COMPETITION NEWS ALERT
SEPTEMBER 19, 2024

VAISH ASSOCIATES ADVOCATES ESTD. 1971

India Revamps its Merger Control Regime

Introduction of "Deal Value Thresholds"

On the 9th of September 2024, the Ministry of Corporate Affairs (MCA), Government of India notified the left-over provisions of the Competition (Amendment) Act, 2023 relating to regulation of combinations{1} (mergers and acquisitions (M&A)] along with three related Rules{2} and the Competition Commission of India ("CCI") published the Competition Commission of India (Combinations) Regulations, 2024 (the "Revised Combination Regulations").

All the above provisions of the Amendment Act, 2023, new Rules, and the Revised Combination Regulations have been brought into force from 10th September 2024.

{1} MCA has notified the coming into force of the Sections 6 to 8 (both inclusive), Sections 21 to 24 (both inclusive), Section 28, Section 30, Section 34, and Section 38 of the Competition (Amendment) Act, 2023 with effect from 10 th September 2024.

{2} (i) Competition (Criteria for Exemption of Combinations) Rules, 2024 (the "Exempted Combination Rules"), (ii) Competition (Criteria of Combination) Rules, 2024 (the "Green Channel Rules") and, (iii) Competition (Minimum Value of Assets or Turnover) Rules, 2024 2 (the "De Minimis Exemption Rules").

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CHANGES IN THE COMPETITION ACT, 2002		
SECTION OF THE MAIN COMPETITION ACT, 2002	**TITLE**	**DESCRIPTION**
Section 5.	Combinations	(i) Deal Value threshold. (ii) Dilution of standard for "Control" from "decisive influence" to 'material influence' while assessing mergers & acquisitions.
Section 6.	Regulation of Combinations	(i) Reduction of the time-limit for approvals of combinations (M&As) from two hundred and ten days to one hundred and fifty days. (ii) Reduction of time limit for forming a prima facie opinion by the Commission to issue a show cause notice to parties within fifteen days (from existing 30 days) for expeditious approval of combinations. (iii) Reduction of time limit for formation of prima facie opinion, whether the proposed combination is likely to cause appreciable adverse effect on competition (AAEC) in India or not within 30 calendar days (as against 30 Working days at present).
Section 6(4) (New)	Regulation of Combinations	Formal introduction of "Green channel" or deemed approval for certain categories of combination not likely to have appreciable adverse effect on competition (AAEC).
Section 6A (New)	Open offers etc.	Waiver of standstill obligations for open market purchases - The existing "standstill obligations" in case of an open offer/public announcement and acquisition of convertible shares/securities on a stock exchange are waived off provided: (a) a merger notification is promptly filed with the CCI, and (b) the acquirer does not exercise any ownership or beneficial rights/ interest/ receives dividends in such shares/ securities till the receipt of approval from CCI.

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REVISED COMBINATION REGULATIONS AND RELATED RULES	
REVISED COMBINATION REGULATIONS	1. **Introducing Deal Value Threshold (DVT)** • DVT mandates notification for transactions exceeding INR 2000 crore. • Applies to acquisitions involving entities with substantial business operations (SBO) in India. • CCI will determine SBO based on following three criteria: - For digital services, if 10% or more of global users are in India. - Gross Merchandise Value (GMV): If 10% or more of global GMV is from India and exceeds INR 500 crores (USD 60 million). - Turnover: If 10% or more of global turnover is from India and exceeds INR 500 crores. • The deal value must include interconnected transactions within two years, along with estimates for future payments and contingencies. 2. **Notice for open market transactions through regulated stock exchange** • Notice shall be given within "30 days" from the date of first acquisition of shares pursuant to implementation of open offer or acquisition of shares or securities convertible into other securities. 3. **Increase in Filing Fee** • The Statutory fee for filing Notice to CCI under Section 6 (2) of the Act, has been revised as under – • FEE for FORM 1- INR 30 LAKHS (from existing INR 20 Lakhs) • FEE for FORM II – INR 90 LAKHS (from existing INR 65 Lakhs).
THE EXEMPTED COMBINATION RULES	**1. Acquisition by underwriter, stockbroker and mutual fund in ordinary course of business** • An underwriter can acquire up to 25% of unsubscribed shares; a stockbroker can acquire up to 25% of shares; and a mutual fund can acquire up to 10% of shares. 2. **Acquisitions below 25% to be treated as solely for the purpose of investment** • Acquisitions below 25% of shares or voting rights are exempt, provided there is no change in control, board representation, or access to commercially sensitive information. • The acquirer or its group entities should have no horizontal or vertical or complementary overlapping with the target entity (ies), but if such overlapping exists then it should not lead to the acquirer holding more than 10% or more shares or voting rights after the acquisition.

