



Mixed signals

The implementation of India's competition law has been marred by contradictions between the legislation, the regulations and various government notifications

Rebecca Abraham reports

In March 2008, a conference in New Delhi on India's new merger notification regime attracted around 150 high-profile delegates from Indian and international law firms and companies. They were there to get to grips with what was then a largely unused piece of legislation – the Competition Act, 2002 – at the heart of which lies a mandatory pre-merger notification requirement. In spite of intense lobbying against certain aspects of the act, the government was determined to implement it.

Attending the conference was a team from India's competition regulator, the Competition Commission of India (CCI). The commission's acting chairman at the time, Vinod Dhall, vowed that the CCI would work constructively with industry as it moved to implement the various provisions of the act.

But, speaking immediately after the conference, some delegates expressed unease about the law. "[We] are

concerned about the presence of ambiguities and omissions," said Siddharth Sharma, the senior in-house counsel at Tata Sons.

"Only time will tell whether the CCI will be able to fulfil its assurances," added Lalit Bhasin, the president of the Society of Indian Law Firms.

Regulations unveiled

Details of how the act is to be implemented finally came on 11 May when the CCI published the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011. The regulations were preceded by four notifications from the Ministry of Corporate Affairs, on 4 March, two of which outlined various exemptions from the pre-merger notification requirement.

The Indian merger control regime is one of the most liberal in the world

Vinod Dhall
Managing Partner
Dhall Law Chambers



A third notification stated that sections 5 and 6 of the Competition Act, which deal with the regulation of combinations, would come into effect on 1 June.

The regulations apply to acquirers and target entities in India and also to groups that have Indian operations. But with asset and turnover thresholds set above those in most other countries (see *Crossing the threshold*, below), Dhall says that “the Indian merger control regime is one of the most liberal in the world”.

Dhall, now the managing partner of Dhall Law Chambers, a law firm that specializes in competition. He believes that the CCI has struck “a fine balance between the need for both competition review and growth of industry and facilitating merger transactions”.

Other observers agree. “The high monetary values of the notification thresholds are appropriate given the importance of not overburdening new agencies, such as the CCI, and India’s positioning as a rapidly industrializing economy,” says Dave Poddar, a Sydney-based partner at Allen & Overy. Poddar, who is part of the firm’s international antitrust group, was one of many international lawyers who attended the March 2008 conference.

Ironing out inconsistencies

Despite the high thresholds, many observers expect M&A transactions to face challenges, partly because of inconsistencies between the Competition Act and the regulations.

One such inconsistency involves the confidentiality of information, which is critical to the success of any M&A deal. Regulation 30 states that it is the responsibility of parties to the combination to request confidentiality from the CCI. But section 57 of the Competition Act prohibits the CCI and the Competition Appellate Tribunal from disclosing information without obtaining permission from the party concerned.

Yash Rana, a Hong Kong-based partner at Goodwin Procter, recently sent an alert to his clients warning that “the onus is on the filing party to show the need to maintain its confidentiality”.

Discrepancies such as this are compounded by the notifications issued by the Ministry of Corporate Affairs on 4 March. These provide a five-year exemption from the pre-merger notification requirement to “groups” and transactions that meet certain asset and turnover thresholds (see *To notify or not to notify?* page 20).

Dhall believes there is a “dichotomy between the government notifications and the merger regulations”. He points

Crossing the threshold

Big-ticket mergers and acquisitions will show up on the CCI’s radar

The Competition Commission of India (CCI) needs to be notified of proposed combinations that cross the following asset or turnover thresholds:

	Assets in India	Turnover in India	Assets in India or outside	Turnover in India or outside
Acquirer or target or both	₹15 billion	₹45 billion	US\$750 million (including at least ₹7.5 billion in India)	US\$2.25 billion (including at least ₹22.5 billion in India)
Acquiring group	₹60 billion	₹180 billion	US\$3 billion (including at least ₹7.5 billion in India)	US\$9 billion (including at least ₹22.5 billion in India)

In addition, any acquisition of 15% or more of shares or voting rights in a target is potentially notifiable.

The regulations

The CCI has to be notified within 30 days of:

- approval of a proposal for a merger or amalgamation by the board of directors of the enterprise concerned, or
- execution of any agreement or any binding document

that conveys an agreement or decision to acquire control, shares, voting rights or assets.

The obligation to notify the CCI lies with the acquirer, in the case of an acquisition or acquiring of control of an enterprise, and jointly with the parties to the combination, in the case of a merger or an amalgamation.

The CCI can impose fines of up to 1% of the global turnover or assets of the combination for failure to notify.

