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India's New Merger Control Regime: An Economist's Perspective

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I. INTRODUCTION

India's new merger control regime will come into force on June 1, 2011. This article describes what consulting economists would like to see from the merger control regime, drawing on experience of merger control in other jurisdictions, in particular Europe and South Africa. In a merger review process with its often tight timescales, it is in everyone's interest to ensure that the resources allocated by the merging parties to compiling economic evidence, and the analytical resources of the Competition Commission of India ("CCI"), are focused on addressing those questions that are most critical for the decision-making process. This article focuses on the processes and working practices we would like to see to ensure that economic evidence is deployed and evaluated effectively in India's new merger review process.

II. ROLE OF ECONOMICS IN THE MERGER REVIEW PROCESS

The Competition Commission of India's draft merger regulations set out the type of information to be included in a merger filing. This covers the types of information typically compiled and assessed in a merger investigation; for example, market shares, as well as providing an opportunity to explain why the proposed merger will not result in an appreciable adverse effect on competition in the relevant markets in India. There is scope to include economic evidence in the discussion of why the merger will not significantly lessen competition.

We would welcome an approach under which an economist is assigned to each merger review case team. The requirement for economic analysis varies on a case-by-case basis; in some cases, perhaps the majority, a merger does not raise prima facie competition concerns, or those concerns can easily be allayed or remedied and the need for economic analysis may be limited. In other cases, economic analysis may be critical for judging whether a merger is likely to result in an appreciable adverse effect on competition. Distinguishing which category a merger falls into can be complex, and can benefit from economic input.

III. OPPORTUNITY FOR EARLY ENGAGEMENT WITH THE CASE TEAM AND ITS ECONOMISTS

Because the CCI must reach an initial view on a merger within 30 days of notification, early informal engagement with the case team is likely to be helpful, particularly in those cases that appear to raise prima facie competition concerns. Early engagement with the economists on the case team will be helpful for reasons including the following:

- The merging parties can provide the CCI with background information on the markets affected by the proposed merger, on the substitution possibilities available to customers,

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and how competition works in particular markets. Basic factual questions can thus be addressed prior to notification, rather than having the clock stopped when information requests are issued post-notification.

- The CCI and the merging parties can focus on the areas where competition concerns are most likely to arise and agree the particular “theories of harm” that are prima facie most plausible in a particular case and which should be addressed.
- The CCI and the merging parties can discuss the data that are available on a particular industry. With these data constraints in mind, they can agree which types of analysis are feasible and which are likely to be most persuasive in determining whether the theories of harm being investigated are, in reality, plausible in a particular merger situation. Obtaining “buy in” from the investigating case team is important in ensuring that when a client invests in a particular type of analysis (especially if this involves significant data collection and analysis), the case team agrees that the proposed analysis in principle is informative for the questions being evaluated. This type of discussion, including discussion on timings, also ensures that the case team has the resources in place to evaluate the analysis when it is received.
- In certain industries little data may exist on areas that are important for evaluating critical questions. In such cases the CCI or the merging parties may wish to commission new data collection, for example through means of a customer survey. Dialogue between the merging parties and the case team on the design of any such data collection is essential. If the merging parties are investing in commissioning a survey, they will wish to know that the CCI agrees with the methodology to be employed (e.g. sample selection methodology, sample size, phrasing of questions asked, who will conduct the survey) and will place reliance on its results. Similarly, if the CCI initiates a survey, obtaining input from the merging parties prior to the survey being carried out can be invaluable to ensure that the survey will be understood by customers, as the merging parties will be experts in understanding their particular markets, and will have experience of the terminology that their customers understand, and may even have experience of commissioning similar surveys in the normal course of their business.

IV. ONGOING DIALOGUE WITH THE CASE TEAM AND ITS ECONOMISTS

Regardless of when engagement with the case team begins, whether significantly prior to notification or at notification, ongoing constructive dialogue with the case team and its economists is helpful for ensuring that the review process proceeds as efficiently as possible from the perspective of all parties. For example:

- If the merging parties submit an economic study, sharing the underlying data with the case team and discussing the results of that analysis will be helpful. If the case team wishes to investigate how the results of any analysis change under alternative scenarios (e.g. using data on a different time period, or under a different assumptions), discussions can focus on whether market evidence suggests that such changes are warranted or justified in a particular case.
- If a survey has been carried out, do both sides agree on the interpretation of the results? If not, what are the areas of disagreement and what other evidence might be adduced to test whether a particular interpretation of the results is reasonable?

In the course of a merger review process the CCI may receive submissions or information from customers or interested third parties (e.g. competitors to or suppliers to the merging parties). Sharing a summary of such information with the merging parties, subject to limitations on confidentiality, can be constructive—for example, if there are additional factors that need to be considered that would reconcile two apparently conflicting submissions.

As the CCI's thinking on a particular case develops, sharing this with the parties can ensure that the merging parties' resources are focused effectively on providing evidence in areas where they may believe that the CCI's provisional conclusions are incorrect, or on designing remedies packages that are acceptable to the merging parties and meet the CCI's concerns.

An ongoing constructive dialogue can ensure that information received and evaluated by the CCI during the merger review process is as relevant as possible to the questions being considered, and that the merger review process proceeds as rapidly as possible towards a well-reasoned conclusion.

V. ANALYSIS AND REASONING EXPLAINED IN PUBLISHED DECISIONS

Finally, we would hope to see merger decisions from the CCI that clearly explain the evidence (including economic evidence) that it has relied upon in reaching its decisions. If certain evidence was disregarded, or treated as having little weight, then understanding the reasons why this was the case will enable future merging parties to focus their submissions accordingly. This also enables merging parties' legal and economic advisors to provide better advice to their clients in the future.

VI. SUMMARY

In summary, we welcome the fact that the CCI now has powers to evaluate mergers and look forward to working constructively on cases in the future. We hope that the merger review processes adopted will allow for early and ongoing engagement between the merging parties and the CCI on the substantive economic issues to be evaluated, and the type of evidence to be adduced. This will enable both the merging parties and the CCI to focus their limited resources on addressing those areas that are most critical to the merger decision process.