

**Joint Comments of the American Bar Association’s
Section of Antitrust Law, Section of Business Law and Section of International Law
on
Implementing Regulations for and Amendments to the Merger Control Provisions of
India’s Competition (Amendment) Act, 2007**

The Section of Antitrust Law, the Section of Business Law and the Section of International Law (together, the “Sections”)* of the American Bar Association submit these comments to present their suggestions regarding regulations to implement certain provisions of India’s Competition Act, 2002, as recently amended by the Competition (Amendment) Act, 2007 (the “Act”). The views expressed herein are being presented jointly on behalf of the Sections. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be considered as representing the policy of the American Bar Association.

The Sections collectively have substantial expertise in the antitrust and merger control laws in the United States and in the practical implications of those laws, and they also have substantial familiarity with comparable laws in the European Union and other jurisdictions. The Sections’ comments reflect their experience in these areas and their knowledge of the Guiding Principles and Recommended Practices for Merger Notification and Review Procedures¹ (“Recommended Practices”) adopted by the International Competition Network² (“ICN”), which

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¹ See, International Competition Network, Recommended Practices for Merger Notification Procedures, available at <http://www.internationalcompetitionnetwork.org/media/archive0611/mnprecpractices.pdf>.

² The International Competition Network seeks to provide competition authorities with a specialized yet informal venue for addressing practical competition concerns. The ICN is the only international body devoted exclusively to competition law enforcement. Where the ICN reaches consensus on recommendations, or “best practices”, arising from the projects, it is left to the individual competition authorities to decide whether and how to implement the recommendations, through unilateral, bilateral or multilateral arrangements, as appropriate.

have been implemented by **increasing numbers of** jurisdictions around the world. We offer these comments in order to share our experience and hopefully assist India in further enhancing the effectiveness of its competition law regime.

Executive Summary

The Sections respectfully submit that the Act in its present form, in some potential applications, may be so burdensome as to discourage competitive conduct and investment in India. The Sections' comments will reference international merger control norms and offer suggestions regarding implementing regulations that may ameliorate some of these counter-productive aspects of the Act, in hopes that they may assist India to develop a more modern and effective merger control process. More fundamentally, the Sections respectfully recommend that India consider appropriate further amendments to bring its competition law into greater conformity with the stated goals of the Act, as well as in greater harmony with international norms.³ The Sections recognize that there may be significant practical constraints on solutions. We would welcome the opportunity to assist the Competition Commission of India (the "Commission") and the appropriate Ministries to develop practical approaches to addressing the concerns, consistent with India's laws.

The Sections understand that implementing regulations are being drafted and are expected to be promulgated in the very near future. Therefore, these comments focus only on those aspects of the Act that the Sections believe to be most urgently in need of attention. The Sections would appreciate the opportunity to offer further comments in the future, both to

Further information on the ICN and its recommended practices is available at <http://www.internationalcompetitionnetwork.org>.

³ See, e.g., International Competition Network, Recommended Practices XIII B that stipulates jurisdictions to consider "reforms to their merger control laws and procedures that promote convergence towards recognized best practices".

provide greater detail regarding our recommendations on the issues raised in these comments and to address other issues presented by the Act in its current form.⁴

The Sections offer suggestions as to how implementing regulations may address concerns raised by the Act in the following areas:

- (1) Transactions which have no or *de minimis* connection with India. The Act would require notification of many transactions that have little likelihood of affecting competition in India in any material way.
- (2) The 210-day waiting period, especially for transactions having no or little local nexus to India and/or no or insignificant competitive impact in India. Such a long “suspensive” waiting period may deter many transactions that would otherwise be beneficial to India’s economy.
- (3) The timing of notifications. The Act is both ambiguous and overly restrictive as to when notifications must be filed, in the latter case potentially depriving parties of the opportunity to coordinate multiple notifications across different jurisdictions. These problems introduce administrative inefficiencies without providing any compensating benefit to the review process.
- (4) The burden of notification, especially for non-problematic transactions. A required initial “short form” notification, that includes only the data needed for the Commission to make a determination as to the need for further information and investigation, would greatly lessen the burden on both the Commission and the parties, facilitate expeditious clearance of non-problematic transactions, and further India’s development of a state-of-the-art merger control regime.

