

**JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION
SECTION OF ANTITRUST LAW AND SECTION OF
INTERNATIONAL LAW ON THE DRAFT CCI (PROCEDURE IN
REGARD TO THE TRANSACTION OF BUSINESS RELATING
TO COMBINATION) REGULATIONS**

March 21, 2011

The views stated in this submission are presented jointly on behalf of these Sections only. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

The Section of Antitrust Law (“Antitrust Section”) and the Section of International Law (together, the “Sections”) of the American Bar Association (“ABA”) respectfully submit these comments on the Draft Competition Commission of India (“CCI”) (Procedure in regard to the transaction of business relating to combination) Regulations, 2010_ (No. __ of 201_) (“Draft Combination Regulations”) published for comment on March 1, 2011.¹ The Sections appreciate the substantial thought and efforts of CCI reflected in the Draft Combination Regulations, and take the opportunity to offer these comments in the hope that they may be of assistance. The Sections are available to provide additional comments, or to participate in consultations with CCI, as appropriate.

We focus in these comments on a few general principles invoked by the Draft Combination Regulations, instead of detailed discussion, because the Sections have submitted comments in 2007 and 2008 regarding Implementing Regulations for and Amendments to the Merger Control Provisions of India’s Competition (Amendment) Act, 2007 (“Competition Act”), and an earlier set of Draft Combination Regulations (together, “Joint Comments”),² and because the short comment period did not allow the Sections to develop more detailed comments. The Sections respectfully refer the CCI to the Joint Comments and appreciate the consideration that the CCI has given to the Joint Comments.

The Sections have substantial experience in the antitrust/competition laws of the United States and other jurisdictions, and the practical implications of those laws. The Sections’ comments reflect their expertise and experience with U.S. law and their familiarity with antitrust/competition law internationally, as well as expertise in the economics underlying the analysis of antitrust issues.

¹ The Draft Combination Regulations were published for comment at <http://www.cci.gov.in/images/media/Regulations/DraftCombinationRegulation.pdf> (visited March 13, 2011).

² The Sections’ 2007 Joint Comments on Implementing Regulations for and Amendments to the Merger Control Provisions of India’s Competition (Amendment) Act, 2007 (“2007 Joint Comments”), together with the Sections’ 2008 Joint Comments on Proposed Draft of the Competition Commission of India (Combination) Regulations, 200_ (“2008 Joint Comments”), are annexed as Appendix III to these Comments.

Executive Summary

The Sections are concerned that Forms I and II are excessively burdensome, unlikely to be useful in the competition review of the vast majority of transactions notified, and likely to overwhelm the CCI with voluminous unnecessary material. The scope of the forms is far broader than that recommended by the International Competition Network (“ICN”). Form II is the default form, to be filed for all but the few types of transactions identified in Schedule 1 and those subject to Form III. However, the broad scope of Form II is similar to that of a U.S. request for additional information (“Second Request”) following a notification under the Hart-Scott-Rodino (“HSR”) Antitrust Improvements Act.³ Historically, second requests are issued for less than 5% of notified transactions in the United States. The Sections respectfully suggest that there is little basis for a notification with the broad scope of Form II to be the default. While Form I is less burdensome than Form II, it requires information that is likely both irrelevant to and overly broad for a competition analysis of the types of transactions it covers. Accordingly, the Sections submit that Form I should be substantially limited. While the Sections do not specifically discuss Form III, to the extent Form III requests information similar to that of Form I, the Sections have similar concerns, especially as the types of transactions subject to Form III would typically be no more likely to raise competitive concerns than those subject to Form I.

Regulation 28 of the Draft Combination Regulations appears to indicate that the Draft Combination Regulations, when final, would apply to transactions for which agreements have been executed that are pending as of the effective date of the regulations. If that is the case, the Sections suggest that the final Combination Regulations instead: (a) apply to transactions signed or entered into after the effective date; (b) provide for an effective date later than June 1, 2011; or (c) while CCI begins to accept notifications before the effective date, exempt pending transactions that are the subject of a contract executed earlier than the effective date. The Sections welcome the provision in the Draft Combination Regulations for consultation prior to filing of notification, which should enable parties to better prepare their notifications. Nonetheless, under the Draft Combination Regulations, parties with pending transactions are in the worst possible position of uncertainty and compliance burden, while the CCI is likely to be inundated with notifications on June 1, 2011.

The Sections welcome the notification on March 4, 2011 of a de minimis exemption to the notification requirement and would also welcome confirmation that the 5-year exemption for acquisitions involving “an enterprise” with “assets of the value of not more than 250/- crores or turnover of not more than 750/- crores” that was notified on March 4, 2011 applies to assets or turnover in India (rather than worldwide). Applying the exemption to require that the proposed transaction involve significant assets/turnover within India would ensure that the CCI receives notification only of those transactions that have a nexus with India. Section 6 of the Competition Act focuses on “competition within the relevant market in India,” reflecting an intent to protect competition within India. In order to accomplish this important objective without unnecessarily burdening both the CCI and parties with notifications of transactions unlikely to affect competition within India, the exemption should be applied both to require that the “enterprise” have the requisite assets/turnover in India and to measure the assets/turnover of

³ Moreover, unlike a Second Request, Form II requires substantial amounts of material unrelated and unnecessary to an assessment of the competitive impact of a transaction.

only the assets being acquired (or the unit of the enterprise being acquired) in the proposed transaction.⁴

The Sections also remain concerned about the excessive length of the review period but welcome the CCI's confirmation of its commitment to complete 90-95% of the merger reviews within 30 days and the remainder within 180 days of the filing of the notification with the CCI.

I. The Unnecessary Burdensomeness of Forms I and II

The ICN Recommended Practices for Merger Notification Procedures (“Recommended Practices”)⁵ state that “[i]nitial notification requirements should be limited to the information needed to verify that the transaction exceeds jurisdictional thresholds [and] to determine whether the transaction raises competitive issues meriting further review.” Forms I and II go far beyond the ICN recommended scope. While the notification forms should strike a proportional balance between the CCI's duty to discharge its mandate under the Act, and the burden placed on firms in India and overseas when notifying combinations to the Commission, the Sections are concerned that Form I and II fail to strike that balance.⁶ In addition, while the Sections do not specifically discuss Form III, to the extent Form III requests information similar to that of Form I, the Sections have similar concerns, especially as the types of transactions subject to Form III would typically be no more likely to raise competitive concerns than those subject to Form I.

A. Comments on Form I

The experience in at least the United States, European Union, and Canada show that the vast majority of transactions that would qualify for Form I do not involve any change in market structure of competitive significance (*e.g.*, acquisitions of less than 15% of the total shares or voting rights of another company, acquisitions of raw materials in the ordinary course of business, and acquisitions of voting shares in companies that the acquirer already controls). These jurisdictions and many others exempt such transactions from merger notification requirements.⁷ It thus should be clear that the information that the Commission will need in such cases to ensure that such transactions do not “cause an appreciable adverse effect on competition within the relevant market” is minimal. Moreover, if such a transaction somehow were to raise competitive issues, the CCI could require the parties to provide additional information and to toll the waiting period until such time as the information is provided.⁸

⁴ The Sections would also welcome clarification that the “enterprise” referenced in the exemption is not the larger “group” to which the enterprise belongs or the parent company, but rather are the assets being acquired or the company whose shares are being acquired, especially if the exemption is applied to worldwide assets and turnover.

⁵ *See*, ICN, Recommended Practices, Recommended Practice V.A., available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf> (visited March 13, 2011).

⁶ The Sections have offered suggestions as to how the notifications may be less burdensome while still providing information that CCI needs to evaluate the likely competitive impact of transactions. *See* 2008 Joint Comments at 7-11.

⁷ In fact, earlier Draft Combination Regulations would have exempted such transactions.

⁸ Draft Combination Regulations 18(2).

Thus, the Sections suggest that the following items in Form I are unnecessary or disproportionately burdensome: Sections 5(a), 5(b), 5(e), 6(c)(i), 6(c)(ii), 6(c)(iv), 8(e), 10(d). A discussion of the burdensomeness of these items and their irrelevance to a competition analysis is presented in Appendix I to these Comments.

B. Comments on Form II

Form II would be required of all notifiable transactions that are of types not identified in Schedule 1 and not covered by Form III. It is therefore the default notification form. Yet, Form II will create significant burdens for merging parties, comparable to those imposed in the U.S. by Second Requests following the initial HSR notification. These burdens will be particularly acute in light of the requirement of Section 6(2) of the Competition Act that notifications be submitted within thirty days following either the approval of a proposed acquisition by the boards of the enterprises concerned or the execution of an agreement for the acquisition of control.⁹ These burdens imposed by default are unwarranted given the experience in the U.S., consistent with that in other jurisdictions,¹⁰ that less than 5% of all HSR notifications are followed by a Second Request.

Moreover, Form II deviates substantially from international norms in its information requirements.¹¹ For example, Sections 5 (a) and (b), which are identical to Form I's Section 5 (a) and (b), would, as discussed in greater detail in Appendix I to these Comments, require production of many documents prepared as part of the acquirer's analysis of the viability of the transaction that will likely shed little light on any impact that the transaction may have on competitive conditions. The Sections' concerns regarding provisions in Form I apply to their counterparts in Form II.

