KHAITAN
&CO LLP
Advocates since 1911

प्राप्ति एवं प्रेषक अनुभाग/R & I Section
भारत सरकार/Govt. of India
कारपोरेट कार्य मंत्रालय
Ministry of Corporate Affairs
डा सं./Dy. No. 281
दिनांक/Date 12/3/2020

New Delhi
1105 Ashoka Estate
24 Barakhamba Road
New Delhi 110 001, India

T: +91 11 4151 5454
F: +91 11 4151 5318
E: delhi@khaitanco.com
www.khaitanco.com

12 March 2020

Mr Abhijit Phukon
Ministry of Corporate Affairs
(Competition Section),
Shastri Bhawan,
Rajendra Prasad Road,
New Delhi - 110001

Dear Sir

Sub: Response of the International Bar Association to the invitation for public comments on the draft Competition (Amendment) Bill, 2020.

We, Khaitan & Co, Advocates, are hereby submitting comments on behalf of the Merger Working Group of the Antitrust Committee of the International Bar Association ("**IBA**") on the draft Competition (Amendment) Bill, 2020 ("**Bill**").

We understand that the MCA has requested the stakeholders to submit comments only through the concerned web link on the MCA website. We are, however, unable to upload any document or format the contents while making the online submission, which we believe might not capture the IBA's response properly and in their entirety. Given the significance of the Bill, we believe it is of utmost importance that all the comments are recorded accurately and are easily comprehensible. We are, therefore, making submissions through email and hard copy delivery as well in addition to the online submission. We would be very grateful if these submissions are taken on record by the MCA.

Thanking you

Yours faithfully

For Khaitan & Co

Swati Bala

Enclosure: 1. Letter to MCA from the IBA

2. IBA's comments on the proposed amendments in the Bill.

3. Annex A: IBA's comments on the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2018.

12 March 2020

Mr Abhijit Phukon
Ministry of Corporate Affairs
(Competition Section),
Shastri Bhawan,
Rajendra Prasad Road,
New Delhi – 110001
India

By electronic transmission

Dear Sir:

RESPONSE TO REQUEST FOR PUBLIC COMMENTS TO THE MINISTRY OF CORPORATE AFFAIRS (COMPETITION SECTION), GOVERNMENT OF INDIA, REGARDING THE COMPETITION (AMENDMENT) BILL, 2020

The Merger Working Group of the Antitrust Committee of the International Bar Association ("**IBA**") hereby encloses for your kind consideration brief comments in response to the invitation to provide comments on the Competition (Amendment) Bill, 2020, as published on your website on 12 February 2020.

The IBA Antitrust Committee appreciates the opportunity to submit the views of its Merger Working Group on the amendments to the Competition Act, 2002 (as amended) in relation to the merger control provisions.

The co-chairs of the Merger Working Group and the officers of the Antitrust Committee would be delighted to discuss the enclosed submission in more detail, should that be of interest.

Yours faithfully,

Daniel G Swanson / Thomas Janssens
Co-Chairs

Antitrust Committee
International Bar Association

INTERNATIONAL BAR ASSOCIATION ANTITRUST SECTION MERGER WORKING GROUP'S SUGGESTIONS TO THE MINISTRY OF CORPORATE AFFAIRS (COMPETITION SECTION), GOVERNMENT OF INDIA, REGARDING THE COMPETITION (AMENDMENT) BILL, 2020

March 12, 2020

INTERNATIONAL BAR ASSOCIATION ANTITRUST COMMITTEE MERGER WORKING GROUP'S SUGGESTIONS TO THE MINISTRY OF CORPORATE AFFAIRS (COMPETITION SECTION), GOVERNMENT OF INDIA, REGARDING THE COMPETITION (AMENDMENT) BILL, 2020

1. INTRODUCTION

1.1 On 12 February 2020, the Ministry of Corporate Affairs (Competition Section), Government of India, ("MCA") released a draft Competition (Amendment) Bill, 2020 ("Bill"), proposing several amendments. In particular, the amendments relating to merger control provide for: (a) inclusion of a *proviso* enabling the Central Government to prescribe new criteria for review of transactions as combinations in consultation with the Competition Commission of India ("CCI"), (b) reduction of the merger waiting period from 210 days to 150 calendar days, (c) inclusion of Section 44 and substitution of the word 'fine' with 'penalty' in Section 42 of the *Competition Act, 2002* (as amended) ("Act"), and (d) revision of the definition of 'control' in terms of a material influence standard.

1.2 The following comments regarding this draft have been prepared by the Merger Working Group ("MWG") of the Antitrust Committee of the International Bar Association ("IBA") to assist the MCA with its task of finalizing the amendment proposals.

1.3 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.[1]

1.4 The IBA's Antitrust Committee includes competition law practitioners with a wide range of jurisdictional backgrounds and professional experience. Such varied experience places it in a unique position to provide a comparative analysis for the development of competition laws, including through submissions developed by its working groups on various aspects of competition law and policy.[2]

1.5 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.[3]

1.6 For example, with regard to India, the MWG has previously made submissions to the MCA and the CCI on nine separate occasions: (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)

---

[1] See https://www.ibanet.org/

[2] See https://www.ibanet.org/LPD/Antitrust-Section/Antitrust/Default.aspx

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

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 *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 (attached as **Annex A**); (h) in December 2018, the MWG submitted comments to the Competition Law Review Committee; and (i) in December 2019, the MWG submitted comments on amendments proposed to the Combination Regulations.

1.7 In the past, the MCA and the CCI have taken into consideration the MWG's inputs, and we hope this submission will also prove useful to the MCA in accomplishing the task with which it has been entrusted.