The onus is on the filing party to show the need to maintain its confidentiality

Yash Rana
Partner
Goodwin Procter



out that while the notifications imply that “for merger control purposes, a ‘group’ will mean 50% or more of voting rights,” the CCI’s regulations use the definition of group in the Competition Act. The act defines a group as two or more enterprises which “exercise 26% or more of the voting rights in the other enterprise”.

The distinction is important because it could affect a deal’s eligibility for an exemption from the pre-merger notification requirement. “The dichotomy needs to be harmonized,” says Dhall.

“There are a lot of grey areas in the exemptions and in the drafting,” says Krishnava Dutt, the Kolkata-based managing partner of Argus Partners. For example, “does the CCI have the power under the act to exempt combinations?” Dutt believes it may not, and suggests this is a “hyper-technical issue” which will probably end up being settled by the courts.

Bracing for delays

Another area of concern is the time the CCI will take to decide if a combination is likely to have an appreciable adverse effect on competition in the relevant market. While the CCI has said that in most cases it will form a prima facie view within 30 days, the act allows it up to 210 calendar days – around seven months – to make a decision. Some prospective M&A deals could collapse if they have to endure such a long wait.

Such delays could also cause practical problems for parties that are required to adhere to Securities and Exchange Board of India (SEBI) regulations as well as the CCI’s. As TK Bhaskar, a partner at Chennai-based HSB Partners, points out, under the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009, share allotments must be made within 15 days of the resolution approving the allotment. If the acquisition of shares triggers the merger control regulations, this time period may need to be extended while the parties await CCI approval.

“The CCI could take more than six months ... this is a fairly long period and we need to see how issues will be resolved,” says Bhaskar.

However, Dhanendra Kumar, who was chairman of the CCI until 5 June, has consistently played down the threat of such long delays. He said on several occasions that the commission would work to clear the majority of transactions

within 30 days. In fact speaking at a conference on his last day in office, he reportedly said that the CCI might take just one day to clear takeover deals involving failed companies or joint ventures that augment research and development capabilities.

The CCI’s ability to deliver on such assurances will be closely watched. Poddar at Allen & Overy believes that given recent levels of foreign investment in India, the CCI is likely to have a substantial caseload in spite of the comparatively high notification thresholds. So, he says: “it will be important it seeks to meet the 30-day clearance timeframe it has set for itself.”

Pallavi Shroff, a partner at Amarchand Mangaldas, goes even further: she would like the commission to move towards a system where approval is deemed to have been given if no decision is made within 30 days.

Troubled history

Scepticism about the CCI’s ability to function efficiently has been triggered by controversies that have dogged it since its creation in October 2003. Two writ petitions filed soon after it was established resulted in the Supreme Court ordering a stay on its functioning. The writ petitions challenged the government’s decision to appoint a retired bureaucrat to head what was essentially designed to be a judicial body.

The court was sympathetic to the challenge and the tug-of-war between the bureaucracy and judiciary was resolved only when parliament amended the Competition Act in 2007, making 108 changes that radically altered the legislation. As a result, the CCI was recast as an expert body with a bureaucrat at its head and appeals against its orders were to be heard by an appellate tribunal headed by a judge.

But soon after, the CCI was back in the Supreme Court when the Competition Appellate Tribunal, which had been established on 15 May 2009, challenged its power to investigate a complaint regarding alleged abuse of dominance. Sections 3 and 4 of the act, which deal with the prohibition of anti-competitive agreements and abuse of dominance respectively, had come into force on 20 May 2009 and the CCI had been working on a complaint against the Steel Authority of India.

The 84-page judgment that followed backed the CCI and

Does the CCI have the power under the act to exempt combinations?

Krishnava Dutt
Managing Partner
Argus Partners



set boundaries to the powers of the appellate tribunal.

Rahul Singh, a competition law expert at the National Law School of India in Bangalore, who is currently on a sabbatical and is a senior associate at Trilegal, believes that a lot of the CCI's problems have been caused by the poor drafting of the Competition Act.

"The commission will obviously struggle if the parent act has been poorly drafted," says Singh. "The CCI has faced unreasonable expectations ... it is not Harry Potter with a magic wand that can be waved and the act itself will be set right."

A new era?

Despite its troubled history, the CCI has recently been striving to improve how it functions. Most commentators agree that it did a good job in acting on responses received from industry to the draft regulations it published in February.

Shroff says the May regulations "are a step in the right direction" and that in coming up with them the CCI "has demonstrated admirable pragmatism".

Shroff, who has long been involved with competition policy and law in India, was the only lawyer on the high-

It will be important [the CCI] seeks to meet the 30-day clearance timeframe it has set for itself

Dave Poddar
Partner
Allen & Overy



powered SVS Raghavan committee set up by the government in 1999, which was the catalyst for the enactment of the Competition Act.

Practitioner's perspective

To notify or not to notify?

