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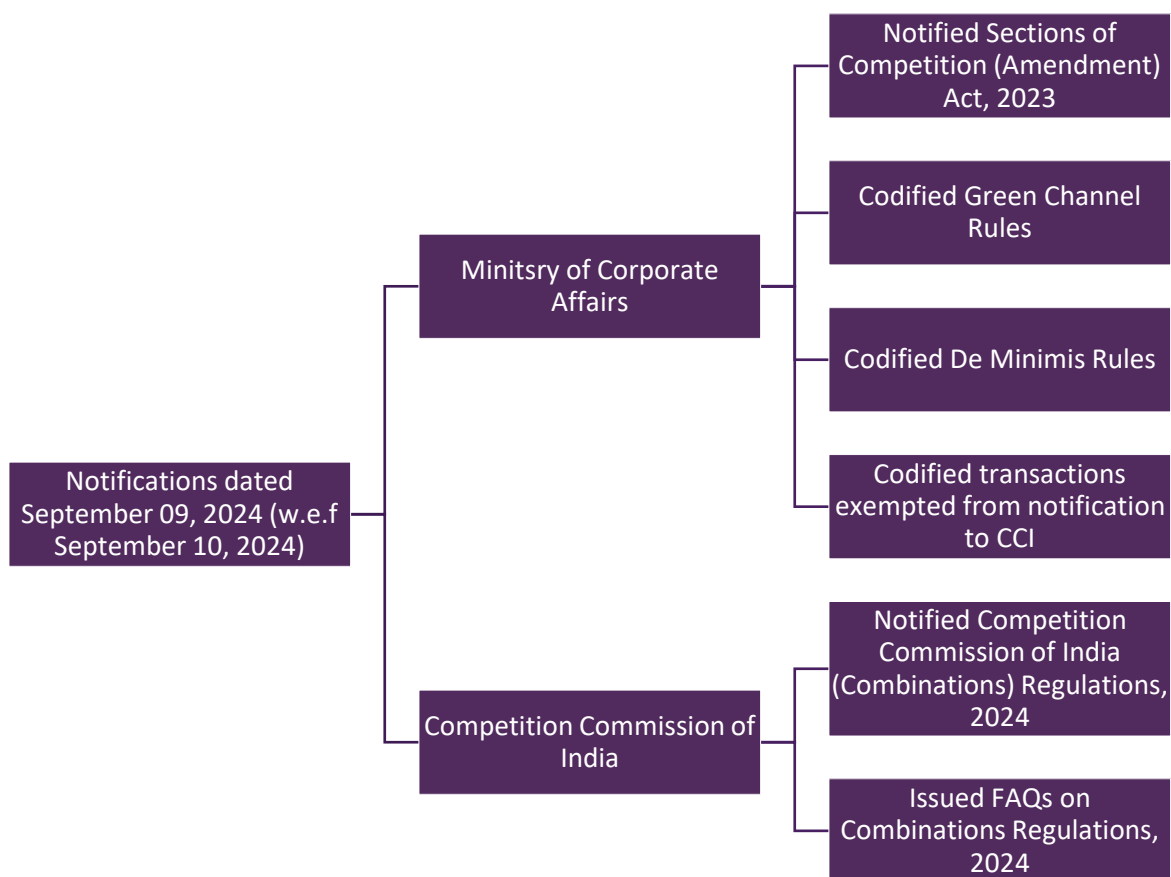
Indian Merger Control Regime - Revamped & Refined

Aditya Bhardwaj, Partner
Rinki Singh, Senior Associate

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On September 09, 2024, the Ministry of Corporate Affairs, Government of India (“MCA”) and Competition Commission of India (“CCI”) overhauled the Indian merger control regime and brought in significant transformations. The MCA notified several provisions of the Competition (Amendment) Act, 2023 related to merger control in India and other rules related to Green Channel route, *De Minimis* thresholds, and transactions exempted from notification to the CCI.

