Competition Matters

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India's Merger Control Regime Gets A Major Overhaul

On 9 September 2024, the Government of India notified several provisions of the Competition (Amendment) Act, 2023 (***Amendment Act***) on merger control along with related rules. Additionally, the Competition Commission of India (***CCI***) also published the Competition Commission of India (Combinations) Regulations, 2024 (***Revised Combination Regulations***). The Amendment Act, related rules[1] and the Revised Combination Regulations (***Merger Control Changes***) come into effect from today, i.e., 10 September 2024. The key changes brought in by these Merger Control Changes are as follows:

i) **Introduction of deal value thresholds**: Transactions with a deal value exceeding INR 20 billion (~ USD 240 million) and where the target enterprise has "*substantial business operations in India*" (***SBO***) will need to be notified. If a transaction meets both these tests, it will not be eligible for the target-based exemption. Transactions which were signed prior to 10 September 2024, but have not been completely consummated as of this date, will need to be reassessed for the applicability of deal value thresholds (***DVT***). If a transaction requires a notification, such transaction must immediately observe standstill obligations (including at a global level) until CCI approval is obtained or attract penalties for gun jumping.

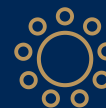
ii) **Exemption for categories of combinations**: The Exemption Rules exempt certain categories of combinations from mandatory pre-notification requirements, replacing the previous exemptions provided in the former Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011. The Exemption Rules are not significantly different from the draft exemption rules released by the CCI earlier in March 2024. The Exemption Rules also propose a uniform test of 'change in control', which refers to a change along the spectrum of control. Similar to DVT, transactions which were signed prior to 10 September 2024 but have not been completely consummated as of this date, yet will need to be reassessed for the applicability of exemptions under the Exemption Rules.

iii) **Expedited merger review timelines**: The CCI now has 30 calendar days (formerly 30 working days) to form a *prima facie* view on a notified transaction. If the CCI does not issue a *prima facie* opinion within 30 calendar days, the transaction is deemed approved. The total merger review period has also been shortened from 210 to 150 calendar days. However, there are several time exclusions built into the review timeline, which may effectively elongate this timeframe.

iv) **Revised definition of 'affiliate'**: For the assessment of overlaps as well as determination of the Green Channel route, the new definition of "affiliate" now requires consideration of entities, where an enterprise has the right or ability to access commercially sensitive information (***CSI***) of the other enterprise in addition to the shareholding or board representation criteria. The CSI criteria is a departure from the previous criteria of the right or ability to exercise any special rights not available to an ordinary shareholder.

v) **Derogation from standstill for on-market transactions**:

1 Competition (Criteria for Exemption of Combinations) Rules, 2024 (***Exemption Rules***), Competition (Minimum Value of Assets or Turnover) Rules, 2024 (***De Minimis Rules***), and Competition (Criteria for Combination) Rules, 2024 (***Green Channel Rules***). The Exemption Rules, De Minimis Rules, and Green Channel Rules are collectively referred to as ***Rules***.



Enterprises can now seek derogation from standstill obligations for on-market purchases, including open offers, and seek post-facto approval from the CCI, subject to certain conditions being met.

A detailed analysis of the key Merger Control Changes introduced are set out below:

Transitional Provisions

At the outset, it is critical to note that effective 10 September 2024, the Revised Combination Regulations and the new Rules become applicable to all qualifying transactions that have not been completely consummated or come into effect, even though the trigger event (either the approval by board of directors or execution of transaction documents) may have taken place prior to such date. These transactions need to be re-evaluated to determine whether a notification under the new Rules and Revised Combination Regulations is warranted.

If CCI approval is required, given the mandatory and suspensory nature of the Indian merger control rules, parties must observe standstill obligations and refrain from any form of gun jumping until the transaction is approved. For transactions in this category, the Revised Combination Regulations provide that no penalties will be levied for pre- 10 September 2024 transgressions. This implies that any acts in violation of standstill obligations post- 10 September 2024 will be subject to gun jumping penalties. Therefore, time is of the essence in assessing the notification requirement in light of the new Rules and the Revised Combination Regulations.

Deal Value Threshold

Transactions where: (a) the value is in excess of INR 20 billion (~ USD 240 million); and (b) the target has "*substantial business operations in India*", would meet DVT, and the target based exemption would be inapplicable to such transactions.

Computing "Value of the Transaction" for DVT

The Revised Combination Regulations state that the value of a transaction must include every valuable consideration, whether direct or indirect or current or future, including but not limited to:

i) any separately agreed consideration on account of any undertaking or restriction imposed on any party (including for example, non-compete fees);
ii) all incidental arrangements entered into between the parties within two years of the transaction coming into effect, including technology assistance agreements, licensing of intellectual property rights, and supply of materials, etc.;
iii) for call options, assuming full exercise of such call option (without discounting to present value);
iv) the value attributable to all inter-connected steps; and
v) consideration payable (as per best estimates) based on the occurrence of a future event / outcome captured in the transaction documents.

