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## Whither Harmonization? India's Draft Combination Regulations

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## I. INTRODUCTION

India's economy is fast becoming one of the largest and most vibrant in the world. While the recent global economic downturn has caused the economies of other large nations to stagnate, India's continues to thrive. Indeed, Willem H. Buiters, chief economist for Citigroup and a chaired professor at the London School of Economics, recently predicted that "India will be the largest economy in the world by 2050."<sup>2</sup> The world is paying close attention to India and its remarkable progression into an economic superpower.

But rapid growth brings challenges. One formidable challenge facing India lies in crafting a merger review regime that protects the country's legitimate sovereign interests while avoiding the imposition of undue costs on merging parties and consumers. The magnitude of this challenge is apparent when one considers the remarkable amount of attention that has been paid to the lengthy process undertaken by the Competition Commission of India ("CCI") in preparing to launch India's merger regime. Each step in the process has been the subject of intense scrutiny and lively dialogue not only within India, but also around the globe. This lengthy process is drawing to a close: On March 1, 2011, the CCI published what it hopes will be the last draft of the Combination Regulations before they take effect on June 1, 2011.

The Draft Regulations present important questions for India, but also for international competition policy more broadly. Because a laudable relaxation of India's regulations governing both inbound and outbound investments has led to a rapidly increasing volume of trans-border deals, India's merger regime will affect countless transactions. Only with careful calibration can the CCI facilitate beneficial cross-border investment and trade while avoiding undue transaction costs on these deals and, consequently, unnecessary harm to consumers. Compounding India's challenge is the fact that many countries are creating or have recently created merger review regimes of their own. If India's merger review regime is perceived as being out of step with those of other countries, serious repercussions on deal flow could result.

This article examines the CCI's Draft Regulations in the context of India's rapid economic growth, with particular emphasis on how those regulations will impact the prospects of international harmonization of merger notification standards. While the CCI wisely has adopted many of the "best practices" suggested by the International Competition Network ("ICN") and the Organisation for Economic Co-operation and Development ("OECD"), it has not yet

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<sup>2</sup> Christine Jenkins, *The 10 Fastest Growing Economies Of The Next 40 Years*, BUSINESS INSIDER (Mar. 1, 2011, 10:46 AM), <http://www.businessinsider.com/fastest-growing-economies-2011-2?op=1>.

embraced key recommended practices. Accordingly, this article suggests that the CCI should review those aspects of its Draft Combination Regulations that depart from internationally accepted best practices and give careful consideration to whether conformity can be achieved.

## II. THE GROWING ECONOMIC STRENGTH OF INDIA AND THE EMERGENCE OF CCI

India's recent economic growth has been nothing short of amazing. While India's economy grew at "just 1¼ per cent in the three decades after Independence" in 1947,<sup>3</sup> its economy now regularly experiences annual GDP growth exceeding eight percent—even as much of the world labors under the ill effects of the global financial crisis.<sup>4</sup> Because of this rapid growth, India now has one of the largest economies in the world.<sup>5</sup>

It is worth pausing to reflect on the means by which India has encouraged such exceptional growth. In short, India's economic boon is directly tied to its deliberate deregulatory efforts. India's relaxation of barriers to inbound and outbound investment over the last 30 years, as well as other efforts to "move[] the Indian economy towards a market-based system," have resulted in its emerging preeminence in the international arena.<sup>6</sup>

Fueling that growth has been a rapid increase in the number of multinational companies doing business in India. In fact, India now trails only China as the top destination for foreign direct investment ("FDI").<sup>7</sup> Because of that FDI, India's rise likely will not slow anytime soon. It is anticipated that India will continue to enjoy annual growth equaling or exceeding eight percent in the coming years.<sup>8</sup> Indeed, a leading analyst has predicted that the "seven biggest emerging markets, led by China and India, will surpass the Group of Seven economies in size in 2032 as the financial crisis accelerates the shift of power in the global economy."<sup>9</sup> It is difficult to review these statistics without concluding that, "India is truly the powerhouse of the future."<sup>10</sup>