Simultaneously, the CCI notified new Competition Commission of India (Combinations) Regulations, 2024 (“Combinations Regulations”) repealing the old Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (“Old Regulations”). In addition, the CCI also issued FAQs on Combinations Regulations. The notifications issued by the CCI as well as MCA have come into force with effect from September 10, 2024. For ease of reference, a snapshot of these notifications is provided below:



What provisions of the Competition (Amendment) Act, 2023 have been notified?

The Competition (Amendment) Act, 2023 was introduced in April 2023, and has been enforced in a staggered manner. The MCA on September 09, 2024, has finally notified the remaining provisions that are related to merger control. To ensure smooth enforcement of the changes introduced by the said amendment, the CCI simultaneously notified the new Combinations Regulations. To provide further clarification on the applicability of the new regime, the CCI also issued FAQs on Combinations Regulations. A summary of key changes introduced by the mentioned notification is outlined below:

Introduction of Deal Value Threshold – Section 5(d) of the Competition Act, 2002 (as amended in 2023) (“Competition Act”)

- **Deal value thresholds** (“DVT”) as per Section 5(d), includes any transaction in connection with acquisition of control, shares, voting rights or assets of an enterprise, merger or amalgamation:
 - whose value does not exceed INR 2000 Crores (approx. USD 238 million / EUR 215 million); and
 - the target enterprise has ‘substantial business operations’ in India.
- Introduction of deal value thresholds marks a significant shift in the merger control regime, which will result in regulatory scrutiny of high-value deals despite limited tangible assets or revenues in India, unless are specifically exempted.

If a transaction requires a notification to CCI, such transaction must immediately observe standstill obligations (including at a global level) until CCI approval; else attract penalties for gun-jumping. However, transactions that were previously exempt, but now meet the DVT, and are either - yet to close or have been part-consummated, will not be fined for gun-jumping; but still require notification to CCI.

The DVT applies also for all transactions which are yet to fully close as on September 10, 2024, the effective date of Combinations Regulations.

- Determination of ‘**Value of transaction**’ or ‘**Deal Value**’ for DVT:
 - Includes every valuable consideration, direct or indirect, immediate or deferred, cash or otherwise and any other considerations stipulated under Regulation 4(1) of the Combinations Regulations.
- Definition of ‘**substantial business operations**’ – In terms of Regulation 4(2) of the Combinations Regulations, an enterprise (target) is deemed to have substantial business operations in India, if:
 - The target provides digital services and has – (i) 10% or more of its global business users or end users in India; **or** (ii) a GMV in India of 10% or more of its global GMV in the 12 months preceding the relevant date; **or** (iii) a turnover in India of 10% or more of its global turnover in the preceding financial year; or
 - Gross Merchandise Value (“GMV”) of the target for the period of 12 months preceding the relevant date in India is – (i) 10% or more of its global GMV, **and** (ii) more than INR 500 Crores; or
 - Turnover of the target during the preceding financial year in India is – (i) 10% or more of its total global turnover derived from all the products and services, **and** (ii) more than INR 500 Crores.
- ‘**Relevant Date**’ is to be reckoned as the date of (i) approval of the Target’s Board to the proposal relating to merger or amalgamation; or (ii) execution of any agreement/document for acquisition or acquiring of control.

Revised definition of ‘Control’ – Explanation (a) to Section 5 of the Competition Act

- In line with the decisional practice of the CCI, the definition of ‘control’ now includes the aspect of ‘material influence’, in any manner whatsoever, over the management or affairs or strategic commercial decisions by one or more enterprises or groups (either jointly or singly) over another enterprise or group.
- Summarily, CCI’s decisional practice over the years indicates that the acquisition of control may be achieved through - (i) Material Influence; (ii) *De facto* control; (iii) *De jure* control; (iv) Negative control; (v) Operational control.

No obligation to notify within 30 days under Section 6(2) of the Competition Act

- Earlier, the parties were under obligation to notify the CCI within 30 days from the date of approval of the proposed combination. However, this obligation has now been suspended and the parties are required to notify the CCI any time before consummation.

