

No more ‘cry wolf’ - India’s merger control provisions come into effect on 1 June 2011

Introduction

The Ministry of Corporate Affairs, India published a notification on 4 March 2010 bringing into force sections concerned with and/or ancillary to merger control under the Competition Act, 2002 (as amended) (“Act”). These provisions will come into effect on 1 June 2011. The provisions of the Act relating to anti-competitive agreements and prohibition of abuse have already come into force with effect from 20 May 2009 (See [Legal Update](#)).

The government has also published other notifications (“Notifications”) which alter the filing thresholds and grant some exemptions. In addition, the Competition Commission of India (“CCI”) recently published new Draft Combination Regulations (“Draft Regulations”) setting out the scheme for implementing the merger control provisions. The important provisions contained in the Notifications and the Draft Regulations are set out below.

Requirement to notify

The Draft Regulations provide that combinations that have taken effect prior to the date of notification of Sections 5 and 6 of the Act shall be exempt from the filing requirement. This suggests that all transactions which are not closed before 1 June 2011 will have to be notified.

The requirement to notify the CCI is mandatory and the Draft Regulations imposes this duty to notify on the acquirer. In the case of a merger or amalgamation, a joint notification has to be made by the parties. The Draft Regulations provide for three different notification forms i.e. Form I (short form), Form II (long form) and Form III (where acquisition, share subscription or a financing facility is entered into by a financial institution, foreign institutional investor, venture capital etc. under a loan or investment agreement).

The Act provides that a notification has to be made within 30 days of the:

- approval of the proposed merger or amalgamation by the Board of Directors of the enterprises concerned;
- execution of any agreement or other document for the acquisition or acquiring of control.

The Draft Regulations clarify that ‘other document’ referred to above shall mean any document, by whatever name called, purporting to convey the intention to acquire control, shares, voting rights or assets.

Revised turnover thresholds

It is noteworthy that a territorial nexus has to be satisfied in the form of a minimum amount of assets or minimum amount of turnover. The revised thresholds relate to either (i) the acquirer and the target (the “Parties”) or (ii) the group to which the target/merged entity will belong post-acquisition (the “Group”) and are as follows:

- The Parties have combined assets in India of Rupees 1500 crores (approx. \$333 million) or combined turnover in India of Rupees 4500 crores (approx. \$1 billion); or
- The Parties have combined worldwide assets of \$750 million or combined worldwide turnover of \$2.25 billion and combined assets in India of Rupees 750 crores (approx. \$166 million) or combined turnover in India of Rupees 2250 crores (approx. \$500 million); or
- The Group has assets in India of Rupees 6000 crores (approx. \$1300 million) or turnover in India of Rupees 18000 crores (approx. \$4000 million); or
- The Group has worldwide assets of \$3 billion or worldwide turnover of \$9 billion and assets in India of Rupees 750 crores (approx. \$166 million) or turnover in India of Rupees 2250 crores (approx. \$500 million).

Exemptions

For a period of 5 years from 1 June 2011 a proposed transaction that would have to be notified under Section 5 of the Act will not have to be notified if the target enterprise has assets of not more than Rupees 250 crores (approx. \$55 million) or a turnover of not more than Rupees 750 crores (approx. \$166 million).

The Banking Amendment Bill, 2011 which has been cleared by cabinet last week and may be placed before the on going session of the Parliament in India, proposes to keep mergers and acquisitions in the banking sector out of the purview of the CCI by granting more powers to the Reserve Bank of India. It is also noteworthy that according to several local press reports it appears that the Ministry of Corporate Affairs is open to considering requests for exemption from certain sectors which deserve special treatment on submission of a formal application.

Time required for issue of orders

According to the Draft Regulations the CCI is to form a prima facie opinion on the proposed transaction within 30 days of submission of the notification form. The proposed transaction will then be cleared or subject to what could possibly be termed as a second 'phase' investigation. A second 'phase' investigation, according to the Draft Regulations, ends no later than 180 days from the date of submission of the notification form. It is to be noted, however, that the time limit under the Act to pass a final order continues to remain as 210 days. In the Draft Regulations the reference to 'days' seems to be to calendar days and not working days.

Filing fees

The Draft Regulations provide for different fees depending on the value/type of transaction which are as shown in the table below. Where a notification is made jointly the fee could be paid jointly or severally.

Filing fees(Form I or II)	Type of transaction
Rupees 10 lakhs (approx. \$ 22,000)	Acquisition of shares, voting rights or assets of enterprise less than Rupees 500 crores (approx.\$111 million)
Rupees 20 lakhs (approx. \$44,000)	Acquisition of shares, voting rights or assets of enterprise between 500 (approx.\$111 million) - 1000 crores (approx. \$222 million)
Rupees 40 lakhs (approx. \$89,000)	Acquisitions of shares, voting rights or assets of enterprise above 1000 crores (approx. \$222 million)
Rupees 40 lakhs (approx. \$89,000)	Merger, amalgamation or acquisition of control over an enterprise

Conclusion

There still remain uncertainties as to analysis of certain agreements such as joint ventures and how they would be dealt with under the Act and this had been highlighted in our recent [legal update](#). The Chairman of the CCI has acknowledged that prior to entry into force of these provisions of the Act the CCI has to frame its own regulations and put procedures in place. It is therefore expected that in the next three to four months there will be other regulations or guidance being issued in this regard.

Contacts

David A. Carpenter

Partner, New York
+1 212 506 2195
dacarpenter@mayerbrown.com

Paul C. de Bernier

Partner, London
+44 20 3130 3232
pdebernier@mayerbrown.com

Kiran Desai

Partner, Brussels
+32 2 551 5959
kdesai@mayerbrown.com

Manu Mohan

Associate, Brussels
+32 2 551 5942
mmohan@mayerbrown.com

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