



# **Competition Commission of India**

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## **IFLR Asia M & A Forum 2010**

### **Early Days: The impact of India's New Merger Regulations**

**by**

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# Regulation of Combinations

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- Combination defined, includes mergers & amalgamation, acquisition of shares, assets above thresholds and domestic nexus (S 5)
- Combination must be above thresholds defined in terms of total assets or turnover plus domestic nexus (S 5)
- Mandatory pre-notification (S 6 (2))
- Suspensive regime (S 6 (2A))
- Assessment of anti-competitive effect based on listed factors (S 20(4))
- India is not like those



# Thresholds

		<b>Assets Total (In India)</b>	<b>Turn over Total (In India)</b>
<b>Only in India</b>	<b>No Group</b>	<b>Rs. 1000 cr</b>	<b>Rs. 3000 cr</b>
	<b>Group</b>	<b>Rs. 4000 cr</b>	<b>Rs. 12000 cr</b>
<b>In and outside India</b>	<b>No Group</b>	<b>US \$ 500 m (Rs. 500 cr)</b>	<b>US \$ 1500 m (Rs. 1500 cr)</b>
	<b>Group</b>	<b>US \$ 2000 m (Rs. 500 cr)</b>	<b>US\$ 6000 m (Rs. 1500 cr)</b>



# Orders on Combinations

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- Competition Commission of India can:
  - Approve
  - Approve with modifications
  - Not approve
- If no order within 210 days, the combination deemed to have been approved
- Regulations specify shorter time limits- stage I
- Approval with Structural and/or Behavioural remedies



# Review Period (s)

Country	Stage One	Stage Two
EU	25-35 W days	90-125 W days (35+125=160 W days or 224 days in the least)
France	5-8 weeks	Additional 4 months. Further extended by 4 more weeks (thus 5 ½ Months in total)
Spain	1 month	7 months
Singapore	30 W days	120 W days (30+120=150 W days)
China	30 W days	90-150 W days
Mexico	40 C days	145 (in complex cases)
Japan	30 C days	120 C days (more if information is late)
USA	30/15 C days	-----
Germany	1 month	3 months (1+3= 4 months)
<b>India</b>	<b>30 c days (draft regulations)</b>	<b>210 C days (150 w days)</b>

Indian time caps not very different from major jurisdictions



# Wide consultations

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- Extensive consultations with Business Associations, Industry Chambers, Law Firms, Consumer Groups
- Took guidance from Advisory Committee (an expert body)
- An international conference on “India’s New Merger Notification Regime (INMNR)” held on 15/16, March, 2008 in New Delhi, by IBA & others
- Delegates from ICN, EU, FTC, ACCC, IBA, ABA & leading legal firms across the world attended
- Benefitting from the experience of mature, functioning jurisdictions
- Almost a continuous dialogue



# Neighbours

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# The Foundations of Law

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- Separation of powers-Executive, Legislative & Judiciary
- Founding pillars for a mature and lasting democracy
- Time proven
- Put to test on a number of occasions
- The Tribune Story
- Rule of Law
- Free Media





# Basics

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- Power corrupts and absolute power corrupts absolutely
- Democracy not only tolerates dissent but welcomes it
- Plurality does create noise
- Noise may become cacophony so much so that voices of reason may not be heard
- Bogey of FDI- claim of ex G C of FTC
- Capital flows towards highest returns



# Journey of US & EU

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- Pre and Post 1990 experience of EU
- Brown Shoe Company - US -India
- Pre and Post 1976 experience of USA
- Predatory pricing
- Even today there are Jurisdictions which call for filing for no reason
- No child was ever born perfect – struggled and improved
- At least, in scanning, this looks near perfect
- De-link birth from production of its future conduct sheet/ horoscope



# Similarities

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- Extraterritoriality
- Mandatory notification
- Coverage of Goods/Services
- Monetary fine/penalties



# Dissimilarities

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- Investigation - DG/Anti Mono Enf Auth
- Appeal - Independent
- Decision Making - Collegium
- Exceptions-N S Examination, Support for Expansion and Competition
- Status Neutrality-domestic/ foreign, public/private
- Market Share- treatment
- Fines -0-10%, 1-10%



# ICN Guiding Principles

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- Sovereignty
- Transparency
- Non-discrimination
- Procedural fairness
- Efficient, timely, and effective review
- Coordination
- Convergence
- Protection of confidential information



# I Nexus to reviewing jurisdiction

## Recommended Practices of ICN

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- A. Appropriate nexus
- B. Appropriate standards of materiality as to the level of “local nexus”
- C. Nexus based on activity within jurisdiction- w.r.t atleast two parties to the transaction

## Slide 14

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**j1** Merger Notification & Review (N&P) subgroup developed RPs for Merger Notification to facilitate convergence-adopted by ICN-April 2006-non binding  
jum, 09-03-2008



## RP I - Indian position

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- *Local nexus further clarified through implementing regulations*
- *Domestic nexus of assets of Rs. 500 crore ( US \$ 125 m) or turnover of Rs. 1500 crore ( US \$ 375 m) given in the Act to include at least assets of Rs. 200 crore (US \$ 50 m) or turnover of Rs. 600 crores (US \$ 150 m) of at least two of the parties to the combination*





## II Notification thresholds

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- Clear and understandable
  - Based on objectively quantifiable criteria
  - Based on information readily accessible to the merging parties
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- *Based on assets and turnover and not in terms of subjective criterion (S 5)*
  - *Based on readily available information*



## III Timing

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- A. Permitted to notify upon a good faith intent
- B. No deadline for notification if closing prohibited
- C. Reasonable time to file following a clearly defined triggering event if closing not prohibited

