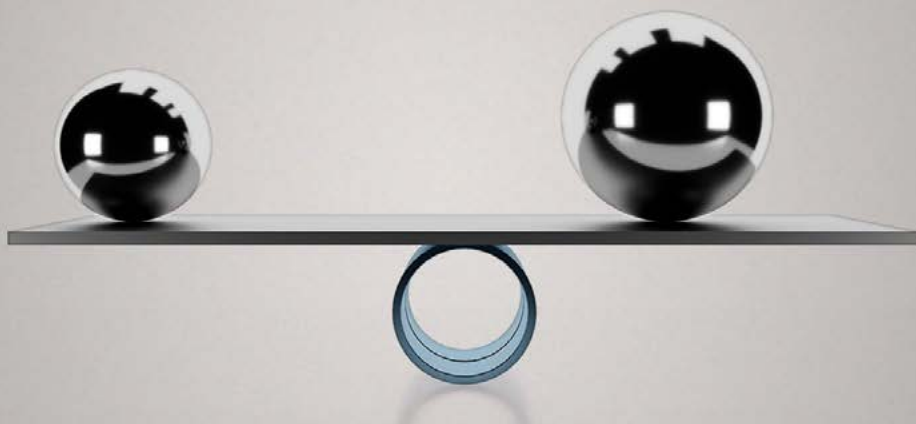


05 September 2023



Draft Competition Commission of India (Combinations) Regulations, 2023 Published for Comments

Earlier this year, the Competition (Amendment) Act, 2023 (**Amendment Act**) materially amended the Competition Act, 2002 (**Competition Act**) and introduced significant changes to the merger control regime. The Competition Commission of India (**CCI**) needed to issue regulations to provide the detailed framework to implement these changes.

On 5 September 2023, the CCI published the draft Competition Commission of India (Combinations) Regulations, 2023 (**Draft Regulations**) for public comments. In addition to implementing the new provisions, the Draft Regulations propose to amend and update various aspects of the existing Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (**Combination Regulations**). Once they come into force, these Draft Regulations will replace the existing Combination Regulations.

Comments can be provided only through the CCI's website by 25 September 2023.

The key features proposed in the Draft Regulations are set out below:

Deal Value Thresholds

One of the key amendments under the Amendment Act is the introduction of deal value thresholds (**DVT**) to cover transactions which are currently not notifiable under the existing asset / turnover based thresholds.

Calculation of the "value of the transaction" in the DVT

The first limb of the DVT is that the value of the transaction crosses INR 20 billion (approx. USD 240 million).

The Draft Regulations set out the methodology for calculating the value of a transaction, and provide that it must include every valuable consideration, whether direct / indirect or current / future. It also provides various indicative examples of consideration that must be included, such as: (a) non-compete fees; (b) all incidental arrangements entered into between the parties within two years of the transaction, including technology assistance agreements, licensing of intellectual property rights, and supply of materials; and (c) the value of all inter-connected steps. The Draft Regulations clarify that all transactions between the parties within two years prior to the transaction will be deemed to be inter-connected, and their value must also be included.

The Draft Regulations state that if the precise value of the transaction cannot be established with reasonable certainty or otherwise, the transaction will be considered to exceed the prescribed DVT.

Determination of "substantial business operations in India"

The second limb of the DVT is that the target has "substantial business operations in India".

The Draft Regulations stipulate that the target enterprise will be deemed to have "substantial business operations in India" if it has, in India, 10% or more of its total global: (a) users,



subscribers, customers, or visitors, at any point in the last twelve months; (b) gross merchandise value, for the preceding 12 months; or (c) turnover derived from all products and services, for the preceding financial year. This appears to be a fairly wide test and, in transactions involving tech companies, it is possible that a target enterprise may potentially meet this test even without having substantive assets or turnover in India.

Flexibility with respect to on-market transactions

A significant change introduced under the Amendment Act is the ability to seek a derogation from the standstill obligations for open market purchases, thereby allowing acquirers to capitalise on market opportunities.

The Draft Regulations provide that such transactions must be notified to the CCI within 30 days from the completion of such on-market transactions. They also clarify that the exercise of certain rights are permitted prior to receipt of the CCI approval, including: (a) benefiting from economic benefits such as dividends; (b) disposing of shares; or (c) exercising voting rights in matters relating to liquidation or insolvency proceedings. However, the acquirer must not directly or indirectly influence the target enterprise in any way.

Once implemented, these changes should make it easier to implement open offers and other on-market purchases.

Deletion of Exempt Transactions under Schedule I

Schedule I of the existing Combination Regulations provide various important exemptions from the notification requirement, including exemptions for minority share acquisitions, intra-group transactions, bonus issues, stock splits and creeping acquisitions (**Schedule I Exemptions**).

The Draft Regulations envisage the removal of the Schedule I Exemptions. It is unclear whether it is proposed to do away with these exemptions altogether, or whether they may be reintroduced through separate notifications or rules made by the Government. If the former, it would likely lead to a significant increase in the number of filings before the CCI, including many transactions which pose no competition concerns.

Deletion of reference to the “Green Channel” route under the Draft Regulations

Currently, the Combination Regulations provide for a “Green Channel” route for notifying certain transactions (which do not involve any horizontal overlap or vertical or complementary relationships) where the transaction is deemed approved on the date of filing. This has been a very popular avenue for notifying non-problematic transactions and has received praise from the business community.

Provisions on this route have been deleted under the Draft Regulations. This route has still been referenced under the draft Form I and an enabling provision appears to have been built into the Amendment Act (although the wording of the enabling provision is unclear and does not expressly refer to Green Channel filings). Therefore, it is currently uncertain whether this is proposed to be removed altogether or if it may be introduced through separate regulations / notifications.

Increase in the filing fees

The Draft 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 (approx. USD 24,000) to INR 3 million (approx. USD 36,000). The filing fees for a Form II have been increased from INR 6.5 million (approx. USD 78,000) to INR 9 million (approx. USD 108,000).

Codification of the pre-filing consultation mechanism

The Draft Regulations have codified the informal pre-filing consultation mechanism that is available to parties to a transaction; however, they re-iterate that the guidance provided through such pre-filing consultation is not binding on the CCI.

Format for offering modifications

In a departure from the present regime, the Draft Regulations provide a format to offer modifications / remedies to the CCI. The items that must be included are: (a) summary of the modifications offered; (b) details on how the modifications address the identified concerns; (c) various details on the divestment products, if any; and (d) monitoring arrangements. The Draft Regulations also prescribe timelines for various steps in the modification process, adding more certainty to the process.



Lack of transitional provisions

The Draft Regulations do not contain any transitional provisions for transactions which have been signed but not closed prior to the introduction of the final regulations. This will be especially problematic while assessing the applicability of the DVT provisions for transactions that do not meet the other jurisdictional thresholds.

Conclusion

Overall, the Draft Regulations are a mixed bag with some helpful changes and some concerns, including the potential removal of the Schedule I Exemptions, uncertainty over the Green Channel route and overly wide tests for determining DVT.

We expect that these issues / concerns will be addressed following the completion of the consultation process.

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