

## Research Articles

September 15, 2024

### ACQUIRERS BEWARE: INDIAN MERGER CONTROL REGIME REVAMPED!

#### 1. BACKGROUND

The Competition Act, 2002 (“**Competition Act**”) was amended on April 11, 2023 *vide* the Competition (Amendment) Act, 2023 (the “**Competition Amendment Act**”). The Competition Amendment Act had introduced certain changes to the merger control regime, provisions on behavioural issues as well as the enforcement framework under the Competition Act.

Amongst other amendments, the Competition Amendment Act had introduced / codified (i) an additional notification criterion for combinations i.e., deal value threshold; (ii) enabling provision allowing open market transactions subject to certain conditions; (iii) amendment to the procedural timelines of combinations; and (iv) green channel approvals. The detailed analysis of the Competition Amendment Act can be accessed [here](#). Certain key changes relating to merger control were pending implementation.

To supplement and clarify the framework set out in the Competition Amendment Act, CCI had released the draft Competition Commission of India (Combinations) Regulations, 2023 (“**Draft Combination Regulations**”) for the purpose of seeking stakeholder input through a consultation process on September 5, 2023<sup>1</sup>. The Draft Combinations Regulations were aimed at repealing and replacing the existing Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011

(“**Existing Combination Regulations**”).<sup>2</sup> The detailed analysis of the Draft Combination Regulations can be accessed [here](#).

Based on the careful examination of the stakeholders inputs to the Draft Combination Regulations its past experience as well as international best practices, CCI, through a notification in the Gazette of India dated September 9, 2024 published the revised Competition Commission of India (Combination) Regulations, 2024<sup>3</sup> (“**Revised Combination Regulations**”).

On the same day, the Ministry of Corporate Affairs (“**MCA**”) also published (i) the Competition (Criteria for Exemptions of Combinations) Rules, 2024<sup>4</sup> (“**Revised Exemption Rules**”), (ii) Competition (Criteria of Combinations) Rules, 2024<sup>5</sup> (“**CoC Rules**”), (iii) Competition (Minimum Value of Assets and Turnover) Rules, 2024<sup>6</sup> (“**Deminimis Rules**”). Lastly, the MCA has, *vide* another notification notified the provisions of certain sections from the Competition Amendment Act to be effective from September 10, 2024 including in respect of regulation of combinations.

#### 2. KEY CHANGES

The aforesaid regulations and rules came into force from September 10, 2024. A brief summary of the key changes is outlined below.

##### ■ Deal Value Threshold

Under Section 5 on ‘Combinations’ under the Competition Act, the Competition Amendment Act had proposed a new deal value threshold (“**DVT**”) which has been made effective from September 10, 2024.

The DVT envisages bringing within the ambit of combinations, any transactions, in connection with acquisition of control, shares, voting rights or assets of an enterprise, merger or amalgamation, whose value exceeds *INR 2,000 crores (Indian Rupees Two Thousand Crores) (approx. USD 238.4 million)* **and** where the *target company (i.e. the one being acquired / taken control of / merged / amalgamated) has substantial business operations in India*.<sup>7</sup>

It is also pertinent to note that, as per the Competition Amendment Act, even if the *de minimis* exemption is available but the transaction meets the requirements of DVT, the transaction shall be notifiable to the CCI (unless an exemption under the Revised Exemption Rules is available).

In order to understand the implications and applicability of DVT, it is essential to understand how the ‘value of the transaction’ and ‘substantial business operations’ is determined.

##### ■ Value of Transactions<sup>8</sup>

As per the Revised Combination 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 limited to**, consideration –

(i) for any covenant, undertaking, obligations or restrictions imposed on the seller or any other person, if such

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consideration is agreed separately;

(ii) inter-connected steps and transactions as read in Regulation 9(4) and Regulation 9(5) of the Revised Combination Regulations;

(iii) payable during two years from the date on which the transaction would come into effect for arrangement(s) entered into as a part of the transaction or incidental arrangement(s) entered, 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) for call options and shares (assuming full exercise of such options); and

(v) payable, as per best estimates, based on the future outcome specified under the transaction documents.

The value of transaction shall also include (a) any consideration payable 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**, and (b) in case of implementation of an open offer, a full subscription to the offer.

The Revised Combination Regulations also clarify that in circumstances where true and complete value of the transaction is not recorded in any 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.

Lastly, 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 crore (Indian Rupees Two Thousand Crores) (approx. USD 234.8 million) has been deemed to be met.