2. PRESCRIBING NEW CRITERIA FOR A COMBINATION IN SECTION 5 OF THE ACT

2.1. The proposed *proviso* empowers the Central Government to provide new thresholds for qualifying combinations that must be notified to the CCI. This amendment provides the flexibility to define new thresholds, as and when the necessity arises in the public interest, without the requirement of a further amendment to the Act. The Report submitted by the Competition Law Review Committee ("Committee")[4] recommended the inclusion of an enabling provision in the Act to provide for 'deal value thresholds' for combinations. The recommendation contemplated assessment of acquisitions in sectors such as the digital economy, where firms with a high acquisition value may not have a large asset base or generate significant revenue, leading to potential under-enforcement in relation to transactions that could potentially have anti-competitive effects.

Position in India

2.2. Acquisitions (of control, shares, voting rights or assets), mergers, and amalgamations which meet the specified jurisdictional thresholds require prior CCI approval and are referred to as 'combinations' under the Act. All combinations must be notified to the CCI for its approval unless otherwise exempted. The Act is strictly suspensory in nature and does not permit entities to consummate a notifiable transaction, partially or completely, before securing CCI clearance.

2.3. The current regime does not provide for deal value (or 'transaction value') thresholds.

2.4. The proposed amendment does not specify deal value thresholds explicitly, but, as the MWG understands it, it would enable the Central Government to introduce deal value and other thresholds in future. Specifically, the proposed amendment provides:

Amendment of section 5.

In section 5 of the principal Act, —

[4] Section 5 of Chapter 7, Report of the Competition Law Review Committee, July 2019, available at: http://www.mca.gov.in/Ministry/pdf/ReportCLRC_14082019.pdf (last accessed 4 March 2020).

(a) after clause (c), the following *provisos* shall be inserted, namely: —

*"**Provided** that the Central Government may in public interest and in consultation with the Commission prescribe any criteria other than those prescribed in clauses (a), (b) and (c), the fulfilment of which shall cause any acquisition of control, shares, voting rights or assets, merger or amalgamation to be deemed to be a combination under this section and a notice for any acquisition of control, shares, voting rights or assets, merger or amalgamation fulfilling such criteria shall be given to the Commission under section 6."*

General Recommendations

2.5. The proposed *proviso* enables the Central Government to introduce 'any' criteria for defining combinations, which could include market shares, size of the parties' test, or any financial metrics. The provision thus seems to be unduly broad, unguided by any limitations or principles, and does not contemplate a prior consultative process.

2.6. The MWG respectfully submits that any criteria, including, without limitation, the deal value criteria, should be included in the Act itself and not be left to be decided and detailed out by way of subordinate legislation. Once a criterion is specifically identified in the Act, the thresholds may, however, be subject to changes through subordinate legislations as and when the need arises.

2.7. In addition, the MWG respectfully recommends that any merger control thresholds should be based on an assessment of the benefits and the costs of imposing regulatory processes on the parties conducting transactions, including the public resources required to properly undertake such reviews in a timely basis. Further, such thresholds should not be subject to frequent changes to ensure predictability and certainty in the Indian economy.

2.8. Finally, and perhaps most importantly, the MWG stresses that introduction of any criteria should always follow a robust public consultation process.

2.9. We now turn to discussing considerations involving a potential deal value threshold.

Deal Value Threshold

2.10. Deal value thresholds are exceptional, in that they subject to review transactions that do not meet the ordinary levels of turnover or other financial metrics that are normally applied to determine whether a transaction may have significant market effects. The MWG, therefore, stresses that deal value thresholds should be introduced only when there is concrete evidence of a significant 'enforcement gap' where the benefits to the public interest outweigh the impact on public and private resources.

2.11. Innovation-oriented markets, including the digital, pharmaceutical, and biotechnology sectors, theoretically have the potential for anti-competitive combinations. However, a deal value threshold should be introduced in a cautious, transparent, and practical manner, having regard to the potential regulatory burden on 'start-up' enterprises, where it is not the existing market strength, but some uncertain prospect of future success that would constitute the justification for a mandatory merger review based on transaction value. Any such review would still apply the

substantive standards applicable to combinations, and the CCI will only have a basis for prohibiting such transactions or taking other remedial action when it has sufficient probative evidence that a combination has caused or is likely to cause an appreciable adverse effect on competition within relevant market(s) in India.[5] Since innovative start-ups typically monetize their investments by selling their operations, a jurisdictional scope that is too wide may dampen innovation in potentially affected relevant markets by constraining start-ups from monetizing their efforts and investments.

2.12. The MWG notes and agrees with the Committee's observations that (a) "introducing new thresholds such as deal-value threshold will certainly require ironing out accompanying practical and operational challenges" and (b) "any new threshold must account for clear and objectively quantifiable standards for computing the necessary figure as well as local nexus criteria."[6]

2.13. On the need for local nexus criteria, the Committee clarified that it "will ensure that only those transactions that have a significant economic link to India are caught by the threshold and neither the CCI nor the parties are burdened with unnecessary notifications".[7] This is a particularly important issue where the transactions are global in scope.

