

Competition Law Hotline

September 28, 2023

ANALYSIS OF THE COMPETITION COMMISSION OF INDIA (COMBINATIONS) REGULATIONS, 2023

Earlier this year, on April 11, 2023, the Competition Amendment Act, 2023 (the "**Amendment Act**") received the presidential assent to amend the Competition Act, 2002 (the "**Act**") and strengthen the existing competition law framework in India. The Amendment Act has introduced changes to the merger control regime, provisions on behavioral issues as well as the enforcement framework under the Act. Several provisions of the Amendment Act were enforced on May 18, 2023. However, certain key changes relating to merger control are largely pending implementation. The detailed analysis of the Amendment Act can be accessed [here](#).

The Amendment Act also requires the Competition Commission of India ("**CCI**") to make regulations in light of certain amendments brought in through the Amendment Act, such as (i) a new notification criteria i.e., deal value threshold, for mergers and acquisitions where value of transaction exceeds INR 2000 crores (Indian Rupees Two Thousand Crores) and the enterprises being acquired/ taken control of / merged or amalgamated have substantial business operations in India; (ii) provision for relaxing application of Section 6 (2A) of the Amendment Act to transactions involving implementation of an open offer or purchase of securities on a regulated stock exchange, subject to certain conditions; (iii) amendment to the scheme for review of combinations, such as issue of statement of objections by the Commission; and (iv) change in process for proposing modification to the combinations. In light of the above and to supplement and clarify the framework set out in the Amendment Act, the CCI has released the draft Competition Commission of India (Combinations) Regulations, 2023 ("**Draft Regulations**") for the purpose of seeking stakeholder input through a consultation process on September 5, 2023¹. The Draft Regulations are aimed at repealing and replacing the Competition Commission of India (procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ("**Combination Regulations**").²

Separately, CCI also released the draft (i) Competition Commission of India (Settlement) Regulations, 2023; and (ii) Competition Commission of India (Commitment) Regulations, 2023 for public consultation.

A) The key features introduced by the Draft Regulations and the change in positions from the Amendment Act are outlined below.

■ DEAL VALUE THRESHOLD ("**DVT**")

The Amendment Act introduced the DVT as a new notification threshold, whereby (i) a transaction in connection with acquisition of any control, shares, voting rights or assets of an enterprise, merger or amalgamation, the deal value of which exceeds INR 2000 crores (Indian Rupees Two Thousand Crores)³; and (ii) the target (i.e. the one being acquired / merged / amalgamated) having substantial business operations in India, will require prior approval from the CCI. As per the Amendment Act, the value of the transaction included every valuable consideration (whether direct or indirect), including any deferred consideration. It is also pertinent to note that even if a 'de minimis exemption' is available, a transaction may be notifiable to the CCI if the deal value thresholds are met. Lastly, the Amendment Act did not set out the conditionalities in respect of substantial business operations and the manner of computation of the deal value and required CCI to make regulations to provide for the same.

In light of the same, the Draft Regulations have now provided further clarity on the determination of 'value of the transaction' and 'substantial business operations in India'.

Value of Transaction

As per the Draft Regulations, the value of a transaction shall include every valuable consideration, whether it is direct or indirect, immediate or deferred, cash or otherwise, **including but not be limited to** –

- (i) consideration for any covenant, undertaking, obligations or restrictions imposed on the seller or any other person (other than the acquirer) in the nature of non-competition or otherwise;
- (ii) interconnected transactions steps as read in Regulation 9(4) of the Combination Regulations. The explanation to the Draft Regulations clarifies that any acquisition by any one of the parties or its group entity in the enterprise being acquired or merged or amalgamated in the transaction, anytime during the period of two years before the relevant date shall also be deemed to be an inter-connected transaction;
- (iii) arrangement(s) entered into as a part of the transaction or incidental arrangement(s) entered into anytime during 2 (two) years from the date on which the transaction would come into effect, including but not limited to technology assistance, licensing of intellectual property rights, usage rights to any product, service or facility, supply of raw materials or finished goods, branding and marketing;
- (iv) options and securities (assuming full exercise of such options); and

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(v) occurrence or non-occurrence of any uncertain future events.⁴