No standstill obligation for Open Offers etc. under newly inserted Section 6A of the Competition Act

- The parties may now implement – a) Open offers and b) acquisition of shares or securities convertible into other securities, through a series of transactions on a regulated stock exchange, before receiving an approval from the CCI, if:
 - A notice of acquisition is filed within 30 days from the date of first acquisition of shares as per Regulation 5(4) of the Combinations Regulations; and
 - In terms of Regulation 6 of the Combinations Regulations and Section 6A (b) of the Competition Act, the acquirer only avails economic benefits such as dividends or any distribution, bonus shares, buy-backs, stock-splits etc. and exercise voting rights only in relation to liquidation and/or insolvency proceedings.

Transition provision – Regulation 34 of Combinations Regulations

- Provisions of Section 6(2), Section 6(4), and Section 6A of the Competition Act are applicable to all transactions which will come into effect on and after September 10, 2024.
- Transactions closed prior to September 10, 2024, are not required to be notified.
- Transactions for which trigger event has occurred prior to September 10, 2024, but are not yet closed will have to be notified.

What clarifications have been accorded by the CCI via FAQs on Combinations Regulations?

The CCI in its FAQs has clarified that enterprises should re-assess if any of their unconsummated transactions which prior to September 10, 2024, were exempted under the old regime but are now notifiable as per the new regime. Such unconsummated transactions are to be notified to the CCI as per the new regime.

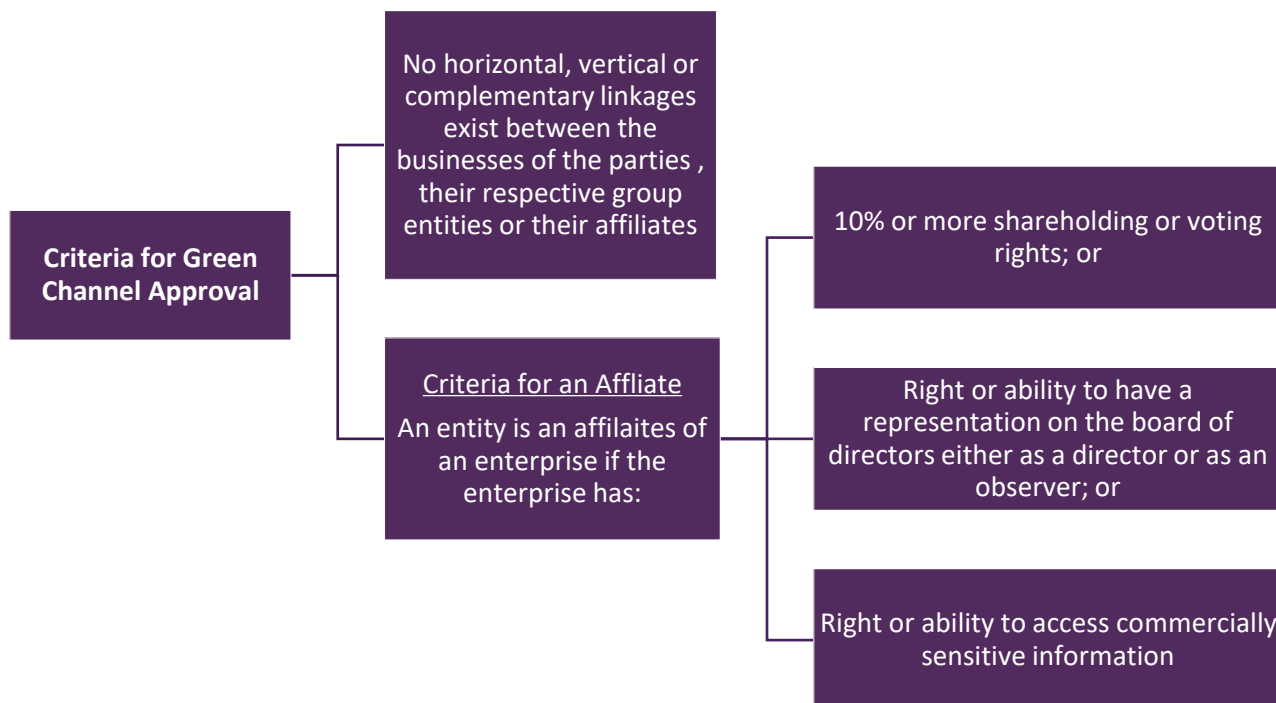
The CCI also clarified that no penalty for gun-jumping under Section 43A of the Competition Act will be levied on transactions which were partially consummated prior to September 10, 2024.