As is frequently the case, the work of developing a market-based economy in India went hand-in-hand with the process of designing and implementing a sound competition regime. For most of its history, India was not a major player in the field of competition law. The Monopolies and Restrictive Trade Practices Act of 1969 gave the Indian government some tools to enforce

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<sup>3</sup> OECD POLICY BRIEF, ECONOMIC SURVEY OF INDIA 2007 1 (Oct. 2007), *available at* <http://www.oecd.org/dataoecd/17/52/39452196.pdf> [hereafter OECD POLICY BRIEF].

<sup>4</sup> CIA, THE WORLD FACTBOOK, INDIA (last updated Mar. 8, 2011), <https://www.cia.gov/library/publications/the-world-factbook/geos/in.html>.

<sup>5</sup> OECD POLICY BRIEF, *supra* note 3, at 1.

<sup>6</sup> *Id.*

<sup>7</sup> UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, New York and Geneva, World Investment Prospects Survey 2010-2012, 13, Figure 14, U.N. Doc. UNCTAD/DIAE/IA/2010/4 (2010), *available at* [http://www.unctad.org/en/docs/diaeia20104\\_en.pdf](http://www.unctad.org/en/docs/diaeia20104_en.pdf).

<sup>8</sup> THE WORLD BANK, THE GLOBAL OUTLOOK IN SUMMARY 2008-2012, Table 1.1 (June 10, 2010), *available at* <http://web.worldbank.org/external/default/main?theSitePK=659149&pagePK=2470434&contentMDK=20370107&menuPK=659160&piPK=2470429>.

<sup>9</sup> Jennifer M. Freedman and Helene Fouquet, *WTO Expects Trade to Grow 6.5% in 2011 After 14.5% Last Year*, BLOOMBERG (Apr. 7, 2011, 6:39 AM), <http://www.bloomberg.com/news/2011-04-07/wto-expects-trade-to-grow-6-5-in-2011-after-14-5-last-year.html> (noting PricewaterhouseCoopers LLP's prediction).

<sup>10</sup> Suvi Dogra & Sapna Agarwal, *India is the Future Powerhouse*, BUSINESS STANDARD, Apr. 3, 2009, *available at* <http://www.business-standard.com/india/news/%5Cindia-isfuture-powerhouse%5C/353831/>.

competition law, but the act was widely perceived as “toothless.”<sup>11</sup> India sent a strong signal to the world regarding the importance of free markets when it adopted the Competition Act of 2002.

Importantly, the Competition Act created the CCI, an expert body with broad powers dedicated to enforcing competition policy. The CCI’s powers span all areas of modern antitrust enforcement, including competition advocacy, unreasonable agreements that restrain trade, monopolization/abuse of dominance, and merger review. Since the act was passed, all but the last of these fields has been implemented.<sup>12</sup> While many multinational companies presumably have welcomed “the prospect of a more level playing field against powerful Indian incumbents and their alliances,”<sup>13</sup> there is undoubtedly concern among them due to the fact that the CCI soon “will be scrutinizing major inbound acquisitions for antitrust issues” for the first time.<sup>14</sup>

### III. THE IMPORTANCE OF MERGER REVIEW HARMONIZATION

India’s new merger review regime is part of a noteworthy global trend. Notably, “the number of merger control regimes [is] approaching one hundred worldwide.”<sup>15</sup> This proliferation has the potential to do a great deal of good, as “[m]erger review regimes with advance notification requirements give competition authorities the ability to identify and remedy potentially problematic transactions” *before* they are entrenched, “thereby benefitting consumers and competition.”<sup>16</sup> Pre-merger review is much more efficient than the alternative: “unscrambling the eggs” to unwind already consummated transactions.<sup>17</sup>

