INTERNATIONAL BAR ASSOCIATION

ANTITRUST SECTION

SUGGESTIONS TO THE MINISTRY OF CORPORATE AFFAIRS (COMPETITION SECTION), GOVERNMENT OF INDIA, REGARDING:

(1) THE RENEWAL OF THE “GROUP” DEFINITION NOTIFICATION DATED 4 MARCH 2016, AND

(2) THE RENEWAL OF THE SMALL TARGET EXEMPTION NOTIFICATION DATED 27 MARCH 2017

7 March 2022

INTERNATIONAL BAR ASSOCIATION

ANTITRUST SECTION

SUGGESTIONS TO THE MINISTRY OF CORPORATE AFFAIRS (COMPETITION SECTION), GOVERNMENT OF INDIA, REGARDING:

(1) THE RENEWAL OF THE "GROUP" DEFINITION NOTIFICATION DATED 4 MARCH 2016, AND

(2) THE RENEWAL OF THE SMALL TARGET EXEMPTION NOTIFICATION DATED 27 MARCH 2017

1. INTRODUCTION

1.1 The Merger Working Group ("MWG") of the Antitrust Section of the International Bar Association ("IBA") is making these submissions in relation to the following notifications:

(a) **Group Definition Notification:** The Notification dated 4 March 2016 (Notification no. S.O. 673(E)) issued by the Ministry of Corporate Affairs ("MCA"), which exempted for a period of five years, an enterprise exercising less than 50% voting rights in another enterprise from the definition of 'Group' under the *Explanation* to Section 5 of the Competition Act, 2002 (as amended) ("Act") ("Group Definition Notification"), lapsed on 3 March 2021. Its application has not been extended by the MCA through the promulgation of another notification. For the reasons provided below, the MWG respectfully suggests that there is a pressing need to renotify the Group Definition Notification, ideally with retroactive effect (i.e., from 3 March 2021).

(b) **Small Target Exemption Notification:** The Notification dated 27 March 2017 (Notification no. S.O. 988(E)) published by the MCA on 29 March 2017 exempts from notifying transactions under Section 5 of the Act to the Competition Commission of India ("Commission") where the enterprise whose assets are being acquired or which is merging or amalgamating has assets less than INR 3,500 million / USD 46.02 million (approximately) / EUR 41.73 million (approximately) **<u>or</u>** turnover less than INR 10,000 million / USD 131.48 million (approximately) / EUR 119.24 million (approximately) in India ("Small Target Exemption Notification").[1] The Small Target Exemption Notification will lapse on 28 March 2022. For the reasons provided below, the MWG submits that the Small Target Exemption Notification should also be renewed.

2. ABOUT THE IBA

[1] Please note that the exchange rates for USD and EUR are as on 4 March 2021. 1 USD = 76.14 INR (approximately) and 1 EUR = 83.87 INR (approximately). Further, the same exchange rates have been used uniformly in subsequent sections of this document.

2.1 The IBA is the world's leading international organisation of legal practitioners, bar associations, and law societies. As the "global voice of the legal profession", the IBA contributes to the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of more than 80,000 individual lawyers from over 170 countries, including India, and it has considerable expertise in providing assistance to the global legal community.[2]

2.2 The IBA's Antitrust Section includes competition law practitioners around the world, including India, with a wide range of jurisdictional backgrounds and professional experience. Such varied experience places the Antitrust Section in a unique position to provide a comparative analysis for the development of competition laws, including through submissions developed by its working group, such as the MWG, on various aspects of competition law and policy.[3]

2.3 The MWG consists of legal practitioners from around the world with extensive experience in merger control in their respective jurisdictions, including India, and in respect of cross-border matters. It has prepared numerous submissions to governments and competition agencies around the world over the past 15 years.[4]

2.4 The MWG has previously made submissions to the MCA and the Commission on several occasions such as: (a) in February 2007, the MWG highlighted the concerns surrounding the Competition Amendment Bill, 2006; (b) in March 2008, the MWG provided comments and suggestions on the draft Competition Commission of India (Combination) Regulations; (c) in August 2013, the MWG provided comments on the Competition (Amendment) Bill, 2012; (d) in December 2014, the MWG submitted its comments and suggestions on "trigger" events for merger notification in India; (e) in April 2015, the MWG submitted comments on amendments to the Competition Commission of India (procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ("Combination Regulations");"); (f) in February 2016, the MWG submitted comments on the Small Target/*De Minimis* exemption in the Indian merger control regime; (g) in September 2018, the MWG submitted comments in relation to the proposed amendments to the Combination Regulations; (h) in December 2018, the MWG submitted comments to the Competition Law Review Committee; (i) in December 2019, the MWG submitted comments on amendments proposed to the Combination Regulations; and (j) in March 2020, the MWG submitted comments on the Competition (Amendment) Bill, 2020.