What are the criteria for the Green Channel route?

The Green Channel route, typically, allows parties to notify the CCI of a transaction, while dispensing with the waiting period for approval. The approval is deemed to be granted, on filing. A transaction will qualify for a filing under the Green Channel route if there are no horizontal overlaps, vertical linkages, or complementarity between the businesses of the acquirer and its group (including affiliates) *vis-a-vis* the target enterprise.

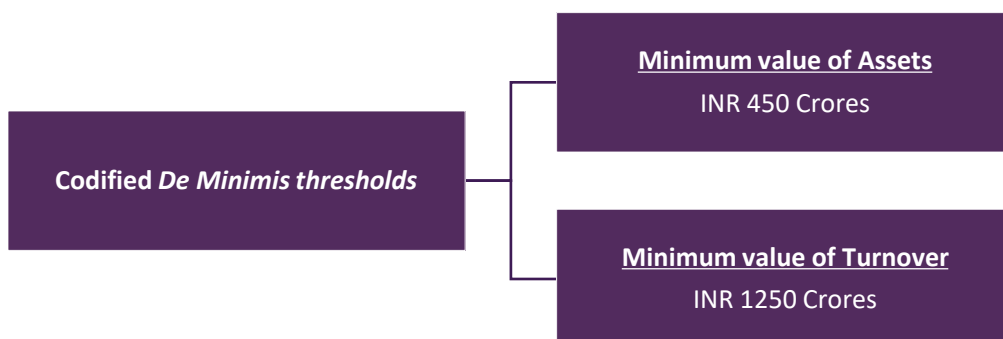
The MCA has notified Competition (Criteria of Combination) Rules, 2024 codifying the current criteria for the transactions notifiable under the Green Channel route. Though most part of the Green Channel Rules remain unchanged from the draft Rules published by CCI for public comments, the said rules have revised the criteria for an 'Affiliate'.

These Rules also affirm the CCI's existing practice that requires parties to map overlaps between the ultimate controlling person of the acquirer (and its affiliates) or its group *vis-a-vis* the target enterprise. The Indian merger control regime provides for an automatic / deemed approval of the CCI upon filing of the prescribed notice under Section 6(4) of the Competition Act. A snapshot of criteria for a transaction to qualify for an approval under Green Channel is provided below:



What are the codified *De Minimis* thresholds?

The MCA has notified the Competition (Minimum Value of Assets or Turnover) Rules, 2024 that codifies the already existing *De Minimis* thresholds as set out in MCA's notification dated March 07, 2024. Under the said rules, certain transactions falling within the stipulated thresholds are exempted from being notified to the CCI. These codified thresholds, in respect of target asset/target entity/merging entity/amalgamating entity, are stated below:



An exemption as per the *De Minimis* thresholds continues to be available if either the value of the assets or the turnover of the target company in India is below the prescribed threshold levels. However, the *De Minimis* exemption does not apply to transactions that qualify the DVT.

Which transactions have been exempted from notification to the CCI?

The Competition (Criteria for Exemption of Combinations) Rules, 2024 codifies categories of combinations that are exempt from being notified to the CCI, including exemptions for minority share acquisitions, intra-group transactions, bonus issues, stock splits and creeping acquisitions. Earlier, such exemptions were provided at schedule I to the Old Regulations which have been replaced by the new rules now. The transactions which stand exempted under the new rules are tabulated below:

Acquisition of shares in ordinary course of business (Rule 1 of the Schedule)

- Acquisition of unsubscribed shares by a registered underwriter or by a registered stockbroker, as the case maybe, not resulting in acquisition of 25% or more shares or voting rights of the target
- Acquisition of shares by a registered mutual fund, not resulting in acquisition of 10% or more shares or voting rights of the target.