Specific to Form II, **Section 12** seeks information regarding efficiencies. While the CCI's interest in potential efficiencies that may result from a notified transaction reflects a sophisticated approach to mergers analysis, the information sought is burdensome and therefore appropriate only for those transactions that the CCI preliminarily concludes may raise competition concerns. For that reason, the U.S. antitrust agencies seek information regarding the quantification of efficiencies only in Second Requests.¹² Other agencies, including the European

⁹ The provision in Section 4(7) of the Draft Combination Regulations indicating that a non-binding letter of intent or other non-binding document would trigger the thirty day period for filing notification, only exacerbates the burden. In fact, the experience with the EU Form CO, which is somewhat less extensive than Form II and was also subject to a filing deadline, indicates some of the difficulties with such a deadline. Even now the parties often submit the Form CO in draft, during pre-notification, several times before the waiting period is triggered, even for non-controversial transactions.

¹⁰ A 2002 survey of its members and observers by the OECD Competition Committee revealed that the vast majority of notified mergers are cleared in the first phase of review. The OECD report on the survey stated: "Across all responding countries except Brazil and Mexico, whose procedures result in a large number of formal investigations and cases, and Japan, where problems with anticompetitive mergers are resolved through consultations, the total number of such more intensive investigations in 2001 was approximately 8 percent of the total number of mergers reviewed." Note by the Secretariat, Analysis and Discussion of Selected Responses to the Questionnaire on Harmonisation of Merger Control Procedures, DAF/COMP/WP3(2002)14, Jan. 10, 2003.

¹¹ A table comparing some of the key provisions in the notification forms of the U.S., EC and Canada with Form II is attached as Appendix II to these Comments.

¹² FTC, "Introductory Guide 3: Model Request for Additional Information" (revised June 2010) at Specification

Commission, take a similar approach by making it optional for notifying parties to provide such information in the formal notification.

This example suggests the fundamental concern that the scope of Form II raises: the experience of competition enforcement agencies elsewhere is that only a small percentage of notified transactions merit the commitment of staff time and resources necessary to perform a thorough investigation.¹³ In the period from 2000 to 2009, between 2.1 and 4.5 percent of transactions reported to the U.S. federal antitrust enforcement agencies in any year have resulted in a merger review that went beyond the first phase following notification.¹⁴ Similarly, less than 5% of transactions notified to the Competition Bureau in Canada are subject to a supplementary information request, which is issued at the end of the first phase of Canadian merger review. Given the small percentage of transactions that merit serious investigation, the burdens that Form II would impose on every notifying party would waste substantial time and resources of notifying parties, who would comply with Form II's onerous requirements by collecting and submitting voluminous data that, for the vast majority of transactions, would likely never be reviewed by CCI's staff. In light of the serious diversion of resources that compliance with Form II would create, the Sections urge CCI to adhere to the ICN's Recommended Practices by limiting the scope of information required in initial notifications "to the information needed to verify that the transaction exceeds jurisdictional thresholds, to determine whether the transaction raises competitive issues meriting further investigation, and to take steps necessary to terminate the review of transactions that do not merit further investigation."¹⁵

Limiting the information required in the notification form to the scope recommended by the ICN will not constrain the CCI's ability to investigate potentially problematic transactions. The experience of other enforcement agencies suggests that CCI will be able to identify combinations that raise antitrust concerns using sources of information beyond the notifications submitted by the merging parties. Some examples of information that agencies regularly use to identify transactions that merit a closer look are reports in the general media or specialized trade publications, the documents submitted under analogues to Item 5 of Form II (even if limited to the scope of the analogous document requests in the notification forms used in Canada, the European Union, and the United States), and contacts with interested customers, suppliers, or competitors. While the motivations of other industry participants counsel that the CCI receive their subjective views with skepticism, they can nevertheless be valuable sources of data, such as information concerning market shares, competitive differentiation, and entry and exit. Moreover, over time, CCI's merger and non-merger enforcement activities will result in greater familiarity with the market structure of particular sectors of the Indian economy and the companies that are active in those sectors.

15(c) (requiring "a detailed description of (including the identification of all documents directly or indirectly used to prepare the company's response to this sub-part and quantification, if possible, of all cost savings, economies or other efficiencies) the reasons for the proposed acquisition and the benefits, costs, and risks anticipated as a result of the proposed acquisition, including, but not limited to, all cost savings, economies, or other efficiencies of whatever kind"). (available at <http://www.ftc.gov/bc/hsr/introguides/guide3.pdf>) (visited March 11, 2011).

¹³ See, *supra*, note 10.

¹⁴ FTC and Antitrust Division of the U.S. Department of Justice, *Hart Scott Rodino Annual Report, Fiscal Year 2009*, at 4 (available at <http://www.ftc.gov/os/2010/10/101001hsrreport.pdf>) (visited March 11, 2011).

¹⁵ ICN, *Recommended Practices* at 11.

Nor would the use of a narrower, more focused, less burdensome notification form deprive the CCI of access to internal documents created by the merging parties that may bear on the issues raised by a particular transaction. Under Section 29(4) of the Competition Act, the CCI is empowered to seek “such additional or other information” from the parties to a combination, and it can use this power to obtain information from parties after it has initially determined that a transaction may raise competitive concerns. Doing so will conserve the resources of parties to the vast majority of transactions that do not raise concerns, while allowing the CCI to tailor its information requests to the facts presented by a specific transaction and the context of the industry involved. This approach will avoid waste of resources and improve the quality of the CCI’s merger review.

The Sections offer additional specific comments regarding Form II in Appendix I to these Comments.

II. Application of the Combination Regulations to Pending Transactions

The Sections understand that the merger control provisions of the Competition Act will come into force on June 1, 2011. Regulation 28 of the Draft Combination Regulations appears to indicate that the notification requirement will apply to combinations that are pending on June 1, 2011 (*i.e.* transactions for which agreements have been entered into or signed, but that have not yet been completed as of that date).

The application of the notification requirement to transactions that are pending on June 1, 2011 would likely pose significant challenges for both parties and the Commission. Parties to transactions now scheduled to close at or shortly after June 1 could face considerable delay and uncertainty. A delay in closing can have significant detrimental effects for merging parties, including jeopardizing the consummation of the transaction, adversely affecting transition planning efforts and ongoing business operations due to workforce attrition and market place uncertainty, and deferring the realization of any efficiencies arising from the transaction.¹⁶ While these risks are inherent in a merger notification requirement, they are risks that parties to pending transactions did not have an opportunity to accommodate. For example, public companies that are parties to pending transactions commenced prior to March 1, 2011 face particular challenges because those companies will not have disclosed in their U.S. securities law filings the risk of delay due to the Competition Act merger notification requirements.

The application of the merger notification regime to all transactions pending on June 1, 2011 is also likely to place a significant burden on the Commission. All pending transactions, which in the normal course would be notified over time as agreements are signed or board approval is obtained, are likely to be notified immediately upon, or shortly following, the coming into force of the regime – a situation that could overwhelm the CCI’s resources.

Consequently, the Sections respectfully recommend that the Combination Regulations apply only to transactions that are signed or entered into after June 1, 2011. This would be the most appropriate solution for both the parties and the CCI. Such an approach would avoid delays for the parties based on the need to wait until the June 1 effective date to

¹⁶ The ICN recognizes these risks in connection with delays attendant to merger reviews in Comment 1 to its Recommended Practice IV-A.

submit a merger notification to the CCI and then await clearance by the CCI before closing the transaction. The CCI would benefit by not being subjected to an unusual volume of filings on or soon after the effective date submitted by anxious parties that had planned to close their transactions in June or July and are facing delays as a result of the newly effective merger review process in India. An alternative solution would be for the CCI and the Government of India to apply the Combination Regulations only to transactions that have not closed by August 1, 2011, enabling parties to pending deals to avoid delay either because the transactions will be closed by that date or because the parties will have been able to notify in India on or soon after June 1 and be able to complete the review process by that date. Finally, if the CCI decides that it must retain the June 1 effective date and will require filings for all covered transactions that have not been completed by that date, the CCI should begin accepting notifications in April and processing those filings so clearances can be issued beginning on June 1. This approach would reduce the delay and burden imposed on parties with pending transactions that will not otherwise be completed by June 1, 2011, while enabling the CCI to avoid a large volume of notifications being filed on or shortly after June 1.

III. Application of Notification of March 4, 2010 Exempting Acquired Entities Below Certain Sizes

Section 6 of the Competition Act focuses on “competition within the relevant market in India,” reflecting an intent that the goal is to protect competition within India. Therefore, the transactions that should be notified are those that have a local nexus to India. The Sections have previously stressed the importance of ensuring that the Indian merger control regime applies only to transactions with a material local nexus to India.¹⁷ The local nexus threshold is a core element of the ICN Recommended Practices – a key to avoiding creating unnecessary burdens for both the competition authority and the parties to M&A transactions. The Sections commend the CCI and the Government of India for the exemptions announced on March 4, 2011 as part of the process of notifying the merger provisions of the Competition Act. The Sections believe that it is important that the exemption established in the March 4, 2011 Notification, exempting from notification transactions where the enterprise being acquired “has assets of the value of not more than rupees 250/- crores or turnover of not more than rupees 750/- crores”¹⁸ (the “De Minimis Provision”), be applied in a manner that will create a meaningful local nexus threshold for the Indian merger control regime.