Further, as per the explanation to Regulation 4 of the Draft Regulations, it is clarified that in circumstances where true and complete value of the transaction is not recorded into agreement executed between parties, the value considered by the board of directors, or a similar approving authority of the acquirer should be considered as the transaction value.⁵

Additionally, the explanation also proposes that, in case the transaction value of a deal cannot be determined with reasonable certainty, the notifying party will be required to presume that the threshold of INR 2,000 crores (Indian Rupees Two Thousand Crores) has been met.⁶

While the Draft Regulations have set out certain transactions and considerations to compute the value of the transaction, the proposed regulation continues to be an inclusive list and it remains unclear on other parameters that could be deemed to be considered while computing the value of the transaction. Further, the items set out above (specifically item (v)), are fairly broad and could lead to ambiguity. The manner of computation for instance, in case of 'non-compete' covenant or 'incidental transactions' has not been clarified and may continue to be a challenge for the parties. The risk of an incorrect computation could trigger the presumption of notifiability and require parties to approach the CCI for approval, which may lead to an onerous obligation.

Lastly, this regulation could have a potential overbearing and onerous effect, as it would lead to a number of transactions (including any combinations which may not lead to an appreciable adverse effect on competition in India) being subjected to the scrutiny of CCI.

Substantial Business Operations in India

The Draft Regulations have clarified that a target will be considered to have substantial business operations in India, if:

- (i) the number of its users, subscribers, customers, or visitors in India, in the 12 (twelve) months preceding the deal execution date, is 10% (ten per cent) or more of its total global number of users, subscribers, customers, or visitors; or
- (ii) the target's gross merchandise value ("**GMV**") in India, for the 12 (twelve) months preceding the deal execution date, is 10% (ten per cent) or more of its total global GMV; or
- (iii) the target's turnover for the preceding financial year in India is 10% (ten per cent) or more of its total global turnover.⁷

While the Draft Regulations set out the parameters, they do not clarify (i) any conditions in respect of whether audited financial statements are to be relied upon; or (ii) any adjustments or carve-outs while computing the turnover or GMV.

■ IMPLEMENTATION OF OPEN OFFER / PURCHASES OF SHARES FROM THE OPEN MARKET

The Amendment Act permits implementation of (a) an open offer; or (b) an acquisition of shares or securities, through a series of transactions on a regulated stock exchange forming part of a combination prior to the approval by CCI, if (i) the notice of the acquisition is filed with the CCI in the manner set out in the Act, and (ii) the acquirer, in the aforesaid case, does not exercise any ownership or beneficial rights or voting rights or receive dividends / any other distributions, till the CCI approves such acquisition, except as may be specified by the regulations.⁸

Contrary to the Amendment Act, the Draft Regulations have proposed that prior to obtaining the CCI's approval, the acquirer can undertake the following actions: (i) avail economic benefits; (ii) dispose shares or securities acquired; and (iii) exercise voting rights in matters related to liquidation or insolvency proceedings. However, the acquirer or any of its affiliates shall not, directly or indirectly, influence the enterprise whose shares or securities are being acquired, in any manner whatsoever.

Further, the acquirer must give a notice along with a declaration as specified in the Draft Regulations within 30 (thirty) days from the date of acquiring the first lot of shares / securities.⁹

Interestingly, the declaration set out in the Draft Regulations contradicts the regulation and requires the acquirer to confirm that it has not, directly or indirectly, exercised: (a) any ownership or beneficial right or interest in such shares or convertible securities, including voting rights and receipt of dividends or any other distributions, except as specified by the regulations; (b) influenced the affairs of the enterprise whose shares are being acquired, and undertakes not to do such exercise till the approval of the combination, in terms of the provisions of the Act.

One will have to wait to see what the final regulations provide in respect of implementation of open offer / purchases of shares from the open market.

■ MODIFICATIONS

In case the CCI has a prima facie opinion that a combination is likely to cause or has caused an appreciable adverse effect on competition, it may direct the parties to the combination to publish such information¹⁰. After receipt of all information, CCI shall issue a statement of objections to the parties identifying the appreciable adverse effect that the proposed combination will cause on competition.¹¹ Thereafter, the parties to the combination or the CCI (*suo motu*) may propose modifications in the manner set out in the Amendment Act.¹²

The Draft Regulations have prescribed and simplified the timelines for the modification process.¹³ Further, the Draft Regulations have also provided a format for the parties to offer modifications.