2.5 In the past, the MCA and the Commission have taken into consideration the MWG's inputs, and the MWG hopes that this submission will also prove helpful to the MCA in taking a decision on re-promulgating the Group Definition Notification and the Small Target Exemption Notification.

3. RE-PROMULGATION OF THE GROUP DEFINITION NOTIFICATION

3.1. Section 5 of the Act prescribes certain thresholds for the value of assets and turnover of (i) the parties to a transaction ("Parties Test"), or (ii) the "group" to which the parties will belong after the transaction ("Group Test"). If these jurisdictional thresholds (which were subsequently modified) are exceeded, a transaction must be notified to the Commission.

[2] See https://www.ibanet.org/.
[3] See https://www.ibanet.org/LPD/Antitrust-Section/Antitrust/Default.aspx.
[4] See https://www.ibanet.org/LPD/Antitrust-Section/Antitrust/WorkingGroupSubmissions.aspx#filter=.mergers.

3.2. In terms of Explanation (b) to Section 5 of the Act, a "group" is defined as two or more enterprises, which directly or indirectly, are in a position to:

(i) exercise 26% or more of the voting rights in the other enterprise ("Voting Rights Test"); or

(ii) appoint more than 50% of the members of the board of directors in the other enterprise ("Board Composition Test"); or

(iii) control the management or affairs of the other enterprise ("Control Test").

3.3. An initial notification (i.e., Notification No. S.O. 481(E)), which was first introduced in March 2011, had enhanced the Voting Rights Test's threshold from 26% to 50%, for a period of five years until March 2016. The concession was further revived and renewed, by way of the Group Definition Notification, on 4 March 2016 for a further five years period until 3 March 2021.

3.4. As a result of the Group Definition Notification, the asset value and turnover of an enterprise was not required to be aggregated with the acquirer group for the purposes of testing the jurisdictional thresholds under the Group Test, if enterprise(s) belonging to the acquirer group exercised less than 50% voting rights in such an enterprise. Accordingly, the asset value and turnover of subsidiaries alone was required to be considered for assessing the reportability of a transaction under the Group Test (assuming that the Board Composition Test and the Control Test were not met).

3.5. However, pursuant to the expiry of the Group Definition Notification on 3 March 2021 and in the absence of its renewal, the threshold for the Voting Rights Test is now rolled back to 26% from 50%. Consequently, the value of assets and turnover of non-subsidiary enterprises in which voting rights meet or exceed 26% is required to be aggregated while assessing a transaction's notifiability under the Group Test. This position will subsist, if the Group Definition Notification is not renewed.

3.6. The reversal to the 26% shareholding threshold for the definition of a group comes with a number of concerns:

Legal Concerns

(i) The 26% threshold has led to a situation where an enterprise could be viewed as belonging to two or more unrelated and distinct groups (i.e., if two or more unrelated shareholders are each able to exercise more than 26% voting rights). Such a position would lead to illogical outcomes, as the value of assets and turnover of an enterprise could now be attributed to multiple unrelated and distinct groups.

(ii) The objective of issuing the Group Definition Notification and the reason for a 50% or more Voting Rights Test threshold instead of a 26% threshold was to ensure that the definition of group under the Act is consistent with the principal legislation of corporate laws in India.

(iii) The 26% threshold also does not tally with accounting standard principles, which ordinarily consolidate enterprises in which the parent enterprise has a 50% or more shareholding.

Concerns for the Industry

(iv) The 26% threshold makes the process of determining reportability more onerous, as multiple associate companies would also have to be considered for determining the value of assets and turnover of the group. Such a prospect is especially cumbersome for private equity and venture capital funds and foreign institutional investors, which often have investments across a host of portfolio companies.