There are two key requirements for the De Minimis Provision to be effective. First, the provision should apply to assets/turnover in India (as opposed to worldwide assets or turnover). Unless the acquired enterprise has assets or turnover in India of at least rupees

¹⁷ See 2007 Joint Comments at 3, 4-6; 2008 Joint Comments at 3-4.

¹⁸ The Notice of the De Minimis Provision may be found at http://www.mca.gov.in/Ministry/notification/pdf/Notification_4mar2011.pdf (visited March 13, 2011). There is an ambiguity in the De Minimis Provision, in that it would be possible to interpret the Provision as exempting only the acquiring enterprise (but not the acquirer) from the notification requirements in these circumstances. The Sections suggest a clarification be made that where the acquired enterprise does not exceed these thresholds, the entire transaction is exempt from the notification requirements. If, however, the De Minimis Provision results in the acquirer, but not the acquired enterprise, being required to file a notification, the Sections request that clarification as to whether Form I is the appropriate notification form for such transactions.

250/- crores and rupees 750/- crores (approximately US\$55 million and US\$166 million),¹⁹ respectively, no merger notification should be required. Second, the exemption should apply based on the assets that are being acquired in the transaction or the shares of the entity that are being acquired rather than on a larger selling “enterprise.” If Company A (with substantial assets and turnover in India) sells assets located in Brazil to Company B and those Brazilian assets generate no turnover in India (or less than rupees 750/- crores in India), the De Minimis Provision should exempt the transaction since the transaction would lack a material local nexus to India. The Sections respectfully suggest that the provision be clarified to confirm that the De Minimis Provision applies in this manner so that the Indian merger control regime will conform to the ICN Recommended Practice regarding the establishment of material local nexus thresholds. The commentary to Recommended Practice I-B provides that:

“[t]he local nexus thresholds should also be confined to the relevant entities or businesses that will be combined in the proposed transaction. In particular, the relevant sales and/or assets of the acquiring party should generally be limited to the sales and/or assets of the business(es) being acquired.”

In addition to the ICN, the OECD has recognized the adoption of a local nexus requirement as a best practice in merger notification procedures.²⁰ The adoption of a local nexus requirement would also be consistent with the approach adopted by many other jurisdictions such as the U.S., EU, many EU member states, China, Korea and Japan. In fact, the trend has been to require the local nexus of at least two parties to the transaction before requiring notification.

The value of a local nexus requirement is borne out by the experience of jurisdictions that recently adopted a local nexus requirement. For example, in Brazil, CADE’s 2005 interpretation of the merger notification thresholds as applying to domestic turnover contributed to a 75% decrease in notified mergers, with similar reductions in the length of investigations by the SDE.²¹ In addition, changes to the notification thresholds in the Czech Republic, including the replacement of merger notification thresholds based on worldwide sales with domestic sales, resulted in a reduction of notified transactions from 239 in 2003 to 56 in 2005.²² Similarly, the head of Germany’s Federal Cartel Office indicated that the agency anticipated that the adoption of a local nexus requirement in 2009 would reduce unnecessary

¹⁹ All approximate U.S. dollar figures are based on exchange rates as of March 11, 2011, of 45.235 rupees to the dollar.

²⁰ ICN Recommended Practice I-A states that “Jurisdiction should be asserted only over those transactions that have an appropriate nexus with the jurisdiction concerned.” In addition, ICN Recommended Practice I-C states that “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.” Similarly, the Recommendation Concerning Merger Review adopted by the OECD Council states that countries should “assert jurisdiction only over those mergers that have an appropriate nexus with their jurisdiction.”

²¹ See <http://www.internationallawoffice.com/Newsletters/Detail.aspx?r=13875&i=1084305> (visited March 17, 2011).

²² See Martin Pecina, “Implementing the ICN Recommended Practices for Merger Notification and Review,” Remarks at the 6th Annual Conference of the International Competition Network, Moscow, Russia, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc425.pdf> (visited March 17, 2011).

notifications and allow the agency to devote more of its resources to addressing genuine competitive concerns.²³ Clarifying that the De Minimis Provision includes a local nexus requirement for merger notification would similarly ensure that the Commission will be able to focus its resources on reviewing transactions with a material connection to India.

Finally, the De Minimis Provision refers to the enterprise “whose control, shares, voting rights or assets are being acquired.” Section 5 of the Act applies to mergers and amalgamations as well as to acquisitions. The De Minimis Provision should be clarified that it applies to mergers and amalgamations, as well as to acquisitions, and as to how the thresholds should be calculated in such transactions.

IV. The Lengthy and Uncertain Waiting Period

The Competition Act establishes a 210-day waiting period. Parties are prohibited from consummating their transaction until the earlier of the expiration of the waiting period²⁴ or the issuance by the Commission of an order²⁵ authorizing the transaction. The Commission has ameliorated the uniquely long waiting period by requiring in the Draft Combination Regulations that it must form a *prima facie* opinion as to whether a combination is likely to cause or has caused an appreciable adverse effect on competition within the relevant markets in India²⁶ within the first 30 days following the filing of a valid notice. The Draft Combination Regulations also provide that the CCI shall endeavor to pass an order or issue direction within 180 days of the filing of such notice.

The Section has previously commented on the lengthy waiting period and the fact that there is no mechanism for distinguishing between simple transactions with no competitive concerns and more complex transactions.²⁷ The Sections appreciate the positive adjustments in the time periods made in the Draft Combination Regulations. However, although the CCI would be required to make a *prima facie* determination within 30 days, any request for additional information of the parties tolls the waiting period. Moreover, there is no assurance that a *prima facie* determination that is pro-competitive or competitively neutral will result in a transaction being cleared at that time. In addition, the 180-day period still remains unworkably long and may function as a deterrent to investment in India. Indeed, even a 180-day goal seems aspirational and there appears to be no bar to the CCI’s requiring the full 210-day statutory waiting period. Parties with transactions requiring premerger notification in India will need to

²³ See, Peter Scott, “An Interview with Bernhard Heitzer”, *Global Competition Review*, Volume 12, Issue 9, October 2009 16 at p. 17. Likewise, the Bulgarian Commission for the Protection of Competition has indicated that, prior to the adoption of a local nexus requirement (and an increase in its notification thresholds) in 2008, a majority of the mergers it reviewed were either not on a scale that could have a significant effect on competition in Bulgaria or concerned businesses that were not active in Bulgaria. See, OECD Directorate for Financial and Enterprise Affairs Competition Committee, *Global Forum on Competition Roundtable on Cross-Border Merger Control: Challenges for Developing and Emerging Economies: Contribution from Bulgaria*, DAF/COMP/GF/WD(2010)81 (December 17, 2010).

²⁴ If the 210 day waiting period simply expires, the transaction is deemed approved by the Commission.

²⁵ See Section 31 of the Competition Act.

²⁶ See Section 18 of the Draft Combination Regulations.

²⁷ See 2007 Joint Comments at 3, 6-8, 10; 2008 Joint Comments at 4-6. Moreover, both of these attributes are inconsistent with the ICN Recommended Practices.

assume that their transaction may not be able to close for almost a year when the nominal waiting periods are extended by information requests that suspend the periods.

Conclusion

The Sections hope that these suggestions are helpful to CCI and would be pleased to offer any further assistance that may be useful as CCI finalizes the Combination Regulations. The Sections recognize the substantial work that CCI has accomplished in developing the Draft Combination Regulations, and appreciate CCI's consideration of our comments and those of others as it continues with its mission to implement the Competition Act and enforce its regulations.

Appendices

- I. Comments Regarding Certain Sections of Forms I and II
- II. Comparison of India's Form II To U.S. HSR/EC Form CO/Canadian Notification Form
- III. Joint Comments of the American Bar Association's Section of Antitrust Law, Section of Business Law and Section of International Law on Proposed Draft of the Competition Commission of India (Combination) Regulations, 200_, together with 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

Appendix I

Comments Regarding Certain Sections of Forms I and II

Form I

- **Section 5(a).** This provision requires parties to “furnish copies of due-diligence exercises, reports, studies, surveys or any other document taken into account for the purpose of assessing the viability of the proposed combination.” Due diligence materials are generally unnecessary for a competitive effects analysis because (1) the overwhelming majority of transactions reported under Form I will have no impact on market structure or competition, and (2) the overwhelming majority of due diligence material will have no relevance to the Commission’s assessment of the competitive impact of a transaction. The due diligence that is undertaken in connection with a transaction mostly involves matters unrelated to competition, such as corporate diligence, credit verifications, human resources, information technology, compliance with environmental and health and safety laws, and internal controls. Further, Section 5(a) does not limit the documents required to those created in relation to the proposed combination, or to those prepared by or for the officers or directors of the combining parties. As a result, Form I would require the submission of working papers and backup materials of virtually every person working on a proposed combination. Such materials can total tens of thousands (and sometimes millions) of pages of material and would contain little, if any information relevant to the CCI’s evaluation of the proposed combination. The European Commission (“EC”), which also has a short and long form notification, requires the submission of only a much more limited set of documents with the notification.¹ Therefore, the Sections recommend the elimination of Section 5(a) from Form I (and, as discussed below, a much more targeted approach to required disclosures in Form II).
- **Section 5(b).** This section requires parties to produce, among other things, “copies of the relevant documents leading to the decision/agreement/approval”. For the same reasons the Sections recommend the elimination of Section 5(a) for Form I notifications, the Sections also recommend the deletion of 5(b).
- **Section 5(e).** This section requires parties to provide copies of Memorandum/Articles of Association/Charter/Partnership Deed/Constitution Document for each combining party. In the experience of the Sections’ members, such documents rarely play any role in competitive analysis. Therefore the Sections recommend the deletion of this section, or limiting the section to require that the companies provide only their corporate registration number or similar identifying information.

