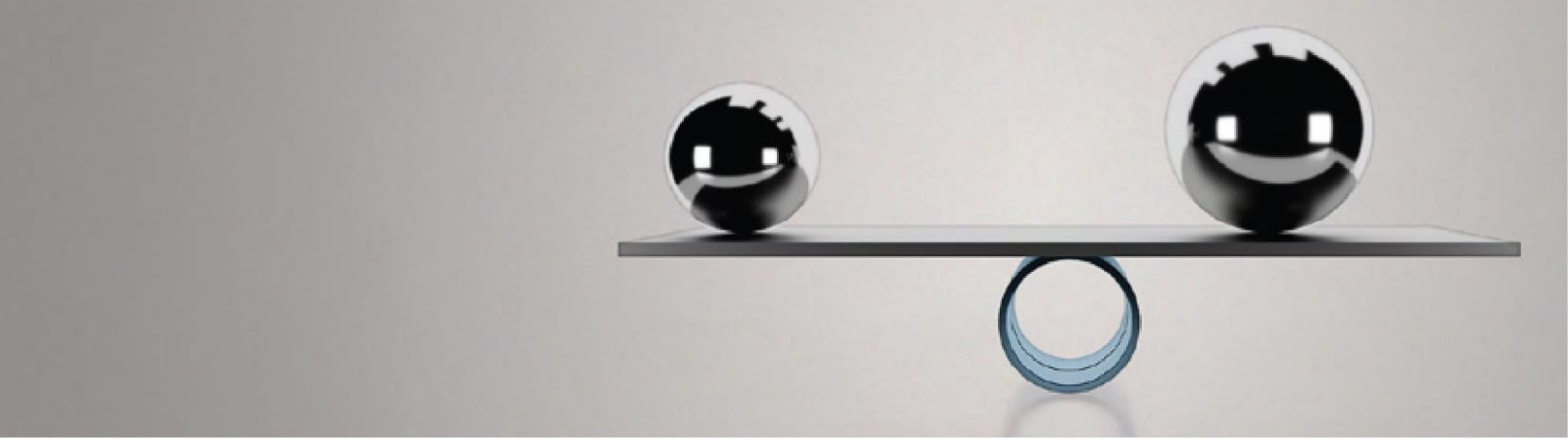
March 2024



Draft Rules relating to Combinations released for Public Comments

The Competition (Amendment) Act, 2023 (***Amendment Act***) consolidated a number of exemptions from the mandatory requirement to notify combinations that the Competition Commission of India (***CCI***) had brought in for ease of doing business. In order to set out the details of these exemptions, the Ministry of Corporate Affairs (***MCA***) has released three draft rules (together referred as the ***Draft Rules***) for public comments:

a) Draft Competition Commission of India (Green Channel) Rules, 2024 (***Draft Green Channel Rules***);
b) Draft Competition Commission of India (De Minimis) Rules, 2024 (***Draft De Minimis Rules***); and
c) Draft Competition Commission of India (Exempted Combinations) Rules, 2024 (***Draft Exemption Rules***).

The Draft Rules are open for public comments until **10 April 2024.** While these rules are seemingly consistent with the existing exemptions, there are some important differences that require further scrutiny. A brief summary of the key changes proposed by the Draft Rules is set out below:

Draft Green Channel Rules

The Draft Green Channel Rules propose to consolidate 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 horizontal overlaps, or vertical or complementary linkages (***Overlaps***) and the notified transaction is deemed approved on the day of the filing).

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 Limbs of the 'Affiliate' Test*	New Limbs of the '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 commercially sensitive information (***CSI***) of the enterprise.

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

The modified third limb, i.e., the 'right or the ability to access CSI', is a key point of departure from the current regime. Notably, 'CSI' has not been defined in either of the Draft Green Channel Rules, the Competition Act, 2002 (as amended by the Amendment Act), or related regulations.

Draft De Minimis Rules

The Draft De Minimis Rules mirror the revised de minimis thresholds as set out in the MCA notification dated 7 March 2024 (***De Minimis Notification***). The De Minimis Notification, which is applicable until 6 March 2026, provides 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 450 crores (approx. USD 54.4 million) in India or turnover of not more than INR 1250 crores (approx. USD 151.1 million) in India. The Draft De Minimis Rules reiterate the asset and turnover thresholds provided in the De Minimis Notification, and effectively codify the notification into rules, as the Amendment Act incorporates the de minimis exemption into the statute.