⁴ For example, future amendments to the Act may establish greater safeguards against misuse of the Act to impede competition, especially from imports or non-Indian enterprises.

The Sections recognize that the Commission has, since the original enactment of the Act in 2003, been active in ensuring its optimal implementation, including conducting 38 advocacy and awareness-building programs and many market studies and research projects, drafting regulations and interpretation bulletins on competition and intellectual property issues, holding consultations with state governments, providing input and opinions on policy and regulatory proposals, and co-developing a curriculum for competition courses in law and economic programs. The Commission has been vigorously advocating competition policy to other parts of the government and drafting with other government departments and advisory groups a “National Competition Policy” for India. By these comments, we wish to express our support and encouragement to the Commission to continue its efforts to increase the effectiveness of India’s competition law regime and to draft regulations that address the issues that are discussed here.

(1) Absence of an effective “local nexus” leading to potentially unnecessary notifications

The Act apparently requires notification to the Commission whenever the total combined assets or turnover of the parties exceed approximately US\$253 million and US\$758 million, respectively, in India,⁵ or US\$500 million and US\$1.5 billion, respectively, worldwide.⁶ It also provides in Section 32 that the “Commission shall, notwithstanding that...a combination has taken place outside India; or...any party to combination is outside India;...have power to inquire...into such...combination if such...has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India and pass such orders as it may deem fit...”

⁵ Sections 5(a)(i)(A), 5(b)(i)(A), 5(c)(i)(A). All approximate U.S. dollar figures are based on exchange rates as of October 23, 2007, of 39.58 rupees to the dollar.

⁶ Sections 5(a)(i)(B), 5(b)(i)(B), 5(c)(i)(B). At least approximately US\$126 million or approximately US\$379 million, respectively, of these worldwide assets or revenues are to be in India. In addition, notification is required if the groups to which the parties belong, have assets or turnover over certain thresholds, regardless of the presence or absence in India of the parties themselves. Sections 5(a)(ii), 5(b)(ii), 5(c)(ii).

Notification and observation of the waiting period would apparently be required when a business with assets in India exceeding approximately US\$253 million or worldwide exceeding US\$500 million, including approximately US\$126 million in India, acquires a business with no assets or turnover whatsoever in India. Similarly, notification and observation of the waiting period would apparently also be required when a group with assets in India exceeding approximately US\$1 billion in India or exceeding US\$2 billion worldwide, including approximately US\$126 million in India, acquires a group with no assets or turnover whatsoever in India.⁷ This will most likely burden the Commission with notifications of many transactions having little or no commercial or competitive relevance to India. As a result, the Commission may be forced to focus unduly on administrative matters concerning management of the numerous notifications, thereby undermining the effective enforcement of the Act.

These notification thresholds appear to be inconsistent with the ICN's Recommended Practices that: "jurisdiction should be asserted only over those transactions that have an appropriate nexus with the jurisdiction concerned;"⁸ "merger notification thresholds should incorporate appropriate standards of materiality as to the level of 'local nexus' required for merger notification;"⁹ and the "determination of a transaction's nexus to the jurisdiction should be based on activity within that jurisdiction, as measured by reference to the activities of at least *two parties* to the transaction in the local territory and/or by reference to the activities of the *acquired business* in the local territory" (emphasis added).¹⁰ These thresholds in the Act also appear to be inconsistent with those adopted by many other jurisdictions, which restrict their

⁷ Sections 5(a)(ii), 5(b)(ii), 5(c)(ii).

⁸ See, Recommended Practice IA.

⁹ See, Recommended Practice IB.