Acquisition of shares/voting rights solely as an investment (Rule 2 of the Schedule)

- Exempted only if such acquisition does not entitle the acquirer to hold more than 25% of total shares or voting rights of the target or result in acquisition of control of the target.
- **Meaning of 'solely as an investment' (Explanation at Rule 2 of the Schedule)**

Acquisition of shares/voting rights shall be treated as 'solely as an investment' when –

- a) No right or ability is gained by the acquirer to have representation on the board of directors of the target either as a director or as an observer.
- b) No right or ability is gained by the acquirer to access commercially sensitive information of the target.
- c) No horizontal, vertical and complementary linkages exist between the acquirer, its group entities or its affiliates *vis-à-vis* the target, its downstream group entities or affiliate. In case such linkages exist, the acquisition should not lead to acquiring of 10% or more shares or voting rights of the target.

Acquisition of additional shares or voting rights (Rule 3, 4 & 5 of the Schedule)

- Acquisition of additional shares or voting rights of the target when the acquirer already holds not more than 25% of shares or voting rights (either prior or after the acquisition), exempted only when (Rule 3) –
 - a) No acquisition of control of the target occurs.
 - b) No right or ability is gained by the acquirer to have representation on the board of directors of the target, either as a director or as an observer.
 - c) No right or ability is gained by the acquirer to access commercially sensitive information of the target for the first time. However, if the acquirer already has a right or ability to have a representation on the board of directors as a director, then the parties are required to notify the CCI if any commercially sensitive information is being accessed for the first time.
 - d) In case there exist horizontal, vertical, or complementary linkages between the activities of the acquirer (including its group entities or affiliates) and the target (including its downstream group entities or affiliates), and if the incremental acquisition does not exceed 5% and the shareholding or voting rights of the acquirer does not result in an increase from less than 10% to 10% or more.

- Acquisition of additional shares or voting rights when the acquirer or its group entities already holds more than 25% of the shares or voting rights of the target, but does not hold more than 50%, either prior or after the acquisition. Provided such acquisition does not result in change in control of the target. (Rule 4)
- Acquisition of shares or voting rights when acquirer or its group entities holds more than 50% of shares or voting rights of the target and the acquisition does not result in change in control of the target. (Rule 5)

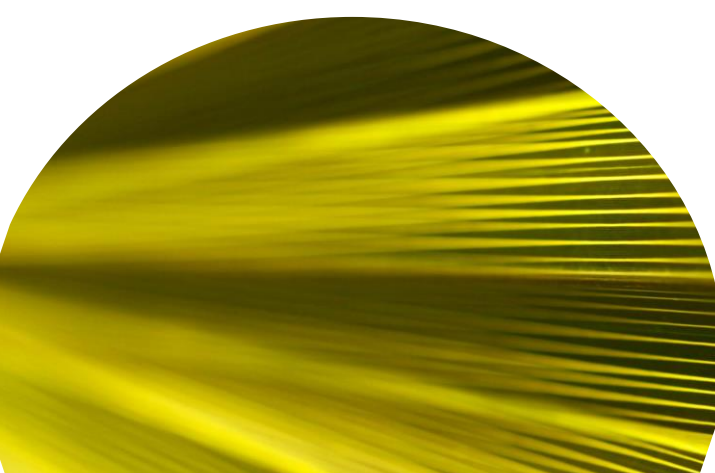
Acquisition of assets in ordinary course of business (Rule 6,7 & 9 of the Schedule)

- Those acquisition of assets in ordinary course of business are exempted that involves acquisition of stock-in-trade, raw materials, stores and spares, trade receivables or other similar current assets that do not constitute business (Rule 6)
- Acquisition of assets not related to business activity of the acquirer or made solely as an investment are exempted if it does not result in control of the target and the assets being acquired do not represent substantial business operations in a particular location, product or service of the target (Rule 7)
- Acquisition of assets within the same group (the acquirer and the target belong to the same group) are exempted if the acquisition does not result in change in control over assets being acquired. (Rule 9)