2.14. The International Competition Network ("ICN"), in this regard, recommends that "merger notification thresholds should incorporate appropriate standards ensuring a material nexus to the reviewing jurisdiction", which could be established by "requiring significant local sales or local asset levels in the merger notification thresholds".[8] The MWG, therefore, suggests that the local nexus criteria could be based on appropriate turnover and/or asset thresholds applicable to the acquirer and the target within India, to ensure that only combinations including at least two parties with material domestic (i.e., India) presence are caught (even if one or both the parties do not exceed the current *de minimis* Indian turnover and asset thresholds of INR 1000 crore and INR 350 crore, respectively).[9]

2.15. The MWG agrees with the Committee that any deal value threshold must be clear and objectively quantifiable and emphasizes that such a threshold must be set at a sufficiently high level. The requirement for an objectively quantifiable criteria has also been endorsed by the ICN and the Organisation for Economic Co-operation and Development ("OECD").[10]

---

[5] See Sections 6(1) and 31 of the Act.

[6] Section 5 of Chapter 7, Report of the Competition Law Review Committee, July 2019, available at: http://www.mca.gov.in/Ministry/pdf/ReportCLRC_14082019.pdf (last accessed 4 March 2020).

[7] Section 5 of Chapter 7, Report of the Competition Law Review Committee, July 2019, available at: http://www.mca.gov.in/Ministry/pdf/ReportCLRC_14082019.pdf (last accessed 4 March 2020).

[8] ICN Recommended Practices for Merger Notification and Review Procedures (2017), pgs. 3-4, available at: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf (last accessed 8 March 2020).

[9] Notification No. S.O. 674(E) dated 4 March 2016, available at: https://www.cci.gov.in/sites/default/files/notification/SO%20673%28E%29-674%28E%29-675%28E%29.pdf (last accessed 8 March 2020).

[10] Suspensory Effects of Merger Notifications and Gun Jumping, OECD, pg. 6, available at: http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2018)11&docLanguage=En (last accessed 8 March 2020).

2.16. The ICN additionally emphasizes that, when establishing merger notification thresholds, "each jurisdiction should seek to screen out transactions that are unlikely to result in appreciable competitive effects within its territory".[11]

2.17. Accordingly, the MWG respectfully submits that it is of utmost importance that a deal value threshold should not be disproportionate to the objective it seeks to achieve and, most certainly, should not have a chilling effect on innovation and investments in the Indian economy by subjecting a large number of transactions with limited or no domestic significance to regulatory burdens (and corresponding impact on the CCI's resources).

2.18. Further, the MWG respectfully submits that the MCA and the CCI ensure that, to the extent that a deal value threshold is ultimately introduced, it will be subject to an adequate stakeholder consultation process prior to finalisation and will be accompanied with detailed guidance on how to implement the test properly and efficiently. While experience with deal value thresholds is beginning to develop in some other jurisdictions that could be useful for the CCI and the Central Government to study in detail, a few relevant issues have been highlighted below for reference purposes:

A. Deal Value Threshold and Cut-Off Date

2.19. As noted earlier, the threshold amount of the deal value should be set sufficiently high to not catch a large amount of unnecessary cases. Until now, no combination has been blocked in India, and, indeed, a large majority of combinations have been approved in phase I. In fact, of the 599 combinations notified until the 2018-19 fiscal year, 2.67% of the notifications were approved subject to modifications, as opposed to 97.32% of those which were approved without modifications.[12] This evidences that under the current thresholds most cases reviewed by the CCI are unproblematic.

2.20. In view of this general experience (which, based on the MWG's collective global experience, is typical of merger review in most jurisdictions around the world), the threshold should be sufficiently high to strike a balance between addressing any potential enforcement gap, and encouraging innovation in India without undue administrative burden and additional cost to the CCI and transacting parties.

2.21. In addition, it is important to consider the extent to which a low threshold may pull into review global transactions, where the deal value, in fact, reflects the expected future growth potential in many countries and not just in India. The interface between the monetary deal value level and the additional local nexus criteria thus assumes added critical significance to ensure that the CCI's limited resources are focused on reviewing only those transactions which are of consequences to India. In this regard, the MWG reiterates that appropriate turnover and/or asset thresholds be built in with deal value thresholds to ensure a material local nexus with India.

[11] ICN Recommended Practices for Merger Notification and Review Procedures (2017), pgs. 3 and 6, available at: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf (last accessed 8 March 2020).

[12] Annual Report of the Competition Commission of India (FY 2018-19) pg. 34, available at: https://www.cci.gov.in/sites/default/files/annual%20reports/ENGANNUALREPORTCCI.pdf (last accessed 8 March 2020).

2.22. Further, it is critical to have a cut-off date for computing the deal value for certainty and predictability. In this regard, the signing date of a binding transaction agreement or the trigger date for filing a combination as defined in Section 6(2) of the Act could serve as a convenient and objective cut-off date.

B. Conditional Value of the Transaction

2.23. Applying value-based thresholds to a transaction with a fixed deal value may be relatively easy if the consideration paid is objectively determinable. However, significant complexity arises where the value of consideration is contingent on certain conditions or targets to be met in future, is partly to be determined at a future date, includes an option to receive shares in future, or accounts for certain assumed liabilities.

2.24. Accordingly, to the extent that value-based thresholds are implemented in India, the MWG respectfully recommends that detailed guidance be issued that should explain and clarify how conditional payments are to be treated, whether future payments should be discounted to their net present value, etc. The guidance should take into consideration all possible cases where the deal value is not fixed and clarify how the value should be calculated in those specific instances.

2.25. Below, we discuss other types of guidance that should be issued if a deal value-based threshold is implemented in India, based on our experience in other jurisdictions.

C. Treatment of Different Types of Transactions

2.26. The application of the deal value thresholds may differ according to types of transactions. In this regard, guidance should be provided about how the rules will apply to different types of transactions like amalgamations, joint ventures, acquisitions of minority stakes, etc.