¹ The only documents that are to be provided with an EU “Short Form” notification are (i) copies of the final or most recent versions of all documents bringing about the transaction; and (ii) copies of the most recent annual reports and accounts of all the parties to the concentration. The U.S. HSR and the Canadian notification form require production only of materials relevant to a competitive analysis that were created by or for officers or directors.

- **Sections 6(c)(i) and 6(c)(ii).** These sections require parties and groups to the combination to describe their main products and services. It requires far more information than would be relevant to the competitive analysis of transactions filing Form I. The Sections suggest that the parties' annual reports will provide information sufficient for Schedule 1 transactions. Moreover, the scope of "main products and services" is unclear. These sections should be limited to products that more than one of the parties sell in India. At the least, the Combination Regulations should make clear that it is necessary to include discussion only of products or services that the parties supply in India. What the parties supply outside India would have no competitive impact in India.
- **Item 6(c)(iv).** This section requires parties and groups to list all products and services they provide other than those described elsewhere in the form. This presents a particular difficulty for businesses that have a broad scope of activities, or offer hundreds or thousands of products. For the purpose of the initial notification, a breakdown of a company's activities by business area or division, such as is done in an ordinary annual report, should be adequate for the CCI to determine whether it should seek more detailed information. Moreover, it requires information unnecessary to a competitive review of Form I transactions. The Sections suggest that this section be deleted.
- **Section 8(e).** This section requires combining parties to detail their production/distribution/supply facilities in India, including the capacities of each facility. While the Sections recognize that capacity and facility locations can be an important parameter of competition in certain industries, this information is generally irrelevant for the types of transactions subject to Form I. Moreover, the required information is often burdensome to collect. Thus, the Sections suggest that this section be deleted.
- **Section 10(d).** This section requires parties to submit copies of notification filed with other competition authorities. So far as the Sections are aware, no other competition authority in the world requires the submission of this information as part of an initial notification. Because the economic activities of parties often vary from country to country, the information contained in the notification to another jurisdiction may have little or no significance to competition analysis in India. In addition, the languages used in many notifications would in most cases not be English but, for instance, Russian, Spanish, Japanese, Chinese, Korean or German. The translation burden associated with the provision of these documents would be substantial and result in very significant costs for the notifying parties. These costs are not justified in circumstances where the information in the documents do not concern competition in India. Section 10(d) is both unnecessary and unduly burdensome, especially since, in those specific instances where the CCI determines that foreign notifications would be relevant for its analysis, it require the production of notifications to other authorities under Section 18(2) of the Regulations.

Form II

- **Section 5(a).** The Sections respectfully suggest at the least a more targeted approach, be implemented in this Section, similar to that of Section 5.4 of the EC's Form CO,²

all analyses, reports, studies, surveys, and any comparable documents prepared by or for any member(s) of the board of directors, or the supervisory board, or the other person(s) exercising similar functions (or to whom such functions have been delegated or entrusted), or the shareholders' meeting, for the purpose of assessing or analyzing the concentration with respect to market shares, competitive conditions, competitors (actual and potential), the rationale of the concentration, potential for sales growth or expansion into other product or geographic markets, and/or general market conditions. For each of these documents, indicate (if not contained in the document itself) the date of preparation, the name and title of each individual who prepared each such document.

or Item 4(c) of the Notification under the HSR Act,³

all studies, surveys, analyses and reports which were prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets, and indicate (if not contained in the document itself) the date of preparation, and the name and title of each individual who prepared each such document.

or ss.16(1)(d) of Canada's *Notifiable Transactions Regulations*,⁴

all studies, surveys, analyses and reports that were prepared or received by an officer or director of the corporation — or in the case of an unincorporated entity, an individual who serves in a similar capacity — for the purpose of evaluating or analysing the proposed transaction with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into new products or geographic regions and, if not otherwise set out in that document, the names and titles of the individuals who prepared the document and the date on which it was prepared.

² Commission Regulation No. 802/2004 (7 April 2004) ("EC Merger Regulation" or "ECMR"), Annex I, Section 5.4 (available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:133:0001:0039:EN:PDF>) (visited March 11, 2011).

³ U.S. Federal Trade Commission, "Antitrust Improvements Act Notification and Report Form for Certain Mergers and Acquisitions: Instructions", Item 4(c), available at <http://www.ftc.gov/bc/hsr/P989316PMNRulesandFormalInterpretationsElectronicSubmission-Instructions.pdf> (visited March 11, 2011).

⁴ Notifiable Transactions Regulations, available at <http://laws.justice.gc.ca/en/c-34/inex.html> (visited March 12, 2011).

The use of language similar to 5.4, 4(c) or 16(1)(d) would strike a reasonable compromise between the CCI's need for information to assess the competitive impact of a proposed combination and the parties' compliance burden. Further, adopting (in whole or in part) the language of these widely used notification forms would aid harmonization of the multijurisdictional notifications, and would be more consistent with ICN Recommended Practices.

- **Section 5(b)** fails to define what is meant by “relevant.” To the extent that the intent is to seek documents described in the bracketed language (“[Reports ... particularly highlighting the competitive situation prevailing and benefits likely to accrue on account of combining ...]”), such documents should already be captured by the amended language the Sections propose for Section 5(a).
- In **Section 6(c)**, rather than requiring information regarding each of the parties’ “main products and services,” it would be helpful to focus the information required on the products and services in which the parties compete (Item 6(c)(iii)), or which one party makes and the other party purchases. This is the approach taken in the EU’s Form CO, which requires notifying parties to submit detailed information only for “affected markets,” defined as “those relevant markets which are likely to be affected by the notified [transaction],”⁵ with reference to quantitative (market share) thresholds set in the notification form. Limiting the scope of information parties are required to submit would help the CCI focus its resources on the potential competitive concerns a transaction may raise, by avoiding the need to receive and review voluminous information that may be, at most, peripheral to any competitive issue that a transaction may raise.
- **Sections 6(c)(i) and 6(c)(ii)**. These sections require parties and groups to the combination to describe their main products and services. The Combination Regulations should make clear that it is necessary to include discussion only of products or services that the parties supply in India. What the parties supply outside India would have no competitive impact in India.
- **Item 6(c)(iv)**. This section requires parties and groups to list all products and services they provide other than those described elsewhere in the form. This presents a particular difficulty for businesses that have a broad scope of activities, or offer hundreds or thousands of products. Moreover, it requires information unnecessary to a competitive review of transactions. For the purpose of the initial notification, a breakdown of a company’s activities by business area or division, such as is done in an ordinary annual report, should be adequate for the CCI to determine whether it should seek more detailed information. At most, as in the EC’s Form CO, the information required should be limited to that related to markets in which the parties compete or have a seller-buyer relationship.
- **Section 8(e)**. This section requires parties to detail their production/distribution/supply facilities in India, including the capacities of each facility. While the Sections recognize that capacity and facility locations can be an important parameter of competition in certain industries, the required information is often burdensome to collect. Thus, the Sections suggest that this section should require only readily available information that relate at most

⁵ ECMR, Annex I, Section 1.6.

only to those product or services where the proposed combination may have an impact on the competitive market structure (*i.e.*, the products and services of one combining party that are similar, identical or substitutable for those of the other combining party).

- **Section 10** is another instance of the potential overbreadth of the term “main products and services”, which ostensibly limits the scope of information that is required to be provided. For example, the request for “selling aids” (Item 10(a)(i)) could, for a notification submitted by a multi-product company such as Tata, General Electric, or Hitachi, require a response of hundreds of thousands of pages of marketing materials. A careful response to Item 10(f), regarding initial investment and stranded costs and exit, could require extensive economic analysis. Item 10(g), requesting price lists, seeks information can be difficult to obtain across a large company’s various businesses, and may be mostly irrelevant in the context of a transaction where the horizontal overlap between acquirer and target is only a small portion of each company’s business or revenues. Item 10(g)(ii) requests competitor pricing information and marketing documents. Presumably, this request seeks information that the parties have obtained through public sources, as sharing this information between competitors could itself raise serious antitrust concerns. Item 10(h) seeks information regarding future prices that the parties are unlikely to be able to predict accurately.
- **Section 11** suffers from similar overbreadth and burdensomeness. There is little justification for requiring such data production in an initial notification. An example is Item 11(d)(ix)(i), which requires a minimum viable scale analysis. Such an analysis requires the estimation of entry costs (and how they vary with output), future pricing, future profitability, and competitive responses of existing firms. For mergers in the consumer goods sector, compliance with Item 11(e)’s requirement to provide maps with the location of all distribution facilities will be difficult, particularly for companies that sell products through multiple levels of distribution and do not know the identity of every retailer in India that carries their products. Item 11(h)’s requirement to provide documents concerning transport costs incurred in the distribution of main products could also require the production of large amounts of data. Item 11(j) asks about competitors’ “pipeline products” or plans to expand capacity, information which, if a competitor has not disclosed it publicly, is unlikely to be accessible to the parties and which the parties may be reluctant to share in detail, even with each other.
- **Section 13(d)** seeks detailed information concerning other notifications that the parties may have made in connection with the transaction. Certainly the fact that a transaction is subject to review in other jurisdictions is something that the CCI would legitimately want to know, but, as discussed regarding Form I, requiring every notifying party to provide every notification it has filed elsewhere may require the production of voluminous data, none of which will be relevant to competitive conditions in India. This requirement is inconsistent with that of other major jurisdictions.