Draft Exemption Rules

On 5 September 2023, the CCI had published the draft Competition Commission of India (Combinations) Regulations, 2023 (***Draft Regulations***) for public comments. These Draft Regulations, in addition to implementing new provisions, propose to delete Schedule I of the existing Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (***Combination Regulations***), which provide various important 'exemptions' from the mandatory pre-notification requirement.

The Draft Exemption Rules propose to re-introduce the exemptions provided in Schedule I of the Combination Regulations. While the Combination Regulations stated that such transactions were "*ordinarily not likely to cause an appreciable adverse effect on competition in India*" and therefore, "*need not normally be filed*", the Draft Exemption Rules are more categorical in listing these as exemptions. The key changes introduced by the Draft Exemption Rules are as follows:

Minority Share Acquisition Exemption Revamped

The Draft Exemption Rules propose to split the current minority share acquisition exemption into two exemptions.

- ***Item 1:*** Relates to acquisition of shares in the 'ordinary course of business' (***OCB***). Previously, the CCI in its decisional practice had held that OCB means "*revenue transactions, done solely with the intent to get benefited from short term price movement of securities*". The explanation to Item 1 now provides the criteria for an acquisition to qualify as OCB and limits its application to acquisition of shares or voting rights by underwriters, stockbrokers, and mutual funds.

  The exemption is available as long as the acquirer does not hold more than a specified threshold of shares or voting rights as depicted in the table below.

Shareholding threshold for OCB	
Acquisition of unsubscribed shares as underwriter	<25%
Acquisition of shares as stockbroker	<25%
Acquisition of shares as mutual fund	<10%

- ***Item 2:*** Relates to acquisition of shares or voting rights 'solely as an investment'. The exemption is available if: (i) the acquirer holds less than 25% of shares or voting rights of the target; (ii) the transaction does not lead to the acquisition of control of the target; and (iii) the transaction qualifies as 'solely as an investment', as explained below.

Condition 1: Acquisition of Shares/Voting Rights

Acquirer holds less than 25% shares or voting rights, and

Condition 2: Control

Does not lead to acquisition of control, and

Condition 3: Solely as an Investment

No right or ability to appoint a director or an observer	No right or ability to access CSI	No Overlaps

If acquirer holds *less than 10%* shares or voting rights post-acquisition – exemption would be available even if there are Overlaps.

Introduction of Exemption for Acquisition of Incremental Shareholding or Voting Rights by an Existing Shareholder, Holding less than 25%

Any incremental acquisition of shares or voting rights by an existing shareholder holding less than 25% of the shares or voting rights (both prior to and after such acquisition) is exempted, provided that such acquisition of shares or voting rights does not result in the acquisition of control. The scope of this exemption hinges on the existence of Overlaps between the acquirer and the target, as detailed below:

Condition 1

Additional acquisition by an existing shareholder [holding less than 25% shareholding/voting rights (pre- and post-transaction)]

+

Condition 2

No acquisition of control

+

Condition 3

Examination of Overlaps

If no Overlaps

No cap on incremental acquisition

If Overlaps

Cap of 5% on incremental acquisition (whether by a single acquisition or series of acquisitions)

If Overlaps + existing shareholding less than 10% and post-transaction shareholding more than 10%

Exemption not available

Exemption on Demerger Introduced

The Draft Exemption Rules propose to introduce a new exemption for demergers under which the issuance of shares by the resulting company as consideration for the demerger to the demerged company or to its shareholders (in the proportion of their shareholding in the demerged company) is exempt from notification.

Intra-group Share Acquisition Exemption

The Draft Exemption Rules propose to delete the exemption for acquisitions of shares and voting rights of enterprises within the same group, limiting the exemption to only asset acquisitions (which do not lead to a change in control). Having said that, Item 5 of the Draft Exemption Rules proposes to exempt the additional 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, as long as such acquisition does not result in the acquisition of control.

'Change in Control' Test

Under the Combination Regulations, various exemptions including exemptions for bonus issue or stock splits and creeping acquisitions, hinge on a test of change of control from 'joint' to 'sole' control or *vice versa*. The Draft Exemption Rules propose 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.

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