

India FDI Forum 2011

New Combination Regulations of India

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Scheme of Presentation

- Political-Economic Reality
- The Indian Merger Law
 - Act
 - Regulations
- Run up to Regulations
- Constraints
- Regulations
- Comparison with the Best
- Broad Principles

Political-Economic Reality

- Law Mooted -Feb 99
- Law Enacted -Jan 03
- Not Implemented
 - Legal Challenges
- Amended -Sept 07
- Commission Constituted -March 09
- Part Enforcement -May 09
- Full Enforcement -June 11
 - Announced March 11
- Brisk Pace of Democracy -12 Years

Indian Merger Law

- 'Combination' defined, includes mergers & amalgamation, acquisition of shares, assets above very huge 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))

Thresholds* in INR and \$

		Assets Total (In India)	Turn over Total (In India)
Only in India	No Group	Rs. 1500 cr	Rs. 4500 cr
	Group	Rs. 6000 cr	Rs. 18000 cr
In and outside India	No Group	US \$ 750 m (Rs. 500 cr)	US \$ 2250 m (Rs. 1500 cr)
	Group	US \$ 6000 m (Rs. 500 cr)	US\$ 9000 m (Rs. 1500 cr)

*After Notifications of 4.03.2011

Orders on Combinations

- 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 give 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)
India	30 c days (draft regulations)	180 C days (128 w days)

Indian time caps not very different from major jurisdictions

Run Up to Regulations-I

- Advisory Committee on Regulations Constituted and Consulted –Eminent Experts
- Entire ICN /UNCTAD/OECD Material Consulted
- Law, Regulations, Forms etc. of EU/USA/Germany/Mexico/Australia/SA/Netherlands/UK/Italy/Portugal/Israel/Korea/Belgium etc.- more than 30 countries compiled and studied
- Comparative Indian Institutions
- In Depth Research-Ph.D.

Run Up to Regulations-II

- Many provisions in other laws- not in ours
- Extensive consultations with Business Associations, Industry Chambers, Law Firms, Consumer Groups, Professional Bodies
- Pattern of Fee- National and International Studied
- Discussed in 'Concept Paper' Form

Constraints-I

- Missing Gaps
- Detailed Internal Procedure
- Explanation for Determination of 'Assets'
- Determination of Turn Over
 - Defined in the Act
 - Still Room For Clarification
- Stages of Assessment- Five
- No Provision For Additional Info But In Last Stage

Constraints-II

- Thresholds use the word 'Jointly'
 - 'De-Mimimis'
 - MCA Notifications
- Factors for determination- 14
 - Information for assessment- Same
 - Form of Notice
- Right to Appeal

The Regulations

- First Stage Certainty in 30 days-Not In Law
- A Modest – Token/Service Based-Fee
- Opportunity of Being Heard Introduced
- Routine Business Transactions Clarified
- A Carve Out For Merger With Less Impact
- Independent Monitoring of Modifications
- Simple and Main Form
- Readily Available Information
- Pre Merger Consultation Provided
- ICN Best Practices Followed

Open Debate

- 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 - even today

Evolution in Other Jurisdictions

- Pre and Post 1990 experience of EU
- 5%-95%- US -India
- Pre and Post 1976 experience of USA
- Predatory pricing
- Jurisdictions which call for filing for no domestic nexus
- No competition law was ever born perfect – struggled and improved

Indian Law in Global Context

- 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)
- *Inference : India has a real modern law imbibing the best practices*



**Comparison
with
the
Best**
(Practices)

ICN Guiding Principles

- 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

- 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 at least two parties to the transaction

RP I - Indian position*

- *Local nexus further clarified through notification*
- *Domestic nexus of assets of Rs. 500 crore (US \$ 125 m) or turnover of Rs. 1500 crore (US \$ 375 m) given in the Act . Further exemption upto assets of Rs. 250 crore (US \$ 60 m) or turnover of Rs. 750 crores (US \$ 140 m)*

* After Notification

II Notification thresholds

- 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

- 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

- 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

RP IV - Indian position

- *Short Form / Complete Form*
- *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. Early termination in a majority of cases*
- *Parties free to pursue other clearances*

V Requirements for initial notification

- 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

- *Transactions not having AAEC may use simpler form*
- *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

- 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

- *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

- 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

- *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

- 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

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

IX Confidentiality

- 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

RP IX - Indian position

- *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

- 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' 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

- A. Should address identified competitive harm
- B. Should provide a transparent framework 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

- 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
 - *Staffing Based on a professional study*
 - *Economists 40% , lawyers 40% and financial analysts etc. 20%*
 - *Training – high priority*
 - *Ongoing exercise*

XIII Review of merger control provisions

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

Broad Principles

- Belief That Only a Few M&As Cause Concerns
 - Even many of these can be addressed by remedies
- Minimum Regulatory Burden
 - Forms of Notice
- Time in Law- Exception Not the Norm
 - Early Clearance in 30 Days/Outer 180 Days
- Facilitation of Business
 - Not To Affect Day to Day Business Transactions
- Certainty Of the Date of Commencement



Thank you

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