D. Non-Merger Specific Consideration

2.27. Merger agreements may be signed along with certain other agreements, which may or may not be ancillary to the merger agreement. Guidance should clarify whether such unrelated agreements be included for calculating the deal value.

E. Good Faith Determination and the Relevant Party

2.28. Parties usually make certain assumptions for determining the deal value, and accordingly, they may disclose it to the authority on a good faith basis. The guidance should clarify whether the internal good faith determinations of the parties would be appropriate, even though they may be subject to variations and uncertainties. Additionally, it should be clearly explained which party should be obliged to do the valuation, and whether one party may delegate such obligation to the other in certain circumstances.

F. Burden of Proof; Pre-filing Consultations

2.29. Parties can and should be expected to support the basis for their determination of deal value and provide further information, if required by the CCI to assess whether a notification is required. The guidance should ideally clarify who should bear the burden of proof as to whether a notification was required but not provided.

2.30. In addition, the MWG is mindful of the CCI's laudable track record in allowing parties pre-filing consultations ("PFCs"). If a deal-value threshold is implemented, the MWG would suggest that the CCI continue with PFCs on the numerous issues that are associated with making this complicated jurisdictional assessment.

Concluding Remarks

2.31. In summary, given the significant burdens which will arise if a deal value threshold is introduced, the MWG reiterates that it is important to introduce such a test only when there is a demonstrated and significant enforcement gap in India. Additionally, as noted by the Committee, the test should be designed to encompass only those transactions, which have a sufficiently material local nexus with India.

2.32. If the MCA and the CCI decide to introduce deal value thresholds, it will be important to consider the expected number of cases that will arise and to ensure that the CCI has the resources to process such cases on a timely basis. In addition, the MWG believes that clear, detailed, and understandable implementation rules or guidance would need to be provided to avoid uncertainty and ensure effective implementation. There should be robust public consultation on any such rules or guidance prior to their implementation, which will also be helpful in "plugging" any potential legal or regulatory gaps or clarifying certain practical aspects in advance for the benefit of both the parties and the CCI.

3. REDUCTION OF THE MERGER TIMELINE IN SECTION 6(2A) OF THE ACT

3.1. The MWG notes and praises the reduction of the merger timeline from the existing 210 days to the proposed 150 calendar days, which is extendable by 30 calendar days by the CCI, if parties require additional time to provide further information or cure defects in the notification they submitted. Reducing the merger review waiting period is the right step to ensure timely review by the CCI. Merger transactions are usually time sensitive, and clearance from competition agencies like the CCI is often a condition to closing. In order to allow transactions to be completed in a reasonable time, this concomitantly requires suspensory jurisdictions, like India, to have a reasonable time frame for merger review.[13] A definitive and reasonable waiting period will thus allow parties to close transactions in a timely and expedited manner.

3.2. Given the above, the MWG assumes that certain suspensions of the waiting period currently specified under the Combination Regulations[14] would be rendered nullified after the amendment, and only one extension of up to 30 calendar days would be allowed. A clarification, however, in this regard would be beneficial for legal certainty and predictability to eliminate the possibility of inconsistency between the CCI and the notifying parties on computing the merger review

[13] ICN Recommended Practices for Merger Notification and Review Procedures (2017), p. 11, available at: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf (last accessed 8 March 2020).
[14] See Regulations 5(4), 5(6), 9(2), 14(5), 19(2) and 19(3) of the Combination Regulations.

waiting period. This will also provide additional certainty to parties to consummate a transaction once the stated waiting period of 150 calendar days, extendable once by 30 calendar days, expires.

3.3. That being said, the MWG is also mindful that there may occasionally be complex or problematic transactions, where the CCI may need additional time to properly investigate and pass a well-reasoned order or to finalize suitable remedies. The proposed amendment, however, does not seem to allow any flexibility to the CCI to extend the waiting period (or 'stop the clock'), which could lead to the CCI not accepting notices to avoid starting the waiting period unless it reviews it thoroughly beforehand, or reaching adverse decisions without sufficient basis, or imposing disproportionate remedies in abundant caution.

3.4. In its September 2018 submission, the MWG discussed the fine balance between the CCI's need for information and the parties' need for a timely and time-bound merger review process. For the convenience of the MCA, we have attached that submission which we believe adequately outlines the balancing of interests for a "stop the clock" provision.

3.5. As outlined in our previous submission, by way of example in relation to a "stop the clock" provision in other jurisdictions, the European Union Merger Regulation provides that the phase II review period may be extended by up to 20 working days in complex cases if the parties request so within 15 working days of the start of the phase II or, at any time, with the consent of the parties.[15]

3.6. In view the above, the MWG believes that procedural flexibility, appropriately circumscribed, should be incorporated to allow the CCI a limited power to halt the review timetable with some outer limit: (a) where it requests information necessary for its assessment and parties fail to provide it within the deadline set by the CCI or (b) where more time is required to do an in-depth investigation of suitability of remedies. Further, the parties should also be allowed to request stopping the clock if they require more time to respond to CCI requests for information, to propose voluntary or revised remedies, to assess proposed modifications by the CCI, or to avoid an adverse enforcement decision.

3.7. The MWG suggests that, if consideration is given to a "stop the clock" provision, that it undergoes a robust consultation to ensure that the balancing of interests is appropriately calibrated.

4. POTENTIAL FOR DOUBLE PENALTY IN SECTION 42 OF THE ACT

4.1. The Bill also proposes to amend Section 42 of the Act, which currently reads as follows:

"Section 42: Contravention of orders of Commission

(1) The Commission may cause an inquiry to be made into compliance of its orders or directions made in exercise of its powers under the Act.