	3. **Acquisition of additional shares where the acquirer already holds not more than 25 % shares or voting rights.** • Provided that the transaction will not result in: - Acquisition of control. - No new board representation. - No access to commercial sensitive information, for the first time. - In cases where acquirer has horizontal or vertical or complimentary overlap with the target increase in incremental shareholding or voting right should not exceed 5% for the first time or up to 10% maximum thereafter. 4. **Intra-Group Transaction(s) & Demergers.** • Following acquisitions or mergers or amalgamations within the same group are exempted if they do not result in a change of control of the acquirer: - Acquisition of additional shares where the acquirer already holds more than 25 % shares or voting rights but does not hold more than 50%. - Acquisition of additional shares if the acquirer already holds more than 50% of the shares or voting rights. - Acquisitions of assets within the same group. - Merger or amalgamation within the same group. • In cases of demerger, issuing of shares by the resulting company either to the demerged entity or to the original shareholders of the demerged company in proportion of their shareholding in the demerged company prior to such demerger is exempt, except for discharge of consideration for fractional shares.
DE MINIMIS EXEMPTION RULES	The new De Minimis thresholds/Target exemption thresholds are: • Assets: INR 450 Crores (up from INR 350 Crores) • Turnover: INR 1250 Crores (up from INR 1000 Crores)
GREEN CHANNEL RULES	• The revised rules clarify the definition of “parties to the combination”, their respective group entities and their “affiliates.” • The Rule define the term “affiliate.” It retains the criteria of 10% shareholding, board representation, and access to commercially sensitive information.

For a detailed summary, continue reading….

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DETAILED SUMMARY

Major Changes in the Competition Act, 2002

Following major changes in the Competition Act, 2002 (the Act), introduced earlier by the Competition (Amendment) Act, 2023, have been formally notified by the Central Government through MCA Gazette Notification dated September 09, 2024, with effect from 10th September 2024 -

(1) Section 5 (d) Introduces "Deal Value Thresholds" (DVT) (supra)

(2) Explanation (a) to Section 5 -Defines "control" as the ability to exercise material influence, in any manner, over the management or affairs or strategic commercial decisions.

(3) Section 6(4) – Formally introduces "Green channel" (supra) for certain combinations which will get automatic approval on the date of filing the Notice to CCI in FORM 1 with the prescribed fee.

(4) Section 6A- Derogation of standstill obligation (of waiting for 150 days) for on -market purchases / transactions such as implementation of open offers or acquisition of shares or convertible securities through SEBI regulated stock exchanges , provided notice for such acquisition /offer etc is filed within "30 days" from the date of first acquisition of shares pursuant to implementation of open offer or acquisition of shares or securities convertible into other securities, under the Revised Combination Regulations (supra) .

(5) Section 6(2A) – Fast tracked merger approval - reduction in period of standstill obligation (or suspensory regime) from 210 days to 150 days from the date of giving notice to CCI.

(6) Section 29 (1)- Reduction in time limit for forming a prima facie opinion by the Commission to issue a show cause notice to parties within fifteen days (from existing 30 days) for expeditious approval of combinations.

(7) Section 29 (1B) - Reduction of time limit for formation of prima facie opinion, whether the proposed combination is likely to cause appreciable adverse effect on competition (AAEC) in India or not within 30 calendar days (as against 30 working days at present).

DEAL VALUE THRESHOLD

What is the Deal Value Threshold?

Last year, the Government of India through the Competition (Amendment) Act, 2023 introduced Deal Value Threshold ("DVT") mainly to capture large-sized killer acquisitions by the Big Tech companies based in USA, which though had a significant presence in India yet escaped scrutiny due to absence of assets or turnover based prescribed thresholds in India. The introduction of DVT was dependent upon the definition of ***significant business operation in India***, which has now been notified, after due consultations by CCI.

Transactions with a deal value exceeding INR 20 billion (~ USD 240 million) and where the target enterprise has "substantial business operations in India" 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 executed prior to 10 September 2024 but have not been completely consummated as of this date, will need to be reassessed by CCI for the applicability of deal value thresholds (DVT), in cases where the assets or turnover thresholds are not met.

How the CCI will determine if an entity is having substantial business operations in India?

As per the 2024 Rules:

In case of the Digital Services

If the number of business users or end users of an entity providing digital services in India is 10% or more of its global users then such entity would be deemed to have substantial business operations in India.