But this proliferation of merger review regimes also has the potential to impose significant costs that ultimately harm consumers. It is common for more than one jurisdiction to review a deal—indeed, dozens of nations could require pre-notification filings for the same merger.<sup>18</sup> Overlapping review can be a serious impediment to economic growth because it has the potential to impose myriad costs, including the following:

- *Information costs.* Before multinational companies can combine, they must know which countries require pre-notification and how to satisfy “filing requirements” that are often “vague, subjective, or difficult to interpret.”<sup>19</sup>
- *Filing costs.* Filing multiple merger notifications is expensive.<sup>20</sup> Many jurisdictions require “extensive information about markets, competitors, customers and suppliers, and entry conditions in each of the markets in which the merging parties operate[]”—“even for transactions that pose few or no competition issues.”<sup>21</sup> Such costs can be substantial.

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<sup>11</sup> See, e.g., Kumkum Sen, “Toothless’ MRTP is Laid to Rest,” BUSINESS STANDARD, Sept. 14, 2009, available at <http://www.business-standard.com/india/news/%5Ctoothless%5C-mrtp-is-laid-to-rest/369990/>.

<sup>12</sup> PRADEEP S. MEHTA, A FUNCTIONAL COMPETITION POLICY FOR INDIA 66-67 (2006).

<sup>13</sup> Kian Ganz, *Taking Aim at Cartels*, AMERICAN LAWYER, Jan. 1, 2011, available at <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202476223213&slreturn=1&hbxlogin=1>.

<sup>14</sup> *Id.*

<sup>15</sup> John J. Parisi, *Cooperation Among Competition Authorities in Merger Regulation*, 43 CORNELL INT’L L.J. 55, 67 (2010).

<sup>16</sup> U.S. Dep’t of Justice, *Int’l Competition Policy Advisory Comm., Final Report* 87 (2000) [hereafter ICPAC Final Report], available at <http://www.justice.gov/atr/icpac/finalreport.html>.

<sup>17</sup> *Id.* at 89.

<sup>18</sup> *Id.* at 90-91.

<sup>19</sup> *Id.* at 91.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

- *Indirect costs.* In addition to more tangible costs, “indirect costs” like “the drain on executives’ time and productivity” also must be considered.<sup>22</sup> Mergers are daunting even under the best of circumstances.<sup>23</sup> A gauntlet of burdensome requirements does not boost enthusiasm to begin the process in the first place—even for pro-competitive combinations.
- *Delay.* “Mergers are almost always time sensitive,” so if review takes too long, then some mergers may not happen at all.<sup>24</sup> Delay can jeopardize transaction financing, increase the risk of workforce attrition and customer uncertainty, and defer the realization of efficiencies.

Simply put, the more divergence there is among merger notification regimes, the greater risk there is of inefficient outcomes that harm consumer welfare. That critical insight is driving the movement to harmonize merger notification standards across jurisdictions.

#### **IV. THE ROLE OF THE ICN AND THE OECD IN HARMONIZING MERGER NOTIFICATION STANDARDS**

Merely acknowledging the importance of harmonizing competition regimes is clearly insufficient to make it a reality. International groups consequently have focused significant time and attention on facilitating an ongoing dialogue among competition authorities designed to achieve this goal. The ICN, for instance, provides a forum for competition authorities and experts from around the world to create best practices for competition policy.<sup>25</sup> The ICN boasts more than 100 members,<sup>26</sup> including “almost all of the world’s competition agencies.”<sup>27</sup> Likewise, the OECD, comprised of authorities from 34 jurisdictions, has worked diligently to foster an ongoing dialogue regarding sound antitrust enforcement policies.<sup>28</sup>

Within the ICN, a Merger Working Group has “developed, and the ICN [has] adopted, a set of eight guiding principles for merger notification and review, which addresses topics such as transparency, non-discrimination, and procedural fairness.”<sup>29</sup> Likewise, “the Working Group [has] developed a set of Recommended Practices for Merger Review Procedures, which address issues such as the need for a nexus between the transaction and the reviewing jurisdictions, objective notification thresholds, and conducting merger investigations efficiently.”<sup>30</sup>

Despite being founded only ten years ago, the ICN has proven tremendously successful. “In a very short time, many jurisdictions already use [the Recommended Practices for Merger

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<sup>22</sup> *Id.* at 92.