(2) If any person, without reasonable clause, fails to comply with the orders or directions of the Commission issued under sections 27, 28, 31, 32, 33, 42A and 43A of the Act, he shall be

[15] See Article 10 of the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), available at: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32004R0139 (last accessed 8 March 2020).

punishable with fine which may extend to rupees one lakh for each day during which such non-compliance occurs, subject to a maximum of rupees ten crore, as the Commission may determine.

(3) If any person does not comply with the orders or directions issued, or fails to pay the fine imposed under sub-section (2), he shall, without prejudice to any proceeding under section 39, be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to rupees twenty-five crore, or with both, as the Chief Metropolitan Magistrate, Delhi may deem fit:

Provided that the Chief Metropolitan Magistrate, Delhi shall not take cognizance of any offence under this section save on a complaint filed by the Commission or any of its officers authorized by it."

4.2. The amendment proposes to add certain provisions to the list of provisions noted above in Section 42(2), including Section 44 of the Act, and substitutes the term 'fine' with 'a penalty'. The MWG believes that Sections 43A and 44 should not be included in Section 42, since this may give rise to the possibility of a double penalty.

4.3. Sections 43A and 44 are purely monetary penalising provisions that empower the CCI to penalise for gun-jumping and for providing false information or omitting to provide material information, respectively. Neither provision speaks of an 'order' or a 'direction' which could be 'contravened' under Section 42. The aim of Section 42 is to inquire into and punish with fine (or penalty after the amendment) in case of a 'contravention of orders of Commission' or with respect to 'compliance of its orders or directions'.

4.4. Given this, the inclusion of Sections 43A and 44 in Section 42 would effectively mean that if a person fails to pay the penalty imposed under those two provisions, another penalty could be imposed on that person for failure to pay a penalty. Further, should a person fail to pay a penalty imposed under Section 42 of the Act, this person could also be punished with imprisonment of up to three years or an additional fine of up to INR twenty-five crores, or both.

4.5. The MWG is concerned that, although such an interpretation might not have been tested in practice yet and ultimately might not be adopted or upheld, an illogical interpretation leading to a double or triple penalty and imprisonment should be rectified in the law itself. In fact, the Act includes Section 39, which provides for execution of CCI orders imposing a monetary penalty. The Act, thus, already includes suitable mechanisms to recover the penalties imposed, and recovery should not be routed through levying further penalties or imprisonment. The MWG, therefore, recommends that Sections 43A and 44 should not be included in Section 42.

5. NEW STANDARD FOR 'CONTROL' IN CLAUSE A OF THE EXPLANATION OF SECTION 5 OF THE ACT

5.1. The Bill recommends a "material influence", rather "decisive influence" standard for control.

5.2. In Section 3 of its September 2018 submission to the CCI[16] (attached as **Annex A**), the MWG outlined its recommendations about minority acquisitions being subject to mandatory merger

[16] IBA's comments to the CCI on the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2018 made on 12 September 2018.

control. There are parallels in our earlier submission to the current issues of material influence vis-à-vis decisive influence, and we accordingly incorporate that submission herein by reference.

5.3. While the MWG is fully cognizant that this is a national issue to be decided upon by India, our members have had considerable experience with other jurisdictions such the European Union that have considered similar issues. Based on the totality of our experience, regardless of the standard used, we respectfully reiterate our recommendation in the earlier submission made to the CCI in September 2018:

In conclusion, the [MWG] respectfully suggests that the best result – both from the perspective of safeguarding effective competition and from the perspective of reasonable burden and costs to undertakings and the CCI – is achieved by applying uniform rules to all acquisitions of minority shareholdings ...subject to notification obligation if they result in the acquirer participating in the affairs of the target enterprise through special voting rights, board seat or other objectively recognizable powers to influence the target's behaviour.[17]

5.4. We further note that the CCI's interpretation of control is already quite wide and captures certain standalone minority investor protection rights which are generally not construed as control in other jurisdictions. The adoption of a material influence standard would also effectively expand the scope of 'group companies' and consequently exaggerate the asset and turnover numbers included in computing the jurisdictional thresholds. This dilution of the 'group test' for assessing merger notifiability will likely increase the number of notifiable transactions.

5.5. Given the CCI's interpretation of control, adopting a standard of material influence might result in a larger number of transactions being notified.

5.6. For example, veto or affirmative voting rights to amend charter documents[18] and change the dividend policy,[19] which have been held to amount to control by the CCI, typically do not confer control on their own and are merely rights given to investors to ensure that they remain aware about the company's operations and protect their financial interest.[20]

5.7. The Bill now, instead of strengthening and improving the standard being followed over years, proposes to lower the standard which will likely have a significant impact on the government's ease of doing business policy in India, transaction costs, and the overall investment climate and appeal of India as an investment destination.

5.8. The issue is succinctly captured in the Report of the Committee.[21] The CCI has already held that material influence, the lowest level of control, implies presence of factors which give an enterprise ***ability to influence*** affairs and management of the other enterprise including factors such as shareholding, special rights, status and expertise of an enterprise or person, Board representation, structural/financial arrangements etc.[22] Further, the CCI has held that even having

---

[17] See point 3.10 at page 5 of Annex A.

[18] *Alpha TC Holdings/Tata Capital Growth* (Case No. C-2014/07/192), decided on 9 September 2014.

[19] *Caladium Investment Pte. Ltd/Bandhan Financial Services Limited* (Case No. C-2015/01/243), decided on 5 March 2015.

