



INTERNET

India's Proposed Merger Control Regime

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The Law

Competition Act, 2002

In order to bring India's competition law into accordance with international standards, the Government of India enacted the Competition Act, 2002 (the "Competition Act"). The Competition Act contains rules relating to anti-competitive arrangements, abuse of dominant positions, and the regulation of mergers and acquisitions, while also establishing its enforcement agency, the Competition Commission of India (the "CCI").

Despite both houses of Parliament passing the Competition Act, the Indian government has to date not been able to bring into force the substantive provisions of the Competition Act. Once any legislation in India is passed by both houses of Parliament, and receives Presidential assent, the legislation needs to be notified in the Official Gazette of India before it can come into effect. This notification can either occur with respect to the legislation as a whole, or with respect to certain individual provisions. Notification of the Competition Act has been delayed, largely due to a writ petition

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filed before the Supreme Court of India, questioning the constitutionality of the composition of the CCI.

Competition (Amendment) Act, 2007

Intending to make the CCI operational, the Indian Parliament passed the Competition (Amendment) Act, 2007 (the “Amendment Act”) in October of 2007, which significantly amended the Competition Act.

The Amendment Act was passed by both houses of Parliament and received Presidential assent, but, as of the date of this Client Alert, none of the substantive provisions of the Amendment Act have been notified in the Official Gazette of India.

This Client Alert examines the major changes that the Competition Act, as amended by the Amendment Act (collectively, the “Act”), **intends to make** to the merger control regime in India and its potential impact on international mergers and acquisitions.

The “India” Nexus

The Act requires mandatory notification to the CCI of all domestic and international mergers, acquisitions, and other types of “combinations” that meet any of the four assets or turnover thresholds set forth in the following charts.

These thresholds are combined and take into account the assets or turnover of both the acquirer and the target (the “Parties”), **or** the group to which the target/merged entity will belong post acquisition (the “Group”).

The Parties			
In India		Worldwide	
Assets	\$255M*	Assets	\$500M
OR		OR	
Turnover	\$764M*	Turnover	\$1.5B
		AND	
		Assets in India	\$127M*
		OR	
Turnover in India	\$381M*		

The Group			
In India		Worldwide	
Assets	\$1B*	Assets	\$2B
OR		OR	
Turnover	\$3B*	Turnover	\$6B
		AND	
		Assets in India	\$127M*
		OR	
Turnover in India	\$381M*		

*All approximate U.S. dollar figures are based on the exchange rate as of December 12, 2007, of 39.29 rupees to the dollar.

Therefore, the Act appears to make notification to the CCI mandatory, even for:

- An entity with assets in India exceeding approximately \$255 million, or assets worldwide exceeding \$500 million (with assets in India exceeding approximately \$127 million) **that acquires an entity with no assets or turnover whatsoever in India;** or
- A group with assets in India exceeding approximately \$1 billion, or assets worldwide exceeding \$2 billion (with assets in India exceeding approximately \$127 million) **that acquires an entity with no assets or turnover whatsoever in India.**

Waiting Period

Once the CCI has been notified of any transaction, the Act requires a **210-day waiting period** for the CCI to review such transaction. A covered transaction would be deemed to be approved by the CCI if it takes no final action during this waiting period.

Accordingly, no merger, acquisition, or other combination that is governed by the Act can be effected before either expiration of the waiting period, or approval by the CCI, whichever is earlier.

Notification Triggers

The Act describes two circumstances that would trigger the requirement to notify the CCI. The parties are required to notify the CCI within 30 days of either:

- Approval by the entity's board of directors; or
- Execution of "any agreement or other document for acquisition."

It is not clear from the language of the Act whether the execution of any non-definitive merger agreement (for example, a confidentiality agreement, binding letter of intent, etc.) would trigger these notification requirements.

Penalties

In the event of failure to comply with the notification requirements, the Act empowers the CCI to impose fines of up to 1% of the total turnover or assets of the companies involved, whichever is higher. In addition, failure to comply with orders or directions of the CCI can be fined with an amount of up to Rs. 100,000 (\$2,545) for each day during which such non-compliance occurs, subject to a maximum of Rs. 100 million (\$2.5 million). Further non-compliance will be punishable with imprisonment for a term of up to three years or with a fine of up to Rs. 250 million (\$6.3 million), or both.

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Current Status

As mentioned earlier, the substantive provisions of the Act have not yet been notified in the Official Gazette, and accordingly are **not** in force. This Client Alert has been prepared as if the Act has been notified in its current state.

However, there has been a fair amount of activism in India (from the business and professional communities) calling for some changes and clarity to the more controversial provisions of the Act. Recently, the Section of Antitrust Law, the Section of Business Law and the Section of International Law of the American Bar Association submitted some detailed comments and suggestions regarding regulations to implement certain provisions of the Act.

It remains to be seen whether India will make these changes to assist in this very important step in the field of merger control. The India Practice Group of Brown Rudnick will continue to monitor this situation and will provide an update to this Client Alert if and when necessary.

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