25 September 2023

To,
The Competition Commission of India
9th Floor, Office Block - 1, Kidwai Nagar (East)
New Delhi - 110023
India

**Sub: Comments on the Draft Competition Commission of India (Combination) Regulations, 2023 issued for public consultation**

Dear Sir/Ma'am,

We have great pleasure in enclosing comments on the Draft Competition Commission of India (Combination) Regulations, 2023 on behalf of the Antitrust Section of the International Bar Association (***IBA***).

The Co-chairs and representatives of the Antitrust Section of the IBA would be happy to discuss the enclosed submission in more detail with the Commission, if helpful.

Yours sincerely,

Samantha Mobley

Co-Chair Antitrust Section

**INTERNATIONAL BAR ASSOCIATION**

**ANTITRUST SECTION**

# COMMENTS ON THE DRAFT COMPETITION COMMISSION OF INDIA (COMBINATION) REGULATIONS, 2023

**25 SEPTEMBER 2023**

## 1. INTRODUCTION

1.1 The Competition (Amendment) Act, 2023 (***Amendment Act***) materially amended the Competition Act, 2002 (***Competition Act***) and introduced significant changes to the merger control regime. Whilst the Amendment Act introduced the enabling provisions, the detailed framework to implement these changes is to be formulated by the Competition Commission of India (***Commission***) through regulations.

1.2 On 5 September 2023, the Commission published the draft Competition Commission of India (Combinations) Regulations, 2023 (***Draft Combination Regulations***), for public comments. The Draft Combination Regulations set out the detailed framework for implementing the amendments, along with certain other revisions to existing provisions. Once brought into effect, these regulations shall replace the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (***Combination Regulations, 2011***).

1.3 At the outset, the International Bar Association (***IBA***)'s Antitrust Section would like to thank the Commission for the opportunity to provide comments on the Draft Combination Regulations. Consultation with stakeholders can help to ensure that a robust, effective, and workable merger control regime is implemented.

1.4 The IBA's Antitrust Section commends the Commission on the comprehensive nature of the Draft Combination Regulations and the clarity they provide on a number of key aspects. The IBA's Antitrust Section's Merger Working Group (***MWG***) would like to assist the Commission in further improving the regulations, and with that objective, is providing certain suggestions set out below.

## 2. ABOUT THE IBA

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.[1]

2.2 The IBA's Antitrust Section 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] Specifically, the MWG consists of legal practitioners from around the world with extensive experience on merger control in their respective jurisdictions, including India. It has prepared numerous submissions to governments and competition authorities around the world over the past two decades.[3]

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

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

3 See https://www.ibanet.org/antitrust-working-groups-and-submissions.

2.3 In the past, the MWG has made submissions to the Commission and the Ministry of Corporate Affairs (***MCA***) on numerous occasions.[4] The MWG hopes that the present submissions assist the Commission in arriving at an effective revamped merger control regime in India. The MWG's suggestions are set out below.

## 3. COMPUTATION OF THE VALUE OF THE TRANSACTION

3.1 The Amendment Act introduces a new and additional form of threshold, i.e., a deal value threshold. It provides that transactions: (a) with a deal value of INR 20 billion (approximately USD 240 million) or more; and (b) where the target enterprise has "*substantial business operations in India*" shall be notifiable, regardless of the size of the target or the turnover or assets of the parties involved. The Amendment Act provides that the criteria to assess both limbs of this test, i.e., (a) computation of deal value; and (b) assessing "*substantial business operations in India"* shall be set out in regulations issued by the Commission.

3.2 Regulation 4(1) of the Draft Combination Regulations provides guidance on the first limb, i.e., computation of deal value. Whilst the conditions set out under the Draft Combination Regulations are largely workable, the MWG respectfully submits that certain further changes, including based on the practical experience of jurisdictions with similar deal value thresholds, will make this provision more effective and practical in its implementation.

(i) *Deleting the 2-year deemed interconnection provision under explanation (e) to Regulation 4(1)*

3.3 Regulation 4(1)(b) of the Draft Combination Regulations provides that the consideration for all interconnected steps to a transaction must be included in the computation of the value of that transaction. In principle, this appears to be a reasonable approach.

3.4 However, explanation (e) to Regulation 4(1) stipulates that all acquisitions by the purchaser or its group in the target, any time prior to 2 years from the current transaction, shall be deemed to be interconnected to the current transaction. This is regardless of whether such prior transactions were, in fact, interconnected to the current transaction and without any factual assessment undertaken to determine interconnection.

3.5 This deeming provision shall result in transactions that are completely independent and separate to the transaction in question, being viewed as interconnected merely based on one factor, i.e., timing. This is concerning for several reasons.

[4] The MWG has previously made submissions to the Commission and the MCA on several occasions, including: (a) in February 2007, on the Competition Amendment Bill, 2006; (b) in March 2008, on the draft Competition Commission of India (Combination) Regulations; (c) in August 2013, on the Competition (Amendment) Bill, 2012; (d) in December 2014, on trigger events for merger notification in India; (e) in April 2015, on amendments to the Combination Regulations, 2011; (f) in February 2016, on the *de minimis* target exemption; (g) in September 2018, on the proposed amendments to the Combination Regulations, 2011; (h) in December 2018, on the Competition Law Review Committee (***CLRC***) suggestions; (i) in December 2019, on amendments proposed to the Combination Regulations, 2011; (j) in March 2020, on the Competition (Amendment) Bill, 2020; and (k) in March 2022, on the renewal of the "group" definition and the *de minimis* target exemption. Recently, in September 2023, the IBA Antitrust Section also submitted comments to the Commission on the draft settlement and commitment regulations.

3.6 First, there may be situations where an enterprise has invested in a target, and at the time of its initial investment, it did not contemplate or intend to increase its investment through a subsequent tranche in the target (corroborated by all transaction documents and other internal / external documents). However, subsequently, due to the target's financial performance or for other reasons, the acquirer or its group entity may decide to increase its investment within 2 years of completing the initial investment. It would be incorrect to consider the initial and subsequent investments as interconnected and aggregate their deal value solely because they fall within a 2-year time frame. Additionally, parties shall also face the risk of gun-jumping proceedings, if the initial investment has closed without being notified to and approved by the Commission, notwithstanding that the initial investment and subsequent investment are unconnected.

3.7 This approach would be particularly detrimental for start-ups, which frequently secure funding from the same set of investors at various different stages. As a result of the deeming provision, they would need to consider the aggregate value of all past investments / funding (within a 2-year time frame), while considering the deal value for any subsequent funding round. This will result in an unnecessary increase in filings and create uncertainty and regulatory burden for start-ups, which is likely to hamper innovation, technological development and the ease of doing business.

