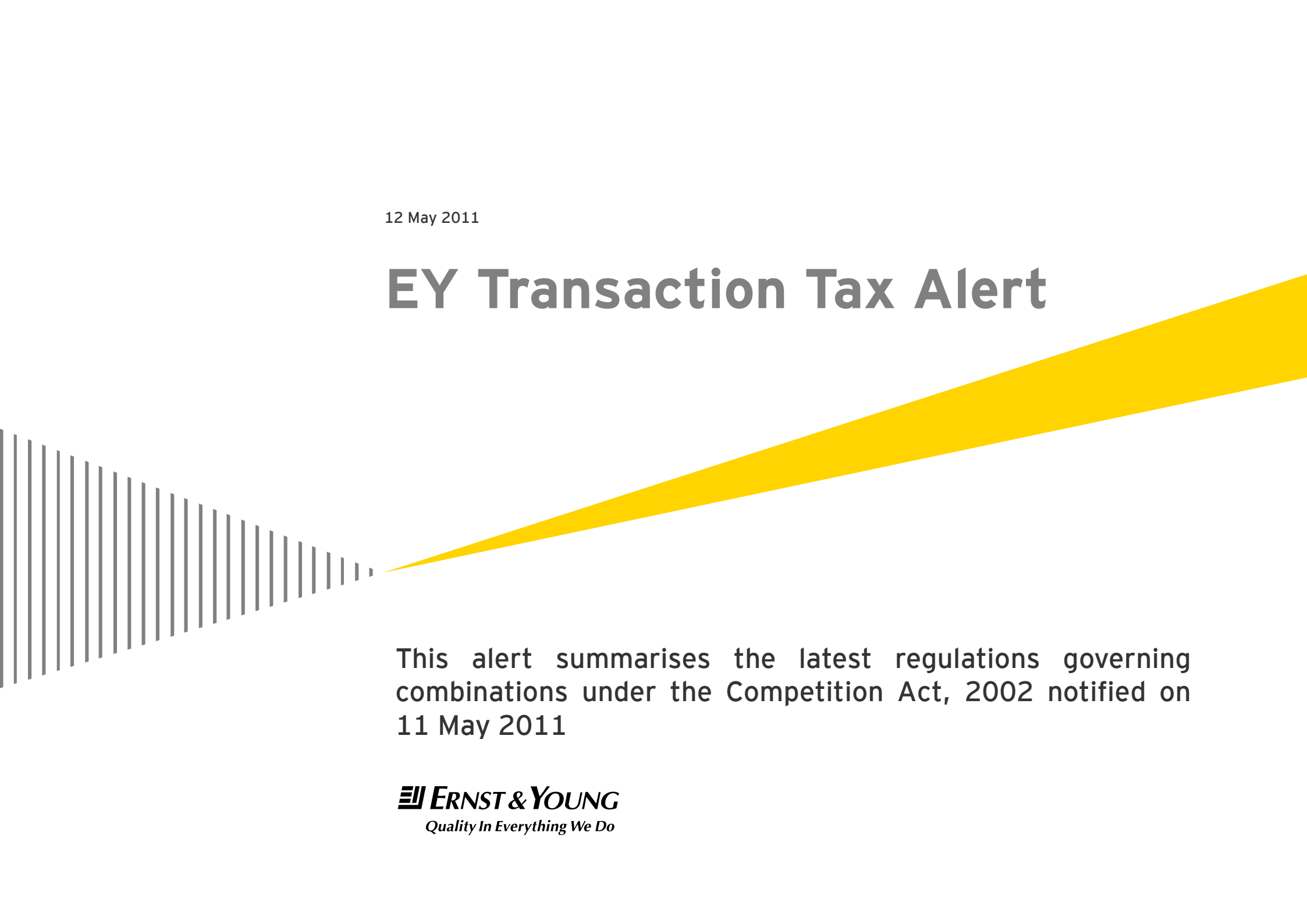


12 May 2011

EY Transaction Tax Alert



This alert summarises the latest regulations governing combinations under the Competition Act, 2002 notified on 11 May 2011

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Executive Summary

This alert summarizes key provisions of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ("Regulations") relating to "combinations" ie mergers and acquisitions ('M&A') notified by Government of India on May 11, 2011 to take effect from June 1, 2011.

Background

The much debated Regulations governing combinations have been finally notified by the Government on 11 May 2011. These Regulations shall come into force on 1st day of June, 2011.

Earlier this year, Government also notified sections 5, 6, 20, 29, 30 and 31 of the Competition Act, 2002 ("Act"), dealing with "Combinations".

Post 1st June 2011, all mergers, acquisitions and amalgamations that meet the thresholds prescribed under the Act would require mandatory pre-notification (subject to the exemptions provided in Regulations) to the Competition Commission of India (CCI) and will not come into effect until 210 days or by order of the CCI, whichever is earlier.

Following are certain key provisions of the Regulations.