#### ■ **Substantial Business Operations in India<sup>9</sup>**

An enterprise shall be considered to have substantial business operations in India if<sup>10</sup>-

(a) In respect of digital service providers, if 10% or more of its global business or end users (average number for three hundred and sixty-five days preceding the relevant date) are based in India<sup>11</sup>; **or**

(b) If Gross Merchandise Value<sup>12</sup> (“**GMV**”) in India during the twelve months prior to the relevant date<sup>13</sup> is (i) 10% or more of its global GMV **and** (ii) exceeds INR 500 crores (Indian Rupees Five Hundred Crores) (approx. USD 59 million). GMV has been defined to mean cash, receivables, or other consideration either for or facilitating, sale of goods and/ or provision of services, by an enterprise, on its own or as an agent or otherwise; **or**

(c) if the turnover in the preceding financial year in India constitutes (i) 10% or more of its global turnover, **and** (ii) exceeds INR 500 crores (Indian Rupees Five Hundred Crores) (approx. USD 59 million)<sup>14</sup>.

It is also relevant to note that the conditions laid out with regard to the INR 500 crore (Indian Rupees Five Hundred Crore) (approx. USD 59 million) requirement above, shall not apply to digital services.

With the introduction of DVT, an additional layer of scrutiny for combination transactions is now added and combination transactions which otherwise could have been exempt as per thresholds laid out under erstwhile Section 5 of the Competition Act or the de minimis exemption, may now fall under the purview of CCI and require CCI's nod before consummation.

#### ■ **Exemptions to Notification<sup>15</sup>**

In the erstwhile regime, Schedule I of the Combinations Regulations provided for specific exemptions to certain transactions from the onus of notifying the CCI. Now, the Revised Exemption Rules provides the categories of combinations that shall be exempt from requirement of a notification.

The key exemption and changes as per the Revised Exemption Rules are:

<b>S. No.</b>	<b>Exemption under Schedule I of Existing Combination Regulations</b>	<b>Exemption under Revised Exemption Rules</b>
1	Acquisitions of shares or voting rights up to 25%, either 'solely as an investment' or in the 'ordinary course of business'.  As per the explanation, an acquisition was to be considered as 'solely as an investment' if:  (a) The acquisition was of less than 10% of the total shareholding / voting rights;  (b) The acquirer only has rights available as an ordinary shareholder; and  (c) The acquirer did not have a right to appoint a director and did not intend to participate in management of the target.	Acquisitions of shares / voting rights of less than 25% where there is:  (a) no acquisition of control;  (b) no right to nominate on the board or observer seat;  (c) no access to commercially <sup>16</sup> sensitive information of the target; and  (d) there exists no horizontal, vertical or complementary overlap between the acquirer group (including affiliates) and the target (or its downstream group and affiliates).  In case the first three criterias are met but the criteria (d) is not, the acquisition threshold shall be 10% of shares / voting rights and not 25%.
2	No corresponding provision	Any incremental acquisitions by an existing shareholder in the target shall be exempt, where the total shareholding / voting remains under 25% and  (a) there is no acquisition of control,  (b) board or observer seats, for the first time, or  (c) no access to commercially sensitive information, for the first time.

In case there is an overlap between the acquirer (or its group entities and their affiliates) and the target (or its downstream group entities and their affiliates), any incremental shareholding or voting rights acquired by a single acquisition or a series of smaller interconnected acquisitions shall be exempt if it does not exceed five per cent and such acquisition does not result in the shareholding / voting rights of acquirer group increasing from less than 10% to more than 10%.

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| 3 | Incremental acquisitions leading to (a) more than 25% but less than 50% shareholding/voting, rights by an acquirer and its group entities or (b) more than 50% shareholding by an acquirer so long as there was no acquisition of sole or joint control, or transfer from sole to joint control, respectively.       | Any incremental acquisition where the acquirer (and its group entities) already has (a) 25% shareholding / voting in an enterprise and up to 50% or (b) 50% shareholding/ voting in an enterprise, shall be exempt so long as there is <i>no change in control of such enterprise</i> .<br><br>The exemption under (b) that was available only to acquirer owning more than 50% shall now be available to acquirer and group entities owning more than 50%. |
| 4 | Stockbrokers and/or underwriters for acquisitions in the ordinary course of business   | Any acquisitions by registered stockbroker (upto 25%), underwriters (25%) and/or mutual funds (10%) in the ordinary course of business shall be exempt.   |
| 5 | Bonus issues, stock splits, buy-backs, rights issues, and consolidation of share capital so long as there was no acquisition of control  | Such corporate actions are exempt so long as it does not lead to a <i>change in control</i> .   |
| 6 | An acquisition of shares or voting rights or assets, by one person or enterprise, of another person or enterprise within the same group, except where the acquired entity is jointly controlled by enterprises not part of the group.  | Intra-group asset acquisitions, so long as there is <i>no change in control</i> on such assets.   |
| 7 | Intra-group mergers and amalgamations where, either (a) one entity holds more than 50% shares / voting of the other entity, or the entities in the same group hold owns more than 50% of the shares / voting rights in each entities being merged, so long as there is no change from joint control to sole control. | A blanket exemption has been provided for intra-group mergers and amalgamations provided that the transaction does not result in <i>change in control</i> .   |
| 8 | No corresponding provision   | In case of a demerger and issuance of shares by the resulting entity as consideration to such demergers in proportion to the shareholding in the demerged entity.   |