Delano Furtado of Trilegal explains how ambiguities in the regulations have created uncertainties about exemptions



All acquisitions of shares, voting rights and control, and mergers and amalgamations which cause or are likely to cause an appreciable adverse effect on competition in India are now on the radar of the Competition Commission of India (CCI). This follows the recent notification of sections 5 and 6 of the Competition Act, 2002, and issue of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011.

The act prescribes monetary thresholds to evaluate if a combination may have an appreciable adverse effect, and the CCI has to be informed of all combinations that are above the prescribed thresholds. Two notifications issued on 4 March by the Ministry of Corporate Affairs outline conditions under which some combinations may be exempted from the obligation to alert the CCI. But inconsistencies between the notifications, the act and the regulations are creating conflicting views on how the exemptions are to be applied.

Identifying an acquired enterprise

One exemption is for enterprises with assets or turnover in India of less than ₹2.5 billion (US\$56

million) and ₹7.5 billion respectively, whose control, shares, voting rights or assets are being acquired. But questions thrown up by the wording of the notification include:

Is the exemption a standalone condition for the acquired enterprise and, if so, does this imply that the acquirer needs to comply with the act? This is because unlike the notification, which exempts only the "enterprise whose control, shares, voting rights or assets are being acquired", the monetary thresholds in the act are for the combination, i.e. both the acquired and acquiring enterprise.

Does the exemption apply only to acquisitions of control or shares of an enterprise or does it extend to merger transactions? While the language of the notification uses the word "acquired", section 5 of the act treats an "acquisition" and a "merger" as two distinct methods through which a combination can occur. This is not reflected in the notification.

In a merger – assuming the exemption extends to such transactions – which is the "enterprise whose control, shares, voting rights or assets are being acquired"? For instance, where enterprise A, which has a corporate shareholder C, merges with enterprise B, which is the surviving entity, both A (as its assets

Samir Gandhi, a Delhi-based partner at Economic Laws Practice, is just as positive and believes that in drawing up the final regulations “the government has listened”. (Gandhi and three others from the firm have been advising the Hamid Karzai government in Kabul on putting in place a modern competition law to help Afghanistan make a smooth transition to a free-market economy.)

One area in which the CCI has definitely taken heed of industry suggestions is on the issue of fees for filing notifications. The draft regulations listed fees ranging from ₹1 million (US\$22,000) to ₹4 million, depending on the value of the acquisition and the nature of the transaction. After intense pressure from industry, the fees are now set at ₹50,000 for Form 1, or short-form notifications, and ₹1 million for Form 2, or long-form notifications. It is expected that only a small percentage of notifications will need to be made in the long form.

Long road ahead

These are early days for merger control in India and both government and the CCI will need to do a lot more to fine-tune the regime.

One area that needs clarifying is the treatment of joint

[The merger control regulations] are a step in the right direction

Pallavi Shroff

Partner

Amarchand Mangaldas



ventures. Dhall points out that “at present there is no clear picture” as only section 3 of the act, which deals with anti-competitive agreements, refers to joint ventures and even there they are mentioned “in a circular way”.

will have been acquired by B as part of the merger) and B (as its shares/control would have been acquired by C) could be seen as the acquired enterprise.

Group exemptions

Under section 5 of the act, all enterprises which are part of a group are to be considered for calculating the monetary thresholds. Accordingly, a group means two or more enterprises which, directly or indirectly, are in a position to exercise 26% or more of the voting rights in another enterprise. But the 4 March notification exempts groups exercising less than 50% of voting rights in the other enterprise.

Since the threshold is worded differently under the act and the notification, multiple interpretations of the group exemption are possible. These include:

The threshold for the group exemption has either been amended from (a) “26% or more” to “less than 50%”, or (b) “26% or more” to “50% or more”. If interpretation (a) is correct, two or more enterprises exercising even 1% control over another enterprise will be a group – this is absurd. However, if interpretation (b) is preferred, only enterprises that exercise more than 50% control over another enterprise will constitute a group and this greatly reduces the categories of transactions that qualify for group exemption.

As section 54 of the act only empowers the Ministry of Corporate Affairs to exempt categories of enterprises or transactions from the purview of the act, it is unclear how the ministry can issue a notification which in essence amends the act. The absence of a formal amendment to the act creates further interpretational anomalies.

As a group (i.e. two or more enterprises exercising 26% or more control in another enterprise) which exercises less than 50% control over another enterprise is

exempted from the provisions of section 5 of the act, it could stay below the radar of the CCI. Thus when enterprises A and B (with the former exercising more than 26% of voting rights in the latter) form a group AB that goes on to acquire the shares or assets of enterprise C (in which AB exercises less than 50% of voting rights), the CCI would not need to be notified.