Key provisions

Transitional provisions (for ongoing transactions)

- ▶ Notice to CCI needs to be filed only in the following cases:
 - ▶ for mergers or amalgamations, notice to be filed only in regard to proposals approved by the board of directors (final decision) on or after June 1, 2011; and
 - ▶ for acquisitions and acquiring of control (where acquirer already has control over another enterprise in similar business) referred to section 5(a) and 5(b) respectively, notice need to be filed only, where binding document(s) is executed, on or after June 1, 2011

Exemption from intimation

Certain categories of combinations have been specified as ordinarily not likely to cause an appreciable adverse effect on competition in India. Accordingly, in respect to such combinations, notice to CCI need not normally be filed with CCI. Following is a list of such exempted combinations:

- ▶ An acquisition of shares or voting rights, solely as an investment or in the ordinary course of business in so far as the total shares or voting rights held by the acquirer directly or indirectly, do not exceed 15% of the total shares or voting rights of the company not leading to acquisition of control
- ▶ An acquisition of shares or voting rights, where the acquirer, prior to acquisition, has 50% or more shares or voting rights, except in the cases where the transaction results in transfer from joint control to sole control
- ▶ An acquisition of assets, not directly related to the business activity of the party acquiring the asset or made solely as an investment or in the ordinary course of business, not leading to control except where
 - ▶ the assets being acquired represent substantial business operations in a particular location or for a particular product or service of the enterprise, of which assets are being acquired, irrespective of whether such assets are organized as a separate legal entity or not
- ▶ An amended or renewed tender offer where a notice to the CCI has been filed by the party making the offer, prior to such amendment or renewal of the offer
- ▶ An acquisition of stock -in-trade, raw materials, stores and spares in the ordinary course of business

- ▶ An acquisition of shares or voting rights not (leading to acquisition of control) pursuant to
 - a bonus issue or
 - stock splits or
 - consolidation of face value of shares or
 - subscription to rights issue to the extent of their entitled proportion
- ▶ Any acquisition of shares or voting rights by a person acting as a securities underwriter or a registered stock broker of a stock exchange on behalf of its clients, in the ordinary course of its business and in the process of underwriting or stock broking, as the case may be
- ▶ An acquisition of control or shares or voting rights or assets by one person or enterprise of another person or enterprise within the same group
- ▶ An acquisition of current assets in the ordinary course of business
- ▶ A combination taking place entirely outside India with insignificant local nexus and effect on markets in India.

Intimation to CCI

- ▶ An enterprise proposing to enter into a combination meeting prescribed thresholds shall give notice of such combination in Form I to CCI

- ▶ Form I is a very simple and user friendly form. Even in this form, in a large number of specified categories of cases, only part I, needing basic information about the filing parties, is required.
- ▶ Parties at their own option or own directions from CCI may file notice in Form II
 - ▶ Form II requires extremely detailed information
- ▶ Fees payable to CCI shall be as under:
 - Form I - Rs 50,000 (Rupees Fifty thousand)
 - Form II - Rs 1,000,000 (Rupees Ten lakhs)
- ▶ As regards acquisitions where notice has to be filed within thirty days of execution of any agreement or other document, regulations provide that "other document" means any binding document, by whatever name called, conveying an agreement or decision to acquire control, shares, voting rights or assets
 - where such a document has not been executed but the intention to acquire is communicated to the Central Government or State Government or a Statutory Authority, the date of such communication shall be deemed to be the date of execution of the other document for acquisition

- ▶ Details of acquisition by a public financial institution, foreign institutional investor, bank or venture capital fund shall be filed with CCI without any fee in Form III

Intimation to CCI in case of series of transactions

- ▶ Where the ultimate intended effect of a business transaction is achieved by way of a series of steps or smaller individual transactions which are inter-connected or inter-dependent on each other, one or more of which may amount to a combination, a single notice, covering all these transactions, may be filed by the parties to the combination

Failure to file notice

- ▶ On failure to file notice, CCI may, upon its own knowledge, inquire into whether such a combination has caused or is likely to cause an appreciable adverse effect on competition in India
- ▶ It may also direct parties to the combination, without prejudice to penalty provisions applicable, to file notice in Form II within 30 days of receipt of communication from CCI by the parties to the combination.

Computation of time limit

- ▶ Time limit for CCI to pass an order of 210 days shall commence from the date of receipt of notice in writing

- ▶ CCI would endeavor to pass an order or issue direction within 180 days of filing of notice

Prima facie opinion

- ▶ CCI shall form its prima facie opinion on notice filed, as to whether such combination is likely to cause or has caused an appreciable adverse impact on competition within the relevant market in India, within 30 days of receipt of such notice.

Publication of details of combination

- ▶ If CCI is of the prima facie opinion that a combination is likely to cause or has caused an appreciable adverse impact on competition within the relevant market in India, the secretary shall within 4 working days of such decision convey the direction of CCI to the parties to such combination to publish details of such combination (in Form IV prescribed) with 10 working days from date of such direction

Orders of the CCI

- ▶ CCI may either approve the combination, reject the combination or approve the combination with modification

Request for confidentiality

- ▶ Any request for confidentiality of information or documents submitted during the investigation shall be duly considered
 - Such request may, inter-alia, clearly state the reasons, justification and implications for the business of the parties to the combination so that all relevant factors may be considered by CCI while taking decision in the matter

Our Comments

- ▶ Considering the transitional provisions prescribed, corporates may consider final board approval / execution of binding agreements in respect of ongoing transactions prior to 1st June 2011 so as to be out of the purview of CCI
- ▶ Going forward, post 1st June 2011, corporates need to factor the CCI approval requirement in the deal timelines
- ▶ Exemption of certain combinations from the purview of CCI may make the impact less regressive and avoid undue hardships.

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