[20] See para 66 of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, which states that veto over such rights would typically not confer control.

[21] See pages 205-206 of the Report of the Committee.

[22] *UltraTech Cement Limited* (C-2015/02/246), decided on 12 March 2018.

one board seat on the board of a company may lead to "*material influence ... over the affairs of*" that company.[23]

5.9. Accordingly, whenever an enterprise acquires only an "*ability to influence*" the management or affairs of another enterprise, the combination becomes notifiable to the CCI. Thus, the acquisition of just one board seat leads to an acquirer having to take CCI approval, even though acquiring a board seat (in, for example, a board of five or eight members) may not give any form of meaningful control to the acquirer to impose the strict burden of requirement of a prior merger control notification. Notifying these kinds of transaction will likely add to, not ease, regulatory burdens in India.[24]

5.10. Given that the number of cases where CCI has accepted or required any remedy is less than 5% of the total cases, the MWG suggest that consideration be given to the impact of such a change on the number of merger control notifications, as well as the need for an appropriate balance between notifiability and ease of doing business, including completing transactions.

5.11. Importantly, even if a transaction is not notifiable under the merger control provisions of the Act (i.e., Sections 5 and 6), the CCI still has jurisdiction under Sections 3 and/or 4 of the Act dealing with, respectively, anti-competitive agreements and abuse of a dominant position. The fundamental issue here is the balance between *ex ante* and *ex post* regulation, and how that decision affects the ease of doing business.

[23] *UltraTech Cement Limited* (C-2015/02/246), (para 12.13) decided on 12 March 2018.

[24] In addition, adoption of a material influence standard would mean that each merger control review by the CCI would likely be expanded, as overlap analysis for entities in the acquirer and target group would potentially cover a larger scope.

Annex A

KHAITAN
& CO LLP
Advocates since 1911

New Delhi
1105 Ashoka Estate
24 Barakhamba Road
New Delhi 110 001, India

T: +91 11 4151 5454
F: +91 11 4151 5318
E: delhi@khaitanco.com

www.khaitanco.com

12 September 2018

The Secretary
Competition Commission of India
10th Floor, Office Block, Tower - 1
Kidwai Nagar (East), Opposite Ring Road
New Delhi – 110023

Sub: Invitation of comments from stakeholders on the proposal for amendments to the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ("Combination Regulations")

Re: The International Bar Association's comments on the proposed amendments to the Combination Regulations

Dear Ma'am

We, **KHAITAN & CO, ADVOCATES, 12TH FLOOR, ASHOKA ESTATE, 24, BARAKHAMBA ROAD, NEW DELHI - 110 001** are hereby submitting comments on behalf of the Merger Working Group ("**Working Group**") of the Antitrust Committee of the International Bar Association to the proposed amendments to the Combination Regulations.

Thanking you

Yours faithfully

For Khaitan & Co

Lakshmi

Encl: Working Group comments on the proposed amendments to the Combination Regulations.

12 September 2018

The Secretary
Competition Commission of India
10th Floor, Office Block, Tower - 1
Kidwai Nagar (East), Opposite Ring Road
New Delhi – 110023

Sub: Invitation of comments from stakeholders on the proposal for amendments to the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ("Combination Regulations")

Re: The International Bar Association's written submissions on the proposed amendments to the Combination Regulations

Dear Ma'am

Please find enclosed a submission that has been prepared by the Merger Working Group ("**Working Group**") of the Antitrust Committee of the International Bar Association in relation to the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2018, on which the Competition Commission of India ("**Commission**") has called for public comment.

The Co-Chairs and representatives of the Working Group would be delighted to discuss the enclosed submission in more detail with the Commission.

Yours faithfully,

Elizabeth Morony

Marc Reysen

Co-Chairs, Antitrust Committee
International Bar Association

INTERNATIONAL BAR ASSOCIATION

ANTITRUST COMMITTEE

SUBMISSION TO THE COMPETITION COMMISSION OF INDIA REGARDING THE PROPOSAL FOR AMENDMENT TO COMBINATION REGULATIONS, 2011

1. INTRODUCTION

1.1 This submission is made to the Competition Commission ("CCI") on behalf of the Merger working group ("**Working Group**") of the Antitrust Committee of the International Bar Association ("IBA") in relation to the proposal for amendments to the Combination Regulations, 2011[1], published for comment on 25 July 2018 ("**Draft**").

1.2 The IBA is the world's leading organisation of international legal practitioners, bar associations and law societies. It takes an interest in the development of international law reform and seeks to help to shape the future of the legal profession throughout the world. Bringing together practitioners and experts among the IBA's 30,000 individual lawyers from across the world and with a blend of jurisdictional backgrounds and professional experience spanning all continents, the IBA is in a unique position to provide an international and comparative analysis in the field of commercial law, including on competition law matters through its Antitrust Committee. Further information on the IBA is available at http://www.ibanet.org .

1.3 The Working Group's comments draw on the vast experience of the IBA Antitrust Committee's members in merger control law and practice in jurisdictions worldwide. Further information on the Antitrust Committee and its Working Groups is available at: https://www.ibanet.org/LPD/Antitrust_Trade_Section/Antitrust/Default.aspx .

1.4 The Working Group is aware that the CCI had a deadline in August for submission of comments. However, the Working Group was not in a position to meet that deadline. The Working Group hopes nonetheless that the CCI will consider its comments as it would like to contribute constructively to the CCI's consultation on the Draft.