<sup>23</sup> See, e.g., Steven H. Appelbaum et al., *Anatomy of a Merger: Behavior of Organizational Factors and Processes Throughout the Pre- During- Post- Stages (Part 2)*, MANAGEMENT DECISION 38/10 674, 675 (2000), available at <http://www.appelbaumconsultants.com/articles/1999-00/AnatomyofMergerPartII.pdf> (last visited Apr. 11, 2011).

<sup>24</sup> ICPAC Final Report, *supra* note 16, at 93.

<sup>25</sup> See, e.g., Parisi, *supra* note 15, at 67 (“[ICN] provides a venue for the world’s competition agencies to concretely address competition policy and enforcement issues.”).

<sup>26</sup> ICN Factsheet & Key Messages 1 (Apr. 2009), <http://www.internationalcompetitionnetwork.org/uploads/library/doc608.pdf> [hereafter ICN Factsheet].

<sup>27</sup> Parisi, *supra* note 15, at 67.

<sup>28</sup> See, e.g., *id.* Detailed information about OECD’s efforts on this topic is available at [http://www.oecd.org/document/44/0,3746,en\\_2649\\_34715\\_44940780\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/44/0,3746,en_2649_34715_44940780_1_1_1_1,00.html).

<sup>29</sup> Parisi, *supra* note 15, at 67.

<sup>30</sup> *Id.*

Review Procedures] as a benchmark for amending their merger review laws and procedures.”<sup>31</sup> Indeed, “96% of competition agencies surveyed make use of ICN work products and materials, and 94% distribute them inside the agency.”<sup>32</sup> The widespread use of ICN materials indicates the emergence of a consensus that its work product is of great utility.

## **V. THE CCI'S DRAFT COMBINATION REGULATIONS AND INTERNATIONAL BEST PRACTICES**

The CCI's Draft Regulations were published for public comment on March 1, 2011.<sup>33</sup> In addition, on March 4, 2011, the Indian Government issued related notifications (the “Notifications”) concerning the Competition Act. The Draft Regulations establish the basic procedures governing the notification and review of reportable transactions.

At the outset, we commend the CCI's efforts to address concerns raised with respect to the implementing regulations. The Competition Act's combination provisions were amended in 2007, and those amendments and related proposed implementing regulations were the topic of a great deal of international discussion and domestic concern in the Indian business community. In the Draft Regulations, the CCI has taken significant strides to harmonize India's merger review regime with international best practices.

There remain several instances, however, where the Draft Regulations diverge from ICN and OECD recommendations.<sup>34</sup> We highlight below key provisions of the Draft Regulations that depart from those best practices and suggest how these provisions can be revised to achieve greater conformity with international best practices while still serving the needs of Indian consumers. Achieving greater conformity with other jurisdictions will ensure that merger review is not unnecessarily burdensome, thereby discouraging parties from investing in India.

### **A. Notification Thresholds and Jurisdictional Nexus**

Under the Competition Act, the jurisdictional thresholds are based on assets and turnover of the parties both within and outside India. One of the Notifications, however, provides for an exemption from notification for transactions where the “enterprise” being acquired has assets of not more than rupees 250/- crores (approximately U.S. \$56 million) or turnover of not more than rupees 750/- crores (approximately U.S. \$167 million).<sup>35</sup> As drafted, however, it is unclear whether these thresholds relate to assets and/or turnover in India or on a worldwide basis. In addition, it is unclear whether the term “enterprise” refers to the larger selling “enterprise” or only the assets or shares of the entity being acquired.

