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Our File No.	69459
Date	April 24, 2015

VIA EMAIL to combinations@cci.gov.in

Sudhir Mital
Member, Combinations Division
Competition Commission of India
B-Wing, HUDCO Vishala, 14, Bhikaji
Cama Place, New Delhi-110066
India

Dear Mr. Mital:

Re: Proposed Amendments To The Combination Regulations

We write on behalf of the Merger Streamlining Group (the "Group"), whose membership consists of multinational firms with a common interest in promoting the efficient and effective review of international merger transactions.[1] The cornerstone of the Group's activity has been to work with competition agencies and governments to help implement international best practices in merger control. In particular, the Group focuses on the *Recommended Practices for Merger Notification Procedures* ("*Recommended Practices*") of the International Competition Network ("ICN"),[2] of which the Competition Commission of India ("CCI") is an active member, in addition to being the Co-Chair of the Merger Working Group.

The Group's work projects to date have included two major surveys on compliance with the *Recommended Practices*, as well as submissions to the European Commission, the U.S. Antitrust Modernization Commission, and to competition agencies in twenty other jurisdictions (such as Russia, China, Japan, Brazil, Chile, Peru, the United Kingdom, Portugal, and Spain), including several submissions to the CCI and the Indian government to promote reforms consistent with the *Recommended Practices*.

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[1] The current members of the MSG include BHP Billiton, Chevron, Danaher, GE, Novartis, Oracle, Procter & Gamble, SAB Miller, Siemens, and United Technologies.

[2] International Competition Network, *Recommended Practices for Merger Notification Procedures*, available online at <http://www.internationalcompetitionnetwork.org/ uploads/library/doc588.pdf> [*Recommended Practices*].

The Group recognizes the CCI's ongoing efforts to improve India's merger control regime and appreciates the opportunity to provide this submission in response to the recent invitation for comments in connection with the *CCI (Procedure in regard to the transaction of Business relating to Combinations) Amendment Regulations, 2015* (the "*Proposed Amendments to the Combination Regulations*"). In particular, the Group believes that the proposed amendment to the second proviso of sub-regulation 5(8) is a directionally positive change and will remedy some of the uncertainties surrounding the definition of "other document for acquisition" and the types of communications with the government or authorities which could trigger a notification.[3] The proposal to add flexibility in respect of signatories for filings is also welcome, although the qualification that there must be a specific rather than general signing authorization unnecessarily limits the progress in this area.

The Group's principal concern with the current amendments is that they may routinely and substantially increase the duration of phase I reviews. More focused alternatives for the extension of phase I in specific situations where that could obviate the need for phase II reviews would be beneficial for both the CCI and merging parties. In addition, the Group respectfully raises two additional issues not addressed by the *Proposed Amendments to the Combination Regulations* where the Group believes that India's merger regime is inconsistent with international best practices and where further changes should be considered. The Group is providing these comments in the spirit of constructive engagement, based on our members' very substantial experience with multinational merger transactions.

1. Length Of Review Process

We understand that the *Proposed Amendments to the Combination Regulations* include revisions which could increase the length of the initial review period substantially — *i.e.,* adding up to another 54 calendar days in addition to the current 30-day period[4] set out in sub-regulation 19(1):

(i) The insertion of the word "working" following the word "thirty" in sub-regulation 19(1) would effectively provide the CCI with 30 working days (approximately 42 calendar days) rather than 30 calendar days to form its *prima facie* opinion on the combination.

(ii) The additional provisos in sub-regulation 19(3) and in regulation 34 specify that where the CCI requests information from any other enterprise or seeks the opinion of any other agency or statutory authority in connection to the combination, the time taken in obtaining such

[3] *The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2015,* sub-regulation 2(1).

[4] The Group notes that the current initial 30-day period already excludes the time taken by parties to a transaction to file additional information requested by the CCI, effectively making this prescribed period longer than 30 calendar days in some cases.

> information or opinion, up to 15 working days (approximately 21 calendar days), shall be excluded from the 30 day period in which the CCI is to form its *prima facie* opinion on the combination.[5] We understand that two separate extensions could be applied in respect of requests to other enterprises and requests to other agencies.

It is common in well-functioning merger review regimes for the first phase review to be completed within approximately 30 calendar days.[6] Moreover, in many regimes there is no provision for "stopping the clock" when obtaining further information from the parties (as currently exists in India[7]) or from third parties or other agencies (as is now being proposed). A longer initial review period is generally not warranted where the notification thresholds and agency resources are set at levels which allow transactions that are unlikely to result in any material competitive concerns to be screened out in this timeframe.[8] Similarly, a stop-the-clock provision is not normally necessary in the first phase of a two-phase review process. Furthermore, the Group is concerned that the exclusion of the time taken to obtain information from other enterprises could be used strategically by competitors, other potential acquirors, or others with reasons to oppose the transaction to delay the review and closing of the transaction.

