August 2011

Review

India Merger Control: New Regime

India's new law on competition, The Competition Act, 2002 (No. 12 of 2003) ("Act"), received Presidential assent on 13 January 2003. However, a long and arduous 8 years had elapsed until the provisions of the Act (as amended by the Competition (Amendment) Act, 2007) relating to the new merger control regime finally came into effect on 1 June 2011.[1] The Competition Commission of India ("Commission") finally has teeth in relation to merger control.

The Act introduces a mandatory notification regime with a stand-still obligation. India will now be on the list of countries where prior consent must be obtained in many cross-border transactions.

The principal provisions of the Act dealing with the substantive test, the jurisdictional thresholds and the timetable for review are:

- Section 5 (*Combination*); and
- Section 6 (*Regulation of combinations*).

Substantive Test

The Act contains a general prohibition that no person shall enter into a transaction which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a transaction shall be void.

Jurisdictional Thresholds

The Act provides that the acquisition, merger or amalgamation of an enterprise which meets any of the following thresholds relating to either assets or turnover on a domestic or worldwide basis shall be a "combination" for the purposes of the Act. The table below sets out the various thresholds:[2]

	Jurisdiction	Assets	Turnover
Buyer and Target Jointly	India	INR 15bn	INR 45bn
	Worldwide	USD 750m (inc. at least INR 7.5bn in India)	USD 2.25bn (inc. at least INR 22.5bn in India)
Buyer's Group (excluding Target)	India	INR 60bn	INR 180bn
	Worldwide	USD 3bn (inc. INR 7.5bn in India)	USD 9bn (inc. INR 22.5bn in India)
Provided That			
***De minimis*: Target**	India	> INR 2.5bn	> INR 7.5bn

India will now be on the list of countries where prior consent must be obtained in many cross-border transactions.

1 In addition to the Act, the Commission has published the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (No. 3 of 2011) ("Regulations") which, in some respects, focuses the applicability of the Act.

2 Please note that the notification (S.O. 480(E)) by the Ministry of Corporate Affairs published in the Gazette of India on 4 March 2011 states that the values to be used for assets and turnover for the purposes of section 5 of the Act are to be enhanced by 50 per cent. which is why the thresholds referred to in the table above appear to be different to those set out in the published text of the Act.

The *de minimis* threshold above only applies for combinations taking place during the initial period of five years from the merger control provisions coming into force.

The Regulations go further and set out a number of transactions that would not normally need to be notified on the basis that they would not expect to fall within the general prohibition. These include:

- acquisitions where the buyer holds no more than 15% of the enterprise for investment purposes only;
- combinations taking place entirely outside India with insignificant local nexus and effect on markets in India; and
- intra-group reorganisations.

Timetable

Where the combination meets the above thresholds, the buyer must mandatorily notify the Commission within 30 days of:

- approval by the board of directors in the case of amalgamation or merger; or
- execution of any agreement or other document for acquisition.

Failure to make such notification by the buyer could attract a penalty of 1 per cent. of the total turnover or assets, whichever is higher, of the combination. The merger control provisions apply to all transactions where these notification triggers occur after 1 June 2011.

The Commission has 30 days from receipt of the notification within which to form a prima facie opinion as to whether the combination is likely to cause, or has caused, an appreciable adverse effect on competition within the relevant market in India. Note, however, that the clock can be stopped by the Commission for any request for further information.

At the end of this period, the Commission will either clear the combination or begin a second-stage in-depth investigation which could last up to an additional 180 days (that is, 210 days from the initial notification). If the Commission does not, on the expiry of a period of 210 days from the date of filing of the mandatory notification, pass an order or issue a direction, the combination shall be deemed to be approved by the Commission.

Summary and Outlook

Although this is a relatively new chapter with regard to India's merger control, it does have some bases of comparison with international standards in relation to the 'Phase 1' and 'Phase 2' investigations albeit the fairly long waiting periods. What remains to be seen is how the Commission applies the regime in practice especially in terms of how willing it will be to diverge from the findings of other competition authorities in relation to a particular transaction.

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