#### ■ Green Channel (Deemed Approvals)

The green channel was codified by inserting a new Regulation 5A to the Existing Combination Regulations *vide* an amendment dated August 13, 2019. Green channel route is a fast track system of deemed CCI approval for certain combinations where there are no business overlaps of any kind, be it horizontal, vertical or complementary in nature, between the parties to combination. The Competition Amendment Act has codified the green channel route into the Act.

As per the CoC Rules, parties to the combination, their respective groups entities and their **affiliates** should fulfil the criteria of the overlap prescribed therein to avail the green channel route. The assessment criteria for overlaps remains largely the same as the Combination Regulations. However, a key change is the to the definition of "affiliates".<sup>17</sup>

For the purpose of the CoC Rules, an enterprise is considered to be an affiliate of another, if such enterprise (i) owns 10% or more of the shares or voting rights, or (ii) right or ability to have representation on the board of directors or an observer seat, or (iii) **right or ability to access commercially sensitive information**, of such enterprise.<sup>18</sup> Under the Existing Combination Regulations, the third criteria was if an enterprise had a right or ability to exercise any special rights not available to an ordinary shareholder.

The Parties to a combination to be considered while assessing overlaps are (a) in case of acquirer, the ultimate controlling person and other entities of the group, (b) in case of the target, the downstream entities forming part of the group, and (c) for enterprises being merged / amalgamated, their controlling persons, and entities forming part of their group.

#### ■ De Minimis Exemption Codification

The *de minimis* exemption, envisaged in the Deminimis Rules, exempts certain combinations from mandatory notification to the CCI if the target enterprise's assets or turnover fall below specific thresholds ("**Target Exemption**"). While Target Exemption has been in practice since 2011 *vide* MCA Circular dated March 4, 2011<sup>19</sup>, the Competition Amendment Act has codified the target exemption provisions into the statute and the Deminimis Rules have codified the thresholds.

The Deminimis Rules replicate the thresholds set out in the MCA notification dated 7 March 2024<sup>20</sup>. The Target Exemption is available in case the assets or turnover of the target enterprise are less than either of the following

revised thresholds: (i) assets of less than INR 450 crore (Indian Rupees Four Hundred and Fifty Crores) (approx. USD 54 million) in India; **or** (ii) turnover of less than 1,250 crore (Indian Rupees One Thousand Two Hundred and Fifty Crores) (approx. USD 149 million) in India.<sup>21</sup>

#### ■ Open Offer Relaxations

The Competition Amendment Act permits implementation of (a) an open offer; or (b) and the acquisition of convertible 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 Competition Act, and (ii) the acquirer, in the aforesaid case, shall not exercise any ownership or beneficial rights or voting rights or receive dividends / any other distributions, unless otherwise specified in the regulations till the CCI approves such acquisition<sup>22</sup>. This section has now been made effective from September 10, 2024.

Further, as per the Revised Combination Regulations, prior to obtaining the CCI's approval, the acquirer can undertake the following actions: (i) avail economic benefits such as dividend or any other distribution, subscription to rights issue, bonus shares, stock-splits and buy-back of securities; and (ii) exercise voting rights in matters related to liquidation or insolvency proceedings. However, the acquirer or any of its group entities or 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 Revised Combination Regulations within 30 (thirty) days from the date of acquiring the first lot of shares/securities.<sup>23</sup>

### 3. OTHER MISCELLANEOUS CHANGES

The new regime has also introduced a number of other relevant changes regarding the operational aspects of the merger control regime. The following is a list of some of the key changes:

(i) The erstwhile act provided for a period of 210 (two hundred and ten) days from the date of notification to the CCI for a combination to come into effect, which has now been reduced to a period of 150 (one hundred and fifty) days or the date on which the CCI has passed an order under Section 31 of the Competition Act, whichever is earlier.