Lengthy reviews create unnecessary costs and risks for parties to a transaction. As recognized in the ICN *Recommended Practices*:

> [M]erger transactions are almost always time sensitive […] Delay in the completion of such reviews may give rise to a number of risks. Delay may jeopardize the consummation of the transaction itself due to intervening developments and/or other time-sensitive contingencies such as financing arrangements. Delay may also have an adverse impact on the merging parties' individual transition planning efforts and on their ongoing business operations due to work force attrition and marketplace uncertainty.[9]

Transactions that do not require an in-depth review should be reviewed expeditiously. The vast majority of transactions are unlikely to raise material competitive

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[5] *The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2015,* sub-regulations 2(8)–(9) and (11).

[6] For example, in the United States, Canada, South Korea and Russia, among other jurisdictions, the initial phase I review must be completed within 30 days from receipt of the filing. The standard phase I review period under the EC Merger Regulation is 25 working days, which normally equates to 35 calendar days.

[7] The Group understands that sub-regulation 19(2) of *The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011* provides that "the time taken by the parties to the combination, in furnishing the additional information…shall be excluded from the [30 day] period".

[8] The ICN recommends that merger review regimes be designed to allow transactions unlikely to raise material competitive concerns to proceed expeditiously (see *Recommended Practice* IV-B, Comment 1) and that in establishing the notification thresholds, jurisdictions "should seek to screen out transactions that are unlikely to result in appreciable competitive effects within [their] territories" (see *Recommended Practice* I-B, Comment 1).

[9] *Recommended Practice* IV. In particular, see *Recommended Practice* IV-A, Comment 1 (emphasis added).

concerns, and delays in the review process would be disproportionate to any corresponding enforcement benefit. A further consideration is the overall length of the review process for transactions that require in-depth review. India already has a relatively lengthy maximum review period compared to other major jurisdictions.[10] This allows transactions which do raise competition concerns to be thoroughly examined, and reduces the need for extra time to be provided for phase I.

Nevertheless, the Group recognizes that the CCI is facing significant resource challenges relative to the volume of transactions which trigger the notification thresholds. In certain cases, the flexibility to lengthen the review period could be beneficial to the CCI and merging parties by allowing for the completion of a review and clearance of a transaction in phase I, rather than forcing a phase II review as a result of inadequate time and resources to meet the phase I deadlines. Accordingly, the Group recommends that the *Combination Regulations* provide for <u>discretionary</u> extensions to the initial review period rather than the <u>mandatory</u> extensions that are being proposed.

Importantly, any such discretion should be used sparingly and only in those situations where the extension is expected to provide the CCI with sufficient time to make a determination regarding whether a particular transaction is likely to result in material competitive concerns. In other words, where transactions are very straightforward, the CCI should continue to strive to complete reviews within 30 calendar days. Conversely, where transactions are very complex, an extension is also unnecessary since an in-depth second phase review would be required in any event and should proceed expeditiously. These extension powers should be focused on cases where the extension may allow a decision to be reached within an elongated phase I period, thereby saving the merging parties <u>and the agency</u> the resources that would have been consumed by a phase II review.

Moreover, the Group believes that the cumulative possibility of an additional 54 calendar days is an excessive increase. The Group suggests that the *Proposed Amendments to the Combination Regulations* limit the CCI to only one of the three possible extensions. In other words, if the CCI determines that it needs to receive input from other enterprises <u>and</u> other agencies, only one 15 working day extension should be available. Furthermore, the additional 12 calendar days contemplated in the proposed amendment to sub-regulation 19(1) should only be available where the sub-regulation 19(3) and regulation 34 extensions are not employed.

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[10] Reviews by the CCI may take up to 210 days, during which the transaction cannot be consummated. By contrast, in the United States and Canada, for example, transactions are subject to an initial 30-day suspensive waiting period. If, within this 30-day period, a second request or request for supplementary information is issued, the review must be completed within 30 days from substantial compliance with the request for information. Since parties are often able to respond to the supplementary information request within 60–90 days, most reviews are completed within 150 days. Similarly, the European Commission typically has 25 working days in which to make its phase I decision and 90 working days to complete its phase II investigation — *i.e.,* a total of approximately 160 calendar days. In South Korea, notifiable transactions are subject to a 30-day waiting period, which can be extended up to 120 days (*i.e.,* 150 days in total) by the Korean Fair Trade Commission. In Russia, the Federal Antimonopoly Service has an initial 30 days to clear the merger or decide that a phase II review is required, which must be completed within a further two months (*i.e.,* around 90 days in total).

