



IBA International Conference

Presentation
on
India's
New Merger Notification Regime
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15-16 March, 2008



The Law

- OECD : *“close to state-of-the-art” (Economic Survey India Report 2007)*
- 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)*



CCI Guiding Principles

- Commission to be in sync with markets
- Minimize compliance costs for enterprises and enforcement costs for Commission
- Fully professional organisation with required skills
- Confidentiality for business, transparency for Commission
- Consultative approach



ICN Guiding Principles

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



Sovereignty

- Jurisdictions are sovereign with respect to the application of their own laws to mergers.



Transparency

- In order to foster consistency, predictability, and fairness, the merger review process should be transparent with respect to the policies, practices, and procedures involved in the review, the identity of the decision-maker(s), the substantive standard of review, and the bases of any adverse enforcement decisions on the merits.



Non-discrimination

(on the basis of nationality)

- In the merger review process, jurisdictions should not discriminate in the application of competition laws and regulations on the basis of nationality.



Procedural fairness

- Prior to a final adverse decision on the merits, merging parties should be informed of the competitive concerns that form the basis for the proposed adverse decision and the factual basis upon which such concerns are based, and should have an opportunity to express their views in relation to those concerns. Reviewing jurisdictions should provide an opportunity for review of such decisions before a separate adjudicative body. Third parties that believe they would be harmed by potential anticompetitive effects of a proposed transaction should be allowed to express their views in the course of the merger review process



Efficient, timely, and effective review

- The merger review process should provide enforcement agencies with information needed to review the competitive effects of transactions and should not impose unnecessary costs on transactions. The review of transactions should be conducted, and any resulting enforcement decision should be made, within a reasonable and determinable time frame.



Coordination

- Jurisdictions reviewing the same transaction should engage in such coordination as would, without compromising enforcement of domestic laws, enhance the efficiency and effectiveness of the review process and reduce transaction costs.



Convergence

- Jurisdictions should seek convergence of merger review processes toward agreed best practices.



Protection of confidential information

- The merger review process should provide for the 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

Slide 13

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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

- *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 (R5)*



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*



Assets /Turnover

	<u>In India</u> Rs. In Cr.(\$)	<u>Global</u> (In Million)
1. Acquisition 5(a) (i) (A)&(B):	1000/3000 (\$ 250m / \$750m)	U.S \$ 500/1500 (in India>Rs. 1500/ \$375m)
2. Acquisition (by group) 5(a) (ii) (A)&(B):	4000/12,000 (\$ 1000m / \$3000m)	U.S.\$ 2000/6000 (in India>1500 Cr/ \$375m)
3. Acquiring of control 5(b) (i) (A)&(B):	1000/3000 (\$ 250m / \$750m)	U.S \$ 500/1500 (in India>Rs. 1500 cr/ \$375m)
4. Acquiring of control (group) 5(b) (ii) (A)&(B):	4000/12,000 (\$ 1000m / \$3000m)	U.S.\$ 2000/6000 (in India>1500 Cr/ \$375m)
5. Merger or amalgamation 5(c) (i) (A)&(B):	1000/3000 (\$ 250m / \$750m)	U.S \$ 500/1500 (in India>Rs. 1500 cr/ \$375m)
6. Merger or amalgamation (group) 5(c) (ii) (A)&(B):	4000/12,000 (\$ 1000m / \$3000m)	U.S.\$ 2000/6000 (in India>1500 Cr/ \$375m)



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
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- *Flexibility – other document*
 - *Window for belated notification after 30 days*



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 circumstances¹⁸



RP IV - Indian position

- *Form 1 / Form 2 (R 6)*
- *30/60 days (R 27)*
- *Specific situations provided for (R 2(h) / 10(1))*
- *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*



Review periods- a comparison

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)	210 C days (150 w days)

Indian time caps not very different from major jurisdictions



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 clarified (R 5)*
- *Simple Form 1 & 2 comparatively – less information*
- *Matters of less concerns - fast track (R 27)*
- *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 (GR 5/7)*
- *Pre-notification consultation - future*



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 (R 27)*
- *After 30 days, one more window (R 35) - may be 90 – 100 days*
- *If not asked to publish after first reply - clear*
- *Opportunity before final opinion (R 41)*
- *No extra burden except publication*
- *Confidentiality (R 55 / GR 38)*



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) / R (41) – Opportunity two times*
- *Third parties allowed (S 29 (3) / GR 27)*
- *Review by CAT*
- *Experts in competition matters (25 years) or*
 - *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

- *R 55/ GR 38*
- *Decisions on website (GR 59)*
- *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 transaction²⁹



RP IX - Indian position

- *Clear confidentiality norms (R 55 / GR 38)*
- *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 (R 55 / GR 38)*



X Intra 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'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

- 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

- 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



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



Where do we stand?

- RP I – V Followed
- RP VI – IX&XI Track laid – Improve as we cruise along
- RP X, XII & XIII Future road map



THANKS

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