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## Sweeping Changes to Indian Merger Control Regime Imminent: Draft Regulations Published

Anshuman Sakle, Anisha Chand, Soham Banerjee, Armaan Gupta (Khaitan & Co ) · Friday, September 8th, 2023

The Indian merger control framework is governed by the *Competition Act, 2002* (Act) and *The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011* (Combination Regulations). To re-align with evolving regulatory needs and streamline processes, Combination Regulations have been reformed periodically.

Earlier this year, the *Competition (Amendment) Act, 2023* (Amendment Act) that materially alters the statute, received presidential assent. However, the implementation of the Amendment Act has been staggered. While some provisions have been already enforced, the amendments relating to the merger review provisions are pending operationalization in view of awaited guidance to effectuate such amendments.

Such guidance now seems to be taking shape with the release of the draft *Competition Commission of India (Combinations) Regulations, 2023* (Draft Regulations) for public consultation. The headline changes brought forth by the Draft Regulations are captured below.

### Clarity on deal value threshold and substantial business operations

The Amendment Act introduces the Deal Value Threshold (DVT) as a new threshold where a transaction will require the CCI's prior approval if the transaction value is more than INR 20 billion (~USD 240 million / ~EUR 224 million) and the target has substantial business operations in India.

The Draft Regulations provide guidance on ascertaining the “*value of transaction*” and “*substantial business operations in India*”.

Value of transaction is proposed to mean “*every valuable consideration, whether direct or indirect, immediate or deferred, cash or otherwise*”. This catch-all definition is further augmented with the clarification that transaction value will include (i) non-compete fees, (ii) consideration attributable to inter-connected transactions (including transactions between the parties entered within 2 years prior to the date of execution of transaction documents), (iii) consideration for transactional or incidental commercial arrangements entered within 2 years of the closing of the notifiable transaction, (iv) consideration for options and securities on an as-converted basis, and (v)

consideration payable for contingencies.

Curiously, the Draft Regulations provide that, where the true and complete transaction value is not captured in transaction documents, the value considered by the board of directors (or similar approving authority) should be considered. The Draft Regulations further state that where precise transaction value cannot be established with “*reasonable certainty*”, the notifying party should presume that the INR 20 billion (~USD 240 million / ~EUR 224 million) threshold is met and proceed accordingly.

The broad definition of “*value of transaction*” evidences the CCI’s clear intent that transactions cannot evade the DVT by slicing and dicing the consideration value or through any other such means. However, considering the ambiguous thresholds and inclusion requirements, parties may be compelled to presume that their transaction trips the INR 20 billion threshold to avoid inadvertent non-compliance.

Compared to transaction value, the guidance on “*substantial business operations in India*” is well-defined. 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 months preceding the deal execution date, is 10% 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 months preceding the deal execution date, is 10% or more of its total global GMV, or (iii) the target’s turnover for the preceding financial year in India is 10% or more of its total global turnover.

The clear and objective qualification criterion for identifying substantial business operations will enable parties to apply this test more efficiently and use this as a simple filter to determine if notification requirements can be avoided. However, given the wide net cast to identify substantial business operations, several transactions (across sectors) will likely qualify for notification requirements even if the “target” has insignificant assets/turnover in India.

### **Guidance on acquisitions through open offers or open market purchases**

Aligned with global standards, the Amendment Act proposes to allow parties to close acquisitions under open offers and open market purchases on a regulated stock exchange pending the CCI’s approval, as long as the acquirer does not exercise any ownership or beneficial rights or interest in such shares, unless permitted by the relevant regulations.

In this regard, the Draft Regulations provide that the acquirer must notify the transaction within 30 days from the date of acquisition of the shares. They clarify that prior to receipt of the CCI’s approval, the acquirer *vis-à-vis* the acquired shares can avail economic benefits like receiving dividends, or participating in a rights issue, bonus issue, stock-splits or buy back; dispose of the shares or securities acquired; and exercise voting rights in relation to matters relating to liquidation or insolvency proceedings. The Draft Regulations specifically prohibit the acquirer from directly or indirectly influencing the target’s activities in any manner.

This change is a welcome move as it provides abundant clarity on making time-sensitive acquisitions through open offers and open market purchases pending the CCI’s approval. Yet, pertinently, the acquirer is prohibited from influencing the target’s activities in any manner. Since this prohibition is not qualified by any threshold like material influence or otherwise, acquirers in

block and bulk deals will need to proceed with utmost caution till they secure the CCI's approval.

### **Introduction of layered requests for additional information**

Presently, once a merger notice is filed with the CCI, more than 99% of all transactions are approved within 30 working days from the filing date. This 30-working day period is exclusive of time taken by parties to respond to the CCI's queries which it may pose after filing. The Amendment Act proposes to reduce the review period from 30 working days to 30 calendar days to expedite review timelines.