2. Power To Invalidate Notifications

The proposed amendments to sub-regulation 14(2) of the *Combination Regulations* would grant the CCI the ability to invalidate a notice filed under regulations 5 or 8 where "it comes to the knowledge of the [CCI] that such notice is not valid or complete as per sub-regulation (1)."[11] The terms "not valid" and "complete" are not defined in the *Combination Regulations* and could be open to a very broad or technical interpretation.

The Group recommends additional language to clarify or circumscribe this discretionary power. Where the missing information that ought to have been included in the notice is minor, and any impact on the CCI's ability to review the transaction is negligible, such "incompleteness" should not warrant an invalidation of the notice. Accordingly, the CCI could add qualifying language to the proposed amendments requiring, for example, that the notice is "not substantially complete" in order for the discretion to invalidate to be exercised.

It is also unclear what types of assessment and oversight will occur before a notice is declared to be "not valid". The Group urges the CCI to provide some further clarification and/or examples, and in doing so, to avoid an overly formalistic interpretation of this term. Very minor formal or procedural failures should not subject a notice to invalidation where there is no substantive effect on the review.

3. Authorized Signatories For Notifications

The *Proposed Amendments to the Combination Regulations* will broaden the category of accepted signatories for notifications. Sub-regulation 2(3) of the proposed amendments would permit "any person duly authorised by the board of directors of the company for the said purpose" to sign a notification[12] (previously, only the Company Secretary could be an authorized signatory, in addition to the directors of the company). This would provide helpful flexibility for merging parties without any negative impact on the effectiveness of the merger review process. However, the CCI appears to have curtailed this flexibility by requiring the signatory be authorized for the specific purpose of signing the notification. The requirement could be unnecessarily burdensome as it would require an additional procedural step of obtaining a resolution from the board of directors granting specific authorization to sign the notification.

Internationally, it is common for jurisdictions to accept as signatory any representative authorized to sign on behalf of the company on a general basis under the applicable domestic laws and the corporate governance process of the company. One of the themes of the ICN *Recommended Practices* is that unnecessary burdens should be avoided in the

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[11] *The Competition Commission of India (Procedure in the regard to the transaction of business relating to combinations) Amendment Regulations, 2015,* sub-regulation 2(6) (emphasis added).

[12] *The Competition Commission of India (Procedure in the regard to the transaction of business relating to combinations) Amendment Regulations, 2015,* sub-regulation 2(3).

merger review process.[13] Therefore, while the Group welcomes this proposed amendment in general, it recommends deletion of the words "for the said purpose" from sub-regulation 2(3).

4. Key Issues For Future Consideration

Although the notification thresholds and filing deadline in India's merger review regime are outside the scope of the current amendments and consultation, the Group encourages the CCI to consider these two important issues as it continues to refine India's competition law in the future. They are areas in which India's merger review process is inconsistent with the ICN *Recommended Practices.*

(a) Material Local Nexus To Reviewing Jurisdiction

As noted in the Group's 2011 submission to the CCI on the draft *Combination Regulations*, it is important that merger regimes contain a meaningful local nexus to the reviewing jurisdiction.[14] As the ICN has clearly recognized, transactions lacking a meaningful local nexus are unlikely to generate local competitive concerns or warrant the use of agency investigative resources. The jurisdictional threshold should require that each of at least two parties to the transaction have significant assets in India, or revenues generated from those assets.[15] Alternatively, it may be sufficient if the target entity being acquired has significant assets in India, or revenues generated from those assets. The notification requirement should not be triggered "solely on the basis of the acquiring firm's local activities."[16]

A meaningful jurisdictional nexus not only reduces the burden on merging parties, but also has the significant benefit of allowing competition agencies to allocate their enforcement resources efficiently. The review of transactions that are unlikely to raise material competitive concerns in India puts further pressure on the CCI's constrained resources.

India's current thresholds can be triggered based on the assets or revenues of the acquiror alone, or the combined activity of the acquiror's "group" and target entity following the combination.[17] As a result, a large enterprise with assets exceeding rupees 1,000 crores, or turnover exceeding rupees 3,000 crores, which acquires a small company with very limited

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[13] See for example *Recommended Practice* V.

[14] See http://mcmillan.ca/Files/124018_Comments%20of%20the%20Merger%20Streamlining%20Group%20-%20Draft%20Regulations%20-%20Procedure%20in%20regard%20to%20the%20transacti%20%282%29.PDF for a copy of the Group's prior submission to the CCI dated March 21, 2011.