¹⁰ See, Recommended Practice IC.

regulations to transactions that have a nexus to their local jurisdictions, including the United States, Canada, the European Union and numerous member states within the EU, and many other countries around the world.¹¹

Regulations setting forth conditions under which the notification and review burden may be minimized, may ameliorate the broad impact of the Act's thresholds.

(2) Waiting period

The Act establishes a “suspensive”¹² approach towards merger control, with a 210-day waiting period¹³ for the Commission to review proposed combinations. A transaction will be deemed approved by the Commission if it takes no final action within this 210-day waiting period.¹⁴ The Sections are concerned that this waiting period is very long for most transactions when compared with the waiting periods of other “suspensive” systems,¹⁵ and inconsistent with ICN's Recommended Practices that urge that “merger reviews should be completed within a reasonable period of time”.¹⁶ The Sections are unaware of any other jurisdiction that prescribes such a lengthy waiting period for all transactions. Significantly, the process established by the Act does not differentiate in this or any other respects between transactions that may raise competitive concerns (requiring a detailed review) and those that do not raise such concerns (and, hence, should be cleared on an expedited basis).

¹¹ See the discussion in the Appendix of the experience of several jurisdictions.

¹² In a “suspensive jurisdiction”, the consummation of a notified transaction is prohibited pending the expiration or early termination of specified “waiting periods”. In contrast, in a “non-suspensive jurisdiction”, the parties are permitted to close notified transactions pending review by the competition agencies.

¹³ Sections 6(2A), 31(11).

¹⁴ Section 31(11).

¹⁵ The U.S. has an initial waiting period of 30 days. The EU provides for a Phase I decision that must be reached within 25 workdays from the effective date of notification, which may be extended for 10 working days where the parties submit proposed remedies, as well as a Phase II investigation with a basic period of 90 working days, that may be extended up to 20 working days under certain conditions.

¹⁶ See, Recommended Practice IVA.

The ICN's Recommended Practices state that "merger review systems should incorporate procedures that provide for expedited review and clearance of notified transactions that do not raise material competitive concerns".¹⁷ This may be achieved by adopting a notification process that permits certain transactions that do not present material competitive concerns to proceed following an abbreviated review and/or waiting period. Under a "multi phase" notification process, all transactions are reviewed to determine the likely existence of competitive concerns (with transactions not raising such concerns being granted necessary clearance) and only transactions presenting potential competitive concerns are required to proceed to the second and any subsequent phases of detailed review and/or waiting periods.

The ICN's Recommended Practices also suggest that "in suspensive jurisdictions, initial waiting periods should expire within a specified period following notification and any extended waiting periods should expire within a determinable time frame".¹⁸ Such waiting periods may be set by considering "the time frames commonly used by competition agencies internationally".¹⁹

The prospect of a seven-month waiting period applicable to all notifiable transactions will unduly delay and may deter many transactions, and will not further India's interests in economic development. It will also place an unprecedented burden on global economic transactions, including transactions that have no significant impact in India. Therefore, in the immediate term, we encourage India to promulgate implementing regulations that will establish clear procedures under which the Commission will exercise its discretion under Sections 29, 31 and 32 of the Act to end the waiting period earlier for transactions with *de minimis* nexus to India and/or clearly insignificant competitive impact in India. Regulations may set forth the time period in which the

¹⁷ See, Recommended Practice IVB.

¹⁸ See, Recommended Practice IVC.

¹⁹ See, Comment 2, Recommended Practice IVC.

Commission must issue any such notice, in the absence of which the Commission may be deemed to have no current objections to the transaction and the transaction may conclude without further delay.

This might be accomplished through regulations applying Sections 6(2A), 29(1) and 31(1) of the Act. Section 6(2A) provides that “[n]o combination shall come into effect until two hundred and ten days have passed from the day on which the notice has been given to the Commission under sub-section (2) or the Commission has passed orders under section 31, whichever is earlier.” Under Section 29(1) of the Act, the Commission is empowered to issue a notice “to show cause to the parties to any combination calling upon them to respond within thirty days of the receipt of such a notice, as to why investigation in respect of such combination should not be conducted”. Section 31(1) provides that “[w]here the Commission is of the opinion that any combination does not, or is not likely to, have an appreciable adverse effect on competition, it shall, by order, approve that combination...”

