

Indian merger control regime revamped: Should you be concerned?

As you may be aware that the Ministry of Corporate Affairs (**MCA**) has finally notified and given effect to certain important amendments to the Indian merger control provisions under the Competition Act, 2002, (**Competition Act**). (Read our previous alert [here](#)). In relation to these changes, the Competition Commission of India (**CCI**) has also notified the new merger control regulations. Along with the amendments, the MCA has also notified the [Competition \(Criteria of Combination\) Rules, 2024](#) and the [Competition \(Minimum Value of Assets or Turnover\) Rules, 2024](#), which consolidate the rules regarding the ‘Green Channel Regime’ and the *de minimis* exemption respectively. To help you understand the relevance and potential impact, we have put together a guidance document in the form of FAQs that touch upon some fundamental issues and concepts emanating from these changes. This update is divided into two sections:

- The CCI (Combination) Regulation, 2024 ([Combination Regulations](#))
- The Competition (Criteria for Exemption of Combination) Rules, 2024 ([Exempted Combination Rules](#))

COMBINATION REGULATIONS

DEAL VALUE THRESHOLD (DVT)

I. What is the “deal value threshold” (DVT) merger control regime and what does it imply?

The DVT comes as an additional threshold test for transactions that need to be notified to the CCI where (i) the “deal value” exceeds INR 2000 crores (~USD 240 million); and (ii) the target company has substantial business operations (**SBO i.e., the local nexus requirement**) in India (We have discussed the criteria for SBO in more detail below in Q XIII). This provision is aimed to bring transactions involving smaller targets (including start-ups) within the purview of the CCI’s merger control jurisdiction. This provision would apply where even though the assets or turnover values of the target may be low, the “deal value” is more than INR 2000 crores.

II. My business is unrelated to the tech/ digital sector. Does the DVT regime concern me?

Yes. The DVT regime is sector-agnostic and will apply to you even if you are not operating in the digital sector. Only the tests applied for notifiability assessment will differ for cases involving targets operating in the digital sector and those involving targets operating in other sectors.

III. I am contemplating a global acquisition. Will the DVT impact me?

Yes. The DVT applies to all deals that meet the twin test of deal value (i.e., deal value of more than INR 2000 crores (~USD 240 million in India) as well as the local nexus requirements (i.e., the SBO requirements in India as explained below in Q XIII).

IV. How do I calculate the value of my deal under DVT? What will form a part of consideration for calculation of the deal value?

In calculating the 'value' of your deal, the following 'considerations' will have to be included:

- Every valuable consideration whether direct or indirect, immediate or deferred, cash or otherwise,
- Separately agreed consideration for covenants, undertaking, obligations or restrictions (e.g. non-compete fee),
- Consideration for each interconnected step of a transaction,
- Consideration payable within 2 years (from the date on which the transaction in question would come in effect) for any arrangements, either part of or incidental to the transaction. E.g. arrangements for technological assistance, IP licensing, product usage rights, supply of raw materials, branding, marketing etc.
- Consideration paid by acquirer or its group for any M&A activity involving the same target in the preceding two years of the trigger event,
- Call options or open offer, assuming full exercise of the option and full subscription to the open offer, respectively,
- Consideration payable for future outcomes as specified under the transaction documents, based on "best estimate" of the board.

V. What will be excluded for the purposes of calculating the "deal value" for the DVT test?

Legal costs, fees paid to investment banks, other regulatory costs (fee paid to regulators, statutory authorities, etc.) should be excluded from the 'deal value'.

VI. What if the transaction documents do not clearly set out the precise value of the transaction/ deal?

In such cases, the transaction value considered by the board of directors or any other approving authority of the entity responsible for filing of notice to the CCI will be taken into account.

VII. What if I am unable to determine my deal value with certainty?

If the deal value is not determinable with certainty, the entity responsible for notifying the CCI may be required to consider such a deal as having met the prescribed deal value threshold. In such cases, the parties must seek expert legal advice to carefully assess the notifiability requirements.

VIII. I am assessing the consideration payable based on certain contemplated future outcomes specified in my transaction documents to calculate my “deal value”. However, the board has not recorded a “best estimate” for such future outcomes. What should I do?

In the absence of such a “best estimate”, you should take the maximum payable amount for such contemplated future outcomes in computing your “deal value”.

IX. I signed a transaction deal before September 10, 2024, but it has not yet been closed. Am I impacted by DVT?

Yes. The Combination Regulations introduce a Transition Provision in terms of which the DVT will be applicable to all transactions that were signed and/ or have not been fully consummated before September 10, 2024. The parties must assess notifiability of such transactions under DVT.

X. Will I be penalized for gun jumping if I have partially consummated my transaction before Sep 10, 2024 which was not notifiable under the earlier provisions, but is now notifiable under DVT?