3.8 This requirement shall also create significant hurdles in certain specific sectors, for instance, the real estate sector. In this sector, companies often secure funding from the same set of investors for various different and unconnected projects, which are housed under different subsidiaries / entities of the company. A deeming provision would effectively result in all past funding / investments for different projects (within a 2-year period) being viewed as interconnected and their deal value being aggregated. This adverse consequence has been felt in other jurisdictions as well. For instance, in Germany, there has been a sharp increase in the number of filings in the real estate sector as a result of the deal value threshold.

3.9 Second, the deeming provision proposed under the Draft Combination Regulations is inconsistent with the Commission's own decisional practice. Previously, in order to determine interconnection, the Commission has undertaken a pragmatic case-by-case analysis, based on numerous factors, including: (a) simultaneity in negotiation, execution, and consummation of the transaction documents; (b) if the two transactions stem from a single transaction document; (c) if closing of one step of the transaction is a condition precedent to closing of the other transaction; and (d) commercial feasibility of isolating the transactions.[5] It has therefore not solely relied on timing. The approach in the Draft Combination Regulations will also be inconsistent with the Supreme Court of India's decisional practice, which has held that while assessing interconnection, the ultimate intended effect of the particular transaction has to be examined and a substantive assessment must be conducted based on the facts of the case.[6]

3.10 The MWG considers that a similar case-by-case approach is appropriate for the deal value threshold as well. There is no necessity for a broader deeming approach, and it may lead to absurd situations where transactions are deemed interconnected for the purpose of deal value but not for the purpose

5 *Competition Commission of India v. Thomas Cook (India) Ltd* (***Thomas Cook Order***)., Civil Appeal No. 13578 of 2015 (available here).

6 *Thomas Cook Order* (available here).

of other provisions of the Competition Act. This is against settled rules of interpretation of statutes which provide that the same term should be interpreted consistently across a statute.[7]

3.11 Third, this deeming provision is also inconsistent with the approach in other jurisdictions. In Germany and Austria (which were early adopters of similar deal value thresholds), a case-by-case assessment is carried out to determine whether individual acquisitions are interconnected.[8] The joint guidance on deal value thresholds issued by the German and Austrian competition authorities (***German and Austrian Guidance***) specifically provide that:

> "*The value of the consideration relates* ***only to the proposed merger project in question****. The value assessment does* ***not cover already held or exchanged company shares****, for example. Instead, a* ***case-by-case assessment has to be carried out to*** *determine whether individual acquisitions that are closely connected in material terms and timing should be regarded as parts of a single merger, in which case the considerations of the individual transactions should also be included in the calculation of that merger's consideration value…*
>
> …
>
> *Example I a: A company holds 25% of the shares in the target company and acquires another 26% of shares. In this case, the value of the consideration has to be calculated* ***only for the 26% of the shares that are to be acquired under the current plans****"* (emphasis added).

3.12 Therefore, the MWG respectfully recommends that this deeming provision should be deleted and the assessment on interconnection should instead be undertaken on a case-by-case basis in line with the decisional practice of the Commission, the Supreme Court of India, and the established approach in other jurisdictions. This would not lead to the exclusion of genuinely interconnected transactions, as the general provision in India's merger regime on inclusion of all interconnected transactions would continue to apply.

| Suggested edits: |
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| *4(1)....*<br><br>*(b) for all interconnected steps as read in sub-regulation (4) and (5) of regulation 9 of these regulations;*<br><br>*…*<br><br>~~*(e) any acquisition by the one of the parties or its group entity in the enterprise being acquired or merged or amalgamated in the transaction, anytime during the period of two years before the relevant date shall also be deemed to be an inter-connected transaction;*~~ |

[7] *Bhogilal Chunilal Pandya v. State of Bombay*, AIR 1959 SC 356.

[8] Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification, Bundeskartellamt and Bundeswettbewerbsbehörde, January 2022 (available here), paragraph 13.

(ii) *Deleting the 2-year deemed interconnection provision under Regulation 4(1)(c) for incidental arrangements*

3.13 Regulation 4(1)(c) states that the consideration for all incidental arrangements entered into within two years from the current transaction coming into effect, have to be included in the computation of the deal value of the current transaction. This is again concerning because it would apply regardless of whether such arrangements are, in fact, interconnected to the current transaction and without any factual determination to examine interconnection.

3.14 First, if this is intended to be a 'look-ahead' provision, the MWG respectfully submits that parties cannot foresee / predict all commercial arrangements that they may subsequently enter into within 2 years after the transaction. For instance, after closing of a transaction, parties may decide to enter into separate and unrelated arrangements within a period of 2 years from the initial transaction, in the ordinary course of business and on an arms-length basis (the transacting parties may be regular trading partners). It is unfeasible for parties to include the value of such subsequent arrangements into the deal value of the initial transaction, as these arrangements were not even contemplated at the time of the initial transaction.

3.15 In fact, at the time of notifying its initial investment, if the subsequent arrangements are not contemplated, then it would be impossible to account for the deal value for such subsequent arrangements. Therefore, this provision may not be implementable at all in practice.

3.16 Second, as stated in paragraph 3.9 above, the deeming provisions proposed under the Draft Combination Regulations are inconsistent with the Commission's own decisional practice of undertaking a pragmatic case-by-case analysis to determine interconnection, based on a holistic set of factors.

3.17 The MWG considers that the Draft Combination Regulations already contain general provisions to aggregate all interconnected transactions (which are in fact not limited by any time duration), and these provisions shall continue to cover genuinely interconnected transactions and incidental arrangements. Therefore, the MWG respectfully recommends that this separate deeming provision should be deleted.

3.18 Alternatively, if this provision is not meant to be a 'look-ahead' provision (but instead is meant to be a 'look-back' provision), the MWG respectfully submits that such an approach would also be incorrect (please refer to submissions in point (i) above).

| Suggested edits: |
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| *4(1)..*<br><br>*…*<br><br>*(b) for all interconnected steps as read in sub-regulation (4) and (5) of regulation 9 of these regulations;*<br><br>~~*(c) For arrangement(s) entered into as a part of the transaction or incidental arrangement(s) entered into anytime during two years from the date on which the transaction would come into*~~ |

~~*effect including but not limited to technology assistance, licensing of intellectual property rights, usage rights to any product, service or facility, supply of raw materials or finished goods, branding and marketing;*~~

(iii) *Incorrect reference to "enterprise value"*

3.19 Section 5(d) of the Competition Act and Regulation 4(1) of the Draft Combination Regulations provide that the value of "*the transaction*" must be considered for computing deal value.