(ii) The CCI is now required to form a prima facie opinion<sup>24</sup> on a combination within 30 (thirty) calendar days and in the event that the CCI does not form a prima facie opinion within the above timelines, the combination shall be deemed to have been approved.

(iii) The definition for "control" has now included within its ambit the aspect of "material influence". This is in line with the decisional practice of the CCI. Material influence implies the presence of factors that give an enterprise/person the ability to influence the affairs and management of the other enterprise, including factors such as shareholding, special rights, status and expertise of an enterprise or person, board representation, structural/financial arrangements, etc.<sup>25</sup>

(iv) The filing fees for Form I and Form II which was INR 20 lakhs (Indian Rupees Twenty Lakhs) (approx. USD 24,000) and INR 65 lakhs (Indian Rupees Sixty-Five Lakhs) (approx. USD 78,000) earlier, respectively, has been increased to INR 30 lakhs<sup>26</sup> (Indian Rupees Thirty Lakhs) (approx. USD 36,000) and INR 90 lakhs (Indian Rupees Ninety Lakhs) (approx. USD 108,000),<sup>27</sup> respectively.

### 4. TRANSITION AND CONCLUSION

The Revised Combination Regulations has been long awaited throughout the merger control ecosystem, since the publication of the Draft Combination Regulations and Competition Amendment Act as it would significantly change the merger control regime. Although, the DVT is certainly the most pertinent amendment to the competition law regime, the entire ecosystem has seen an overhaul through introduction of novel concepts such as codification of the de minimis threshold, relaxations offered towards implementation of open offers and the changes in the exemptions available under the Revised Exemption Rules.

It is important to note that all those transactions that have been executed but which have not been closed as on date (whether in whole or in part), will have to be re-looked at, in light of the new regulations. All combinations will have to be assessed in greater detail to ensure that there's no gun jumping. Going forward, for large value deals, an extensive evaluation exercise shall have to be undertaken to determine the value of the transaction (both objective and subjective) so as to not fall foul of gun jumping provisions of the CCI.

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You can direct your queries or comments to the relevant member.

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

<sup>2</sup> Regulation 30 of Draft Combination Regulations.

<sup>3</sup> F.No.CCI/CD/Comb. Regl./2024, Revised Combination Regulations.

<sup>4</sup> Notification G.S.R. 549 (E), Revised Exemption Rules.

<sup>5</sup> Notification G.S.R. 548 (E), CoC Rules.

<sup>6</sup> Notification G.S.R. 547 (E), Deminimis Rules.

<sup>7</sup> Section 5(d) as amended through the Competition Amendment Act; Regulation 4(2) of Revised Combination Regulations.

<sup>8</sup> Regulation 4(1) of Revised Combination Regulations

<sup>9</sup> Regulation 4(2) of Revised Combination Regulations

<sup>10</sup>Regulation 4(2) of Revised Combination Regulations

<sup>11</sup>Explanation 2(f), Regulation 4(2) of Revised Combination Regulations; *“end user means any natural or legal person using digital services other than as a business user, for informational or transactional purpose.”*

<sup>12</sup>Explanation 2(a), Regulation 4(1) of Revised Combination Regulations

<sup>13</sup>Regulation 2(1)(c) of Revised Combination Regulations; *“Relevant date” means the date on which the approval of the proposal relating to merger or amalgamation is accorded by board of directors or the date of execution of agreement or the date of such other document for acquisition or acquiring of control referred to in sub-section (2) of Section 6 of the Act.*

<sup>14</sup>Regulation 4(2) of Revised Combination Regulations

<sup>15</sup>Schedule to Revised Exemption Rules and Schedule I of the Existing Combination Regulations

<sup>16</sup>Commercially sensitive information has not been defined in the Revised Combination Regulations.

<sup>17</sup>Regulation 6(4), 6(5) and 6(6) of Revised Combination Regulations; Rule 3 of CoC Rules.

<sup>18</sup>Rule 3(2) of CoC Rules.

<sup>19</sup>Notification F. No. 5/4/2003-IGC/CS

<sup>20</sup>Notification S.O. 1131 (E) No. 1074 dated March 7, 2024.

<sup>21</sup>Rule 3 of Deminimis Rules.

<sup>22</sup>Section 6A of the Act, as amended through the Competition Amendment Act.

<sup>23</sup>Regulation 6 of Revised Combination Regulations.

<sup>24</sup>Section 29(1B) of the Act, as amended through the Competition Amendment Act.

<sup>25</sup>CCI Frequently Asked Questions (FAQs)

<sup>26</sup>Regulation 11(a) of Revised Combination Regulations.

<sup>27</sup>Regulation 11(b) of Revised Combination Regulations.

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