The Revised Combination Regulations explain that consideration of all acquisitions between the parties within two years prior to the trigger event shall be included to calculate the value of the transaction. In case of a transaction involving an open offer, full subscription to the offer must be considered for the computation of the value of such transaction.

Critically, the Revised Combination Regulations provide that, if the precise value of a transaction cannot be established with reasonable certainty, the transaction may be considered to exceed the prescribed deal value of INR 20 billion.

Determination of "Substantial Business Operations in India"

Under the Revised Combination Regulations, the target has "*substantial business operations in India*" when:

i) the target's gross merchandise value (***GMV***), in India, in the twelve months preceding the trigger event is 10% or more of the global GMV **AND** more than INR 5 billion (~ USD 60 million); **OR**
ii) the target's turnover, in India, in the preceding financial year is 10% or more of its global turnover, **AND** more than INR 5 billion (~ USD 60 million);
iii) specifically for digital services, (a) 10% or more of the target's business users or end users are in India, **OR** (b) the target's GMV in India in the 12 months preceding the trigger event is 10% or more of its global GMV; **OR** (c) the target's turnover in India, in the preceding financial year is 10% or more of its global turnover.

Notably, the definition of 'digital service' is wide and includes the provision of a service or one or more piece of digital content, or any other activity by means of the internet with or without consideration, to end users or business users (to be

calculated based on the average number of such users for the past one year preceding the trigger event).

Exemption Rules

The Exemption Rules replace schedule I of the combination regulations, which until now provided exemptions from the notification requirement, including exemptions for minority share acquisitions, intra-group transactions, bonus issues, stock splits and creeping acquisitions.

The key changes introduced by the Exemption Rules are as follows:

Minority Share Acquisition Exemption Revamped

The Exemption Rules split the former minority share acquisition exemption into two separate exemptions.

Acquisitions in the Ordinary Course of Business

This relates to the acquisition of shares in the 'ordinary course of business' (***OCB***). Previously, the CCI in its decisional practice had held that OCB meant "*revenue transactions, done solely with the intent to get benefited from short term price movement of securities*". The explanation to Rule 1 now limits the application of OCB to the acquisition of shares or voting rights only by underwriters, stockbrokers, and mutual funds.

This exemption is available as long as the acquirer does not hold more than a specified threshold of shares or voting rights as provided below:

- Acquisition of unsubscribed shares as underwriter: <25%
- Acquisition of shares as stockbroker: <25%
- Acquisition of shares as mutual fund: <10%

Acquisitions Solely for Investment Purposes

This relates to the acquisition of less than 25% of shares or voting rights of the target, not leading to an acquisition of control or right or ability to access CSI, solely as an investment, only if the:

- Acquirer does not acquire the right or ability to appoint a director or an observer to the board; and
- Transaction does not lead to any horizontal overlaps, or vertical or complementary relationships (***Overlaps***); and
- If Overlaps exist, the exemption would only be available where the acquirer holds less than 10% of the shares or voting rights of the target, after the acquisition.

Exemption for Acquisition of Incremental Shareholding or Voting Rights

An incremental acquisition of shares or voting rights by an existing shareholder holding less than 25% of shares or voting rights (both prior to and after such acquisition) is exempt. However, such acquisition should not result in the acquisition of control or provide the acquirer with the right or ability to access to CSI of the target, depending upon the nature of Overlaps, as explained below:

- If no Overlaps exist: no cap on the incremental acquisition up to 25%;
- If Overlaps exist: cap of 5% on the incremental acquisition (whether through a single acquisition or a series of acquisitions);
- If Overlaps exist and the existing shareholding or voting rights is less than 10% and after the transaction shareholding is more than 10%: exemption not available.

Intra-group Transaction(s) Exemption

Under the Competition Act, 2002, 'group' means two or more enterprises which, directly or indirectly, are in a position to: (a) exercise 26% or more of the voting rights in the other enterprise; or (b) appoint more than 50% of the members of the board of directors in the other enterprise; or (c) control the management or affairs of the other enterprise.

It is clarified that for the purposes of the Exemption Rules, the acquirer and its group entities mean the ultimate controlling person of the acquirer and other entities forming part of the same group.

Acquisition of Shares and Voting Rights

Acquisition of shares or voting rights where the acquirer or its group entities already hold 50% or more shares or voting rights in the target prior to such acquisition are exempt, provided such acquisition does not result in change in control.

Acquisition of Assets

Acquisition of assets of another entity, within the same group, is exempt, except in cases where there is a change in control over the assets being acquired.

Mergers and Amalgamations

A merger or amalgamation of enterprises within the same group is exempt, provided that the transaction does not result in change in control.

'Change in Control' Test

The Amendment Act codifies the 'material influence' standard

into the defintion of control. Under the earlier Combination Regulations, various exemptions including those relating to bonus issue or stock splits and creeping acquisitions were based on a test of change of control from 'joint' to 'sole' control. The Exemption Rules introduce a uniform test of 'change in control' for such exemptions, i.e., such exemptions are available as long as the transaction does not result in a change in control. It remains to be seen whether 'change in control' would only include a change from joint control to sole control (*or vice versa*) or would also include a change along the spectrum of control.