3.20 However, in contrast, explanation (d) to Regulation 4(1) of the Draft Combination Regulations provides that the deal value shall be: *"the consideration attributed by the parties to the enterprise(s) being acquired, taken control of, merged or amalgamated",* i.e., the value of the target enterprise, in its entirety. This implies (based on a literal interpretation of this regulation) that when an acquirer is purchasing 1% shareholding of an enterprise, it may need to consider the entire value of the target enterprise, and not just the deal value for the acquisition of that 1% shareholding.

3.21 This seems to be a drafting oversight and is not consistent with the other provisions in relation to the deal value framework. It would also be inconsistent with the position in other jurisdictions, which limit deal value computation to the value of the transaction and not the entire target enterprise in which an investment is made. [9]

3.22 The MWG respectfully submits that the Draft Combination Regulations should clarify that the consideration should be limited to the actual consideration of the deal only. Additionally, given that the value should be limited to the actual consideration of the deal only, the Draft Combination Regulations should also clarify that ancillary costs like stamp duty, brokerage, expert advice to ascertain the value, etc., shall not be included, as they do not form a part of the actual consideration of the deal. This suggestion is consistent with international best practices (for instance, please see the German and Austrian Guidance which specifically exclude these costs).

| Suggested edits: |
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| *4(1)..*<br><br>*Explanation - ...*<br><br>*(d) the value of transaction shall only include the actual ~~be the~~ consideration attributed by the parties to the part of the enterprise(s) being acquired, taken control of, merged or amalgamated and will exclude all ancillary costs including but not limited to stamp duty, brokerage, consultant or advisory fees. ~~(d) the value of transaction shall be the consideration attributed by the parties to the enterprise(s) being acquired, taken control of, merged or amalgamated;~~* |

9 German and Austrian Guidance (available here), paragraph 17.

(iv) *Consideration for uncertain future events should be excluded*

3.23 Regulation 4(1)(e) of the Draft Combination Regulations provides that the consideration paid "*for occurrence or non-occurrence of any uncertain future event as per estimates of the acquirer*" should be included while assessing the deal value.

3.24 The MWG respectfully suggests that a distinction should be drawn between future payments that are unconditionally bound to be paid (i.e., they are not conditional on the occurrence of an uncertain event), and future payments which may or may not be paid depending on the occurrence of certain events / milestones. Whilst it is reasonable to include the former, it appears to be excessive to include the latter as those future events may not take place at all, and therefore, the calculation of the deal value for applying the threshold may be artificially inflated by including their value.

3.25 In fact, the MWG understands that the Commission has itself previously recognised that uncertain events may be excluded from the scope of the current transaction being notified, and any subsequent transactions may be assessed at a later point, if and when the trigger event for such a transaction takes place.[10]

3.26 The proposed requirement of including all uncertain future events would also create practical difficulties in arriving at an accurate valuation of the transaction given the unpredictability of such future events and their valuation. In this regard, the International Competition Network's (***ICN***) Recommended Practices for Merger Notification and Review Procedures (***ICN Recommended Practices***) provide that: "*clarity and simplicity are essential features of well-functioning notification thresholds*", and it is necessary to adopt "*clear, understandable, and easily administrable 'bright-line' tests"*.[11] Inclusion of such uncertain events goes against this principle of having clear and easily administrable tests. As the Commission is aware, the ICN recommends principles and best practices that should be followed by all competition authorities globally, and in the past, the Commission and the MCA have generally sought to align the Indian framework with ICN Recommended Practices. The ICN's members include competition authorities from 129 jurisdictions, including India, and therefore, its principles and recommended practices are well accepted globally.

3.27 This inclusion of all uncertain future events is also inconsistent with explanation (g) to Regulation 4(1) of the Draft Combination Regulations, which requires the deal value to be determined with "*reasonable certainty*". The valuation and probability of uncertain future events cannot be determined with "*reasonable certainty*".

3.28 Such inclusion of all uncertain future events is also inconsistent with the approach in other jurisdictions. In Germany and Austria, for instance, when an uncertain future event is to be included in the computation of the value of the transaction, it is weighted according to the probability of the occurrence or non-occurrence of such future event.[12]

3.29 Therefore, the requirement that any and all uncertain events should be included in the computation of the value of the transaction, without any qualifications, may be excessive. The MWG

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10 *Reliance Industries Limited / Bharti AXA Life Insurance Limited* (Combination No. C-2011/07/01, available here)

11 ICN Recommended Practices (available here), Item II. D, Comment 1.

12 German and Austrian Guidance (available here), paragraph 34.

respectfully recommends that only the consideration paid for future events whose occurrence is not conditional or uncertain should be included in the computation of the value of the transaction.

| Suggested edits: |
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| *4(1)....* <br> *(e) for occurrence or non-occurrence of ~~any uncertain~~ future events specifically contemplated on the Relevant Date, that are not conditional or uncertain, as per estimates of the acquirer.* |

(v) *"Relevant Date" for computing the deal value*

3.30 The Draft Combination Regulations helpfully provide a definition for "Relevant Date" as the "date on which the approval or agreement or the other document referred to in sub-section (2) of Section 6 of the Act is accorded or executed, as the case may be" (i.e., the date of the execution of the transaction documents or approval of the board of directors for mergers / amalgamations).

3.31 Based on this definition, it appears to the MWG that the intention is that the deal value should be computed on signing / board approval (and not on closing). However, the Draft Combination Regulations do not provide a specific reference / clarification that the deal value should be computed on the "*Relevant Date*" (as defined above). The MWG respectfully suggests that such a specific clause would be helpful to remove any ambiguity on whether the deal value should be computed on signing or on closing.

3.32 This suggestion is consistent with other provisions of the Draft Combination Regulations. For instance, explanation (b) to the same regulation (relating to deal value) clarifies that the foreign exchange rate shall be computed on the basis of the "*Relevant Date*" as defined above.

| Suggested edits: |
|---|
| *4(1)..* <br> *Explanation - .....* <br> *(h) The value of the transaction shall be computed on the Relevant Date.* |

(vi) *Consideration for options and securities to be acquired*

3.33 Regulation 4(1)(d) of the Draft Combination Regulation provides that the value of consideration includes any option and securities to be acquired assuming full exercise of such options, while assessing the deal value. The MWG respectfully submits that assessing the deal value assuming full exercise of options and securities (which may or may not be exercised) is likely to inflate the value of the transaction presently contemplated, particularly as the exercise of such options is entirely optional and therefore may never happen. It is for this reason that notification requirements for an acquisition in the context of an option are assessed by the Commission only when the option is being exercised and not when the option is acquired. Similarly, despite being notified of the acquisition of such options, the Commission typically does not include options and securities within the scope of its approval until the time when definitive documents for the exercise of such options are executed.[13]

3.34 Further, including the value of such uncertain options and securities for determining the deal value of the transaction, but failing to give approval of such transactions may give rise to an absurd outcome: the full value of such securities would be used to trigger a notification of the transaction to the Commission, but the approval would be limited and acquisition of such options and securities would not benefit from the Commission's approval. Independent of this, the future value of options will be difficult to ascertain reliably. It may be affected by a plethora of commercial and market factors which may only be determinable at the time of exercise of those options.