(3) Time for notification

The Sections have identified two respects in which the provisions of the Act as to the timing of notifications would benefit from reconsideration and clarification.

First, the Act requires parties to a combination to file notifications within 30 days after either approval by their board of directors or the execution of “any agreement or other document for acquisition,” without specifying whether it is the earlier or the later of these two events that trigger the time to file notification.²⁰ It is also unclear whether the execution of a non-binding letter of intent or other similar document (without the execution of any definitive agreement) will

²⁰ See, Section 6 of the Act.

trigger notification requirements under the Act.²¹ In any event, since India does not permit transactions to close until they are cleared by the Commission, it is in the parties' interest to notify the Commission as soon as practicable. Such a notification deadline in a "suspensive" jurisdiction, such as India, seems contrary to ICN's Recommended Practices that "jurisdictions that prohibit closing while the competition agency reviews the transaction for a specified time period following notification should not impose deadlines for pre-merger notifications".²² Moreover, "elimination of filing deadlines will facilitate the coordination of multi-jurisdictional filings and reviews".²³

Second, the Act is silent on whether parties may notify the Commission prior to the approval of the transaction by their board of directors or the execution of any definitive agreement or "other document". Express introduction of permissive early notifications will be beneficial on three counts: first, in a "suspensive" jurisdiction, such as India, parties may be able to "time" their filings in such a manner that they are likely to complete the notification and review process and obtain the Commission's clearance by the proposed "closing date" for the transaction; second, it may provide the Commission with more time to review the transaction than if notifications are filed only after the execution of a definitive agreement or board approval; and, third, such a provision will lessen the current uncertainty. Implementation of a permissive early notification process will also be in conformity with ICN's Recommended Practices that permits parties to "notify proposed mergers upon certification of a good faith intent to consummate the proposed transaction".²⁴

²¹ The experience of Brazil may be instructive. Brazil's merger control regime was also ambiguous as to when notification must be filed, resulting in uncertainty and disputes relating to penalties for late filings.

²² See, ICN Recommended Practice IIIB. See, e.g., in the U.S., 15 U.S.C. §18a(a).

²³ Ibid.

²⁴ See, ICN's Recommended Practice IIIA.

(4) Notification and review for non-problematic transactions

As noted above, the process established by the Act does not differentiate between transactions that may raise competitive concerns (requiring a detailed review) and those that clearly do not raise such concerns (and, hence, should be cleared on an expedited basis). In many jurisdictions, including the United States, the vast majority of all notified transactions are non-problematic, and are cleared in the initial waiting period. It would be less burdensome for both the Commission and the parties if the Commission promulgated regulations requiring initial “short form” notifications that include only a limited range of specific information which would be sufficient for the Commission to make an initial determination as to whether an in-depth investigation is necessary. Such “short form” notifications should be deemed to provide data necessary for the Commission to consider the factors set forth in Section 20(4) of the Act, unless the Commission determines an in-depth investigation is necessary.²⁵ In the event an in-depth investigation is necessary, the Commission may require the filing of additional information in a “long form” notification, in the exercise of its authority under Section 36(4), to “direct any person: (a) to produce...such books, or other documents...as may be specified.; (b) to furnish...such other information...as may be required...”