OR

The Gross Merchandise Value (GMV) of the target

In the preceding twelve months from the date of execution or approval of the deal whichever is earlier in India is 10% or more of its global GMV and more than INR 500 crores (USD 60 million approx.) then such entity would deem to have substantial business operations in India.

OR

The turnover of the target

In the preceding financial year in India from the date of execution or approval of the deal whichever is earlier is 10% or more of its total global turnover derived from all the products and services and more than INR 500 Crores then such entity would be deemed to have substantial business operations in India.

How the value of the transaction will be calculated for DVT?

To calculate the value of a transaction for checking applicability of DVT, under clause (d) of Section 5 of the Act, all forms of valuable consideration must be included. This consideration can be direct or indirect, immediate or deferred, and can be in cash or other forms. The calculation must also encompass any payments made for covenants, undertakings, obligations, or restrictions imposed on the seller or other parties, even if these are agreed separately from the main transaction.

Additionally, the transaction value should incorporate all interconnected steps and transactions, as defined by the relevant regulations. Any payments due within two years of the transaction's effective date must also be considered. These payments may pertain to matters such as technology assistance, intellectual property licensing, rights to use assets, supply of raw materials or finished goods, as well as branding or marketing services.

Furthermore, payments related to call options and future acquisitions of shares must be factored in, assuming full exercise of those options. The transaction value should also account for any acquisitions made by the parties or their group entities in the target company during the two years prior to the transaction.

The calculation should include a best estimate of any contingent future payments specified in the transaction documents, without discounting them to present value. However, transaction-related costs such as fees for legal advice, investment banking services, or regulatory compliance are excluded from this value.

In cases where the true value of the transaction is not clearly documented, the board of directors or the approving authority's assessment will be considered. If necessary, the maximum payable amount may be used as the best estimate of the transaction's value.

Whether the Deals based on DVT signed before the date of implementation need to be notified?

In cases where neither the asset nor the turnover based thresholds, prescribed under clause (a) to (c) of Section 5 of the Act are applicable, in order to check the notifiability of the transaction based on DVT, only transactions where the relevant date—defined as the date of the board of directors' approval of the merger or amalgamation proposal, the date of execution of the agreement, or the date of acquisition or acquisition of control - falls on or after the date of enforcement of the Revised Combination Regulations, that is, September 10, 2024, will need to be notified.

SCHEDULED EXEMPTIONS

The new Rules outline specific transactions that are considered unlikely to have an adverse effect on competition and are therefore exempted from the requirement of prior approval from the CCI. These Rules replace the earlier Schedule 1 exemptions under the Combination Regulations, 2011 (which stands repealed now) The exempted transactions are listed in 12 categories, which are explained briefly hereunder.

Acquisition of shares of an enterprise in the Ordinary Course of Business ("OCB")

Earlier any acquisition of shares by a securities underwriter or a registered stockbroker in the OCB was exempt from the requirement of notice to the CCI. Hower, now the Competition (Criteria for Exemption of Combinations) Rules, 2024 circumscribes the acquisitions of shares by the underwriting, stockbroker and mutual fund in OCB only to the extent:

1. Where an acquisition of unsubscribed shares by an underwriter is not more than equal to 25%.
2. Where an acquisition of shares by a stockbroker is not more than 25%.
3. Where an acquisition of shares as a mutual fund is not more than 10%.

Acquisition of shares or voting rights treated solely for the purposes of Investment

The acquisition of shares or voting rights will be considered solely for investment purposes if the acquirer's total shares or voting rights, whether directly or indirectly, do not exceed 25% of the company's total shares or voting rights and does not result in control over the company, provided that:

1. The acquirer does not gain the right or ability to be represented on the board of directors, either as a director or an observer, and does not gain access to commercially sensitive information of the company.
2. The acquirer, along with its group entities and affiliates, is not engaged in activities related to the production or provision of products or services that are similar, identical, or substitutable for those of the target company or its downstream entities.
3. The acquirer, along with its group entities and affiliates, is not involved in activities that operate at different stages of the production chain or in complementary activities to those of the target company or its downstream group entities.

However, if the acquirer or its group entities are engaged in any of these activities, the acquisition will still be regarded as solely for investment purposes if the acquirer holds less than 10% of the shares or voting rights post-acquisition.