The local nexus requirement is a core tenet of the ICN and OECD recommendations. Indeed, the ICN exhorts that “[j]urisdiction should be asserted only over those transactions that

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<sup>31</sup> *Id.* at 67-68.

<sup>32</sup> ICN Factsheet, *supra* note 26, at 4.

<sup>33</sup> The Draft Combination Regulations were published for comment at <http://www.cci.gov.in/images/media/Regulations/DraftCombinationRegulation.pdf>.

<sup>34</sup> The ICN Recommended Practices are available online at <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>. The OECD Recommendation of the Council on Merger Review (2005) (“OECD Recommendation”) is available online at <http://www.oecd.org/dataoecd/3/41/40537528.pdf>.

<sup>35</sup> The Notification is available online at [http://www.mca.gov.in/Ministry/notification/pdf/Notification\\_4mar2011.pdf](http://www.mca.gov.in/Ministry/notification/pdf/Notification_4mar2011.pdf).

have an appropriate nexus with the jurisdiction concerned.”<sup>36</sup> An appropriate local nexus avoids undue burden on both the competition authorities and transaction parties.

If based on worldwide assets and/or turnover, the Indian notification thresholds could apply to transactions with no foreseeable affect on competition in India. For example, a multinational company with turnover in India in excess of rupees 3,000 crores that acquires another company with no assets or turnover in India, but with turnover of rupees 800 crores in other countries, would be required to notify that transaction under the Draft Regulations. But international best practices instruct that “[d]etermination 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 ....”<sup>37</sup> To be consistent with these international best practices, then, the exemption should be phrased in terms of assets and/or turnover in India.

Moreover, the exemption should apply based on the assets that are being acquired or the shares of the entity that are being acquired, rather than on a larger selling “enterprise.” Modified in this manner, the exemption would be consistent with Comment 3 to ICN Recommended Practice I.B. which states 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 acquired party should generally be limited to the sales and/or assets of the businesses being acquired.”

### **B. Transactions Subject to Notification**

Schedule 1 of the Draft Regulations requires a Form I filing in connection with certain transactions that will not result in a change of control or influence and, consequently, would not be expected to result in a material effect on competition. These transactions include:

- Acquisitions of 15 percent or less of the shares or voting rights in an entity, not leading to control;
- Acquisitions of shares or voting rights where, prior to the acquisition, the acquirer already controls the target enterprise;
- Acquisitions of assets that either are not related to the business activities of the acquirer or are acquired solely as an investment or in the ordinary course of business (provided that the acquisition does not lead to control of all or part of a target enterprise);
- Acquisitions by securities underwriters in the ordinary course of business; and
- Acquisitions resulting from a bonus issue or a subdivision of shares.

An earlier draft of these regulations contemplated that many of these transactions would have been exempt from notification requirements. Indeed, these transactions would appear to raise minimal competition issues and appropriately could be excluded from notification altogether. Exempting from merger notification transactions with no or minimal adverse effect on competition will relieve the burden on the nascent CCI, as well as on the filing parties, and will preserve government resources to investigate more problematic transactions. For these

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<sup>36</sup> ICN Recommended Practice I.A, *supra* note 34, at 1; *see also* OECD Recommendation, I.A.1.2.1, *supra* note 34, at 2 (“Member countries should ... [a]ssert jurisdiction only over those mergers that have an appropriate nexus with their jurisdiction ....”).

<sup>37</sup> ICN Recommended Practice I.C., *supra* note 34, at 2.

reasons, we recommend that the enumerated transactions be excluded from Schedule 1 and appropriate notifications be issued regarding the exemptions.

### **C. Extensive Information Requests**

The Draft Regulations provide for three separate notification forms. Form I applies to certain transactions, enumerated in Schedule 1, that the CCI has determined will raise minimal competitive issues. Form III requests specific information in connection with certain transactions pertaining to acquisitions by banks and other investment institutions. Form II is the “default notification form” required of all notifiable transactions that are not of the types identified in Schedule 1 and are not covered by Form III.