The Sections’ Recommendations

Ideally, the foregoing concerns raised by the Act would be addressed directly and fully by further legislation. Legislative changes would be definitive, and may address other issues that cannot be reached by regulation. However, the Sections recognize that the legislative process is lengthy and may not provide timely relief. During this delay, many transactions may be deterred

²⁵ An optional system of initial short form notifications has been implemented in Canada with generally positive results, as well as a sense in some quarters that the process may be further improved by requiring short form notifications uniformly, in order to avoid the uncertainty under the current system as to when a long form notification should be filed.

and India's economic development may be unduly hampered. In these circumstances, as an interim measure, implementing regulations may be promulgated under the authority granted in Section 64, that enable the exercise of discretion by the Commission in ways that may ameliorate the adverse impact of the Act. The Sections, therefore, respectfully suggest that while India considers further amendments to the Act, the Government of India and the Commission adopt appropriate rules and regulations under Section 64, that would ameliorate the adverse effects of the Act, and bring India's merger control regime into greater harmony with ICN's Recommended Practices and international norms.

In particular, based upon our experience with over 115 years of U.S. antitrust law and decades of familiarity with the competition laws of other jurisdictions, we offer the following specific suggestions for implementing regulations that would ameliorate the four areas of concern discussed in these comments. We recommend adoption of implementing regulations that will:

1. Implement Sections 6(2A), 29(1), 31(1), and 36(4) of the Act (i) to introduce an initial review/waiting period within which the Commission shall issue an order under Section 29(1) to show cause upon a determination that the transaction requires detailed review because it may have an appreciable adverse effect on competition in India, Section 31(1) to approve a transaction because it does not, or is not likely to, have an appreciable adverse effect on competition, or under Section 36(4) to require the submission of a "long form" notification because additional data is needed for the Commission to make a determination on the likely competitive effects of the transaction, and (ii) to provide that, if, within this initial waiting period, the Commission issues no such order under Sections 29(1), 31(1), or 36(4) and does not issue an order extending the initial review period for a specified length of time, then the

Commission may be deemed to have no current objections to the transaction and to have determined that a detailed review is not necessary, in which case an order shall automatically issue under Section 31(1) so that the transaction may conclude without further delay.

- a. Provide that the initial review and/or waiting period shall not extend beyond 30 to 45 calendar days and that the detailed review and/or waiting period shall not extend beyond another specified period, for a total of the maximum of 210 calendar days set forth in the Act.²⁶
 - b. Where the Commission determines that the transaction may have adverse competitive effects in India and requires an in-depth investigation, the Commission should state the grounds for its decision and afford the parties an opportunity to file appropriate supplementary documents (prior to the time of initiation of a detailed review) responding to the Commission's determination.²⁷
2. Implement Sections 6(2), 6(3), 20(4), 32, and 36(4) of the Act to introduce a "short form" notification process. Such a notification should require parties to provide only certain basic information about the proposed combination that will enable the Commission to determine whether additional investigation (and a more detailed notification) is necessary. Such "short form" notifications should be deemed to provide data necessary for the Commission to consider the factors set forth in Section 20(4) of the Act, unless the Commission determines that an in-depth investigation is necessary. Only in the event the Commission determines that an in-depth

²⁶ The ICN recommends that initial waiting periods not extend beyond six weeks with detailed review not to extend beyond six months from the date of submission of the initial notification(s). *See*, Comment 2, Recommended Practice IVC.

²⁷ Such a provision will be consistent with ICN's Recommended Practice VIC, which provides that "merging parties should be advised no later than the beginning of a second-stage inquiry why the competition agency did not clear the transaction within the initial review period".

investigation is necessary, will a more detailed notification be required under Section 36(4) to provide additional data relevant to the factors identified in Section 20(4).