Acquisition of additional shares where the acquirer already holds not more than 25 % shares or voting rights

An acquisition of additional shares or voting rights by an acquirer or its group entities in an enterprise, where the acquirer or its group entities already hold less than 25% of the shares or voting rights, will be subject to the following conditions:

1. N*o Acquisition of Control:* The acquisition must not result in the acquirer or its group gaining control of the enterprise.
2. *No New Board Representation:* The acquirer or its group must not, for the first time, gain the right or ability to have representation on the board of directors (either as a director or as an observer).
3. *No Access to Commercially Sensitive Information:* The acquirer or its group must not gain, for the first time, the right or ability to access commercially sensitive information of the enterprise, unless they already have representation on the board as a director.
4. *Limit on Incremental Shareholding in Linked Activities:* If the acquirer or its group entities have horizontal, vertical, or complementary linkages with the target enterprise or its downstream entities:

- The incremental shareholding or voting rights from a single acquisition or a series of smaller interconnected acquisitions must not exceed **5%**, and
- Such an acquisition must not increase the acquirer's or its group's total shareholding from less than **10%** to **10% or more**.

Acquisition of additional shares where the acquirer already holds more than 25 % shares or voting rights but does not hold more than 50%

An acquisition of additional shares or voting rights by an acquirer or its group entities in an enterprise, where the acquirer or its group entities already hold more than 25% of the shares or voting rights but does not hold more than 50% of the shares will be exempt provided that such acquisition does not results in change of control of such enterprise.

Acquisition of additional shares where the acquirer already holds more than 50 % shares

An acquisition of additional shares or voting rights by an acquirer or its group entities in an enterprise, where the acquirer or its group entities already hold more than 50% of the shares or voting rights will be exempt provided that such acquisition does not results in change of control of such enterprise.

Intra-Group Transaction(s) & Demergers

The regulation defines "acquirer and its group entities" as the ultimate controlling person of the acquirer and other entities within the same group. An entity is considered an affiliate of another enterprise if the latter holds 10% or more of its shares or voting rights, has the right to a board seat or observer role, or has access to the enterprise's commercially sensitive information. Accordingly, the regulation exempts the intra-group transactions and demergers wherein:

1. Acquisition of Additional Shares or Voting Rights (25%-50%): If the acquirer already holds more than 25% but less than 50% of the shares or voting rights, additional acquisition is allowed, as long as it does not result in a change in control.
2. Acquisition of Shares (More than 50%): If the acquirer already holds more than 50% of the shares or voting rights, additional acquisition is permitted unless it leads to a change in control.
3. Intra-group Acquisitions and Mergers: Acquisitions of assets or mergers/amalgamations within the same group are allowed if they do not result in a change of control over the assets or businesses.

Demerger and Resulting Share Issues: In cases of demerger, issuing of shares by the resulting company either to the demerged entity or to the original shareholders of the demerged company in proportion of their shareholding in the demerged company prior to such demerger is exempt, except for discharge of consideration for fractional shares.

DE MINIMIS -TARGET EXEMPTION

Section 5(e) of the Act provided an enabling power to the government of India to prescribe the minimum thresholds of assets or turnover for the enterprise being acquired (target enterprise) which would exempt the acquisitions of such small enterprise from the definition of a "combination" under Section 5 of the Act. The formal prescription of such minimum thresholds was awaited. The extant Rules now prescribe those minimum thresholds, which will grant exemption to the acquisition of target enterprise below these prescribed thresholds for all times to come.

Earlier, as an ad hoc arrangement, such minimum thresholds (de minimis) for the "target exemption" were prescribed by the MCA since 2011, from time to time, by way of Gazette Notifications issued under Section 54 (a) of the Act, for periods of 5 years each and these were revised lastly on March 7, 2024. The extant Rules make no change in these revised thresholds, which remain the same, that is, if target enterprise to be acquired has either assets below INR 450 Crores or turnover below 1250 Crores in the financial year immediately preceding the financial year in which such acquisition takes place.

GREEN CHANNEL ROUTE (DEEMED APPROVED TRANSACTIONS)

Section 6(4) and Section 6(5) of the Act along with Regulation 5A of the erstwhile Combination Regulations, 2011, provide for "Green Channel" (introduced by the CCI during the COVID-19), for deemed approval on the date of filing of notice itself, in respect of those combinations where the parties or their affiliates to the transaction had neither horizontal nor vertical overlap and the parties do not produce or supply goods or services, which are complementary to each other. The present Rules further clarify the scope of the "parties" to such combination" and their "affiliates".

Now "Parties" to such combination will include the ultimate controlling person of the acquirer and other entities in the same group, the enterprise being acquired along with its downstream entities forming part of its group, and enterprises being merged or amalgamated along with their controlling persons and group entities.

Further, an enterprise will be considered as "affiliate "to another enterprise if the latter holds 10% or more shareholding or voting rights of the former or exercises right or ability to nominate a Board member either as a director or as an observer or has right to access to commercially sensitive information of the former enterprise.

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