Appendix II

COMPARISON OF INDIA’S FORM II TO U.S. HSR/EC FORM CO/CANADIAN NOTIFICATION FORM

Information Required	United States HSR	European Commission Form CO	Canadian Competition Bureau Notifiable Transactions Form	Indian Form II
Party identification.	Section 1 requests the name and address of the party filing the notification.	Section 2 requests the name and contact information of the parties to the transaction.	Section 1 requests the name and contact information of the party filing the notification.	Section 4 requests the name and contact information of the party filing the notification. <u>Section 5(e) then requests the incorporating statutes of all parties to the transaction.</u>
Parties’ internal documents.	Section 4(c) requires parties to provide internal documents related only to competitively relevant topics, prepared by or for officers or directors.	Section 5(4) requires parties to provide internal documents related only to competitively relevant topics, prepared by or for officers or directors, or their delegates, or for shareholders’ meetings.	Section 6 requires parties to provide internal documents related only to competitively relevant topics, prepared by or for officers or directors.	Section 5 requires parties to provide all due diligence and internal documents “taken into account for the purposes of assessing the viability of” the transaction, but is <u>not</u> limited to competitively relevant topics. Very broad, as it includes all due diligence documentation (e.g., environmental reports, corporate diligence, etc.). No limit on class of employee from whom the requested documents must be collected.
Description of the products and/or services supplied by the parties.	Section 5 requires parties to identify the classes of their products/services according to standardized government code.	Section 6 requires descriptions of antitrust markets,	Section 4.3.2 requests a summary description of the principal categories of products produced by the parties. Products not relevant to the assessment of the competitive impact of the transaction may be excluded.	Section 6(c) requires parties to provide information about the main products supplied by the parties and their corporate groups, as well as a list of all other products other than the main products. Products irrelevant to the assessment of the competitive impact of the transaction <u>may not</u> be excluded.
Detailed information about the products or services supplied.	Section 5 requires turnover information for the products listed; section 7 requires the parties to identify by standardized government codes the businesses from which both parties earn revenues.	Only for those products where the transaction creates horizontal or vertical relationships above certain market share thresholds, Sections 7 and 8 request (1) turnover and market share data, (2) lists of competitors,	Only for those products described in Section 4.3.2, Section 4.3 requests turnover as well as lists of customers and suppliers and their contact information.	Sections 10 and 11 request information about the main products supplied by the parties, <u>regardless of their relevance to the competitive assessment of the transaction.</u> The requests are substantially broader than Sections 7 and 8 of the Form CO, and include requests for speculative information and documents that could

Information Required	United States HSR	European Commission Form CO	Canadian Competition Bureau Notifiable Transactions Form	Indian Form II
	The parties are required to provide additional information about the geographic locations of their operations relating to these overlapping codes.	customers and suppliers and their contact information, and (3) certain information about demand and supply.		possibly be illegal to obtain (<i>e.g.</i> , future pricing plans and competitor pricing plans and price lists).
Information about filings in other jurisdictions.	Optional request to provide list of jurisdictions requiring filings.	No such request.	Section 3 requests a list of jurisdictions in which competition filings were made in respect of the transaction, and the dates of those filings.	Section 13(d) requests a list of all jurisdictions in which <u>any filings (not limited to competition filings)</u> made in respect of the transaction, as well as copies of those notifications.
Irrelevant information.	Information for all sections must be provided, but the HSR Form is substantially shorter than both Form I and Form II.	The Commission's practice is to agree to waivers with the parties as regards information that is not necessary for the review; this occurs frequently and in pre-notification contacts.	Section 116(2) of Competition Act allows parties to omit information (under oath) on the basis that the information could not, on any reasonable basis, be considered relevant to the Commissioner's assessment of the proposed transaction.	Form II does not indicate any mechanism for avoiding having to respond to each and every question for every reportable transaction, no matter how irrelevant the information to the authority's assessment of the transaction. Instead, only in the case where "authentic" information is not available, parties are required to provide their own estimates. The inability to avoid having to provide irrelevant information is particularly burdensome due to the lengthy nature of Form II.
Information not known or reasonably obtainable or cannot be provided because of privilege or confidentiality	HSR permits parties to provide a statement of non-compliance explaining lack of data and best estimates if precise data not available. Privileged documents may be withheld if a privilege log is provided to the agency.	The form does not explicitly address these items, but in practice such information is excluded. Especially legally privileged information is never provided	Section 116(2) of Competition Act allows parties to omit information (under oath) on the basis that the information is not known or reasonably obtainable, or cannot be supplied because of privilege or confidentiality requirements.	Form II does not indicate any mechanism for avoiding having to provide information not known or available or that cannot be provided for confidentiality or privilege reasons.

**Joint Comments of the American Bar Association’s
Section of Antitrust Law, Section of Business Law and Section of International Law
on
Proposed Draft of the Competition Commission of India (Combination) Regulations, 200_**

Further to our comments (“Initial Comments”) dated November 15, 2007, regarding Implementing Regulations for and Amendments to the Merger Control Provisions of India’s Competition (Amendment) Act, 2007 (the “Act”), the Section of Antitrust Law, the Section of Business Law and the Section of International Law (together, the “Sections”)* of the American Bar Association respectfully submit these comments on aspects of the Proposed Draft of the Competition Commission of India (Combination) Regulations, 200_ (“Draft Combination Regulations”).¹ 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. We also offer comments on certain aspects of the Proposed Draft of Competition Commission of India (General) Regulations, 200- (“Draft General Regulations”) that may affect merger control and the operation of the Draft Combination Regulations.

The Sections recognize that the Competition Commission of India (the “Commission”) has been making substantial efforts to consult with stakeholders within and outside of India regarding the Act and the competition enforcement regime in India. We appreciate the

* The members of the Working Group that drafted these comments are Yee Wah Chin, Paul S. Crampton, Snehal Patil, and Pooja Thakur, with comments from Michael H. Byowitz, Rebecca P. Dick, Adrian Emch, Dorothy Fountain, H. Stephen Harris, Jr., Ronan Harty, Navin Joneja, Stephen Kinsella, Elizabeth Kraus, David Schwartz, Ronald Stern, and Mark Whitener. The views expressed herein do not necessarily reflect the views or opinions of the professional organizations with which the members of this Working Group are affiliated.

¹ The Draft Combination Regulations recently were posted for comment on the website of the Competition Commission of India at <http://www.competition-commission-india.nic.in/>.

Commission considering our Initial Comments² and the comments submitted by others since the enactment of the Act. The Sections welcome the Commission's efforts and appreciate this opportunity to comment upon the Draft Combination Regulations and Draft General Regulations. We would be pleased to provide any additional comments, or to participate in consultations with the Commission, as appropriate.

As noted in the Initial Comments, the Sections have substantial expertise in the law in the United States, and have substantial familiarity with antitrust/competition law, particularly as it relates to merger control, internationally. The Sections' comments reflect this experience and draw on it and the *Guiding Principles and Recommended Practices for Merger Notification and Review Procedures* ("Recommended Practices")³ adopted by the International Competition Network ("ICN"), as relevant.

1. Summary

The Initial Comments offered suggestions regarding how implementing regulations could address concerns raised by the Act in the following four areas of merger control, which the Sections considered to be most urgently in need of further consideration: (1) transactions that have no or *de minimis* connection with India; (2) the 210-day "suspensive" waiting period, especially as it might relate to transactions having no or little local nexus to India and/or no or insignificant competitive impact in India; (3) the timing of notifications; and (4) the burden of notification, especially for non-problematic transactions. Although the Sections believe that the

² A copy of our Initial Comments is annexed as the Appendix to these comments for the Commission's convenience.

³ See *International Competition Network, Guiding Principles and International Competition Network, Recommended Practices for Merger Notification Procedures*, available at <http://www.internationalcompetitionnetwork.org/media/archive0611/icnmpguidingprin.htm> <http://www.internationalcompetitionnetwork.org/media/archive0611/mnprecpractices.pdf>.

optimal manner in which to address these issues would be through further amendments to the Act, the Sections understand that this may not be realistic before the merger notification regime comes into force later this year, and welcome the Commission's steps to address these issues in the Draft Combination Regulations.