[15] See *Recommended Practice* 1-C, Comment 1.

[16] *Recommended Practice* 1-C, Comments 1 and 3.

[17] *The Competition Act,* 2002, No. 12 of 2003, sub-sections 5(a)–(c). For example, sub-section 5(a)(i) provides for the consideration of the assets or revenues of "the acquirer and the enterprise, who control, shares, voting rights or assets have been acquired or are being acquired", jointly; sub-section 5(b)(ii) provides for the consideration of the assets or revenues of "the group to which the [target] would belong after the acquisition".

assets or revenues in India would be required to notify the CCI[18] — despite the negligible incremental effect and thus no likelihood of the transaction creating any material competitive concerns in India.

The Group understands that there is some scope within the current statutory regime and *Combination Regulations* to address nexus issues. For example, the CCI has in the past created a number of exemptions to the notification requirements in Schedule I of the *Combination Regulations*.[19] In 2011, the CCI issued a Notification which exempted transactions, for a five-year period, from the filing requirements where the target entity had assets of less than rupees 250 crores or turnover of less than rupees 750 crores.[20] However, the Group understands that this exemption was repealed in 2014.[21] The Group urges the CCI to consider the local nexus issue as an area for future amendment, and to refine the thresholds to require meaningful local activity by at least two entities to a transaction or by adding an additional meaningful threshold for the target entity.

(b) Filing Deadline

The Group has expressed concerns in past submissions regarding the filing deadline under India's merger control regime. The ICN has correctly noted that filing deadlines are not warranted in suspensive regimes.[22]

The Indian *Competition Act* requires that parties notify the CCI within 30 days of certain "triggering events".[23] This filing deadline can be difficult to meet, particularly for parties to an international transaction where there may be numerous products, markets, and complex issues to address in multiple jurisdictions in a coordinated manner. Moreover, it is unnecessary, given that India has a suspensive regime (with a potentially lengthy two-phase review process) and imposes burdens on the parties without a corresponding material benefit to the CCI.

In the normal course, parties wish to avoid unnecessary delays that may hinder closing. The suspensive waiting period prevents parties to a transaction from implementing the transaction for up to seven months in India and thereby provides the CCI with a full opportunity for effective enforcement, regardless of when a transaction is notified. Accordingly, the Group submits that the 30-day filing deadline is unnecessary.

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[18] *The Competition Act,* 2002, No. 12 of 2003, sub-section 5(a)(i)(A).

[19] *The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011* (No. 3 of 2011), Schedule I.

[20] S.O. 479(E), 480(E), 481(E), March 4, 2011.

[21] *CCI (Procedure in Regard of the transaction of business relating to combinations) Amendment Regulations, 2014,* sub-regulation 2(5).

[22] *Recommended Practice,* 1-B.

[23] *The Competition Act,* 2002, No. 12 of 2003, sub-section 6(2); see also *The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011* (No. 3 of 2011), sub-regulation 5(7) and (8).

The Group recognizes that such a change is beyond the authority of the CCI and would require amendments to be passed by Parliament. Nevertheless given the CCI's important role in the development and implementation of competition policy in India, the Group urges the CCI to encourage the government to consider making changes to this area in the future.

The Group also recognizes that the CCI has some flexibility in how the 30-day filing deadline is interpreted and implemented. The Group understands that, to date, the CCI has tended to take a relatively strict approach with respect to the "trigger events."[24] The Group views the proposed amendment to the second proviso of sub-regulation 5(8) as a positive change which will provide helpful clarity for parties contemplating a combination.[25] The Group also encourages the CCI to consider other revisions to the trigger events or filing deadlines to provide more time and flexibility to merging parties, such as by permitting parties to request an extension to an unduly early filing deadline. Given India's two-phase suspensive review process, such changes would not impede the efficient and effective enforcement of the merger control regime.

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Thank you very much for considering the Group's views. We would be pleased to discuss this submission with you or your colleagues further, at your convenience.

Yours very truly,

A. Neil Campbell

Casey W. Halladay

Copy to: Members of the Merger Streamlining Group
Jun Chao Meng, McMillan LLP

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[24] For example, the current sub-regulation 5(8) of the *Combination Regulations* provides that, even where no "other document" has been executed, but an "intention to acquire" is communicated to the Central/State Government or a Statutory Authority, the CCI regards the filing deadline as being triggered.

[25] *The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2015,* sub-regulation 2(1). The proposed amendment to the proviso classifies a public announcement made under the *Securities and Exchanges Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011* as an "other document" triggering the filing deadline, replacing the broader and less clear concept of a communication to the Central/State Government or a Statutory authority.