The Draft Regulations introduce a layered mechanism for the CCI's review process. Once a merger notice is filed, the CCI can ask parties to remove defects in the notice within 10 working days. Interestingly, the CCI's review clock of 30 calendar days will start only after the defect-free notice is refiled and the 30-calendar day review timeline will continue to be exclusive of time taken by parties to respond to any subsequent queries of the CCI during the review process. The CCI may further extend the review period to (i) collect information from third parties and consider their submissions and/or (ii) provide an opportunity for an oral hearing to the transacting parties.

The numerous carve-outs to the 30-calendar day review period could potentially result in a significant delay in approvals. Hence, the proposed mechanism for layered requests may not necessarily result in an acceleration in the overall clearance timeline. However, the flexibility to allow for an oral hearing during any stage of the merger review process is a welcome and industry-friendly proposal.

### **Change in mechanism for modifications to notified transactions**

As proposed in the Amendment Act, after a merger notice is filed, the CCI will have 30 calendar days to determine if the transaction causes anti-competitive concerns or not. If the CCI concludes that competitive concerns are likely, it can initiate a detailed investigation process which will run up to 150 days excluding various carve-outs. Under the Amendment Act, the detailed investigation process begins with the issuance of a Statement of Objections to the notifying party(ies).

If the CCI finds that a transaction is likely to cause competitive concerns, it can consider modifications to the transaction as a condition for approval. Modifications may be provided either by the CCI or by the Parties in a prescribed format. Interestingly, modifications can be proposed either before the CCI has concluded that a transaction is likely to cause concerns or after such findings.

The Draft Regulations substantially improve the existing modification regime in terms of processes and timelines. This change should ideally allow a reduction in overall approval timelines owing to quicker identification and finalization of modifications. Nevertheless, the CCI can consider providing further clarity on whether a specific order of priority should be established for formulating modifications between the CCI and the involved parties. This would help prevent redundant, parallel, and potentially conflicting efforts in formulating proposed modifications.

## **Increase in Filing Fee**

A merger notification to the CCI is ordinarily made in a Form I format. However, if the parties' combined market share exceeds 15% in any horizontally overlapping market or exceeds 25% in any vertically overlapping market, the parties may notify the transaction in Form II.

The filing fee for Form I is proposed to increase to INR 3 million (USD ~36,000 / EUR ~33,500), while the Form II fee will jump to INR 9 million (USD ~108,000 / EUR ~101,000).

The increase possibly represents the CCI's increasing efforts in closely reviewing complex mergers. The shorter timelines within which clearance is to be now granted may have also prompted the CCI to raise the filing fee. That said, the enhancement in the filing fee will certainly add to the transaction costs.

## **Streamlining exemptions and filings under the Green Channel route**

As previously mentioned, the Combination Regulations have undergone several amendments to keep pace with the country's continuously evolving business environment. These amendments specifically incorporated scenarios exempted from notification requirements such as minority acquisitions, creeping acquisitions, ordinary course investments, intra-group transactions, etc., which are generally unlikely to raise competitive concerns. Similarly, the Combination Regulations were amended to introduce green channel route (GCR) filings which provide for deemed approval immediately upon filing the merger notice if there are no horizontal, vertical, or complementary overlaps between the acquiring group and target entity, without any substantive assessment by the CCI. Importantly, since these provisions were incrementally added directly to the Combination Regulations, they did not form part of the Act.

Since the Amendment Act now captures the broad provisions for various exemptions and deemed approval, the corresponding provisions are absent from the Draft Regulations. It is expected that the Ministry of Corporate Affairs, Government of India – the relevant nodal agency, will introduce detailed guidance on various exemptions and deemed approvals to substitute their absence from the Draft Regulations.

## **Conclusion**

Notably, the Draft Regulations not only complement the merger control amendments but also amend certain other areas in the process. For example, the pre-filing consultation process features formally in the Draft Regulations, the introduction of a format for modifications is also novel, etc.

The highlight of Draft Regulations expectedly remains the DVT. The guidance on DVT is carefully crafted and signals the CCI's cautioned disposition to prevent transactions from circumventing the DVT. Changes in the review processes and the mechanism for modifications demonstrate the CCI's intent to ensure expedited approvals without compromising on the review quality. This intent is further echoed in the provisions allowing limited actions in open market purchases or block deals pending the CCI's approval.

Overall, the Draft Regulations appear well thought-through and decisive in its expression. While there is some scope for refinement, the changes indeed represent the growing maturity of the CCI in the realm of merger control.

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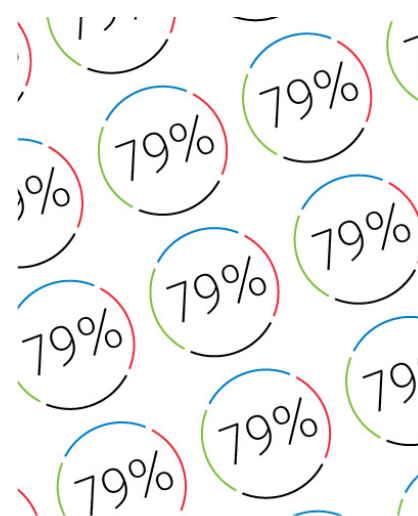
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