In the Sections' view, the Draft Combination Regulations resolve in whole or in part many of the concerns raised in the Initial Comments. There remain some concerns regarding transactions with little nexus to India, the waiting period for non-problematic transactions, the timing of notification, and the burden of notification, discussed below. Further, the Sections note certain additional concerns raised by the Draft Combination Regulations provisions with respect to *de minimis* acquisitions, filing fees, notification of changes and confidentiality treatment accorded the parties' information.

2. Nexus with India

The Sections welcome Regulation 5(2)(iii) of the Draft Combination Regulations, which would provide an exemption⁴ for proposed combinations in which each of at least two of the parties do not have either assets in India of rupees five hundred crores (approximately US\$51 million), or turnover in India of at least rupees fifteen hundred crores (US\$153 million); it appropriately addresses a substantial portion of the concerns raised in the Initial Comments regarding transactions with no significant nexus to India.⁵ However, Regulation 5(2)(iii) does not address transactions in which the parties' aggregate assets in India exceed rupees one

⁴ Regulation 5 identifies "Categories of transactions not likely to have appreciable adverse effect on competition in India." The Sections understand the intent of Regulation 5 to exempt these categories of transactions from notification, and suggest that, to the extent practicable, Regulation 5 expressly establish such an exemption. *See* Initial Comments, p. 13.

⁵ Regulation 5(2)(iii) addresses transactions of the types identified in Section 5(a)(i)(B), 5(a)(ii)(B), 5(b)(i)(B), 5(b)(ii)(B), 5(c)(i)(B), and 5(c)(ii)(B) of the Act, where the parties' worldwide assets or turnovers together with their aggregate assets or turnovers in India would otherwise trigger notification.

thousand crores or turnovers in India exceed rupees three thousand crores.⁶ Therefore, notification would be required for a transaction in which a business with assets in India exceeding rupees one thousand crores acquires a business with no assets or turnover in India at all.

The Sections urge revision of the Draft Combination Regulations to include an exemption for transactions within Section 5(a)(i)(A), 5(a)(ii)(A), 5(b)(i)(A), 5(b)(ii)(A), 5(c)(i)(A), and 5(c)(ii)(A) of the Act, in which only one of the parties has a minimum level of assets or turnover in India. With this additional provision, the Sections believe that the thresholds would create a “nexus” requirement that is consistent with the ICN’s Recommended Practices.⁷

3. Waiting Period For Non-Problematic Transactions

The Sections welcome the Commission’s establishment of 30-day and 60-day periods in which it will form a *prima facie* opinion regarding a transaction. (Regulation 27(2).) These time limits alleviate much of the Sections’ concern with the 210-day waiting period established in the Act,⁸ and we appreciate the Commission taking these concerns, expressed by us and others, into account in developing the Draft Combination Regulations. However, with respect to the waiting period applicable to transactions that are not likely to have a significant impact on competition in India, based on our understanding of the Draft Combination Regulations, the only manner in which merging parties can be assured that their proposed transaction will be approved within 30 days is if they submit the information described in Form 1 of the Draft Combination Regulations, which contemplates the provision of substantially more information than Form 2. By comparison, if merging parties elect to file Form 2, Regulation 27(2)(a) of the Draft Combination

⁶ See Section 5(a)(i)(A), 5(a)(ii)(A), 5(b)(i)(A), 5(b)(ii)(A), 5(c)(i)(A), 5(c)(ii)(A) of the Act; Initial Comments, pp. 4-6.

⁷ See Recommended Practices 1A, 1B and 1C.

⁸ See Initial Comments, pp. 6-8.

Regulations would not require the Commission to reach its *prima facie* opinion until 60 days after the receipt of the form.

This longer waiting period applicable to the shorter notification form is burdensome to parties and may not benefit significantly the Commission's review of transactions. The Sections are unaware of other jurisdictions that permit merging parties to elect between submitting an initial long-form notification and a short-form notification, and require a longer waiting period in connection with a short-form notification.⁹ The Recommended Practices suggest a "multi phase" notification process, with a short initial review period (of six weeks or less) for non-problematic transactions that may be followed by an extended period on a finding of potential competitive concerns.¹⁰ Such a system has worked well in the United States, European Union and Canada, among other jurisdictions, both large and small. The experience of the Sections' members is that if a transaction clearly is unlikely to have significant adverse competitive effect, a fairly small set of data will suffice to confirm that. In such cases, a short review period of a small set of crucial data would be all that is needed for the Commission to screen out transactions that raise no antitrust interest from those as to which more information is required. The extensive information required in Form 1 to qualify for a shorter review period would burden the Commission with the review of extraneous data and the parties with compiling that data.

Another reason to shorten the period for reviewing Form 2 is the Commission's flexibility to require the notifying parties to provide additional information. (The Act Section 29(4); Draft Combination Regulations 26, 40.) This ability gives the Commission the effective

⁹ It is worth noting that Canada, which has extensive experience with short and long form notifications, opts for a shorter waiting period for the shorter form and a longer waiting period for the longer form.

¹⁰ See Recommended Practice IVB, IVC.

power to extend the review period as needed. As a result, we recommend shortening the waiting period for Form 2 to no longer than 30 days, as the Commission may assure itself a longer period of review in appropriate cases by requiring the provision of additional information. Moreover, the Commission may profitably establish and take advantage of a pre-notification consultation process to clarify timing and information needs with parties, to further ensure that the Commission will receive the information needed to make an informed decision within 30 days.

The Sections encourage the Commission to revisit this important matter, so that parties to multinational transactions are not required to file substantially more information in India than elsewhere in order to obtain approval in India within the same waiting period (generally approximately 30 days) that is applicable to transactions raising insignificant competition issues in the European Union, the United States, Canada, and elsewhere. In all events, after some experience, the Commission may wish to consider amendments to the Act in light of experience and to bring India's process closer to international best practices.

4. Timing of Notification & Definition of Triggering Event

Regarding the timing of notifications, the Sections welcome the Commission's expressed intention to be reasonable and flexible. (Regulation 18.) The Sections observe that subregulation 19(2) of the Draft Combination Regulations would permit the Commission, in its discretion, to admit a notice beyond the thirty day period set forth in subsection 6(2) of the Act (in which a notification must otherwise be made), although that would not affect the potential exposure of the notifying party to a penalty of up to one percent of its total turnover, under section 43A of the Act.¹¹

The Sections strongly encourage the Commission to incorporate into the final

¹¹ As suggested in our Initial Comments (pp. 8-9, 13-14), amending the Act to eliminate the filing deadline in this suspensive regime would bring the Act into greater conformity with the Recommended Practices.

Combination Regulations, pursuant to its residual authority under Section 62(2)(h) of the Act, greater flexibility as to when notification may be made to the Commission. As noted in the Initial Comments and in the Recommended Practices,¹² given that the Act establishes a suspensive notification regime, it is in the merging parties' strong interest to notify the Commission as soon as practicable, rather than having to wait until a defined "triggering event." If the Commission concludes that it is not possible to achieve greater flexibility regarding when the formal notification may be made, then, at a minimum, and as suggested in the Recommended Practices, the Sections suggest that the Commission "accord the parties the opportunity for confidential pre-notification consultations to present and discuss the proposed transaction in advance in order to facilitate timely submission and review of the formal notification."¹³

As to the particular "triggering event" set forth in subsection 6(2) of the Act and Draft Combination Regulation 6(2), the Sections underscore the views expressed in the Initial Comments regarding the need for greater certainty in this test.¹⁴ As presently drafted, it is not clear whether the applicable triggering event would be the execution of a confidentiality agreement, a "term sheet," a letter of intent or the definitive acquisition or agreement between the parties. It also is unclear whether it is the earlier or the later of the enumerated events that triggers the time for notification.

5. Suggestions to Reduce the Burden of Notification

With respect to the burden of notification, particularly for non-problematic transactions, the Sections note that Form 2 is consistent in many respects with initial notification requirements of other jurisdictions. A noteworthy exception is the absence of any mechanism to allow the

¹² See Recommended Practice IIIB, Comment 1.

¹³ See Recommended Practice 3A, Comment 4.

¹⁴ See Initial Comments, pp. 3, 8-9.

merging parties to omit any information that is not known or reasonably obtainable, or that cannot be obtained without creating a significant risk that confidential information will be disclosed beyond the Commission and/or susceptible to misuse.

As an initial matter, the Commission may want to establish, as part of a pre-notification conference/consultation procedure, the opportunity for parties to raise such issues and to seek guidance as to how to comply with the Act in the circumstances. After more experience, the Commission may wish to consider a more formal mechanism to address these and related concerns. For example, the United States permits parties to provide a statement of non-compliance explaining the lack of data and best estimates if precise data are not available.¹⁵ Moreover, Section 116(2) of Canada's Competition Act allows notifying parties to omit information on the basis that the information could not, on any reasonable basis, be considered relevant to the determination of whether the proposed transaction is likely to have an appreciable adverse effect on competition within Canada, and this mechanism has been invoked without adverse effect on Canada's merger control enforcement.