3.35 As such, the MWG respectfully submits that the value of future options and securities be calculated at the expected present value (and not at a future value – unless such value is prescribed in the transaction documents). In Germany and Austria, all future payments are discounted to a cash value to calculate the value of the payments for a uniform date.[14]

| Suggested edits: |
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| *4(1)..*<br>*Explanation (a)*<br>*the value of future payments shall not be discounted to present value except for in cases of valuation of options and securities under sub-regulation (d) of Regulation 4(1);* |

## 4. DETERMINING SUBSTANTIAL BUSINESS OPERATIONS IN INDIA

4.1 Regulation 4(2) of the Draft Combination Regulations sets out the criteria for determining the second limb of the deal value threshold, i.e., "*substantial business operations in India*". The Draft Combination Regulations prescribe that this condition shall be met if the target enterprise has, in India, 10% or more of its total global:

(i) users, subscribers, customers, or visitors, at any point in time in the last 12 months; or

(ii) gross merchandise value, for 12 months preceding the relevant date; or

(iii) turnover derived from all products and services, for the preceding financial year (collectively, referred to as the ***SBO Test***).

4.2 The conditions prescribed under the SBO Test are alterative tests rather than conjunctive tests (given the use of the phrase "or" instead of "and"). Therefore, if any of the conditions are met, this

13 See *Reliance Industries Limited / Bharti AXA* (available here), where the Commission only approved the proposed transaction without getting into a possible additional acquisition as notified by the parties.

14 German and Austrian Guidance (available here), paragraph 30.

limb would be satisfied. Further, the SBO Test is sector agnostic, and applies equally to transactions in all sectors.

## A. Submissions relating to condition (i) (i.e., users, subscribers, customers, or visitors)

### (i) *Reference to "visitors" should be deleted*

4.3 One of the (alternative) metrics prescribed under the SBO Test is "*visitors*". As mentioned in paragraph 4.2 above, this currently applies equally to all sectors as the conditions prescribed under the SBO Test are sector agnostic.

4.4 The MWG considers that inclusion of this metric is likely to be problematic for several reasons.

4.5 First, "*visitors*" are not an accurate indicator of sales, economic value, or competitive presence. For instance, a brick-and-mortar store may receive hundreds of "*visitors*" who do not make any purchases. Similarly, a technology-based company (for instance, a company selling mobile phones or laptops) may set up experience centres which receive hundreds of "*visitors*" daily, but such "*visitors* may not be making any purchases. Similarly, an e-commerce website may receive many "*visitors*" on its website who do not end up making any purchases or use any services being provided by the company. Therefore, visitors (in and of itself) do not represent sales, economic value or the competitive significance of an enterprise and it is therefore not a suitable indicator to assess "*substantial business operations*".

4.6 Second, it may not be feasible to track "*visitors*", especially in non-digital sectors. Brick-and-mortar stores typically do not track / record all "*visitors*" at their stores, showrooms, experience centres, etc. This data would need to be tracked, not only in India, but in all stores globally to be able to assess whether the 10% threshold is satisfied. As a result, this is likely not implementable in any practical or reliable way.

4.7 Third, inclusion of this metric would be inconsistent with the Commission's approach / decisional practice. The Commission typically has not considered "*visitors*" as a metric either for digital or non-digital markets.

4.8 Fourth, this test would be inconsistent with ICN Recommended Practices, which provide that for notifiability thresholds, it is important to adopt "*clear, understandable, and **easily administrable** tests"*[15] (emphasis added).

4.9 Finally, inclusion of "*visitors*" as a metric is also inconsistent with the position in most other jurisdictions which have deal value thresholds (such as Austria, Germany, United States of America (***USA***) and Japan).[16] None of these jurisdictions have "*visitors*" as a standalone criterion to assess substantial business operations.

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15 ICN Recommended Practices (available here), Item II. D, Comment 1.

16 *Austria*: Federal Cartel Act, 2005 (available here), Section 9; and German and Austrian Guidance (available here), Part D; *Germany*: Competition Act (available here), Section 35; and German and Austrian Guidance (available here), Part D; *USA*: Size of Transaction Thresholds (available here); *Japan:* Policies Concerning Procedures of Review of Business Combination (available here), Item 6(2).

4.10 Therefore, the MWG respectfully recommends that this criterion should be omitted.

(ii) *“Subscribers” and "users” should be revised to “active users”*

4.11 The MWG respectfully submits that “active users” would be a more accurate metric to assess market presence, as opposed to subscribers and users. This is because “*subscribers*” or “*users*” data can be unreliable, as they include dormant / inactive accounts. Users often subscribe to services, and then do not use them (or do not use them regularly) and, therefore, subscription / user numbers do not provide an accurate reflection of the usage of a service. Further, subscriber / user data often also include fake accounts and double count users that register with a new phone number but do not transfer their account. Therefore, active users is a more accurate parameter to assess market presence.

4.12 This suggestion is in line with the position in other jurisdictions as well. For instance, the German and Austrian Guidance provides that “users” may *inter alia* be based on MAU.[17] Similarly, the EU’s Digital Markets Act adopts the “active users” standard.[18]

(iii) *Time period for tracking users, subscribers and customers should be revised*

4.13 One of the conditions prescribed under the SBO Test is that the target enterprise has, in India, 10% or more of its total global users, subscribers, customers, or visitors, “*at any point in time*” in the last 12 months. This implies that if this threshold is exceeded even for a single day (but not for the other 364 days in the year), a notification requirement shall still be triggered (assuming the deal value limb has been met).

4.14 However, it should be noted that yardsticks such as these normally are applied as an average over a sustained period of time. This provides a more comprehensive and representative measurement. For example, the user base and traffic for each country may fluctuate across the year owing to various factors such as seasonal shifts, national holidays and so on. Therefore, to avoid capturing transactions merely based on temporary gains and falls, this test should not be determined on the basis of a single day’s figure. An average over a period of 12 months would be a more representative measure.

