

**COMPETITION COMMISSION OF INDIA (PROCEDURE IN REGARD TO THE
TRANSACTION OF BUSINESS RELATING TO COMBINATION)
REGULATIONS, 201 _ (NO. _ OF 201)**

SUBMISSION OF COMMENTS FROM CUTS INTERNATIONAL

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CUTS INTERNATIONAL COMMENTS ON REGULATIONS FOR COMBINATIONS

CUTS acknowledges comments received from the following experts within their personal capacity, which have been incorporated in the document:

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HIGHLIGHTS

1. By and large, the Draft Regulations are fine and in line with Competition Act, 2002 (as amended in 2007)
2. The effective date for Sections 5 and 6 of the Act to be brought into force is 1 June, 2011. This provides a preparatory period of 3 months for enterprises to get ready.
3. The expression “Appreciable Adverse Effect on Competition” (AAEC) within India has not been defined in the Act but Section 20 (4) thereof lists the various factors to be reckoned by the CCI for the purpose of determining whether a combination would have the effect of or is likely to have AAEC in the relevant market. It is hoped that despite the said listed factors being very general in semantic description, the CCI will, over a period of time, accord constructive interpretation and lay down parameters and criteria for objective determination of AAEC.
4. The pre-merger consultation provisions in Regulation 12 is a step in the right direction. Very correctly, Regulations 12 (4) and 12 (5) declare that the consultation opinion is confidential and not binding on the CCI.
5. Regulation 25 (6) provides that the CCI shall endeavour to pass an order on combinations within 180 days of the filing of the notice under Section 6 (2) of the Act. This clips 30 days from the 210 days provided in Section 31 (11) of the Act. This will be welcomed by industry and enterprises.
6. Regulation 18 (1) enjoins the CCI to form a prima facie opinion on a combination within 30 days of receiving notice as to whether a combination is likely to cause AAEC on competition within the relevant market in India. This is a welcome provision, as it will speed up the procedure, particularly in the case of simple/routine combinations.

LOWLIGHTS

7. Regulations require of all initial filings the equivalent of what one would ask for on a second request. Asking for too much information at the outset, prior to a sorting out process, will substantially waste resources and time of filing companies and also CCI. This needs to be reviewed.
8. Regulation 28 declares that the Regulations shall not apply to a combination, if it has taken effect prior to the effective date. The expression “has taken effect” needs to be

clarified, as it could be interpreted differently by different parties. An illustration of possible ambiguity in this regard is when combination transactions are covered by more than one financial step. It is possible that one financial step has concluded and the second is yet to take place after the effective date. It requires a clarification whether such transactions where one part falls after the effective date will fall under the exemption or will have to be notified.

9. Notwithstanding Regulation 28 (granting exemption), Section 20 of the Act permits the CCI to inquire into whether such a combination has caused or is likely to cause an AAEC in India within one year from the date on which it has taken effect. Regulations cannot override the provisions of the Act and this should be addressed while framing the Regulations.
10. Regulation 19 (1) requires the parties to the combination to publish the details within 10 working days. This is after the CCI arrives at a *prima facie* opinion that the combination is likely to cause AAEC. But if one looks at Sections 29 (1), 29(1)A and 29(2) of the Act, the CCI has to issue a notice to the parties and secure their opinion and also receive the report from the Director General, before asking the parties to publish details of the combination under Section 29 (2). Thus Regulation 19 (1) is not in consonance with Sections 29 (1), 29(1) A and 29 (2) of the Act. In other words, the opportunity to be given to the parties under Section 29 (1) is extinguished in Regulation 19 (1).
11. The independent agencies to oversee modification in a proposed combination are appointed as per Regulation 24. This is a step in the right direction but this should not lead to unnecessary delays. There should be a time line prescribed within which the independent party would need to submit their report to CCI. The regulation should also state that the fees payable to the independent agency will be determined by the CCI. Payment modality has been stated, but the fees
12. Confidentiality of information is provided in Regulation 27. In the event such information is shared with a regulatory/sectoral authority under different statutes, it could lead to objections from the parties to the combination. This should be clarified.
13. **Lack of Third Party Involvement in Merger Proceedings:** Even though the Draft Regulation is a significant improvement over the earlier versions, one of the essential arenas that it leaves unheeded pertains to the involvement of third parties, including consumer groups, in merger proceedings. Third party interventions are important in merger review processes mainly for two reasons: knowledge of information is important for all parties; and studies have revealed that in general, when stakeholder participation is uncertain, inefficiencies are seen to arise. The role of customers and competitors in merger control and regulations has been growing increasingly. Two models that rely significantly on the importance of third party interventions and have introduced third party intervention in their merger reviews are the EU and the United States.

The European Community Merger Regulation (ECMR) and the review practice of the Commission specifically requires the involvement of third parties. Besides the statutory rules on the involvement of third parties in the merger process, the Commission's Best Practices on the conduct of EC merger control proceedings (published in 2004) contain informal guidance on how the Commission will deal with third parties in concrete cases. Third parties have a dual role in the procedure: they are valuable sources of information for the Commission and they can become 'quasi-parties' in the proceedings with their

own procedural rights if they can show a 'sufficient interest' as to the outcome of the proposed transaction.

In addition, sometimes interested third parties have the ability to influence which authority will review the case. Similarly, antitrust authorities in the US rely greatly on input from third parties in analyzing the potential competitive effect of mergers. Third-party evidence is often an important aspect of the agency's evaluation of the potential competitive effect of a transaction. The role of third parties in merger investigations is illustrated by several recent actions in the US and the EU and great lessons can be learnt from decisions even if the customer evidences were not binding. For example, in the US, the recent Oracle/PeopleSoft and Arch Coal decisions as well as the EU GE/Honeywell case emphasize on the significance of intensive and successful third party involvement in merger proceedings. Such instances bring to light yet another glaring limitation in the Draft Merger Regulations.