The particular requirement in Item 13 of Form 2 for data regarding "total capacity...in India...for all the enterprises in the group" appears both burdensome and unlikely to produce useful information. It apparently requires "total capacity" data relating to all products of any enterprise in the "group" to which a party belongs, regardless of whether the products have any potential competitive significance to the transaction. This aspect, together with the broad definition of "group" discussed below, is likely to generate materials of marginal utility to the Commission while burdening the parties with a substantial data gathering exercise. The Sections suggest that Item 13 be revised to limit the data required to that for products of potential

¹⁵ See 16 C.F.R. §§ 803.2, 803.3; Instructions to HSR Notification and Report Form.

competitive significance to the transaction (*i.e.*, those in which the parties have a competitive or potential supplier-customer relationship) that one or more of the parties manufacture or sell in India.

The Sections suggest that the requirements to provide copies of notifications filed in other jurisdictions as well as orders or judgments issued in relation to “the ‘combining enterprises’ on a competition issue by any Competition Authority/Court/Tribunal/Government in the last 5 years” might be streamlined by, in the first instance, requiring only that the fact of notifications in other jurisdictions be disclosed and, in the second, limiting the orders and judgments to be produced to those that relate to the notified transaction specifically or in the last five years to the products of potential competitive concern. The current breadth of the requirement may be very burdensome to parties and provide the Commission with little additional useful information.

The Sections’ comments with respect to Form 2 apply with equal force to Form 1. In addition, Form 1 would require extensive information with respect to non-overlapping products of the merging parties, *e.g.*, production capacities and capacity utilization levels (Item 12) and considerable information described in Items 20 and 21. The information required for Form 1 is far beyond that suggested in the Recommended Practices, that initial notifications be limited to information needed to verify that the transaction is notifiable and to determine whether the transaction raises competitive issues that merit further investigation.¹⁶ If the Commission retains Form 1, the Sections suggest that it consider requiring it only in the event that the Commission’s review, following the submission of Form 2, indicates that further investigation is called for.¹⁷

¹⁶ See Recommended Practice IVC, Comment 2; ICN, Implementation Handbook for Merger Notification and Review Procedures, Chap. 4 (April 2006) at http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/ImplementationHandbookApril2006.pdf; Initial Comments, pp. 3, 10, 12-13.

¹⁷ This is the procedure presently followed in Canada, which allows the parties to choose initially to file a short form

Alternatively, the Commission could develop a pre-notification consultation procedure during which guidance may be provided as to the extent to which Form 1 must be completed in the particular circumstances.¹⁸

The Sections also note that clause (b) of the Explanation to Section 5 of the Act provides that “group” means

- two or more enterprises which, directly or indirectly, are in a position to —
- (i) exercise twenty-six per cent. or more of the voting rights in the other enterprise; or
- (ii) appoint more than fifty per cent. of the members of the board of directors in the other enterprise; or
- (iii) control the management or affairs of the other enterprise;

The determination of when an entity has the ability to “control the management or affairs of” another entity may not always be readily made. It may therefore make it difficult for an entity to determine the scope of the “group” subject to the Act and for which information must be provided.

Given these uncertainties, once the Commission has accumulated sufficient experience in enforcing the provision, it may consider whether this is an area that may benefit from legislative amendment, to delete (iii) and thus to decrease the uncertainty for businesses seeking to comply with the law. In the interim, the Sections suggest that the Commission consider establishing a

or long form. If a short form is chosen, and the Canadian competition authority determines that further investigation is warranted, the parties must file a long form and observe a longer waiting period.

¹⁸ For example, the Sections submit that the extensive information that is required in Form 1 with respect to other entities in the same “group” as the notifying party may be both burdensome to the party and inundate the Commission with material of marginal relevance. Information may be provided regarding products that have little competitive relevance to the transaction and with respect to entities that are not involved in any of the goods or services that are of potential competitive impact. As with Form 2, the Sections suggest that the Commission consider limiting the requirements of Form 1 to those entities in the “group” that produce products that compete with those of the other party or that supply products to, or purchase products from, the other party to the proposed transaction or any of its competitors. Similarly, information required in respect of entities within the same group as the notifying party that do not produce products described above (*i.e.*, competitively overlapping, functionally equivalent or vertically related products) might be limited to the names of those entities and a very brief description of the products produced or distributed by those entities without affecting the effectiveness of the Commission’s investigation.

pre-notification consultation process during which guidance may be provided as to the scope of the “group” for which information would be required. In the alternative, the final Combination Regulations might apply the notification requirements of the Forms, particularly Form 1, only as to entities that are members of groups by virtue of (i) and (ii) of clause (b) of the Explanation to Section 5 of the Act, and not to those entities that are members of groups only by virtue of (iii) of clause (b).

As to both Form 1 and Form 2, the Sections suggest that the Commission substitute references to “main products” and “Accounting Standard 17 (of India) or International Accounting Standard 14,” with references to products in the “ordinary course of business,” a term used in the Draft Combination Regulations that avoids introducing additional terms that are not readily susceptible to definition (“main products”) and/or may not be relevant to an economic analysis (accounting standards). Similarly, we encourage the Commission to clarify that references in the final Combination Regulations to “other products” should be interpreted to mean other classes of products in which the parties are competitors, so that the merging parties are not required to develop a list of their entire product lines, which may be thousands of individual stock keeping units of little or no competitive relevance to the transaction. In many cases, references to the parties’ websites or annual reports will provide sufficient information for the Commission’s initial investigation.

6. Other Issues Raised by the Draft Combination Regulations

a. De Minimis Share Acquisitions

Regulation 5(2)(i) of the Draft Combination Regulations exempts from notification

an acquisition of shares or voting rights...solely as an investment or in the ordinary course of business, of not more than twenty six percent of the total shares or voting rights of the company, of which shares or voting rights are being acquired, directly or indirectly or in accordance with the execution of any

document including a share holders' agreement or articles of association, not leading to control of the enterprise whose shares or voting rights are being acquired;

This proposed exemption would incorporate a *de facto* control test as well as a “solely as an investment” test into the proposed 26% voting interest bright line test. As noted above, a *de facto* control standard is a difficult one to implement and creates uncertainty for businesses seeking to comply with the law. The experience in the United States under the Hart-Scott-Rodino Antitrust Improvements Act, which exempts from notification certain transactions “solely for the purposes of investment,” indicates that such a test requires an evaluation of subjective intent that in contentious cases cannot be made without a fact-based investigation.¹⁹

In the interest of achieving greater certainty regarding when a notification may be required, the Sections suggest that the Commission consider omitting the *de facto* control and “solely as an investment” tests from the final Combination Regulations. To lessen the potential that, without these two tests, transactions likely to have adverse competitive impact would be exempt from notification, the Sections suggest that, instead, the bright line threshold may be reduced from 26%.²⁰ Regulation 5(2)(i) would provide instead

an acquisition of shares or voting rights by the parties, referred to in sub-clause (i) or (ii) of clause (a) of section 5 of the Act ~~, solely as an investment or in the ordinary course of business,~~ of not more than ~~twenty-six~~ [___] percent of the total shares or voting rights of the company, of which shares or voting rights are being acquired, directly or indirectly or in accordance with the execution of any document including a share holders' agreement or articles of association, ~~not leading to control of the enterprise whose shares or voting rights are being acquired;~~

¹⁹ A number of enforcement actions under the HSR Act arose out of the application of the investment exemption. See, e.g., *United States v. Smithfield, Inc.*, No. 2:04cv526 (E.D. Va. filed Nov. 12, 2004); *United States v. Manulife Financial Corporation*, No. 1:04CV00722 (D.D.C. filed May 3, 2004).

²⁰ The Sections do not suggest a specific threshold lower than 26%, because there is no consensus among jurisdictions as to the level at which such a threshold should be set. The U.S. has a 10% cap for transactions to be exempt under the investment exemption. 16 C.F.R. §802.9.

b. **De Minimis Asset Acquisitions**

Regulation 5(2)(ii) of the Draft Combination Regulations exempts from notification

an acquisition of assets...not directly related to the business activity of the party acquiring the asset or made solely as an investment or in the ordinary course of business, not leading to control of the enterprise whose assets are being acquired except where the assets being acquired represent the entire business operations in a particular location or for a particular product or service of the enterprise, of which assets are being acquired, irrespective of whether such assets are organized as a separate legal entity or not;

The provision of an exemption from notification for de minimis asset acquisitions is helpful. However, a number of the concepts on which the definition, as currently drafted, relies pose interpretative difficulties. For example, as noted above, the test of “solely as an investment” requires an evaluation of subjective intent that in contentious cases cannot be made without a fact-based investigation. In addition, the criterion of “not leading to control of the enterprise whose assets are being acquired” has the same difficulties as the *de facto* control test discussed above. The standard of “not directly related to the business activity of the party acquiring the asset” also may be difficult to apply. If the intent is to cover competitive activities or supplier or customer relationships, then it may be more effective to state that directly. Finally, the requirement in the carve out to the exemption for de minimis asset acquisitions that the assets being acquired do not “represent the *entire* business operations in a particular location or for a particular product or service of the enterprise whose assets are being acquired” may be too rigid. With the standard of “entire,” a party in theory could acquire 99% of the business operations in a particular location or for a particular product or service but still claim that the de minimis exception applies.