4.15 An annual approach would be consistent with other limbs of this test, as both the gross merchandise value and the turnover conditions under the same regulation are determined on an annual basis. It is unclear why an inconsistent yardstick is being adopted only for the first condition (i.e., the metrics pertaining to users, subscribers, customers, or visitors).

4.16 An annual metric shall also assist in aligning this provision with ICN Recommended Practices, which state that thresholds should be “*easily administrable*”.[19] It would also be consistent with the position in other jurisdictions, which require the conditions for assessing SBO to be based on a

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17 German and Austrian Guidance (available here), paragraphs 67 and 88.

18 Digital Markets Act (available here), Article 3(2)(b).

19 ICN Recommended Practices (available here), Item II. D, Comment 1.

reasonably sustained time period. For instance, in Korea, one of the parameters prescribed is that the target has sold products / services to at least 1 million people per month for 3 years.[20]

4.17 Therefore, the MWG respectfully recommends that the first criterion should be assessed on a sustained annual basis. This will ensure consistency within the same regulation and make this test more practical in implementation.

(iv) *The factors relating to users, subscribers and customers should be limited only to companies operating in digital markets*

4.18 Users, subscribers, and customers may be important metrics in digital markets, given that in such markets, products may be 'free' and therefore, turnover may not be a sufficient metric. However, in non-digital markets, the value of sales / turnover is the most appropriate metric to assess market power.

4.19 In non-digital markets, firms typically do not track their presence through number of "*users*", but rather, track their value and volume of sales. For instance, a real estate company normally does not track the number of "*users*" (i.e., persons utilising or staying in a flat) but would track the value and volume of sales of their flats / houses. Similarly, an automobile company normally does not track the number of "*users*" (i.e., persons utilising or driving their vehicles) but would track the value and volume of automobile sales. Given that companies operating in non-digital markets may not be able to track data based on users / subscribers / customers, any thresholds based on such yardsticks (for these companies) may not be workable or implementable (and even if they were, they are not measuring the company's core selling activities).

4.20 Therefore, the MWG considers that factors relating to users, subscribers and customers should only be limited to digital markets where there may be significant interactions with consumers that do not take the form of sales. Non-digital markets should instead be assessed using reliable and readily available traditional metrics such as turnover.

4.21 This suggestion is in line with the position in other jurisdictions as well. For instance, the German and Austrian Guidance provides that: "*in the **digital sector**… user numbers or the access frequency of a website* [are] *examples of possible indicators*".[21] However, for non-digital sectors, the German and Austrian Guidance instead refers to factors such as turnover.[22] Similarly, in Korea, the number of monthly customers is only considered if the target provides "***internet-based services***".[23]

4.22 Further, to ensure clarity and feasibility of implementing this suggestion, it would be beneficial if the scope of 'digital sector' is clearly defined.

4.23 The Commission could usefully consider adopting the general approach in certain other jurisdictions. For instance, the Digital Markets Act (in the EU)[24] provides a list of activities / services that may be covered within the scope of digital markets, which includes: (a) online

[20] Enforcement Decree of the Monopoly Regulation and Fair Trade Act (available here), Article 19(1) and 19(2).
[21] German and Austrian Guidance (available here), paragraph 66. Please also refer to the examples set out at the end.
[22] German and Austrian Guidance (available here), example 2, paragraph 97.
[23] Please refer to the article available here.
[24] Digital Markets Act (available here), Article 2(2).

intermediation services; (b) online search engines; (c) online social networking services; (d) video-sharing platform services; (e) interpersonal communications services; (f) operating systems; (g) web browsers; (h) virtual assistants; (i) cloud computing services; (j) online advertising services. A similar inclusive definition could be provided under the Draft Combination Regulations.

4.24 Accordingly, the MWG respectfully recommends that application of metrics relating to users, subscribers and customers should be limited to digital markets / activities only, within the parameters duly set out by the Commission. This will ensure that this provision is implementable and consistent with international best practices.

(v) *Provision for transfer of specific assets or only a portion of the target business*

4.25 The SBO Test does not clarify the assessment methodology for transactions where only specific assets, or a portion of the target's business is being acquired. For instance, if a transaction involves an acquisition of only one of the multiple businesses of the target, accounting for the gross merchandise value or the turnover or MAU for the entire business may be inaccurate.

4.26 Further, this over-broad approach is also inconsistent with explanation (f) to Section 5 of the Competition Act, the wording of the *de minimis* target exemption and the Commission's general practice of only considering the value of the portion of assets / business being acquired.

4.27 Therefore, the MWG respectfully recommends that a specific clarification should be provided under the SBO Test, to limit the assessment to the relevant assets / business being acquired.

(vi) *Addition of the words "in India"*

4.28 The SBO Test provides that:

> *"the enterprise referred therein would be deemed to have substantial business operations in India, if: (a) the number of its users, subscribers, customers, or visitors, at any point in time during a period of twelve months preceding the relevant date is 10% or more of its total global number of users, subscribers, customers or visitors, respectively; or (b) its gross merchandise value for the period of twelve months preceding the relevant date is 10% or more of its total global gross merchandise value; or (c) its turnover during the preceding financial year, **in India**, is 10% or more of its total global turnover derived from all the products and services".* (emphasis added)

4.29 Therefore, whilst condition (c) of the SBO Test expressly clarifies that the turnover should be "*in India*", conditions (a) and (b) have (inadvertently) missed including the term "*in India*". This seems to only be a drafting oversight, since a meaningful nexus to India is essential for deal value thresholds. The MWG respectfully recommends the addition of the term "*in India*", in conditions (a) and (b), to remedy this issue.

B. **Submissions relating to non-digital markets**

(i) *A conjunctive asset-based test should be included for companies operating in non-digital markets*

4.30 For companies operating in non-digital markets, apart from turnover, the other potentially relevant metric to assess significance of operations is asset value. The Draft Combination Regulations currently do not include assets as a relevant factor for assessing presence.

4.31 The MWG respectfully suggests that an additional (cumulative) asset-based test may be included for non-digital companies to provide a more effective indicator of local nexus to India.

4.32 Previously, the Government of India has relied upon a cumulative asset and turnover based test for notifiability under the target-based *de-minimis* exemption.[25] Such a test has been utilised for more than 10 years and has proven to be a successful model. The Commission has only expressed concerns regarding this test being insufficient for the digital sector.[26] Therefore, the MWG is not suggesting such a test for the digital markets and is only proposing this cumulative test for non-digital markets.