2. EXECUTIVE SUMMARY

2.1 Given that this submission comes after the deadline set for comments, the Working Group has limited itself to comments on what it sees as the 2 main aspects of the proposed amendments which raise concerns, namely :

2.1.1 Proposed amendments which would narrow the existing exemption from the filing obligation for acquisitions of minority interest 'n Schedule I, category (1); and

2.1.2 Proposed 'stop the clock' on the 210-day statutory review period where the CCI issues a request for information ("RFI").

[1] Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2018.

3. EXEMPTION FOR ACQUISITIONS OF MINORITY INTERESTS[2]

3.1 According to Regulation 4 of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ("**Combination Regulations**"), categories of combinations mentioned in Schedule I of the Combination Regulations are ordinarily not likely to cause an appreciable adverse effect on competition in India, and are thus normally exempted from the prior notification obligation under sub-section (2) of Section 6 of the Competition Act, 2002 ("**Act**").

3.2 Accordingly, Schedule I, category (1) of the Combination Regulations, stipulates that an acquisition of less than 25% of the total shares or voting rights of an enterprise is exempted from the notification obligation in so far as the acquisition is made solely as an investment or in the ordinary course of business.

3.3 This exemption is further clarified in Schedule I, category (1) as follows:

Explanation:

The acquisition of less than ten per cent of total shares of voting rights of an enterprise shall be treated as solely as an investment:

Provided that in relation to the said acquisition:

(a) the Acquirer has ability to exercise only such rights that are exercisable by the ordinary shareholders of the enterprise whose shares or voting rights are being acquired to the extent of their respective shareholding; and

(b) the Acquirer is not a member of the board of directors of the enterprise whose shares or voting rights are being acquired and does not have a right or intention to nominate a director on the board of directors of the enterprise whose shares or voting rights are being acquired and does not intend to participate in the affairs or management of the enterprise whose shares or voting rights are being acquired.

3.4 According to paragraph (8) of the Draft, the exemption is proposed to be revised by removing the reference to "*acquisitions of less than ten per cent*". Further, the clarification is proposed to be supplemented with the following two qualifications:

(c) the Acquirer and the enterprise whose shares or voting rights are being acquired are not, directly or indirectly, engaged in: identical

[2] *The Working Group respectfully notes that the comments made herein may be subordinate to the question of whether any acquisitions that do not result in the change of control fall under the scope of Section 5 of the Act. In that regard, additional consideration may need to be given to the operative phrase governing merger control in Section 5 of the Act, namely "[t]he acquisition of one or more enterprises by one or more persons or merger or amalgamation shall be a combination of such enterprises and persons or enterprises..." (emphasis added). More specifically, this seems to raise a substantial question as to whether Section 5 can be interpreted to cover acquisitions of minority shareholdings that do not confer control, as the focus of Section 5 is, by its express terms, on an "acquisition of one or more enterprises." The Working Group would be happy to discuss this in greater detail.*

or similar trade of goods or provision of services; or activities at different stages or levels of the production chain; and

(d) where the Acquirer is a pooled investment vehicle which collects funds from investors, whether Indian or foreign, for investing it in accordance with a defined investment policy for the benefit of its investors; and the enterprise whose shares or voting rights are being acquired and any of the enterprise in which the Acquirer already holds shares or voting rights, are engaged in identical or similar trade of goods or provision of services, or activities at different stages or levels of the production chain, the acquisition is less than five per cent (5%) of the total shares or voting rights of the enterprise whose shares or voting lights are being acquired.

3.5 The Working Group welcomes the proposal of applying similar rules to all acquisitions of less than 25% and removing separate criteria applicable to acquisitions of less than 10%. In the Working Group's view, there are no reasons to apply different qualitative criteria to acquisitions of minority shareholdings of different sizes. Insofar as an acquisition of a shareholding does not vest the acquirer with rights to control or materially influence the decision making of the target enterprise, the risk of anticompetitive effects arising from the acquisition is generally very small. Accordingly, if the acquirer will not have the power to influence the competitive behaviour of the target company it is irrelevant from the perspective of competition analysis whether the shareholding is less than 25% or less than 10%.

3.6 The Working Group considers that the existing two qualifications (a and b above) for treating acquisitions of less than 10% solely as investments are sufficient and appropriate for the protection of effective competition. For the reasons set out above, these two qualifications are also sufficient and appropriate to protect competition for acquisitions below 25%. In the absence of any special voting rights allowing the shareholder to wield power which is disproportionate to the level of its minority shareholding and in the absence of any board seat, any right to appoint a member of the board or intention to engage in management, a shareholding below 25% will generally not allow a shareholder to have control or even any material influence over a company. Even if the acquirer and the target enterprise have businesses that are horizontally or vertically linked, the acquisition is not susceptible to competition concerns, save for very exceptional situations, if the acquisition is made solely as an investment or in the ordinary course and the companies will continue to operate their business independently.

3.7 The current qualification (a and b), which concern the nature of the voting rights acquired and the acquirer's presence in the decision making bodies of the target enterprise, are also clear, objective and easily understandable standards that enable merging parties to readily ascertain their notification obligations[3]. On the contrary, the proposed new qualifications concerning the horizontal or vertical relationship between the parties' operations requires in practice carrying out the burdensome exercise of defining the markets where the parties are operating.