No, there will be no gun jumping penalty imposed for a partially consummated transaction. However, the transaction will now have to be notified to the CCI prior to consummation.

Illustration: Company A is acquiring company B (together referred to as “Parties”) and this acquisition is to be completed in three steps i.e., Steps 1, 2 & 3. The Parties have already consummated Step 1 before September 10, 2024, as the transaction was not notifiable to the CCI. However, the acquisition has become notifiable to the CCI after September 10, 2024, as it meets the criteria for DVT.

Parties will have to now notify the entire transaction (all steps) together to the CCI. However, there will be no gun-jumping penalty for consummation of Step 1.

XI. My transaction qualifies for the small target exemption (De minimis) but the value of the deal exceeds INR 2000 crores. Will such a transaction be deemed to be exempted from notification under the DVT as well?

No. The *de minimis* exemption does not apply to transactions that are otherwise notifiable under the DVT regime. This means that, if the criteria for deal value and the local nexus (SBO) requirements are met under the DVT and the transaction is not exempted otherwise, such a transaction will have to be notified to the CCI prior to consummation.

XII. If my transaction is exempt under the available exemptions under the Combination (Exempted Combination) Rules, 2024 (Exempted Combination Rules), do I still need to notify the CCI if it meets the DVT criteria?

No. If your transaction qualifies for one or more exemptions provided under the Exempted Combination Rules, such transaction will not be required to be notified to the CCI, even though the transaction meets the criteria for DVT.

SUBSTANTIAL BUSINESS OPERATIONS (SBO)

XIII. When can a target be considered to have SBO in India?

SBO in India will be assessed on the basis of the following criteria: (i) Gross Merchandise Value (**GMV**) (**GMV criteria**); Or (ii) turnover (**Turnover criteria**); Or (iii) number of business or end users (**User criteria**) - this is an additional criteria applicable **only** for target entities providing digital services.

Digital Service - has been defined to mean any service or one or more pieces of digital content or any other activity by the target entity being provided through the internet (whether for a consideration or free) to its end users or business users. The threshold requirements are different for target entities providing digital services. If the target entity meets any of the following requirement, it would be considered to have SBO in India:

Criteria	Threshold for digital service providers	Threshold for non-digital service providers
User criteria <i>Or</i>	Average number of end or business users in India on the digital service of the target entity in the past year is 10% or more of global users.	N/A
GMV criteria <i>Or</i>	Indian GMV of the target entity in the past year is 10% or more of its total global GMV.	Indian GMV is 10% or more of its total global GMV AND Indian GMV is more than INR 500 crore (~USD 59.5 million).
Turnover criteria	Turnover in India of the target entity in the preceding financial year is 10% or more of its total global turnover.	Turnover in India is 10% or more of its total global turnover AND

Turnover in India is more than INR 500 crore (~USD 59.5 million).

XIV. If I am acquiring only a part of the business of a target entity, how do I assess if the criteria for SBO is met for the target entity?

In such a case, the criteria for SBO i.e., GMV criteria OR Turnover criteria OR User criteria (only in case of digital services) must be assessed only for the *part* of the target's business being acquired.

Illustration: Company K is a global company operating in multiple business divisions including the automobile industry, the lubricants industry, and the F&B industry. Company K is now looking to expand its business in India in different business portfolios. For this, Company K is acquiring certain businesses of Company R in India. Company R also has a global presence and is involved in multiple business divisions including lubrication, auto-parts, and certain other digital services.

In this case, based on the business being acquired, if the deal value is above INR 2000 crores (~USD 240 million), the parties will have to assess if Company R meets the criteria for SBO in India based on the following thresholds:

Scenario a: Company K is acquiring only the *lubrication* business of Company R

The criteria for SBO in India would have to be assessed based on the lubrication business of Company R (Lubrication Business) i.e., (i) GMV only in relation to the Lubrication Business; OR (ii) Turnover only in relation to the Lubrication Business.

Scenario b: Company K is acquiring only the *digital services* business of Company R

The criteria for SBO in India would have to be assessed based on the digital services business of Company R (Digital Services) i.e., (i) GMV only in relation to Digital Services; OR (ii) Turnover only in relation to Digital Services; OR (iii) Users (End users / business users) in relation to the Digital Services.

OPEN OFFER OR ON-MARKET PURCHASES

XV. In case of an open offer or on-market purchases, can I avail any benefits while CCI clearance is awaited?

Yes. The acquirer can obtain economic benefits such as dividends, bonus shares etc. and can also exercise limited voting rights (pertaining only to liquidation or insolvency proceedings). However, pending the CCI's approval, ownership rights cannot be exercised and the acquirer and any of its group entities must not directly or indirectly 'influence' the target entity.