- a. In the case of transactions without significant local nexus to India, such “short form” notifications can be completed simply by sworn certifications by the parties regarding such lack of local nexus. The Sections suggest that all transactions in which the acquired assets or businesses have assets or revenues in India below an appropriate threshold, such as 10% of the notification thresholds set forth in Section 5 of the Act, may satisfy the “short form” notification requirement with a certification that the acquired businesses or assets have assets in India below that threshold.²⁸
 - b. In the case of transactions with no local nexus to India, such as when the acquired business has no assets or revenues in India, or assets or revenues below a defined *de minimis* level, the transaction will be deemed, under Section 32, not “likely to have, an appreciable adverse effect on competition in the relevant market in India” and no notification will be required, consistently with the practices of many jurisdictions globally and with the ICN recommended practices.
3. Expressly permit parties to file early notifications of any proposed combinations that are subject to the Commission’s jurisdiction before such notifications are required, as well as adopt appropriate provisions to prevent frivolous or premature filings, such as by requiring parties to certify as to their intent to conclude the transaction and by specifying the stage after which parties may file such notifications.

²⁸ In fact, Canada requires notifications only when assets located in Canada or an operating business located in Canada are being acquired, without untoward effects.

4. Allow liberal extensions of the notification deadline, consistent with the practice followed by other jurisdictions (including the EU in the past, when it had a deadline for notifications). If notification deadlines are implemented, specify whether it is the earlier or the later of approval by the board of directors or the execution of “any agreement or other document for acquisition,” that triggers the time to file notification, and the standards for determining when a “definitive agreement” has been reached so that parties may determine when their notifications are due. In particular, clarify the types of documents that will be treated as “other documents” requiring notifications under the Act. Alternatively, provide an indicative list of types of documents that will not be deemed as “other documents” and, hence, will not trigger such mandatory notifications.

Conclusion

The Sections offer the foregoing recommendations based upon our experience. We hope these comments are helpful and we would consider it a privilege to be able to offer any further assistance that may be helpful as India drafts implementing regulations and considers any further amendments to the Act.

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Appendix

The U.S. does not require notification by a U.S. company for the acquisition of assets or a company outside the U.S. unless the acquired assets or acquired company generate revenues in the U.S. of over US\$59.8 million or the acquired company holds assets in the U.S. with a value in excess of US\$59.8 million. 16 C.F.R. §§ 802.50, 802.51.

The EU requires notification when (1) the aggregate worldwide turnover of all the parties exceeds €5 billion, and the Community-wide turnover of each of at least two parties exceeds €250 million, unless each of the parties achieves more than two-thirds of its aggregate Community-wide turnover in one and the same member state, or (2) the aggregate worldwide turnover of the parties exceeds €2.5 billion, and the Community-wide turnover of each of at least two parties exceeds €100 million, and in each of at least three member states, the aggregate turnover of all the parties exceed €100 million, and in each of at least three of the same member states, the turnover of each of at least two parties exceeds €25 million, unless each of the parties achieves more than two-thirds of its aggregate Community-wide turnover in one and the same member state. Merger Regulation, Council Regulation (EC) No 139/2004 of 20 January 2004.

In addition, for example, in Belgium, the statutory thresholds for mandatory merger notification have been altered no less than five times. Each reform has been carried out increasing the local nexus in the jurisdictional thresholds. The Czech Republic has abandoned its combined worldwide threshold, replacing it with the requirement that at least two parties generate Czech revenues of approximately €47 million (or, should the acquirer not be active in the Czech Republic, that the target generates Czech turnover of approximately €47 million). Finland has shifted from worldwide thresholds and the requirement for the target to “conduct business” in Finland to requiring that the parties have a combined worldwide turnover of at least

€50 million and that at least two parties generate revenues of €20 million in Finland. With effect from January 1, 2007, Norway raised its two notification thresholds of 5 million to 20 million Norwegian Krone, which were unduly low (in 2005, for example, 623 transactions were notified but only 3 gave rise to competitive concerns), to 20 million and 50 million Norwegian Krone respectively. Most recently, effective November 4, 2007, South Korea adjusted its notification thresholds for transactions involving foreign parties, raising it from Korean turnover of 3 billion won to 20 billion won for each of two of the parties involved.

There are numerous other examples globally of jurisdictions whose notification thresholds require that at least two parties to the transaction, or the acquired business, have a significant nexus to the jurisdiction in the form of significant local turnover and/or assets, as recommended by the International Competition Network.