4.33 An asset and turnover based test is consistent with the ICN Recommended Practices, which recommend sales (turnover) and assets as objective, readily available financial metrics that can provide appropriate thresholds.[27] The addition of assets would also be in line with the position in other jurisdictions. In Germany, assets are considered as an indicator of domestic presence;[28] and in Austria, the physical presence of a target enterprise is a relevant factor for assessing local nexus.[29]

4.34 It is important that this test is conjunctive and not alternative, because only considering one of the factors may provide a skewed representation of the company's activities related to India. It is for this reason that the current target-based *de-minimis* exemption is also a conjunctive test. An alternative test may cast the net too wide, placing onerous burdens on parties to notify transactions, and on the Commission to assess additional transactions that are likely to be non-problematic in India. For instance, in Japan, an alternative rather than conjunctive test was established when introducing deal value thresholds, which has resulted in several competitively insignificant transactions being notified to the competition authority.

4.35 In summary, the MWG's recommended refinements to the SBO test are set out below:

| Suggested edits: |
|---|
| *4 (2) For the purpose of proviso to clause (d) of section 5 of the Act, the enterprise referred therein would be deemed to have substantial business operations in India, if:*<br><br>*For companies operating in digital markets:*<br><br>*(a) the number of monthly active users, ~~subscribers,~~ or customers ~~or visitors at any point in time during a period of twelve months preceding the relevant date~~ for ~~during a~~ the preceding financial* |

[25] Government of India's Notification No. S.O. 1192(E), 16 March 2022 (available here).

[26] CLRC Report, July 2019 (available here), paragraph 5.11.

[27] ICN Recommended Practices (available here), Item II. B., Comment 1.

[28] German and Austrian Guidance (available here), page 20.

[29] German and Austrian Guidance (available here), page 20.

*year, in India,* *is 10% or more of its global number of* *active monthly* *users,* ~~*subscribers,*~~ *or customers* ~~*or visitors*~~*, respectively, or (b) its gross merchandise value for the* ~~*period of twelve months preceding the relevant date,*~~ *preceding financial year, in India,* *is 10% or more of its total global gross merchandise value; or (c) its turnover during the preceding financial year, in India, is 10% or more of its total global turnover derived from all the products and services.*

*For companies operating in non-digital markets:*

~~*(a) the number of users, subscribers, customers or visitors at any point in time during a period of twelve months preceding the relevant date is 10% or more of its global number of users, subscribers, customers or visitors, respectively; (b)*~~ *(a)* *its gross merchandise value for the* ~~*period of twelve months preceding the relevant date,*~~ *preceding financial year, in India,* *is 10% or more, of its total global gross merchandise value; or* ~~*(c)*~~ *its turnover during the preceding financial year, in India, is 10% or more of its total global turnover derived from all the products and services;* *and (b) its assets during the preceding financial year, in India, are 10% or more of its total global assets.*

*Provided that where a portion of an enterprise or division or business is being acquired, taken control of, merged or amalgamated with another enterprise, the thresholds above shall be calculated based on the specific portion or the division or business being acquired, taken control of, merged or amalgamated.*

*Explanation- For the purposes of this regulation:*

*(b) digital markets mean markets where products and services are accessible only through the internet, including but not limited to: (a) online intermediation services; (b) online search engines; (c) online social networking services; (d) video-sharing platform services; (e) interpersonal communications services; (f) operating systems; (g) web browsers; (h) virtual assistants; (i) cloud computing services; (j) online advertising services; and (k) app stores.*

## 5. RE-INTRODUCTION OF SCHEDULE I EXEMPTIONS

5.1 Schedule I of the Combination Regulations, 2011 provides for various important exemptions for competitively insignificant transactions, including intra-group transactions, minority share acquisitions, and creeping acquisitions. These exemptions promote ease of doing business in India and reduce transaction costs for parties. They are also beneficial for the Commission as it can instead focus its time and resources on more substantive transactions. In fact, on numerous occasions, the Commission has itself acknowledged the importance of these exemptions for an efficient and effective merger control regime.[30]

5.2 The Draft Combination Regulations have deleted references to these exemptions, which has raised significant concerns among stakeholders. If these exemptions are removed from the merger control

[30] "*At the same time, there is a need for flexibility and quick response to the needs of industry… Therefore, the government and CCI, through a number of legislative, procedural, and administrative changes, has made the process from notification of a transaction to its approval simple and user-friendly in order to reduce compliance burden on the business and industry…. Schedule I of the combination regulations issued by the Commission dispenses with notification for transactions that are not likely to raise competition concerns. …In its approach, the Commission has focused on quick approval of mergers and acquisitions that do not cause appreciable adverse effect on competition*." Competition Commission of India's Fair Play, Volume 44: January - March 2023 (available here), page 17.

regime altogether, it will create several adverse consequences. For instance, if an individual acquires even a single share of a large, listed conglomerate (for instance, Reliance Industries or Adani Limited), they would have to notify the Commission of this acquisition. This will lead to hundreds (if not more) of transactions having to be notified on a daily basis. Similarly, if a parent entity acquires its wholly owned subsidiary, it may have to notify such a transaction. Imposing a notification requirement (and suspensory requirements) on such transactions will derail the business landscape in India, hamper deal making, increase transaction costs substantially, and also over-burden the Commission.

5.3 Accordingly, the MWG respectfully recommends that such exemptions should be re-introduced. This may be done either by way of revisions to the Draft Combination Regulations or through a separate and simultaneous notification / rules. Section 6(7) of the Competition Act allows for the introduction of such exemptions though separate notifications / rules. If the exemptions are re-established through separate notification / rules, the MWG strongly urges that such notification / rules are brought into effect (post public consultation) simultaneously with the final revised combination regulations, so that there is no intervening period where parties are unable to avail of these exemptions.

5.4 Re-introduction of these exemptions will be in line with the ICN Recommended Practices, which state that: (a) intra-group transactions; and (b) minority share acquisitions, should be excluded from the scope of merger review. It further provides that: "*jurisdictions may consider using exemptions to exclude from merger review transactions that, because of their nature, are unlikely to have durable effects on competition*".[31]

5.5 This suggestion is also consistent with the position in several other jurisdictions, such as the USA,[32] the European Union (***EU***),[33] United Kingdom (***UK***),[34] Brazil,[35] Germany,[36] and Austria,[37] which have similar exemptions in place.

| Suggested edits: |
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| *Re-insertion of the Schedule I Exemptions either by way of amendment to the Draft Combination Regulations, or through simultaneous notification / rules under Section 6(7) of the Competition Act.* |

31 ICN Recommended Practices (available here), Comments 2 - 4.

32 Acquisitions in the ordinary course of business, solely for investment purposes, and intra-person transactions are exempt from the notification requirement. Part 802 of Title 16 of the US Code of Federal Regulations (available here).