XVI. When do I need to file the notice with the CCI in case of an open offer or on-market purchases and in what form?

In case of an open offer, notice needs to be filed within 30 days from the date of first acquisition of shares pursuant to the implementation of the offer. Along with the notice in the requisite form, the acquirer also needs to file a declaration under Schedule II of the Combination Regulations, confirming that it has not exercised any rights except the ones provided for in the Combination Regulations.

OTHER KEY CHANGES

XVII. What are some of the other key changes in the new Combination Regulations?

In addition to the changes above (including DVT), the Combination Regulations have also introduced certain other changes including process to offer modifications to transactions, enhanced filing fees, overall reduction in review timelines, *void ab initio* combinations etc. which we have discussed in more detail in this section.

XVIII. What is the enhanced filing fee?

Form	Old fee	Revised fee
Form I	INR 20 lakhs (~USD 24,000)	INR 30 lakhs (~USD 36,000)
Form II	INR 65 lakhs (~USD 77,000)	INR 90 lakhs (~USD 110,000)

XIX. When can you propose modifications to the transaction?

Stage	Time period to propose and accept modification(s)
Phase I	<ul style="list-style-type: none"> ▪ When can the CCI propose modification(s)? <ul style="list-style-type: none"> – Before the CCI forms a prima facie opinion (PFO): The CCI should communicate a decision to propose modifications within 7 days of its decision (<i>Excluded from the 30-day period with the CCI to form PFO</i>). – Parties can submit acceptance to the CCI within 5 days of communication (<i>Excluded from 150-day total review period</i>). ▪ When can parties propose modification(s)? <ul style="list-style-type: none"> – Before the CCI forms a PFO: Parties can proactively offer modifications within 10 days from date of filing or from date of clearing filing defects (if any).

	<ul style="list-style-type: none"> – After the CCI forms a PFO and issues show cause notice (SCN): Parties can submit modifications along with response to SCN within 15 days from receipt of SCN.
Phase II	<ul style="list-style-type: none"> ▪ When can parties propose modification(s)? <ul style="list-style-type: none"> – Post receipt of statement of objections (SO) by the CCI: Parties can propose modifications (Initial Modification) in response to CCI’s SO within 25 days of receipt of SO. – If the CCI rejects Initial Modification: Parties can submit a counter offer with revised modifications (Counter Offer) to the CCI within 12 days of the CCI’s communication. ▪ When can CCI propose modification(s)? <ul style="list-style-type: none"> – The CCI can also propose modifications post receipt of Counter Offer by the parties.

XX. What are the other key changes introduced to the merger control regime?

In addition to the changes discussed above, following are some other key changes that have been introduced to the merger control regime:

- **Reduction in overall review timeline.** The overall review period has been reduced from 210 days to 150 days (This excludes relevant ‘clock-stops’ including time taken by the CCI to propose modifications before forming a PFO on the transaction, time taken by parties to accept such modifications proposed by the CCI, and time taken to respond to information requests from the CCI.)
- **Increased penalties.** Maximum penalty for making false statements or omission to furnish material information increased to INR 5 crores.
- **‘Void ab initio’ combinations.** If within one year from the date of the combination having taken effect, the CCI finds (i) any green channel filing to not meet the stipulated requirements; or (ii) any information or declaration provided to be materially incorrect or incomplete, the approval by the CCI will be *void ab initio* and the CCI can pass an order after providing parties an opportunity of hearing. Parties would be allowed to file a fresh notice in such cases and no penalty for gun-jumping would be imposed if the fresh notice is filed within 30 days.

EXEMPTED COMBINATION RULES

The MCA has notified the Exempted Combination Rules on 10 September 2024 which now codify the category of transactions that will be exempt from notification to the CCI in line with the amendments to the Competition Act.

These rules replace the earlier exemptions contained in Schedule I to the older CCI (Procedure in Regard to the Transaction of Business Relating to Combinations) Regulations, 2011 (**Schedule I Exemptions**). We have discussed the categories of combinations which will be exempt pursuant to these rules below:

XXI. Categories of exemptions which have been significantly modified from the earlier Schedule I Exemptions

▪ Which category of transactions are exempted from notification in the ordinary course of business?

Acquisitions of shares/ voting rights in the ordinary course of business by underwriters, stockbrokers, and mutual funds, as the case may be, are exempted if:

- It is an acquisition of unsubscribed shares by an underwriter as per an underwriting agreement or a stockbroker's acquisition of shares, provided that the underwriter or stockbroker does not hold more than 25% of the target company's total shares/ voting rights.
- It is an acquisition of shares/ voting rights by a mutual fund provided that the mutual fund does not hold more than 10% of the target company's total shares/ voting rights.

▪ In which cases would acquisitions of shares/ voting rights solely as an investment or acquisition of additional shares/ voting rights be exempt from notification to the CCI?