If the parties to the combination fail to carry out the modification(s) within the period specified by the CCI, the combination shall be deemed to have an appreciable adverse effect on competition and be dealt with in accordance with the provisions of the Act.¹⁴

B) In addition to the above clarifications / changes, the following key features have been proposed through the Draft Regulations:

(i) Deletion of Schedule I – As per the Combination Regulations, the categories of combinations mentioned under Schedule I of the Combination Regulations are ordinarily not likely to cause an appreciable adverse effect on competition in India and did not require filing of a notice under section 6(2) of the Act. As per the Draft Regulations, all references to such exempt categories of combinations and Schedule I have been removed. It remains uncertain as to whether the Schedule I exemptions will be removed altogether or whether a revised set out of combinations would be introduced under separate regulations or notifications.

(ii) Enhancement of Filing Fees - The filing fee for (i) Form I is proposed to be increased to INR 30,00,000 (Indian Rupees Thirty Lakhs) instead of INR 20,00,000 (Indian Rupees Twenty Lakhs) as currently levied; and (ii) Form II is proposed to be increased to INR 90,00,000 (Indian Rupees Ninety Lakhs) instead of INR 65,00,000 (Indian Rupees Sixty-Five Lakhs) as currently levied.¹⁵

(iii) 'Green Channel' route – The Amendment Act has formally introduced the 'Green Channel' route to the Competition Act, 2002. However, the Amendment Act provides that the conditionalities of combinations that are eligible for a 'Green Channel' route and the form and mode of payment for such route shall be in the manner as may be prescribed. The Draft Regulations have not laid down any regulations prescribed in relation to the 'Green Channel' route. While the Amendment Act has a reference to the 'Green Channel' route under Form I, the references to the 'Green Channel' route as set out in the Combination Regulations have been omitted in the Draft Regulations.

(iv) Uncertainty on the manner of transition of applicable regulations on the existing transactions – The Draft Regulations do not provide clarity on the process and manner of transition for the regulations which may be applicable to the existing transaction. It is ambiguous whether the Combination Regulations or the Draft Regulations will be applicable to the transactions that have been signed but have not been closed prior to the implementation of the Draft Regulations.

(v) Relevant Date – The Draft Regulations have introduced the concept of relevant date which means the date on which an agreement or approval has been 'accorded' or 'executed'. The relevant date is intended to provide that all calculations, assessments of thresholds and time periods would be in relation to such date, for the purposes of different combination transactions as per Section 5 of the Act.

CONCLUSION

The Draft Regulations effectively enhance and align the merger control process with the provisions of the Amendment Act.

Given the broader and inclusive regulations around computation of the deal value threshold, it appears that a greater number of transactions shall fall within the scope of notifiable combinations. Even though there are uncertainties / omissions in respect of certain regulations, such as, removal of Schedule I and the 'Green Channel' route, the introduction of the Draft Regulations is a step forward towards streamlining the merger control mechanism. In general, the Draft Regulations present a combination of positive alterations and certain areas of ambiguity and concern.

We still await the final regulations that the CCI will enact after considering feedback from the stakeholders, and whether the ambiguities present in the Draft Regulations will be resolved in the final regulations.

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You can direct your queries or comments to the authors.

¹ Available at <https://cci.gov.in/images/stakeholderstopicconsultations/en/draft-combinations-regulations1693891636.pdf>.

² Regulation 30 of the Draft Regulations.

³ Section 6 (B) of the Amendment Act.

⁴ Regulation 4 (1) of the Draft Regulations.

⁵ Explanation (c), Regulation 4 of the Draft Regulations.

⁶ Explanation (g), Regulation 4 of the Draft Regulations.

⁷ Regulation 4(2) of the Draft Regulations.

⁸ Section 8 of the Amendment Act.

⁹ Regulation 6 of the Draft Regulations.

¹⁰ Section 29 (2) of the Act.

¹¹ Section 22 of the Amendment Act.

¹² Section 22 of the Amendment Act.

¹³ Regulation 25 of the Draft Regulations.

¹⁴ Regulation 25 (6) of the Draft Regulations.

¹⁵ Regulation 11 of the Draft Regulations.

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