(v) The MWG is not aware of any significant concerns regarding the operation of this exemption during the decade that it was in effect, and it contributed to a clear and certain regime for determining whether a transaction meets the financial thresholds for notification.

Concerns for the Commission

(vi) The 26% threshold can potentially trigger a surge in merger filings with substantial additions to the value of assets/turnover of any "group", thereby leading to an increase in the regulatory burden on the Commission. The foreseeable result would be that a number of non-problematic mergers will require notification and further encumber the Commission's resources simply because of the supplementary assets and turnover of enterprises which in reality are not even controlled or managed by the parties to a transaction.

3.7. Importantly, the Guidance Notes to Form I already require notifying parties to disclose overlaps to the Commission with all enterprises in which any party has, *inter alia,* 10% or more shareholding, special rights, director or observer rights, etc. This requirement necessitates disclosure of market-facing information, which allows the Commission to address any issues germane to the competitive assessment of a proposed transaction.

3.8. Accordingly, the expiry of the Group Definition Notification now clouds an otherwise clear self-assessment regime for notification of transactions with a layer of uncertainty and ambiguity.

3.9. To remedy this situation, the MWG respectfully suggests that the Group Definition Notification be re-promulgated. Ideally, this renewal should also be made with retroactive effect from the date of its expiry on 3 March 2021 to enable only considering those enterprises as part of their groups on which they exercise effective control (i.e., 50% or more shareholding). This will also support the Commission to avoid expending its resources on non-problematic notifications that would either have benefited from the intra-group exemptions or would have been non-notifiable for not breaching the jurisdictional thresholds, thereby focusing its energies on transactions that merit closer scrutiny.

4. RE-PROMULGATION OF THE SMALL TARGET EXEMPTION NOTIFICATION

4.1. The best practice that has globally evolved around merger control regulation recommends that merger control thresholds should only apply to those transactions which have a material nexus to a particular jurisdiction.[5] Further, the merger control thresholds should be built on objective and quantifiable factors such as asset and turnover values.[6] Therefore, in practice, merger control thresholds should be reflective of domestic activities of the parties to a transaction (notwithstanding the global extent of their businesses) and use asset and/or turnover based thresholds rather than market share-based review thresholds.

4.2. The merger control provisions under the Act are generally built on metrics of asset and turnover thresholds and materiality to India, as pre-requisites for notification of a transaction to the Commission.

4.3. However, Section 5 of the Act, as currently written, does not have a "two or more" requirement, where "two or more" enterprises[7] involved in a transaction each exceed the modified global and Indian turnover and asset thresholds in the Act. In other words, the jurisdictional asset or turnover thresholds set out under Section 5 of the Act, as modified, prescribe a minimum value of assets or turnover required to be crossed by the acquirer and target enterprises on a *combined basis*, in order to qualify as a notifiable "combination".

4.4. As such, the jurisdictional thresholds apply irrespective of the size of the individual parties to the transaction and only prescribe thresholds on a *combined* basis. In the absence of the Small Target Exemption, it is therefore possible for a transaction to qualify as a combination under Section 5 of the Act, even if the asset value or turnover of the target enterprise, or the value of the assets being acquired, taken control of, merged or amalgamated, as the case may be, are insignificant.

4.5. To illustrate, if a large company were to acquire a small business (say, a garage), which has assets and turnover of minimal value; in the absence of the Small Target Exemption, this would require a notification to be filed even though it does not result in any change in the market structure or competitive dynamics of the market, purely on account of the acquirer enterprise exceeding the jurisdictional thresholds under Section 5 of the Act on its own.

4.6. As a result, without the Small Target Exemption, a single large acquiring enterprise having the requisite worldwide and India asset base and/or turnover would be required to notify an acquisition of voting shares /assets /control of a target enterprise with no or

---

5 The International Competition Network ("ICN") notes that "*Jurisdictions are sovereign with respect to the application of their own laws to mergers. In exercising that sovereignty, however, jurisdiction should be asserted only with respect to those transactions that have a material nexus to the reviewing jurisdiction*", Part II A, *Working Group Comments, Original Comments (September 2002), Amended (May 2017), (available at: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf).*

6 The ICN notes that "*Mandatory notification thresholds should be based exclusively on objectively quantifiable criteria. Examples of objectively quantifiable criteria are assets and sales (or turnover)*", Part II E, *Working Group Comments, Original Comments (September 2002) Amended (May 2017), (available at: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf).*

7 See, e.g., Article 1.2 the European Union Merger Regulation (Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings).

minimal global/Indian assets or turnover. It is highly unlikely that this kind of transaction would have any impact on the competitive character of markets in India.