Acquisition of shares/ voting rights solely as an investment or acquisition of additional shares/ voting rights are exempt in certain cases if the following conditions are met:

- *Acquisition of shares/ voting rights shall be treated as solely as an investment if:*
 - i. Acquisition of shares/ voting rights does not exceed 25% of shareholding in the target; and
 - ii. There is no acquisition of control in the target, and
 - iii. Acquirer does not gain a right or ability to have a representation on the board of directors of any enterprise either as a director or as an observer, and
 - iv. Acquirer does not gain a right or ability to access commercially sensitive information (CSI) of any enterprise; and
 - v. Acquirer, its group entities and their affiliates do not have any horizontal overlap or any vertical or complementary activities with the target including its downstream group entities and its affiliates. **Carve-out for acquisition up to 10% of shares/ voting rights of the target.** Even if an acquisition of shares/ voting rights result in overlaps or relationships as set out in (v) above, such acquisitions will qualify as “solely as an investment”, provided its is not more than 10% of shares/ voting rights and it meets all other conditions as set out at (ii) to (iv) above.

- **Acquisition of additional shares/ voting rights by existing shareholders, not leading to more than 25% of shares/ voting rights if:**
 - i. There is no acquisition of control, and
 - ii. Acquirer does not gain a right or ability to have a representation on the board of directors of any enterprise either as a director or as an observer **for the first time**, and
 - iii. Acquirer does not gain a right or ability to access CSI of any enterprise **for the first time**; and
 - iv. The acquisition (whether through single or multiple inter-connected transactions) does not (i) exceed 5%; and (ii) result in shareholding or voting rights increasing from less than 10% shareholding in the target prior to the additional acquisition to more than 10% post the acquisition, where there is horizontal, or vertical or complementary linkages between acquirer (or its group entities) and the target (including its downstream group entities and affiliates)
- **Acquisition of additional shares/ voting rights where the acquirer prior to acquisition holds more than 25% shares/ voting rights but does not result in more than 50% shares/ voting rights before or after acquisition are exempt when there is no change of control.**
- **Acquisition of additional shares/ voting rights where the acquirer prior to acquisition holds more than 50% shares/ voting rights are exempt when there is no change of control.**
- **Are transactions within the same ‘group’ exempt from notification to the CCI?**

Transactions between two or more entities in the same ‘group’ are exempt under the following circumstances:

- **Acquisition of assets.** Acquisition of assets by one person or enterprise within the same group where there is no change in control over the assets being acquired.
- **Merger or Amalgamation.** Merger or amalgamation within the same group where the transaction does not result in a change of control.

XXII. Categories of exemptions with certain incremental changes from the earlier Schedule I Exemptions

- **Are acquisitions of shares or voting rights pursuant to bonus issue/ stock splits/ consolidation/ buy-back/ rights issue of shares still exempt from notification?**

Yes, provided such acquisition does not lead to a ‘change’ in control.

- **Are acquisitions of current assets in the ordinary course of business exempt from notification?**

Yes, acquisition of current assets (like stock-in-trade, raw materials, stores and spares, trade receivables or other similar current assets *that do not constitute business*) in the ordinary course of business are exempt from notification to the CCI.

XXIII. New additions and exclusions

- **Are demergers and consequent issuance of shares by resultant company exempt from notification to the CCI?**

Yes, the new Exempted Combination Rules now exempt demergers and consequent issuance of shares by resultant company in cases where the issuance of shares is in the same proportion of shares held in the demerged company, prior to the demerger, except in cases for the discharge of fractional shares.

- **Is an amendment/ renewal to a tender offer (already intimated to the CCI) still exempt from notification under the new Exempted Combination Rules?**

No, in cases where the CCI is intimated of a tender offer, a subsequent amendment/ renewal to such a tender offer is no longer exempted from notification.

XXIV. Other changes- Change in the criteria for ‘affiliate’ test

- **Company ‘A’ holds less than 10% shares in Company ‘B’ and has no other special commercial rights vis-a-vis Company ‘B’, can ‘A’ and ‘B’ be considered as “affiliates”?**

In addition to shareholding and board representation rights, under the new regulations, the ‘right’ or ‘ability’ to access CSI is also required to be assessed:

Previous definition	New definition
direct or indirect shareholding of 10% or more; <i>or</i>	10% or more of the shareholding or voting rights of the enterprise; <i>or</i>
a right or ability to nominate a director or observer in another enterprise (s); <i>or</i>	right or ability to have a representation on the board of directors of the enterprise either as a director or as an observer; <i>or</i>
a right or ability to exercise any right (including any advantage of commercial nature with any of the party or its affiliates) that is not available to an ordinary shareholder.	right or ability to access CSI of the enterprise.

We trust you will find this an interesting read. For any queries or comments on this update, please feel free to contact us at insights@elp-in.com or write to our authors:

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