Other exemptions

In addition to these exemptions, the regulations provide that certain categories of combinations (listed in schedule I of the regulations) are “ordinarily not likely to cause an appreciable adverse effect” and need not “normally” be notified to the CCI. From this it appears that every transaction in one of these categories needs to be subjected to an appreciable adverse effect analysis before deciding if the CCI has to be notified. Schedule I includes intra-group acquisitions, but which transactions would qualify for this exemption remains unclear given the lack of clarity on what constitutes a group.

Way forward

These contradictions require immediate clarification from the Ministry of Corporate Affairs and the CCI. Meanwhile, as the penalty for not notifying the CCI may be as much as 1% of the combination’s turnover or assets, parties and M&A practitioners should claim the exemptions only after careful evaluation.

Delano Furtado is a partner at Trilegal. Avirup Bose, Anant Kaushik and Siddharth Sharma, who are associates at the firm’s Mumbai office, contributed to the article. Trilegal is a full-service law firm with offices in Delhi, Mumbai, Bangalore and Hyderabad. It has more than 140 lawyers.

“It is important that the commission clarifies when joint ventures will be covered by the merger regime and when they will be covered by agreements,” says Dhall.

Another area that needs to be re-examined is the wording of the 4 March notification, which according to Dhall may unintentionally benefit certain parties. The notification suggests that both the asset threshold (₹2.5 billion) and the turnover threshold (₹7.5 billion) will have to be crossed before it becomes necessary to notify the CCI of the formation of a combination.

This may allow an entity that is situated outside India, which has few assets in the country but nevertheless has a huge turnover (for instance through imports), to escape notifying the CCI. “This is an unintended consequence and should be reviewed,” says Dhall.

Too many cooks?

The success of the CCI will also depend on whether it can carve out a space for itself in the crowded regulatory arena. Since the opening up of the Indian economy, several sector-specific regulators have emerged, and at least three – the petroleum, electricity and telecommunications regulators – are required by the laws that govern them to enhance the level of competition in the sectors they oversee.

While most commentators take this overlap for granted, Singh observes that the regulatory authorities are now “more alive” to the problem. Indeed, it is clear that those who drew up the Competition Act recognized this quandary, as sections 21 and 21A enable the CCI and sector-specific regulators to consult with each other whenever a matter related to competition comes before them.

Dhall, who believes “there isn’t enough dialogue at the moment between the CCI and other regulators,” says these sections should be used “freely and frequently”.

However, Gandhi at Economic Laws Practice argues that “there can only be an overlap if regulators are doing exactly the same thing”, and “no other regulator does the kind of sophisticated economic analysis that the CCI undertakes” in order to uncover any violations of the Competition Act.

Little change expected

As far as merger control is concerned, the CCI may have its job cut out as only the largest M&As will appear on its

No other regulator does the kind of sophisticated economic analysis that the CCI undertakes

Samir Gandhi

Partner

Economic Laws Practice



[The CCI] will definitely get access to information, but what they do with that information will depend on their expertise

Rahul Singh

Senior Associate

Trilegal



radar. As Dutt at Argus Partners explains, most M&A transactions in India occur within the small and medium-sized enterprise sector and there will be no change in how these deals happen.

Indeed, critics argue that little has changed on the competition landscape in India since the CCI began functioning and that it is business as usual for most companies. The commission’s first final order, made in December 2010, was criticized as being timid, as it ruled in favour of banks and non-banking financial institutions that were allegedly abusing their dominant position by levying a penalty on borrowers who tried to prepay their housing loans.

More recently, on 25 May the CCI imposed a penalty of ₹100,000 each on 27 film producers after finding them guilty of forming a cartel to exploit cinema owners (see **News**, page 9). But observers say the fines will do little to change the status quo.

Keeping an ear to the ground

Singh at Trilegal says India’s competition regulator “has been tottering” for two reasons: it has lacked expertise and has also not had access to information.

The CCI is well aware of the former and over the past couple of years it has hired experts. It has also called on the services of more experienced regulators from the US and Europe to train its staff.

But while its effectiveness in investigating anti-competitive agreements and abuse of dominance will continue to be hampered by a lack of information, it will face no such problems as it seeks to regulate M&A transactions. This is because parties wanting their deals to go through swiftly can be expected to readily provide any information requested.

Singh speculates that the new-found access to information that the CCI will have as it polices M&A activity may boost its ability to investigate agreements and abuse of dominance. “With merger controls they will definitely get access to information, but what they do with that information will depend on their expertise,” he says.

Whatever happens, these are clearly exciting times for professionals working in the M&A field. And most will agree with Bhaskar of HSB Partners who says: “let the first filings happen and then we will see how it all pans out.” ■