33 The European Commission's Consolidated Jurisdictional Notice on the control of concentrations between undertakings (available here) provides that a concentration within the meaning of the merger regulations is limited to transactions involving a change in control. Therefore, transactions not leading to change in control, e.g., internal restructurings or minority non-controlling acquisitions, do not trigger a notification requirement.

34 Whilst the merger control regime in the UK is voluntary, the Competition and Markets Authority will typically not investigate an acquisition of a minority shareholding that does not confer any control rights over the target enterprise (available here).

35 Certain minority acquisitions do not have to be notified to the Administrative Council for Economic Defense (***CADE***) if they do not result in the acquisition of control and do not meet the stipulated *de minimis* rule (available here).

36 An acquisition of shareholding of less than 25% which does not confer any control rights do not constitute concentrations. Please see the Act against Restraints on Competition, Section 37 (available here).

37 An acquisition of shareholding of less than 25% and which does not confer any control rights do not constitute concentrations. See the Federal Cartel Act, Section 7 (available here).

## 6. RE-INTRODUCTION OF THE GREEN CHANNEL ROUTE

6.1 A key success story of the Indian merger control regime has been the "*green channel*" route for notifying transactions. The "*green channel*" route is available to transactions where there are no horizontal overlaps, vertical or complementary relationships between the parties to the transaction. Such transactions are deemed approved on the day of filing, significantly expediting deal timelines for competitively insignificant transactions and facilitating the Government's ease of doing business initiative. This also ensures that the Commission's resources can instead be diverted towards more substantive transactions, therefore benefiting both the Commission as well as parties. Since its introduction in 2019, nearly 25% of all transactions filed with the Commission have been through the "*green channel*" route, corroborating its importance to the business community and the Commission's efficient operation of the merger control regime.[38]

6.2 The Draft Combination Regulations have deleted reference to the "*green channel*" framework, which has raised significant concerns amongst stakeholders.

6.3 Given that transactions notified under the "*green channel*" route do not raise any competition concerns and have significantly eased the transactional and economic burden for parties as well as the Commission, the MWG respectfully recommends that the "*green channel*" route merits re-introduction. This may be done either by way of revisions to the Draft Combination Regulations or a separate and simultaneous notification / rules. Sections 6(4) and 6(5) of the Amendment Act allow for the introduction of the "*green channel*" route though separate notifications / rules. If this is done through separate notification / rules, the MWG strongly urges that such notification / rules are brought into effect (post public consultation) simultaneously with the final revised combination regulations, so that there is no intervening period where parties are unable to avail of this key route.

| Suggested edits: |
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| *Re-insertion of the Green Channel route either by way of amendment to the Draft Combination Regulations, or through simultaneous notification / rules under Section 6(4) and 6(5) of the Competition Act are exercised.* |

## 7. DEROGATION OF STANDSTILL OBLIGATIONS FOR ON-MARKET TRANSACTIONS

7.1 The MWG commends the Commission for introducing the provisions relating to derogation of standstill obligations for on-market purchases. These provisions strike a harmonious balance between merger filing requirements and efficient operation of capital markets. They are consistent with the Government's ease of doing business initiative and will remove the roadblock investors currently face in undertaking on-market purchases (which typically have to be implemented instantaneously and cannot be suspended for a period of time).

38 Please see article available here.

7.2 This proposed framework is also consistent with the position in several other jurisdictions, including for example the EU, Brazil, and Denmark, which all have similar relaxations to ease implementation of on-market purchases.[39]

7.3 Additionally, the Draft Combination Regulations set out the permissible list of rights that may be exercised prior to the Commission's approval. This list of rights strikes a balance between allowing parties to capitalize on market opportunities and reap the economic benefits of investments, whilst also ensuring that they do not start exercising control over the target prior to the Commission's approval. This is a pragmatic approach and the MWG supports these provisions in their current form.

## 8. OPPORTUNITY OF BEING HEARD BEFORE A MERGER NOTICE IS INVALIDATED AFTER CHANGES IN INFORMATION

8.1 The Draft Combination Regulations remove the requirement to provide parties a mandatory hearing opportunity before invalidating a notification under Regulation 15(4) (pertaining to change in information provided in the notification form).

8.2 The MWG respectfully recommends that Regulation 15(4) should be revised to retain the parties' right to be heard prior to the invalidation in such cases. This will be consistent with Section 36 of the Competition Act which mandates the Commission to be guided by the principles of natural justice while discharging its functions to ensure procedural fairness.

8.3 This is also in line with international best practices. The ICN Recommended Practices provide that: "[p]rior to a final adverse decision on the merits, merging parties should be informed of the competitive concerns that form the basis for the proposed adverse decision and the factual basis upon which such concerns are based, and should have an opportunity to express their views in relation to those concerns".[40] Similarly, the OECD's Recommendation of the Council on Merger Review notes that: "[m]erger laws should ensure procedural fairness for merging parties, including the opportunity for merging parties to obtain sufficient and timely information about material competitive concerns raised by a merger, a meaningful opportunity to respond to such concerns, and the right to seek review by a separate adjudicative body of final adverse enforcement decisions on the legality of a merger".[41]

8.4 Additionally, restoring this procedure will be consistent with Regulation 14(6) of the Draft Combination Regulations. It grants parties a right to be heard prior to the Commission invalidating their merger notice on account of defects / lack of information.

| Suggested edits: |
|---|
| *15...* |

[39] *EU*: European Union Merger Regulations (available here), Article 7(2); *Brazil*: Internal Regulation of the Administrative Council for Economic Défense, 2017 (available here), Article 109; *Denmark*: The Danish Competition Act, 2015 (available here), Article 12c.

[40] ICN's Guiding Principles for Merger Notification and Review (available here), paragraph 4

[41] OECD Recommendation of the Council on Merger Review (available here), paragraph 3.

*(4) Where the Commission is of the view that the change is likely to affect the factors for the determination of the appreciable adverse effect on competition significantly, after giving the parties an opportunity of being heard and after recording reasons, it may treat the notice already filed as not valid*

## 9. SCRUTINY OF NOTICE

9.1 Regulation 14 of the Draft Combination Regulations stipulates that in case of any defects in a merger notification, the Commission must communicate these defects to the parties within ten working days of receipt of the notice. The Commission's review clock starts only once the parties have provided their response to the Commission's defects letter. However, the Draft Combination Regulations do not clarify what would be considered a "*defect*" for the purpose of the Commission's review clock. Further, the Draft Combination Regulations do not clarify how many such defect letters may be issued. This ambiguity may result in delayed approvals and impair the ease of doing business in the country.