4.7. Therefore, the Small Target Exemption was introduced into the Indian merger control regime to remedy the problem arising out of the absence of the "two or more" requirement under the Section 5 thresholds, as modified. It reduces the burden for private parties, and use of the Commission's scarce resources, by avoiding the preparation and review of filings in such situations. It is consistent with best practices for merger notification, which seek to avoid reviews in situations where a transaction would not be expected to cause any material adverse competitive effects.[8]

4.8. The Small Target Exemption was introduced for the first time on 4 March 2011, for a period of five years. It exempted those transactions where the target enterprise had assets under INR 2,500 million / USD 32.88 million (approximately) / EUR 29.80 million (approximately) **or** turnover less than INR 7,500 million / USD 98.64 million (approximately) / EUR 89.39 million (approximately). It was re-promulgated on 4 March 2016 for an additional period of five years (Small Target Exemption Notification 2016) with enhanced the materiality thresholds to INR 3,500 million / USD 46.02 million (approximately) / EUR 41.73 million (approximately) **or** turnover less than INR 10,000 million / USD 131.48 million (approximately) / EUR 119.24 million (approximately).

4.9. Subsequently, on 27 March 2017 (notification superseding the Small Target Exemption Notification 2016), apart from extending the exemption for another five years expanded the applicability of the Small Target Exemption was extended to merger and amalgamations it had previously been restricted only to transactions designed as acquisitions).

4.10. The Small Target Exemption is an important safe harbour to exclude non-problematic transactions from the Commission's merger control review jurisdiction. This ensures that the regulatory compliance obligation for businesses is not overly burdensome for transactions highly unlikely to raise competition issues in India, while simultaneously preserving the Commission's "bandwidth" to review more substantial transactions.

4.11. Furthermore, by introducing the thresholds for the asset and turnover value of the target, the Small Target Exemption harmonizes the Indian merger control regime with globally accepted best practices.

4.12. It also limits the possibility of over-regulation for transactions unlikely to raise a material competition issue, which can be seriously detrimental for businesses, including private equity and venture capital fundings for start-ups and expanding companies that are facilitators of economic growth.

4.13. The MWG respectfully further submits that there are no compelling reasons to alter the Small Target Exemption as currently written and in effect, given the Small Target

---

[8] The ICN notes that "*In establishing merger notification thresholds, each jurisdiction should seek to screen out transactions that are unlikely to result in appreciable competitive effects within its territory. Requiring merger notification as to such transactions imposes unnecessary transaction costs and commitment of competition agency resources without a corresponding enforcement benefit*", Part II B, Comment 1, *Working Group Comments, Original Comments (September 2002), Amended (May 2017) (available at: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf).*

Exemption in its current form has ensured that all substantial transactions are reviewed by the Commission. In particular, the current design of the Small Target Exemption allows for an exemption to apply if the target does not exceed either Indian assets or Indian turnover thresholds. Changing the “or” to “and” would have the net effect of requiring the target not to exceed both the Indian assets and Indian turnover tests. Simply stated, if the “or” is replaced by an “and”, a target which has over INR 3,500 million / USD 46.02 million (approximately) / EUR 41.73 million (approximately) of assets but is below INR 10,000 million / USD 131.48 million (approximately) / EUR 119.24 million (approximately) turnover, would no longer be eligible for the Small Target Exemption. This could result in a surge in notifications, increasing the regulatory burden on businesses and the Commission alike. Further, given the uniformly applicable and generic nature of the Small Target Exemption Notification 2017, the present turnover and asset thresholds are appropriate.

4.14. Therefore, in the absence of any reasons that warrant changes, the MWG respectfully suggests that the current Small Target Exemption should be renewed “as is” for a period of five years (or more). In summary, without the Small Target Exemption, an effective screening mechanism to review only those transactions with a material local nexus to or competitive impact in India would disappear, which neither favours the philosophy of boosting investments in India nor benefits the Commission’s already constrained resources.