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Simon Baxter and Nikolaos Peristerakis[1]

I. INTRODUCTION

On March 4, 2010, the Ministry of Corporate Affairs of India published a Notification according to which the merger-related Sections 5 and 6 of the Competition Act, 2002 (as amended) (the "Act") will enter into force as of June 1, 2011. The merger control regime will be supplemented by procedural guidance (the "Draft Regulations") that is expected to enter into effect prior to June 1.

The entry into effect of the new Indian merger control regime is a long awaited development, not only because it took several years for the merger related provisions of the Act to enter into force, but also because India was the last BRIC[2] country without a merger control regime applicable to cross-border mergers and acquisitions. The delay was due to both a challenge of the Act before India's Supreme Court and subsequent amendments by the Parliament of India that led to two important modifications in the merger control regime as originally anticipated by the Act: (i) modification of the regime from a voluntary to a mandatory notification with a bar on closing; and (ii) extension of the maximum waiting period from 90 days to 210 days.

These modifications, combined with very expansive notification thresholds, will raise a number of important procedural issues for cross-border transactions.

II. RELEVANT DATE FOR ESTABLISHING JURISDICTION

The Act provides that it applies to all mergers, acquisitions, and joint ventures that are "put into effect" after June 1, 2011. Neither the Act nor the Draft Regulations provide any clarification as to whether "put into effect" refers to signing or closing. This suggests that transactions that (i) have been signed before June 1 but close afterwards and (ii) meet the very broad Indian merger notification thresholds will need to be notified to the CCI. This situation could delay closing in many of these deals, even if these deals raise no competitive concerns and have no effects whatsoever in India,[3] given that the CCI's resources are expected to be overwhelmed with a significant number of filings on June 1.

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[2] BRIC is a grouping acronym that refers to the countries of Brazil, Russia, India, and China.

[3] See part V below.

The CCI could easily address this issue by taking the position that 'put into effect' refers to the date of signing, not closing, an approach that would be consistent with standard practice generally followed in the EU and the vast majority of other jurisdictions around the world.

III. NOTIFIABLE TRANSACTIONS

Section 5 of the Act states that any merger between two enterprises and any acquisition by one enterprise of voting shares, assets and/or control over management or assets of another enterprise would be a combination that would trigger a filing requirements if the Section 5 jurisdictional thresholds are met. However, the Act remains silent as to the level of control/influence above which an acquisition of voting shares or assets would constitute a combination liable to trigger the jurisdictional thresholds. Schedule I of the Draft Regulations takes an overly broad view of what constitutes a combination, by including several types of transactions that are typically not viewed as notifiable transactions in the vast majority of jurisdictions, such as (i) acquisitions of minority non-controlling stakes of less than 15 percent; (ii) acquisitions of assets such as raw materials in the ordinary course of business; and (iii) intra-group transactions.

Even though these transactions included in Schedule I are only subject to a short form notification requirement, the short form requires the parties to furnish a significant amount of information that is unrelated to the competitive assessment of any transaction in India including, *inter alia*, (i) copies of the due diligence reports, studies, surveys, or any other document taken into account for the purpose of assessing the viability of the proposed transaction, (ii) articles of association/charter/partnership deed/constitution document of each of the parties involved; (iii) copies of any notifications made to other competition authorities made in connection with the proposed combination anywhere else in the world; and (iv) certified copies of any orders/judgments in connection with any of the parties to the combination from the last 5 years.

In addition, the short form triggers the same review periods as the long form, which means that even acquisitions of minority stakes and/or intragroup transactions involving companies with no nexus with India could be subject to Indian merger clearance before closing.

IV. THRESHOLDS

The Act contains eight alternative turnover and asset thresholds under which a merger filing could be required. The thresholds are defined by reference to the acquirer, the acquirer's group and the target. The "acquirer's group" includes all companies in which the ultimate parent of the acquirer (i) owns 50 percent or more of the voting rights; (ii) appoints more than half of the directors; or (iii) controls the management or affairs. However, the "acquirer" is not defined in the act, and it is unclear whether it refers to the acquisition vehicle or to the parent company of the acquisition vehicle. The thresholds can be distinguished in two categories: (i) combined turnover or asset thresholds for the acquirer and the target; and (ii) combined turnover or asset thresholds for the acquirer's group and the target.