Introduction of Demerger Exemption

The Exemption Rules exempt: (a) demergers; and (b) the issuance of shares to the demerged company or to its shareholders, as a consideration for the demerger.

Green Channel Rules

The Green Channel Rules codify the current criteria for filing a notice under the 'Green Channel' route. The 'Green Channel' route is available if the parties, their respective group entities and / or their 'affiliates' have no Overlaps, and the notified transaction is deemed approved on the day of the filing. The Green Channel Rules remain unchanged from the draft Green Channel rules published by the CCI for public comments.

The one notable change in the criteria for qualifying under the 'Green Channel' route is in the definition of an 'affiliate', as reflected in the table below:

Old 'Affiliate' Test*	New 'Affiliate' Test
Direct or indirect shareholding of 10% or more; **OR**	10% or more of the shareholding or voting rights of the enterprise; **OR**
Right or ability to nominate a director or observer to the board; **OR**	Right or ability to have a representation on the board of directors of the enterprise either as a director or as an observer; **OR**
Right or ability to exercise any special right (including any advantage of commercial nature with any of the party or its affiliates) that is not available to an ordinary shareholder.	Right or ability to access CSI of the enterprise.

**As provided in the Notes to Form I published by the CCI.*

Notably, the meaning and scope of 'CSI' has not been provided in either the Green Channel Rules, the Amendment Act, or the Revised Combination Regulations.

Derogation From Standstill for On-market Transactions

In the past, the suspensory merger control regime has created hurdles for transactions involving open market purchases / stock market acquisitions, including extant Takeover Regulations. The Merger Control Changes allow acquirers the ability to seek a derogation from standstill obligations for open market purchases, thereby allowing them to capitalise on market opportunities. An application for derogation is subject to: (a) the parties filing a notification form (within 30 days of the first on-market acquisition); and (b) the acquirer not exercising ownership or beneficial rights or interest in such securities (including exercising voting rights, but excluding (i) receipt of economic benefits such as dividends etc. and (ii) exercise of voting rights in matters relating to liquidations and / or insolvency), until the CCI approves the transaction. However, the acquirer must not directly or indirectly influence the target enterprise in any way by exercising these rights. As such, these amendments make it easier to implement open offers and other on-market purchases.

De Minimis Rules

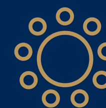
The De Minimis Rules codify the existing *de minimis* thresholds as set out in the Ministry of Corporate Affairs' notification dated 7 March 2024 (***De Minimis Notification***). The De Minimis Rules mirror the De Minimis Notification, prescribing that a transaction need not be notified to the CCI for its prior approval, if the target has either assets of not more than INR 4.5 billion (~ USD 54 million) in India or turnover of not more than INR 12.5 billion (~ USD 150 million) in India.

Unlike the De Minimis Notification, the De Minimis Rules do not have an expiry date. Therefore, unless the De Minimis Rules are amended or revoked, the De Minimis Rules will continue to be in force.

Procedural Changes

Shortened Timeline for Phase I Review and Approval if CCI's 30 Calendar Day Deadline Expires

As per the Amendment Act, the CCI now has 30 calendar days (as opposed to the earlier 30 working days) to form a *prima facie* opinion on whether a transaction causes or is likely to cause any appreciable adverse effect on competition in



India. Where the CCI fails to give a *prima facie* opinion on a transaction within 30 calendar days, such transaction will be deemed to be approved. The overall timelines for the CCI to complete its review have also been reduced from 210 calendar days to 150 calendar days.

The shortened review timelines may lead to increased risks of invalidation. However, the Revised Combination Regulations allows the parties to withdraw-and-refile notifications with the CCI's permission and provides for the adjustment of filing fees if such refiling is done within 45 days.

Increase in Filing Fees

The Revised Combination Regulations have significantly increased the filing fees for both Form I (short form) and Form II (long form). The filing fees for Form I have been increased from INR 2 million (~ USD 24,000) to INR 3 million (~ USD 36,000). The filing fees for a Form II have been increased from INR 6.5 million (~ USD 78,000) to INR 9 million (~ USD 107,000).

Format for Offering Modifications

The Revised Combination Regulations now provide a format to offer modifications / remedies to the CCI under Form IV, which requires the following information to be provided: (a) a summary of the modifications offered; (b) details on how the modifications address the identified concerns; (c) details of the divestment products / assets, if any; (d) monitoring arrangements; and, (e) timelines for completion of a divestment, etc.

Conclusion

The merger control regime stands substantially modified due to the suite of changes made by the Government of India and the CCI. Due care and attention must be exercised in evaluating whether transactions require a notification, given that significant additional information, analysis and judgment calls will now be required to come to this conclusion. Most importantly, the transitional provisions mean that all transacting parties which may have previously excluded an Indian merger notification must urgently revaluate whether these amendments change the position, as they would need to implement a standstill and notify the CCI for approval forthwith.

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