Forms I and II both require far more information than international best practices would suggest. Indeed, international best practices instruct 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 investigation.”<sup>38</sup> Initial notification requirements, moreover, should “avoid imposing unnecessary burdens on parties to transactions that do not represent material competitive concerns.”<sup>39</sup>

Here, we are concerned that Forms I and II appear to fall short of striking the balance between providing the CCI with information necessary to discharge its mandate and avoiding undue burdens on the parties.<sup>40</sup> For example, Sections 5(a) and (b) of both forms require production of many documents, such as due diligence reports and other material prepared as part of the analysis of the viability of the transaction, that will shed little light on any impact the transaction may have on competitive conditions in India. Moreover, both forms seek detailed information concerning merger notifications that parties may have made in other jurisdictions. Requiring every notifying party to provide a copy of every merger notification filed in any another jurisdiction will result in the production of voluminous data, most of which will be irrelevant to competitive conditions in India.

Requiring excessive information of merging parties will create significant negative consequences. Because “the vast majority of notified transactions do not raise material competitive concerns,”<sup>41</sup> requiring the submission of extensive and potentially irrelevant information requested by Forms I and II will impose unnecessary burdens on the notifying parties. We also fear the burdens that this aspect of the Draft Regulations will impose on the CCI at a time when that agency is working diligently to build the appropriate infrastructure for its merger review regime. Also noteworthy is the fact that such burdensome information requirements will delay and possibly discourage time-sensitive transactions where the parties either cannot compile the necessary information within the time period for filing or have to postpone corporate approval of the transaction pending collection of this information. For these reasons, we submit that the information requested by Forms I and II is more properly the subject of a request for additional information.

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<sup>38</sup> ICN Recommended Practices V.A., *supra* note 34, at 11.

<sup>39</sup> ICN Recommended Practice V.B., *supra* note 34, at 11; *see also* OECD Recommendation I.A.1.2, *supra* note 34, at 2. (“Member countries should ... seek to ensure that their merger laws avoid imposing unnecessary costs and burdens on merging parties and third parties.”).

<sup>40</sup> To the extent that Form III requests similar information, the same concerns apply.

<sup>41</sup> ICN Recommended Practices IV.B., Comment 1, *supra* note 34, at 8.



### **D. Lengthy and Uncertain Waiting Periods**

Under the Competition Act, 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.<sup>42</sup> The Draft Regulations attempt to shorten this extraordinarily long waiting period by requiring the CCI to form a *prima facie* opinion within an initial 30 days as to whether the combination is likely to cause an appreciable adverse affect on competition within the relevant markets. The Draft Regulations also provide that the CCI shall endeavor to pass an order or issue direction within 180 days of the filing of a valid notification.

We are concerned by the lengthy waiting period incorporated into the Draft Regulations and the absence of a mechanism for distinguishing between simple transactions with no competitive concerns and more complex transactions. International best practices instruct that “[m]erger review systems should incorporate procedures that provide for expedited review and clearance of notified transactions that do not raise material competitive concerns.”<sup>43</sup> Although the Draft Regulations require the CCI to make a *prima facie* determination within 30 days, it does not appear that the agency will be required to issue an order clearing the transaction within any particular time frame—even if the combination will not result in any anticompetitive effects. In contrast, international best practices counsel that in suspensive jurisdictions such as India, “initial waiting periods should be subject to definitive and readily-ascertainable deadlines to permit transactions that do not present material competitive concerns to proceed with minimal delay and disruption.”<sup>44</sup> Moreover, even if the CCI adheres to the goal of issuing an order or direction within the 180-day period, commentators have expressed concern that this period is unworkably long and may deter investment in India.