9.2 The MWG respectfully recommends that Regulation 14(2) should be revised to clarify that a defects check is limited to determining if all the queries under the provided format have been responded to (in the prescribed formats) and all documents / ancillaries required have been provided. This would be similar to the process followed in court and tribunal proceedings. Substantive information requests, including requests for additional information, should not be included as "*defects*", and should be sought by way of additional information requests, as is the current practice.

9.3 Further, to avoid multiple rounds of defect letters, the MWG suggests that Regulation 14(4) should also clarify that "*all*" defects in the notice shall be communicated to the parties within ten working days of receipt of notice.

| Suggested edits: |
| --- |
| *15...*<br><br>*(2) Where the information or document(s) contained in the notice under regulation 5 or regulation 8 of these regulations or any response filed pursuant to these regulations appears to be incomplete in ~~any~~ respect to the information and documents specifically required under Schedule I of these regulations, the parties to the combination may be asked to remove such defect(s) or furnish the required information including document(s).*<br><br>*(3) Where after the receipt of the complete notice ~~in the course of inquiry~~, it is found by the Commission that it requires additional information, the Commission may direct the parties to the combination to file such additional information.*<br><br>*(4) The parties shall comply with the directions as referred to in sub-regulation (2) within the time specified by the Commission and the notice shall be deemed to have been given under regulation 5 or regulation 8 of these regulations only on the date of such compliance:* |

| |
|---|
| *Provided that all the defects in notice shall be communicated to the parties to the combination within ten working days of receipt of notice.* |

## 10. LACK OF EXPRESS TRANSITIONAL PROVISIONS

10.1 The Draft Combination Regulations do not contain an express transitional provision for transactions that have been signed, but not consummated prior to the enforcement of the final revised combination regulations.

10.2 This creates uncertainty for such transactions, including on key issues such as the applicability of deal value thresholds. For instance, a transaction may not be notifiable under the current regime when the transaction is signed. However, subsequently, the same transaction may become notifiable (for instance, under deal value thresholds) once the revised regulations are brought into effect. For such transactions, parties may have already undertaken integration activities, and application of the new regime may result in inadvertent gun-jumping. Additionally, parties will also have to notify such transactions to the Commission and suspend closing till the Commission's approval, disrupting the closing timelines. Such a situation will create uncertainty and will lead to parties having to revisit timelines and terms for transactions which have already been signed. Such undesirable situations can be avoided with the inclusion of express transitional provisions.

10.3 Whilst Regulation 34 of the Draft Combination Regulations contains a repeal and savings clause, it does not expressly cover the above-mentioned situation. Therefore, the MWG respectfully recommends that an express transitional clause should be included. A specific transitional provision had been included previously in the Competition Act as well when the merger control regime was brought into effect in 2011.[42]

10.4 Similar transitional provisions have been provided in other Indian statutes as well, for instance the Central Goods and Services Act, 2017[43] and the Foreign Exchange Management Act, 1999.[44]

| Suggested edits: |
|---|
| *34(2)...*<br><br>*(d) It is hereby clarified that all transactions signed / executed, but not consummated prior to these Regulations coming into effect, shall continue to be governed under the repealed regulations.* |

42 "*Filing of notice under sub-section (2) of section 6 of the Act - The notice referred to in sub-section (2) of section 6 of the Act would be applicable as follows:*

*(a) for mergers or amalgamations referred to in clause (c) of section 5 of the Act, notice to be filed only in regard to proposals approved by the board of directors on or after the 1st day of June, 2011; and*

*(b) for acquisitions referred to in clause a) of section 5 of the Act or acquiring of control referred to in clause (b) of section 5 of the Act, notice need to be filed only, where binding document(s) is executed, on or after the 1st day of June, 2011".*

43 The Central Goods and Services Act, 2017, Section 174 (available here).

44 The Foreign Exchange Management Act, 1999, Section 49 (available here).

## 11. INCREASE IN THE FILING FEES

11.1 The Draft Combination Regulations propose to significantly increase the filing fees for both Form I (short form) and Form II (long form). The filing fees will increase for: (a) Form I, from INR 2 million (approx. USD 24,000) to INR 3 million (approx. USD 36,000) (a 50% increase); and (b) Form II, from INR 6.5 million (approx. USD 78,000) to INR 9 million (approx. USD 108,000) (a 38% increase).

11.2 The proposed increase would be the fifth increase in the filing fees since 2012. If the proposed filing fees increase is implemented, the filing fees for Form I and Form II would have increased by INR 2.95 million (approx. USD 35,000) and INR 8 million (approx. USD 96,000), respectively, since 2012.[45] This would mean that the filing fees for Form I and Form II have increased by 5900% and 800%, respectively, since 2012.

11.3 Such an increase in the filing fees also appears to be excessive when compared to other similarly placed jurisdictions such as, Brazil,[46] Russia,[47] and South Africa[48] (all part of the BRICS nations). In other jurisdictions such as the EU,[49] Korea[50] and Japan,[51] there are no filing fees at all for merger filings. Therefore, this increase in the filing fees may be reconsidered and any decision to raise these fees should only be made if there are compelling justifications for such an increase.

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45 The filing fees for Form I and Form II in 2012 was INR 50,000 (approx. USD 600) and INR 1 million (approx. USD 12,000), respectively.

46 The merger filing fee in Brazil is BRL 85,000 (approx. INR 1.4 million). Therefore, this is INR 1.6 million (approx. USD 19,000) and INR 7.6 million (approx. USD 90,000) less than the proposed filing fee for a Form I and a Form II, respectively (available here).

47 The merger filing fee in Russia is RUB 35,000 (approx. INR 30,000). Therefore, this is INR 2.97 million (approx. USD 35,000) and INR 8.97 million (approx. USD 108,000) less than the proposed filing fee for a Form I and a Form II, respectively (available here).

48 The merger filing fee in South Africa can range from ZAR 165,000 (approx. INR 720,000) for intermediate mergers to ZAR 550,000 (approx. INR 2.4 million) for large mergers. No merger filing fee is required for small mergers. Therefore, the filing fee for an intermediate merger is INR 2.28 million (approx. USD 27,000) and INR 8.28 million (approx. USD 100,000) less than the proposed filing fee for a Form I and a Form II, respectively. In addition, the filing fee for a large merger is INR 600,000 (approx. USD 7,200) and INR 6.6 million (approx. USD 79,000) less than the proposed filing fee for a Form I and a Form II, respectively (available here).

49 Please see the link available here.

50 Please see the link available here.

51 Please see the link available here.