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Alert Memo

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The Adoption of Merger Control in India

On March 4, 2011, the Indian Government announced that the provisions of the Competition Act 2002 relating to merger control (Sections 5 and 6) will come into force on June 1, 2011.[1] Notification will be mandatory for transactions meeting the relevant thresholds, and closing without clearance will be prohibited. There is uncertainty as to whether these provisions of the Competition Act 2002 apply only to concentrations that are agreed or announced after that date (or, in addition, apply to concentrations that have been announced, but have not yet closed). The Government's announcement was preceded by the Indian Competition Commission's issuance, on March 2, 2011, of draft procedural regulations.[2] As explained below, although the draft regulations make a number of important and welcome clarifications, many fundamental matters remain to be clarified.

I. JURISDICTIONAL THRESHOLDS

The merger control rules of the Competition Act 2002 apply to the "*acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises*."[3] Under the Act and draft regulations, transactions satisfying any one of the following thresholds must be notified in India:

The first two thresholds apply only to the undertakings directly involved in a reportable transaction:

- **Transactions Involving Companies That Derive Turnover in India Only.** Transactions must be notified if: (1) the value of the assets of the enterprises involved in the transaction exceeds Rs. 1,500 Crores (approximately US$ 333

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[1] The Act may be found at: http://www.cci.gov.in/images/media/competition_act/act2002.pdf?phpMyAdmin=QuqXb-8V2yTtoq617iR6-k2VA8d.

[2] The regulations may be found at: http://www.cci.gov.in/images/media/Regulations/DraftCombinationRegulation.pdf.

[3] Section 5 of the Competition Act 2002.

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million), or (2) the turnover of the enterprises involved in the transaction exceeds Rs. 4,500 Crores (approximately US$ 999 million).

- **Transactions Involving Companies That Derive Turnover in India and Elsewhere.** Transactions must be notified if: (1) the value of the assets of the enterprises involved in the transaction exceeds US$ 750 million, including at least Rs. 750 Crores (approximately US$ 166 million) in India, or (2) the turnover of the enterprises involved in the transaction exceeds US$ 2,250 million, including at least Rs. 2,250 Crores (approximately US$ 499 million) in India.

The third and fourth thresholds apply to the corporate groups to which the undertakings (or merged entity) directly involved in a reportable transaction belong:

- **Transactions Involving Corporate Groups That Derive Turnover in India Only.** Transactions must be notified if: (1) the value of the assets of the "group" to which the acquired enterprise will belong post-acquisition exceeds Rs. 6,000 Crores (approx US$ 1,332 million), or (2) the turnover of the group to which the acquired enterprise will belong post-acquisition exceeds Rs.18,000 Crores (approx US$ 3,995 million).

- **Transactions Involving Corporate Groups That Derive Turnover in India and Elsewhere.** Transactions must be notified if: (1) the value of the assets of the "group" to which the acquired enterprise will belong post-acquisition exceeds US$ 3 billion, including at least Rs. 750 Crores (approximately US$ 166 million) in India, or (2) the turnover of the group to which the acquired enterprise will belong post-acquisition exceeds US$ 9 billion, including at least Rs. 2,250 Crores (approximately US$ 499 million) in India.

The thresholds provide for the following *de minimis* exception: a transaction need not be notified where the value of one party's assets does not exceed Rs. 250 Crores (approximately US$ 55 million) or where its turnover does not exceed Rs. 750 Crores (approximately US$ 160 million). The draft regulations do not say, however, whether this *de minimis* threshold applies only to Indian assets/turnover or also to non-Indian assets/turnover.

The thresholds are designed to catch high-profile transactions that are expected to have a significant effect on Indian commerce. A number of important questions nevertheless remain. By way of example, neither the Competition Act 2002 nor the regulations define the scope of reportable concentrations that are subject to India's merger

control regime, the concept of "control" remains uncertain, and the rules on "group" transactions raise a number of practical questions (*e.g.*, it is unclear how they might apply to certain corporate structures).

II. REVIEW TIMETABLE

Transactions that are notifiable under the Competition Act 2002 cannot be closed under Indian law until they have been approved. The Competition Act 2002 provides for a review period of 210 days, although that period does not begin until a complete notification has been submitted. If a notification is found to be incomplete, the review time period will not run while the parties correct the notification.

The draft regulations provide that the Indian Competition Commission will adopt a *prima facie* view within 30 days (although it is uncertain whether this refers to calendar or business days). Although the draft regulations are not clear, the implication seems to be that a notified transaction may close (and the merger review will cease) if the Indian Competition Commission reaches a *prima facie* view that it will not have appreciable adverse effects in India.

III. NOTIFICATION FORMS

The draft regulations contain draft templates for three types of notification forms. Broadly speaking, the first (Form I) concerns simple cases, the second (Form II) concerns more complex cases, and the third (Form III) concerns acquisitions by financial institutions, foreign investors, banks, private equity funds and the like.[4] Each of these forms requests a great deal of information, meaning that any notification in India is likely to require significant time and resources.

IV. NOTIFICATION FEE

The draft regulations introduce a sliding scale for filing fees depending on the value of the transaction. These fees range from 10 lakhs rupees (approximately US$ 22,000) to 40 lakhs rupees (approximately US$ 88,000).

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4 *See* the Notification available at: http://www.mca.gov.in/Ministry/notification/pdf/Notification_4mar2011(4).pdf

V. SUBSTANTIVE APPRAISAL

The substantive test under the Competition Act 2002 is whether a reportable concentration is expected to have "*appreciable adverse effects in India*." Section 20(4) of the Competition Act 2002 provides that the Indian Competition Commission's assessment will, *inter alia*, take account of the following factors:

- The merging companies' and their main rivals' market shares;
- The extent of actual and potential competition;
- The nature and extent of competition between the merging companies;
- The level of market concentration;
- The degree of countervailing customer bargaining power;
- The extent of effective competition;
- The nature and extent of barriers to entry;
- The nature and extent of innovation;
- The nature and extent of vertical integration in the market;
- The availability of the "failing firm" defence;
- The merger's contribution to economic development; and
- Whether the benefits of the merger outweigh any adverse impact.

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Please feel free to be in touch with any of your regular contacts at the firm or any of our partners or counsel listed under "Antitrust and Competition" in the "Practices" section of our website (http://www.clearygottlieb.com) if you have any questions.

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