

M&A Hotline

March 08, 2016

CHANGE IN MERGER CONTROL THRESHOLDS

- Thresholds for pre-merger notification increased by 100%.
- Target de-minimis threshold increased for a pre-merger notification

A. BACKGROUND

Under the Competition Act, 2002 ("**Act**"), the Government is required to enhance or reduce the financial thresholds triggering a pre-merger notification before the Competition Commission of India ("**CCI**"), every two years on the basis of the wholesale price index or fluctuations in exchange rate of rupee or foreign currencies. The Government has also the power to provide exemptions to certain enterprises from the provisions of the Act in public interest. Based on these powers conferred on the Government, on March 4, 2011 the Government had (a) increased the thresholds under section 5 of the Act by fifty percent and (b) provided exemption from pre-merger notification for targets which did not meet certain de-minimis thresholds ("**2011 Notification**"). The present notifications dated March 4, 2016 increases (a) the thresholds for the purposes of section 5 of the Act by 100% and (b) the target de-minimis exemption threshold ("**2016 Notification**").

B. KEY CHANGES AND ANALYSIS

1. Thresholds mentioned under Section 5 of the Act to be increased by 100%

Position previously

Thresholds under Section 5 of the Act were increased by 50% by the Central Government under the 2011 Notification.

Present Position (Post 2016 Notification)

The thresholds under Section 5 of the Act are increased by 100%.

Based on the language of the 2016 Notification, it is not entirely clear whether the 100% increase in the thresholds is to be applied to the revised thresholds after the 2011 Notifications or should it be applied to the original thresholds under section 5 of the Act. The 2011 Notification on the section 5 thresholds did not have a time horizon (unlike the target de-minimis exemption which was valid for a period of five years) and therefore in the absence of a notification revoking the 2011 Notification, it would be deemed to be in force. Having said that, legally it may be argued that the 100% increase should be applied to the original section 5 thresholds as (a) the wording of the 2016 Notification makes a reference only to section 5 of the Act and not the 2011 Notification and (b) the 2011 Notification was not an amendment to the Act and therefore a reference to section 5 of the Act cannot be construed to include the increase in the thresholds prescribed by the 2011 Notification.

In light of the 2016 Notification, the section 5 thresholds are provided in the table below:-

| Person/ Enterprise | In USD (1 USD= INR 65) | | In USD (1 USD= INR 65) | |
|---|---------------------------------------|---|--|--|
| | In India | | Outside India (Including in India) | |
| | Assets | Turnover | Assets | Turnover |
| Parties to the Combination | >INR 2000 crores (USD 307.69 million) | >INR 6000 crores (USD 923.0777 million) | >USD 1 billion including at least INR 1000 crores in India (USD 153.846 million) in India. | >USD 3 billion including at least INR 3000 crores (USD 461.538 million) in India. |
| Group to which the enterprise would belong after the acquisition, merger or amalgamation. | >INR 8000 crores (USD 1.231 billion) | >INR 24000 crores (USD 3.692 billion) | >USD 4 billion including at least INR 1000 crores (USD 153.846 million) in India. | >USD 12 billion including at least INR 3000 crores (USD 461.538 million) in India. |

2. De-minimis target threshold exemption enhanced.

Research Papers

Compendium of Research Papers

April 11, 2024

Third-Party Funding for Dispute Resolution in India

April 02, 2024

Opportunities in GIFT City

March 18, 2024

Research Articles

Private Client Insights - Sustainable Success: How Family Constitutions can Shape Corporate Governance, Business Succession and Familial Legacy

January 25, 2024

Private Equity and M&A in India: What to Expect in 2024?

January 23, 2024

Emerging Legal Issues with use of Generative AI

October 27, 2023

Audio

IBC allows automatic release of ED attachments: Bombay HC reaffirms

April 15, 2024

The Midnight Clause

February 29, 2024

Enforceability of unstamped or inadequately stamped Arbitration Agreements

January 10, 2024

NDA Connect

Connect with us at events, conferences and seminars.

NDA Hotline

Click here to view Hotline archives.

Video

Cyber Incident Response Management

February 28, 2024

Webinar : Navigating Advertising

Even if the section 5 thresholds were met, if the target whose assets, shares or voting rights were acquired, did not have assets or turnover of the value of more than INR 250 crores (USD 38.461 million) and INR 750 crores (USD 115.384 million) in India respectively, then a pre-merger approval was not required.

The thresholds for the assets and turnover has now been increased to INR 350 crores (USD 53.846 million) and INR 1000 (USD 153.846 million) crores in India respectively.

The above exemption only increases the thresholds. However, the application of the exemption in all other aspects remains the same. Consequently any acquisition of shares, voting rights or assets of a company which either has assets or turnover of less than INR 350 crores (USD 53.846 million) and INR 1000 crores (USD 153.846 million) respectively in India will be exempted from a pre-merger notification even if the section 5 thresholds are met.

C. MISSED OPPORTUNITIES

While the 2016 Notifications are around expected lines, there are a couple of other reliefs that should have been considered and included:-

1. The de-minimis target exemption threshold should be party neutral/agnostic and it should not just apply to the target but should also apply to the acquirer's group i.e. if the group to which the acquirer belongs does not meet the de-minimis thresholds then such transaction should also not require a pre-merger approval.
2. The de-minimis target exemption threshold should have also been extended to merger and amalgamations as contemplated in section 5(c) of the Act and not just acquisition of assets, shares and voting rights as is currently the case.

– **Vinay Shukla, Ankit Mishra & Simone Reis**

You can direct your queries or comments to the authors

DISCLAIMER

The contents of this hotline should not be construed as legal opinion. View detailed disclaimer.

This Hotline provides general information existing at the time of preparation. The Hotline is intended as a news update and Nishith Desai Associates neither assumes nor accepts any responsibility for any loss arising to any person acting or refraining from acting as a result of any material contained in this Hotline. It is recommended that professional advice be taken based on the specific facts and circumstances. This Hotline does not substitute the need to refer to the original pronouncements.

This is not a Spam mail. You have received this mail because you have either requested for it or someone must have suggested your name. Since India has no anti-spamming law, we refer to the US directive, which states that a mail cannot be considered Spam if it contains the sender's contact information, which this mail does. In case this mail doesn't concern you, please unsubscribe from mailing list.