Combined Firm Thresholds for the Acquirer Plus Target

- Assets in India of Rupees 1,500 crores (approximately U.S. $328 million) or more; or
- Turnover in India of Rupees 4,500 crores (approximately U.S. $985 million) or more; or

- Worldwide assets of at least U.S. $750 million out of which at least Rupees 750 crores (approximately U.S. $164 million) in India; or
- Worldwide turnover of at least U.S. $2.25 billion out of which at least Rupees 2,250 crores (approximately U.S. $492 million) in India.

Combined Firm Thresholds for the Acquirer's Group Plus Target

- Assets in India of Rupees 60 billion (approximately U.S. $1.3 billion); or
- Turnover in India of Rupees 180 billion (approximately U.S. $3.9 billion); or
- Worldwide assets of at least U.S. $3 billion, out of which Rupees 7.5 billion (approximately U.S. $164 million) of assets in India; or
- Worldwide turnover of at least U.S. $9 billion, out of which Rupees 22.5 billion (approximately U.S. $492 million) of turnover in India.

Even if the above thresholds are met, a transaction does not need to be notified if one of the following *de minimis* exceptions is met:

***De Minimis Exceptions*[4]**

- Turnover of target of less than Rupees 7.5 billion (approximately U.S. $164 million); or
- Turnover of target of less than Rupees 2.5 billion (approximately U.S. $54.7 million).

Even though the Notification increased the asset and turnover thresholds by 50 percent compared to the 2007 amendment of the Act, the thresholds are overly expansive and do not include a proper geographic nexus test. All the tests in the Notification are based on the combined turnover/assets of all the parties involved in the combination, and there are no minimum turnover or asset thresholds that must be met by the target. As a result, companies with a significant Indian presence would technically need to notify virtually every single merger, acquisition, or even intra-group reorganization or acquisition of a minority stake, regardless of whether the transaction has any effects in India. For example, if a Brazilian-based company with significant activities in India were to acquire a 10 percent interest in a company which is only active in Italy, but whose worldwide assets or sales exceed the *de minimis* thresholds, the transaction would trigger a filing obligation in India, despite the fact that the target does not have any assets or sales in India. Similarly, if the same Brazilian-based company decided to reorganize its Brazilian subsidiaries, this intra-group reorganization could trigger an Indian merger control filing requirement.

[4] The Notification does not specify whether the *de minimis* exceptions refer to the Indian or worldwide sales/turnover of the target, which means that the entire worldwide turnover of the target should be taken into account.

V. REVIEW PERIOD AND STANDSTILL OBLIGATION

The initial review period (regardless of whether a short or a long form is submitted) is 30 days from receipt of a notification within which time the CCI will determine whether the transaction is likely to lead to an appreciable adverse effect on competition ("AAEC"), which appears very similar to the SIEC test. In practice, the time to obtain approval can be significantly longer, given that the 30 day clock stops every time that the CCI asks for more information. If the CCI concludes that the transaction may give rise to an AAEC, then the CCI will extend the review period to a maximum of 210 days.

The Draft Regulations allow for confidential pre-notification guidance, which is a welcome development given that such pre-notification contacts could be helpful in terms of clarifying any procedural points that are still unclear and/or discuss the scope of information to be provided.

A standstill obligation applies during the review period. It is unclear whether the scope of the bar on closing is global or only applies to India. There are no provisions for allowing a carve-out of the Indian aspects of global transactions, but the CCI could address this issue by allowing such carve-outs as a matter of practice.

VI. FINES FOR FAILURE TO NOTIFY

CCI can impose a fine of up of one percent of the total turnover or assets of the combination for failure to notify, whichever is higher. If the company resists paying the fine, the CCI can file a criminal complaint in court, and on that basis the court could impose a criminal fine of up to U.S. $5.5 million and/or imprisonment of up to three years.

VII. CONCLUSION

The entry into effect of India's new merger control regime is an important parameter that will need to be factored into the regulatory checklist of every global M&A deal. Even though it remains to be seen how the jurisdictional thresholds will be applied in practice by the CCI, the very broad scope of notifiable concentrations, combined with potentially lengthy review periods, could result in significant delays for cross-border M&A deals. Regardless of the merits of the issues involved, India should be at the top of the list of priority jurisdictions for every transaction involving any company with significant activities in India, along with other major gateway jurisdictions such as China, the EU and the U.S.