This potential concern could be eliminated by revising the language to read “all or substantially all of the business operations.” A number of jurisdictions address this concern by

applying their merger review regime to acquisitions of assets that are less than all of the business operations at a particular location or for a particular product. The United States, for example, excludes from its ordinary course of business exemption “[a]n acquisition of all or substantially all the assets of an operating unit,” defining “operating unit” to mean “assets that are operated by the acquired person as a business undertaking in a particular location or for particular products or services, even though those assets may not be organized as a separate legal entity.” 16 C.F.R. §802.1(a). In Canada, where the applicable thresholds are met, the merger notification regime applies to a “proposed acquisition of any of the assets in Canada of an operating business” with an exception for acquisitions of real property or goods in the ordinary course of business if the person proposing to acquire the assets would not, as a result of the acquisition, hold “all or substantially all of the assets of a business or of an operating segment of a business.” (Cdn. Competition Act, ss. 110(2); 111(a).)

c. **Filing Fees**

Pursuant to subregulation 12(2)(a) of the Draft Combination Regulations, a filing fee of rupees twenty lacs (approximately US\$51,000) will be required to be submitted at the time that Form 1 or Form 2 is filed. Subregulation 12(2)(b) would then require a second fee, in the same amount, to be submitted together with the response to any notice to show cause that is issued under subsection 29(1) of the Act. Subregulation 12(2)(c) would then appear to require a third fee, again in the same amount, to be submitted along with the proof of publishing details of a combination under subsection 29(2) of the Act.

This structure may well put the Commission in a position in which it may be perceived to have a financial incentive to issue a notice under subsection 29(1), regardless of how *bona fide* the concerns that led to the issuance of that notice may have been. The Sections note that other

authorities around the world that charge a filing fee have sought to avoid this perception by establishing either a single filing fee, or a filing fee that is a function of the size of the transaction.²¹

d. Intimation of Changes

Subregulation 22(1) of the Draft Combination Regulations requires notifying parties to “inform the Commission of any change in the information provided in the notice to the Commission at the earliest [sic] during the continuation of the proceedings under the Act.” Subregulation 22(4) then permits the Commission to invalidate the notification if it concludes that “the change is likely to significantly affect the factors for the determination of the appreciable adverse effect on competition.” In addition, subregulation 22(6) would require the filing fee to be forfeited in such situations.

The Sections submit that the breadth of subregulation 22(1) (“any change” must be notified, regardless of substance) and the potentially draconian results of any notification of change provided in subregulations 22(4) and 22(6) may in some circumstances be counterproductive. For example, such a requirement reduces the incentives of parties to advise the Commission of changes that they would otherwise freely bring to its attention in view of the risk that notification may result in invalidation of the original notification and forfeiture of the filing fee. Other jurisdictions have developed effective, less severe, approaches to address these issues. In the United States, for example, parties may remedy deficient notifications and suffer only having the waiting period begin anew as of the cure of the deficiency. 16 C.F.R.

²¹ See ICN, Merger Notification Filing Fees: a Report of the International Competition Network (April 2005), available at http://www.internationalcompetitionnetwork.org/media/archive0611/filing_fees_rpt.pdf For example, in the United States, the filing fee is on a graduated scale, based on the value of the transaction that is adjusted annually, subject to inflation. Currently, the fee is \$45,000 if the transaction is valued at greater than \$63.1 million but less than \$126.2 million, \$125,000 if the transaction is valued at \$126.2 million or greater but less than \$630.8 million; and \$280,000 if the transaction is valued at \$630.8 million or greater. <http://www.ftc.gov/bc/hsr/filing2.shtm>

§803.10(c)(2).

With regard to the Act, the Sections suggest that, to avoid these issues, the Commission may wish to incorporate a “substantial compliance” test into subregulation 16(3) of the Draft Combination Regulations regarding defects in notices, and then to replace the proposed language in subregulation 22(4) with a test based on whether the new or updated information is such that the Commission would not have found the initial notification to have been in “substantial compliance” with the requirements of the applicable form.

Alternatively, another, more flexible approach would be based on the timing of the notice of any changes. For example, if a change was notified within the first 30 days of the original notification, no more action may be needed than to extend the investigation beyond 30 days. On the other hand, if a change is notified later in the review period, and was a development that significantly affects the competitive analysis, then it may be appropriate and necessary either to issue a notice to show cause under Section 29 of the Act, or to treat the notice as no longer valid.

As to the filing fee, the Sections suggest that, while it may be forfeited if the notice is determined to be no longer valid, a new filing fee be waived if the parties file a new notification within a short time of the invalidity determination. Otherwise, the Commission may be perceived to have the motive of generating additional filing fees by determining notifications to be invalid and requiring new notifications with filing fees. The United States has taken an analogous approach whereby parties may in certain circumstances withdraw premerger notifications and file new notifications within 48 hours without an additional filing fee.²²

e. Confidentiality

Regulation 55 of the Draft Combination Regulations provides for requests for

²² FTC HSR FAQs 12, <http://www.ftc.gov/bc/hsr/faq.shtm>

confidential treatment, with reference to the provisions of the Draft General Regulations. The Sections welcome the provisions for confidential treatment of parties' sensitive information, and suggest that the scope of the confidentiality granted should generally be broader than the default provided in Regulation 55. In particular, the Sections suggest that the Commission consider revising the draft regulation to provide that confidential treatment requires non-disclosure by the Commission to any person or entity outside of the Commission, and, if possible, to persons within the Commission who are not involved in the investigation of the notified transaction, unless expressly decided otherwise by the Commission with stated reasons or ordered by a court in the specific instance.²³

The Draft General Regulations provide that requests for the preservation of the confidentiality of information provided to the Commission "may be made only if making the document or documents or a part or parts thereof public will result in disclosure of trade secrets or destruction or appreciable diminution of the commercial value of any information or can be reasonably expected to cause serious injury." (Draft General Regulation 38(3).) The Sections suggest that the definition of the types of materials eligible for confidential treatment should include oral statements and other non-documentary materials.²⁴ Moreover, confidential business information that may not be deemed trade secrets, such as the parties' business plans or costs,

²³ Subclause (3) of Regulation 55 of the Draft Combination Regulations provides that "The Commission or the Director General...may exchange the information with other competition authorities with whom the Commission has a Memorandum of Understanding or agreement for exchange of such information." Subclause (4) of Regulation 55 states that "Where the Commission or the Director General...desires to exchange information with other competition authorities, a waiver from the parties to the combination shall be obtained." If the effect of the two subclauses together is that no disclosure may be made to other competition authorities without a waiver by the parties, that would ensure greater protection of the parties' confidential information.

²⁴ Regulation 44(2) of the Draft General Regulations, providing that "the Commission or the Director General...may: (a) admit evidence taken in the form of verifiable transcripts of tape recordings, unedited versions of video recording, electronic mail...as documentary evidence" would seem to imply that oral statements might be eligible for confidentiality. However, Regulation 46(1) refers to "evidence, either oral or documentary," which would seem to indicate that disparate treatment may be appropriate. Therefore, it would be preferable to make explicit the availability of confidential treatment to materials not in paper form.

should also be eligible for confidentiality protection, and thus, the Sections recommend that confidentiality protection be broadened to cover confidential business information more generally. The Sections also observe that making information available to others short of the public may nonetheless result in “disclosure of trade secrets or destruction or appreciable diminution of the commercial value of any information or can be reasonably expected to cause serious injury.” For example, if in interviewing a competitor in the course of investigating a transaction, a party’s information is disclosed to the competitor, injury may occur even though the disclosure is not to the public.

Moreover, documents containing confidential information must be marked “restriction of publication claimed,” “in red ink on top of the first page and the word ‘confidential’ clearly and legibly marked in red ink near the top of each page,” and a public version must be made available. (Draft General Regulation 38(5).) While it is desirable as a general rule to require clear identification of confidential material, the Sections suggest that some flexibility be included in the process as regards these provisions. For example, it is not uncommon that large volumes of materials must be assembled and disclosed within a short time in the course of an investigation. In such circumstances, rather than delay disclosure, and therefore the investigation, by the detailed marking of all confidential materials, it may be desirable to provide that such markings and public versions be supplied within a specific and reasonable time following the disclosure of the materials. In addition, the Sections suggest that provision be made for designation of materials other than documents as confidential.

Finally, the Sections suggest that Regulation 55(2) of the final Combination Regulations be broadened to make confidentiality available for information provided in Form 3, to accord the same protection to those materials as to information submitted under Forms 1 and 2.

Conclusion

We hope these suggestions are helpful and we would be pleased to offer any further assistance that may be helpful as India further develops its competition law regime. The Sections recognize the substantial work the Commission has performed in addressing the challenging issues of implementing the Act and developing an entire enforcement regime, and appreciate the Commission's consideration of our comments and those of others as it proceeds with its work.

March 12, 2008

Appendix

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

**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

* The members of the Working Group that drafted these comments are Yee Wah Chin, Mark C. Katz, R. Shyam Khemani, Snehal Patil, Tony Reeves, J. William Rowley, David A. Schwartz, Pooja Thakur and Mark D. Whitener, with input from Lalit Bhasin, Michael H. Byowitz, Eleanor M. Fox, Prakash Narayanan and Mohammad A. Syed. The views expressed herein do not necessarily reflect the views or opinions of the professional organizations with which the members of this Working Group are affiliated.

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.

November 15, 2007

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.