3.8 In certain circumstances, it may be difficult to ascertain whether the acquirer and the target are competitors or are in a vertical relationship. This is in particular the case for large conglomerate groups and private equity houses. This concern is highlighted in light of the proposal to take account of "any of the enterprises in which the Acquirer already holds shares or voting rights", which suggests that even a shareholding of 1% or less can be relevant for the assessment. Further, the explanation is not limited geographically, and can be interpreted to not apply even if a horizontal or vertical relationship exists between the parties

[3] See ICN's Recommended Practices for Merger Notification and Review VIII (B) comment 1, available at http://www.internationalcompetitionnetwork.org/uploads/library/doc1108.pdf

outside of India. It should be noted that, as the question concerns an acquisition of a small minority stake with no engagement at board or management level, the acquiring company rarely has access to such information on the target company which would allow them to make the comparison of the parties' businesses at the detailed level required to conclude on whether there is a potential vertical relationship, or even a horizontal overlap beyond anything obvious.

3.9 The Working Group also respectfully notes that after the proposed change only very few transactions would benefit from Schedule 1, category (1) exemption. This will not only increase the burden and costs of companies engaged in relevant transactions (and thus dissuade capital market investments), but also likely result in a significant surge in the number of notifications made to the CCI. Taken that the number of cases in which non-controlling minority stakes would be found to lead to competition concerns is likely to be small, the proposed amendments would seem to disproportionately increase burdens and costs on businesses and CCI, with only limited benefit.

3.10 Basing the notification obligation of minority acquisitions on substantive overlaps between the parties also seems to be at odds with the general approach of legislators and competition authorities internationally, as illustrated by the following examples:

(a) In 2014, the European Commission ("**EU Commission**") published a White Paper for consultation, which proposed to bring acquisitions of non-controlling minority shareholdings within the European Union Merger Regulation ("**EUMR**"). Importantly, the EU Commission proposed that acquisitions of minority shareholdings between 5% and 20% would fall under (a simplified) notification obligation only if accompanied by additional factors such as rights which give the acquirer a "de-facto" blocking minority, a seat on the board of directors, or access to commercially sensitive information of the target.[4]

(b) In the United States of America, for example, there is an exemption in the implementing rules for acquisitions of 15% or less of an issuer's voting securities by institutional investors made solely for the purpose of investment, which means the investor plays no management role and holds only a passive investment (16 C.F.R. § 802.64).

(c) In Germany, acquisitions of minority shareholdings of less than 25% may only require notification if accompanied by rights to directly or indirectly exercise a competitively significant influence on the target enterprise. In general, competitively significant influence on another undertaking may exist due to a link between two or more undertakings that allows the acquiring party to influence the competitive behaviour of the target in such a way that it is likely to reduce competition between the undertakings, to the degree that they will no longer act independently on the market.

(d) In the UK, acquisitions of minority shareholding may fall under the jurisdiction of the Competition and Markets Authority if the ability to exercise material influence in the target company transfers to the buyer. The focus is on the acquirer's ability materially to influence policy relevant to the behaviour of the target entity in the marketplace. The policy of the target in this context means the management of its business, and thus includes the strategic

[4] EU Commission White Paper COM (2014) 449 Towards more effective EU Merger Control, para. 47.

direction of a company and its ability to define and achieve its commercial objectives. There is a rebuttable presumption that a share of voting rights above 25% confers on the buyer the ability to exercise material influence. Although there is no presumption of material influence below 25%, the CMA may examine any shareholding of 15% or more in order to see whether the holder might be able materially to influence the company's policy. Exceptionally, a shareholding of less than 15% might attract scrutiny where other factors indicating the ability to exercise material influence over policy are present.

In conclusion, the Working Group respectfully suggests that the best result – both from the perspective of safeguarding effective competition and from the perspective of reasonable burden and costs to undertakings and the CCI – is achieved by applying uniform rules to all acquisitions of minority shareholdings below 25% (as the Draft proposes) and only making such acquisitions subject to notification obligation if they result in the acquirer participating in the affairs or management of the target enterprise through special voting rights, board seat or other objectively recognizable powers to influence the target's behaviour (as currently applied to acquisitions of less than 10%).

4. **Proposed 'stop the clock' on the 210-day statutory review period where the CCI issues a request for information**

4.1 A proposed amendment to sub-regulation 5(4) of the Combination Regulations would now make it clear that the time taken by the parties to provide the CCI with the additional information it requested from them during the course of its review, must be excluded from the 210-calendar day statutory waiting period set out at sub-section (2A) of Section 6 of the Act. This in effect would give the CCI the ability to 'stop the clock' each time a request for information is issued to the parties.

The Working Group recognizes the need of the CCI to obtain from merging parties all relevant information allowing it to conduct a thorough assessment of the proposed merger in a timely and effective manner. The Working Group respectfully suggests, however, that the 210 calendar day review period should be sufficient to assess a transaction, including through additional requests for information, in all but the most exceptional circumstances. The Working Group would like to stress that 'stop the clock' measures, particularly when used extensively and without prior warning during the course of a given review, can be seriously disruptive to the parties' legitimate interests in ensuring predictability and certainty to the timing of their proposed transaction. In order to better reconcile the objective of the authority in exceptional circumstances to extend its review period to obtain additional information from the parties and the parties' interests in timing predictability, the Working Group would respectfully propose that the CCI follows an approach which is closer to that of the EU Commission under the EUMR. Pursuant to the current EU Commission practice, the statutory waiting period under the EUMR is not automatically suspended whenever the EU Commission issues an RFI. Rather, the EU Commission is given the authority to "stop-the-clock" only when the parties have been asked to provide the relevant information *and* the parties have failed to respond within the timeframe specified. The EU Commission is then authorized to issue a formal decision requesting the missing information and stopping the clock until such time as the parties fully comply with the formal request. In the Working Group's respectful view, this approach would strike a finer balance between the CCI's need to obtain relevant information in a timely manner, and the parties' interest in having predictability and some degree of control over the timeline of their proposed merger.