parties' groups – the acquirer(s)'s group(s) and the target (not seller).

Specifically, parties must either meet thresholds (1) or (2), AND (3) – i.e. the target must always meet the thresholds in (3).

EITHER

Threshold (1): Parties' Turnover / Assets in India

a) The assets of the parties (acquirer(s) and the target) in India are INR 15 billion (approximately EUR 240m), or the turnover of the parties in India is INR 45 billion (approximately EUR 725m); or

b) The assets of the parties' groups (acquirer(s)'s group(s) and the target (not seller)) in India are INR 60 billion (approximately EUR 950m), or the turnover of the parties' groups in India is INR 180 billion (approximately EUR 2.9 billion)

OR

Threshold (2): Parties' Worldwide Aggregate Turnover / Assets, including Indian nexus

Worldwide turnover/assets

a) The worldwide aggregate assets of the parties (acquirer(s) and the target) worldwide are INR 33.75 billion (approximately EUR 540m), or the turnover of the parties worldwide is INR 101.25 billion (approximately EUR 1.6 billion); or

b) The worldwide aggregate assets of the parties' groups (acquirer(s)'s group(s) and the target (not seller)) worldwide are INR 135 billion (approximately EUR 2.1 billion), or the turnover of the parties' groups worldwide is INR 405 billion (approximately EUR 6.5 billion)

And including nexus to India

c) The assets of the parties (acquirer(s) and the target) in India are INR 7.5 billion (approximately EUR 120m), or the turnover of the parties in India is INR 22.5 billion (approximately EUR 360m); or

d) The assets of the parties' groups (acquirer(s)'s group(s) and the target (not seller)) in India are INR 7.5 billion (approximately EUR 120m), or the turnover of the parties' groups in India is INR 22.5 billion (approximately EUR 360m)

AND

Threshold (3): Target's Turnover / Assets in India (the *de minimis* threshold)

The assets of the target in India are at least INR 2.5 billion (approximately EUR 40m), and the turnover of the target in India is at least INR 7.5 billion (approximately EUR 120m)

Notifiable transactions

The CCI published Regulations on 11 May 2011, which clarify that a number of transactions will not "normally" need to be filed as they will not cause an appreciable adverse effect on competition in India. The Regulations state that:

- An acquisition of shares or voting rights not exceeding 15 per cent of total shares/voting rights of the target is normally not notifiable.[1]
- Where a purchaser already holds 50% or more of the shares in a target, and increases its stake, this is normally not notifiable so long as there is no change from joint to sole control.[2]
- A combination "taking place entirely outside India with insignificant local nexus and effect on markets in India" is normally not notifiable.[3]

These are all welcome refinements to what is a broad Competition Act. However, the law is still open to broad interpretation (notably the word "normally") and it will be important to watch how the CCI applies the rules on notifiable transactions in practice.

The most welcome development of all in the run-up to the entry into force of the new Indian merger control rules has been the clarification by the Indian government that the Target *de minimis* threshold concerns Indian turnover and assets only.[4] This gives the regime a clear "local effects" threshold and clarifies what was a significant ambiguity in the original text, which persisted until last Friday, 27 May, i.e. four days before the entry into force of the merger control provisions.

Review period and standstill obligation

The CCI is required to issue its *prima facie* opinion on the merger within 30 calendar days of notification,[5] although it may stop the clock for information requests.[6] The CCI Regulations give a target of issuing an order within 180 calendar days of filing by the parties but the statutory limit for the issuance of a final order is 210 calendar days.

It is not clear if parties will be able to close a transaction on the basis of the *prima facie* opinion of the CCI; this is not stated in the Regulations. It also remains to be clarified if the CCI will accept Indian carve-outs to allow the non-Indian parts of a transaction to close. These issues will be of significant interest to practitioners and merging parties alike, until a reasonable bank of procedural precedent is established.

Penalties for failure to notify

The CCI can impose fines of up to 1 per cent of the global turnover or assets of the combination for failure to notify. Failure to pay the fine can even lead to prison sentences.

Conclusion

While the CCI's Regulations, and in particular last week's clarification on the need for local presence of the target, are a welcome clarification to what is broad legislation, some important questions about the new Indian merger control regime remain unanswered. Most notably, the concept of a notifiable transaction will need to be further clarified in practice. The potentially long waiting periods for clearance are also of significant concern. One thing is clear, however: India should now be on every lawyer's list when undertaking merger control analyses, particularly because of the relatively short deadline to file following the signing of any agreement.

White & Case LLP will be pleased to guide you through the new Indian competition regime and to answer any questions you may have.

[1] Schedule 1 of The Competition Commission of India Regulations no. 3 of 2011 (11 May 2011).
[2] *Ibid.*
[3] *Ibid.*
[4] This was clarified in an announcement on 27 May 2011.
[5] Article 19(1) of the Competition Commission Regulations *ibid.*
[6] Article 19(2) of the Competition Commission Regulations *ibid.*

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