Other Exempted Transactions (Rule 8, 10, 11 & 12)

- Acquisition of shares pursuant to bonus issue, stock splits, consolidation of face value of shares, buy back of shares or rights issue of shares, not leading to change in control. (Rule 8)
- A merger or amalgamation of enterprises within the same group, not resulting in change in control. (Rule 10)
- Acquisition of shares, control, voting rights or assets approved by the CCI under Section 31 of the Competition Act. (Rule 11)
- Demerger and subsequent issuance of shares as consideration by the resulting company in the same proportion as held in the demerged company prior to the demerger, except in the cases for discharge of fractional shares. (Rule 12)

Previously, certain “routine” transactions, such as those made by certain categories of financial & other institutions, were required to be notified after their completion but were not subject to the standstill requirement. Now, Competition (Amendment) Act, 2023 exempts such “routine” transactions from notification obligations. These include any acquisition of shares through a share subscription, or a financing facility, made through a loan or investment agreement by the following entities: (i) public financial institutions; (ii) foreign portfolio investors; (iii) banks; and (iv) category I alternative investment funds (as defined under the Securities and Exchange Board of India (Alternative Investment Funds) Regulations, 2012).



What are the procedural changes which have been introduced in the new Merger Control Regime in India?

In addition to the changes above, the Combinations 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.

Revised merger review timelines

- As per Section 29(1B) of the Competition Act, the CCI is required to form a *prima facie* opinion within 30 days of receipt of notice under Section 6(2) that the proposed combination is likely to cause or has caused an appreciable adverse effect on competition in the relevant market in India. In case, CCI fails to form an opinion under Section 29(1B) within 30 days, then in terms of proviso to Section 31(1), the proposed combination shall be deemed to be approved by the CCI.
- The overall timelines stipulated under Section 6(2A) of the Competition Act within which the CCI has to complete its review has been reduced from 210 calendar days to 150 calendar days.
- Where CCI issues a 'defects notice' i.e. a notice highlighting incomplete documents, missing information, etc., the CCI's review clock will begin only when the parties address those defects. CCI has 10 working days from filing i.e., 2 calendar weeks to issue the defects notice.

Increase in filing fee – Regulation 11 of the Combinations Regulation

- The Combinations Regulations have significantly increased the filing fees for both Form I (short form) and Form II (long form).
- The filing fee for Form I have been increased from INR 2 million (~ USD 24,000) to INR 3 million (~ USD 36,000). The filing fees for a Form II have been increased from INR 6.5 million (~ USD 78,000) to INR 9 million (~ USD 107,000).

Refinement of the process for offering modifications

- Both the CCI and the transacting parties can now propose modifications to the transaction, at any time during Phase I and Phase II reviews.
- The Combination Regulations now provide a format to offer modifications / remedies to the CCI under Form IV, which requires the following information to be provided: (i) a summary of the modifications offered; (ii) details on how the modifications address the identified concerns; (iii) details of the divestment products / assets, if any; (iii) monitoring arrangements; and, (e) timelines for completion of a divestment, etc.

Void 'ab initio' transactions – Section 6(6) of the Competition Act

- If within one year from the date of the combination taking effect, the CCI finds (i) any Green Channel filing has failed to meet the stipulated requirements; or (ii) any information or declaration provided is materially incorrect or incomplete, the approval by the CCI will be declared void *ab initio* and the CCI can accordingly 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.

Key Contacts



Nusrat Hassan
Managing Partner, India
D: +91 9892742700
nusrat.hassan@dentonslinklegal.com



Milind Jha
Partner
D: +91 9958861811
milind.jha@dentonslinklegal.com



Abhishek Sharma
Partner
D: +91 9818438336
abhishek.sharma@dentonslinklegal.com



Aditya Bhardwaj
Partner
D: +91 8828339099
aditya.bhardwaj@dentonslinklegal.com



Ambuj Sonal
Partner
D: +91 8652060925
ambuj.sonal@dentonslinklegal.com



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