

KIRKLAND ALERT

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India Finalizes Merger Control Regulations

On June 1, 2011, the pre-merger notification regime recently announced by India's national competition authorities took effect. Because this new regime may trigger filing obligations for international deals, it is an important development for companies already doing business in India, and for those considering investments in India or in global businesses with significant Indian operations. For your convenience, we provide below an overview of this new merger notification regime. It is important to note, however, that ambiguities contained in the text of the regulations leave open many questions about how certain aspects of this new regime will develop. Thus, coordination with experienced Indian competition counsel is imperative. Kirkland & Ellis maintains strong ties with key Indian corporate and competition practices, and would be pleased to work with you to identify the Indian law firms best suited to handling your transactions.

Overview: The final Combination Regulations (the "Combination Regulations") establish basic procedures governing the mandatory notification and review by the Competition Commission of India ("CCI") of certain M&A transactions. The Combination Regulations implement the notification regime established by India's Competition Act of 2002 (the "Competition Act"), which prohibits transactions likely to cause "an appreciable adverse effect on competition" within a relevant market in India.

Effective Date: The Combination Regulations went into effect on June 1, 2011. They will apply to transactions where binding documents are signed on or after June 1, 2011, and to mergers or amalgamations approved by the boards of directors of the parties on or after June 1, 2011.

Jurisdictional Thresholds: As a general rule, notification is required for transactions where the parties have either: (a) combined assets in India of rupees 1500 crores (approximately USD 335 million) or combined turnover in India of rupees 4500 crores (approximately USD 1 billion); or (b) combined worldwide assets of USD 750 million or combined worldwide turnover of USD 2.25 billion, and combined assets in India of rupees 750 crores (approximately USD 165 million) or combined turnover in India of rupees 2250 crores (approximately USD 500 million).

Exempt Transactions: Transactions where the "enterprise" being acquired has either assets in India of not more than rupees 250 crores (approximately USD 55 million) or turnover in India of not more than rupees 750 crores (approximately USD 165 million) are exempt from notification. It generally is understood that these thresholds apply to the entity being acquired and its controlled subsidiaries (as opposed to the larger selling "enterprise"), although the language as drafted is not explicit.

Schedule I of the Combination Regulations lists transactions "ordinarily not likely" to cause an appreciable adverse effect on competition in India and for which notice under the Act "need not normally be filed." Several exemptions are similar to those contained in the U.S. Hart-Scott-Rodino Antitrust Improvements Act (the "HSR Act") and its implementing regulations. For example, such exemptions apply to transactions where the acquirer will hold 15% or less of the total shares or voting rights solely as an investment, and where the acquirer already holds 50% or more of the total shares or voting rights prior to the acquisition, as well as to acquisitions of current assets in the ordinary course of business. Schedule I also exempts transactions taking place entirely outside India with an insignificant local nexus and effect on markets in India.

Notification Forms: The Combination Regulations provide for a short form notification ("Form I"), as well as a more extensive notification ("Form II"). Most transactions will be filed on Form I, although parties may elect to file a more substantial Form II notification. The Combination Regulations specify types of transactions ap-

appropriate for notification on Form I, including horizontal combinations that involve a combined market share of less than 15% and vertical combinations that involve an individual or combined market share of less than 25%. Transactions involving greater market shares presumably should be notified on Form II. Form II is significantly more burdensome than Form I, requiring detailed information regarding the products or services and the market structure. Form II also includes a document request similar to Item 4(c) in the HSR Act Premerger Notification and Report Form (“HSR Form”). In cases where the parties have filed a Form I notice and the CCI requires information requested in Form II, the CCI can direct the parties to file a Form II notice. The CCI also has the power to request additional information beyond that required by the Forms.¹

Filing Fees: The filing fees are significantly lower than the comparable filing fees for an HSR Form. Fees for Form I filings are rupees 50,000 (approximately USD 1,110) and for Form II filings are rupees 1 million (approximately USD 22,250).

Suspension Periods: Parties are prohibited from consummating their transaction until the earlier of the expiration of a 210-day waiting period or the issuance by the CCI of an order authorizing the transaction. The CCI is required to form a *prima facie* opinion within 30 days from the receipt of the notification as to whether the combination is likely to cause an appreciable adverse effect on competition within the relevant markets. If the parties propose a modification before the CCI reaches a *prima facie* opinion, however, the CCI will have up to 15 additional days (a total of 45 days) to form its opinion. Such additional time will not count

towards the running of the 210-day waiting period. Moreover, any time taken by the parties to provide additional information or to submit a Form II notice after initially filing a Form I notice will not count towards the 30-day or 210-day periods. Thus, the merger review process could significantly exceed the 210-day period set forth in the Competition Act.²

Filing Deadlines: Unlike the HSR Act, the India merger control regime specifies deadlines for pre-merger notification. The parties must file a required notification with the CCI within 30 days of: (a) approval of the merger or amalgamation by the boards of directors; or (b) execution of an agreement or other binding document with respect to the proposed transaction. In the case of a hostile acquisition, the filing period generally will be triggered by the acquirer’s execution of a document conveying the decision to make the acquisition.

Although the Combination Regulations move India’s merger control regime closer to conformance with international best practices, there is still some uncertainty as to how particular provisions will be implemented. We look forward to working with our Indian colleagues to help clients invest in the vibrant and rapidly growing Indian economy.

¹ Certain acquisitions by a public financial institution, foreign institutional investor, bank, or venture capital fund pursuant to any covenant of a loan agreement or investment agreement are required to be notified on Form III within 7 days of consummation and without payment of a filing fee.

² Any reference above to “days” means calendar days.

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