➤ *Flexibility – other document*



## IV Review periods

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- A. Be completed in a reasonable time
- B. Incorporate procedures for expedited review of transactions not raising concern
- C. Initial waiting period should expire within a specified period and any extended waiting period within a determinable time frame in suspensive jurisdictions
- D. Initial review be completed in a specified period and extended review be completed within a determinable time frame in a non-suspensive jurisdictions
- E. Tailored procedures for particular circumstances<sup>18</sup>



## RP IV - Indian position

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- *Form 1 / Form 2*
- *30 days*
- *Final determination in a definite time*
- *Compares well with mature jurisdictions including ICN examples EU and France*
- *210 days cap in a fraction of cases. Majority early termination*
- *Parties free to pursue other clearances*



# V Requirements for initial notification

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- A. Limited to verify exceeding thresholds, determine competitive issues, meriting further investigation and take steps necessary to terminate the review if no further investigation
- B. Avoid unnecessary burdens on parties to transaction with no material competitive concern
- C. Pre notification guidelines possibility
- D. Limit translation and formal authentications burdens



## RP V - Indian position

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- *Transactions not having AAEC clarified*
- *Simple Form 1 & 2 comparatively – less information*
- *Matters of less concerns - fast track*
- *IAS 17 or International IAS 14 - main products – readily available*
- *Compulsion of law. Difference between initial and full inv is not of information but involving public and third parties thru publication*
- *English – authentic version*
- *Pre-notification consultation - likely*

# VI Conduct of merger investigations

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- A. An effective, efficient, transparent and predictable merger review process
- B. Opportunity meeting/discussions at key points
- C. Advice to parties not later than beginning of stage II inquiry why not cleared within initial review period
- D. Investigation completion without undue delay if no definitive deadlines
- E. Avoid unnecessary/unreasonable costs/burden on merging/ third parties
- F. Due regard for legal privileges and confidentiality doctrines



## RP VI - Indian position

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- *Matters of less concern – 30 days*
- *After 30 days, one more window - may be 90 – 100 days*
- *If not asked to publish after first reply - clear*
- *Opportunity before final opinion*
- *No extra burden except publication*
- *Confidentiality*





## VII Procedural fairness

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- A. To merging and third parties with legitimate interest
- B. Sufficient, timely information on facts/competitive concern forming basis of proposed adverse decision and meaningful opportunity to respond before a final adverse order
- C. Third parties allowed to express views
- D. Process is implemented fairly , efficiently and consistently
- E. Opportunity for timely review by a separate adjudicative body of final adverse decision on merits



## RP VII - Indian position

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- *S 29 (2) / Regulations – Opportunity two times*
- *Third parties allowed S 29 (3)*
- *The Commission – an Expert Body(15 yrs)-*
  - *International trade, Economics, Business, Commerce, Law, Finance, Accountancy, Management, Industry, Public affairs or Competition Matters*
- *Review by CAT*
- *Experts in competition matters (25 years)*
  - *Competition matters, International trade, Economics, Business, Commerce, Law, Finance, Accountancy, Management, Industry, Public affairs, Administration*
- *Guidelines on review - future road map*



## VIII Transparency

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- A. High level of transparency subject to appropriate protection of confidential information
- B. W.r.t. to jurisdictional scope of law, decision making procedures, principles and criteria used by agency to apply substantive review
- C. Making information about law, policy and practice readily available to the public



## RP VIII - Indian position

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- *Regulations*
- *Decisions on website*
- *Information about law, policy and practice on website*
- *Procedure on substantive assessment – future*
- *Further guidelines – as we go*



# IX Confidentiality

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- A. Business secrets etc. subject to confidentiality protection
- B. Promote transparency of confidentiality laws, policy and practice applicable
- C. Should defer contacts with third parties until the transaction is public without adverse effect on investigation
- D. Balance between confidentiality of third party submissions and procedural fairness
- E. Avoid unnecessary public disclosure of confidential information in a pending transaction<sup>28</sup>



## RP IX - Indian position

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- *Clear confidentiality norms*
- *Followed best practices*
- *Public version and confidential version*
- *Review not public before publication (S 29 (2))*
- *Reasoned order for confidentiality*
- *Staff accountable to maintain confidentiality*
- *Consent before disclosure*



# X Inter agency coordination

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- A. Coordinate review of mergers raising competitive issues of common concerns
- B. Coordination in accordance with applicable laws/other legal instruments and doctrines
- C. Tailored to particular transaction and need of the agency
- D. Encourage and facilitate parties's cooperation in merger coordination process
- E. Seek remedies tailored for domestic competitive concerns and avoid inconsistency with remedies with other reviewing jurisdictions

➤ *Guidelines in future*



# XI Remedies

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- A. Should address identified competitive harm
- B. Should provide a transparent frame work for proposal, discussion and adoption of remedies
- C. Procedures to ensure that remedies are effective and easily administrable
- D. Means to ensure implementation, monitoring and enforcement

➤ *Guidelines - as we cruise along*





## XII Competition agency powers

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- A. Authority and tools necessary for effective enforcement of applicable laws
  - B. Sufficient staffing and expertise for enforcement
  - C. Sufficient independence for objective application and enforcement
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- *Study by IIM B – professional approach all along*
  - *Economists 40% , lawyers 40% and financial analysts etc. 20%*
  - *Training – high priority*

# XIII Review of merger control provisions

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- A. Periodical review for continual improvement
- B. Reforms that promote convergence towards best practices
  - *Following best practices – right from start*



# Indian law in global context

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- WTO : *“Law is broadly comparable to those of other jurisdictions with effective laws in this area and, for the most part, embodies a modern economics - based approach” (Trade Policy Review of India 2007)*
- OECD : *“close to state-of-the-art” (Economic Survey India Report 2007)*
- Lesson : *India the most hot and safe spot for any M&A*



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# Thank you

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