We therefore suggest that the Draft Regulations be revised to provide for an initial 30-day waiting period after the expiration of which parties would be free to consummate their transaction, absent a request for additional information from the CCI.<sup>45</sup> We also suggest that the regulations be revised to indicate that the CCI will either clear or challenge transactions subject to a request for additional information within the 180-day period.

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<sup>42</sup> See Competition Act §§ 6(2A), 31(11).

<sup>43</sup> ICN Recommended Practice IV.B., *supra* note 33, at 8.; see also OECD Recommendation I.A.1.2.4, *supra* note 33, at 2 (“Member countries should ... provide procedures that seek to ensure that mergers that do not raise material competitive concerns are subject to expedited review and clearance ....”).

<sup>44</sup> ICN Recommended Practice IV.C., Comment 1, *supra* note 34, at 8.; see also OECD Recommendation I.A.1.3., *supra* note 34, at 2 (“The review of mergers should be conducted, and decisions should be made, within a reasonable and determinable time frame.”).

<sup>45</sup> A related provision of the Competition Act requires parties to file their notification within 30 days of the approval by the board of directors of the proposal relating to the transaction or the execution of any agreement or other document for the acquisition. This requirement is inconsistent with ICN Recommended Practices III.B, which provides that “[j]urisdictions that prohibit closing while the competition agency reviews the transaction or for a specified time period following notification should not impose deadlines for pre-merger notification.” Consequently, we recommend that the CCI take steps to remove this mandatory filing deadline from the Competition Act. Until such time as the legislation can be amended, we recommend that the definition of “other document” in Section 4(7) of the Draft Regulations, which is broad enough to encompass a letter of intent or perhaps even a non-disclosure agreement, be limited to a definitive agreement.

### **E. Application to Pending Transactions**

The merger control provisions of the Competition Act take effect on June 1, 2011. Pursuant to Section 28 of the Draft Regulations, it appears that the notification requirement will apply to combinations for which agreements have been signed, but that have not yet been consummated, as of June 1, 2011. Consequently, all pending transactions will be viewed as subject to the application of those regulations. The resulting uncertainty and delay would be contrary to the overarching goal of international best practices to “promot[e] an effective, efficient, transparent and predictable merger review process,”<sup>46</sup> as well as to complete merger review in a timely manner.<sup>47</sup>

Moreover, the immediate application of the Draft Regulations to pending transactions will create challenges for both the CCI and merging parties. Parties to a pending transaction will face closing delays that may jeopardize the transaction itself, for example, by affecting financing arrangements. Such delays will be particularly burdensome on merging parties that had planned to close their transactions on or shortly after the June 1 effective date. Moreover, if the CCI cannot accept notifications prior to the effective date, it may be inundated with filings on June 1, 2011—thus overwhelming the CCI staff. To avoid such unintended results, we recommend that the Draft Regulations be amended to clarify that they will apply only to transactions that are signed or entered into after June 1, 2011. The CCI will retain the ability to review transactions entered into prior to June 1, 2011 under Section 20 of the Competition Act (which gives the agency the power to initiate an inquiry into a transaction within one year of closing). Such an approach will protect the interests of consumers while avoiding the imposition of unnecessary delays on parties and unnecessary burdens on the CCI.

### **VI. CONCLUSION**

India’s economic rise has been truly spectacular. We credit this remarkable growth trajectory not only to the commitment of the Indian government to foster a more market-based economy, but also to the entrepreneurial spirit of Indian businesses and to the keen intellect of India’s people. A government striving for free markets, coupled with the human potential that India boasts, creates nearly limitless opportunities for Indian businesses and consumers. Only with careful calibration of India’s merger review regime, though, can this full potential be achieved. We therefore submit that the CCI should ensure conformity of India’s merger review regime with international best practices—a winning move for Indian businesses, consumers, and international trade.

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<sup>46</sup> ICN Recommended Practice VI.A., *supra* note 34, at 14.

<sup>47</sup> See OECD Recommendation I.A.1., *supra* note 34, at 2 (“Merger review should be effective, efficient, and timely.”).