RESPONSE TO THE

PUBLIC CONSULTATION ON "THE COMPETITION COMMISSION OF INDIA (COMBINATIONS) REGULATION, 2023"

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ESYA centre

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Introduction

The Competition Commission of India (CCI) opened public consultations on the Draft (Combinations) Regulations, 2023 ("Draft Regulations") on September 05, 2023. The Esya Centre[1] is pleased to be afforded an opportunity to respond to the draft regulations.

Our response is divided into two parts. Part I provides a preliminary overview of our response, with Part II delving deeper into specific aspects of the regulations, such as timelines and confidentiality.

Part I - Preliminary Overview

The Draft Regulations clarify the procedure the CCI will follow in exercising its ex-ante merger control powers under the revised combinations framework introduced by the Competition (Amendment) Act, 2023. Overall, the Draft Regulations establish a solid foundation for a transparent and time-bound merger review in the process. In particular, the Draft Regulations reduce the overall timeline for assessing combinations from 210 days to 150 days and allow firms more opportunities to negotiate with the Commission.

The Draft Regulations also clarify important terms in the Competition (Amendment) Act, 2023. Most notably, the Regulations specify the elements that will be considered when determining whether a particular combination meets the deal value threshold for merger notification. They also establish a substantial business operations test, which will help international companies assess whether they need to file a merger notification with the CCI. However, the definitions, as currently drafted, are rather vague and yield much scope for interpretation for both the Commission and firms. Our response suggests how the definitions under the Regulations can be made more specific, based on a comparison with other jurisdictions.

The flexibility provided for on-market transactions is another positive feature of the Draft Regulations. Regulation 5(4) allows firms to finalize acquisitions resulting from open offers or purchasing shares or convertible securities on a recognized stock exchange, subject to time-bound notification to the CCI. Regulation 6 specifies the actions an acquirer can take vis a

1. The Esya Centre is a New Delhi-based technology policy think-tank. Its mission is to generate empirical research and inform thought leadership to catalyse new policy constructs for the future. It simultaneously aims to build domestic institutional capacities for generating ideas that enjoin the triad of people, innovation and value, consequently helping reimagine the public policy discourse in India. More information can be found at: www.esyacentre.org.

vis the target company, including receiving dividends and exercising voting rights in certain matters, allowing companies to maintain the value of their investments during the review period. While these relaxations are in step with practices in other jurisdictions, the Draft Regulations do not provide for the necessary safeguards. Moreover, certain terms used in the Regulation, such as “influence” exercised by an acquirer over a target, must be clarified through FAQs or guidance.

Part II - Detailed Analysis

1. Deal Value Thresholds (Regulation 4)

Transaction value as a threshold for combination notifications has been a part of the merger control regimes in various jurisdictions such as the USA, South Korea, Germany and Austria. Other jurisdictions like the UK[2] and Australia[3] are reforming their competition frameworks to include merger notification obligations based on transaction value thresholds. The CCI is participating in a global shift towards the utilisation of transaction values for mandatory notification, owing to the necessity to include strategic transactions in the digital sector under the merger control regime. The digital sector is characterised by low investment in assets and lower turnovers that do not accurately represent their market power. This market power is often based on the user base and arrangements regarding intangible assets like data and intellectual property. As a result strategic transactions in the digital sector often do not meet the traditional merger notification thresholds, allowing them to escape scrutiny by competition authorities.

Regulation 4(1) of the Draft Regulations deals with the interpretation of the term "value of transaction" prescribed under Section 5(d), which was introduced through the Competition (Amendment) Act 2023. Under Regulation 4(1), the transaction value is defined to include every valuable consideration, whether direct or indirect, immediate or deferred, cash or otherwise including but not limited to the considerations for transactions and arrangements specified under Clauses (a)-(e), supported by Explanations (a)-(g). Thus under Regulation 4(1) the transaction value is defined in an illustrative and inclusive manner and is evidently non-exhaustive.

Regulation 4(1)(a) includes within the transaction value, consideration for non-competition obligations imposed on persons other than the acquirer. However, it would be prudent to specify when these non-competition payments ought to be considered a part of the deal value, for example by evaluating if the arrangement was in conjunction with the relevant transaction or aligning in material terms and timing. Issuance of further clarifications, detailing the objectives and parameters regarding the methodology calculating the transaction value pursuant to Regulation 4(1)(a) would add to the coherence of the provision.

2. https://bills.parliament.uk/bills/3453

3. https://www.cliffordchance.com/briefings/2023/07/revealed--possible-thresholds-for-proposed-mandatory-merger-fili.html

The Draft Regulations attempt to address transactions which are structured as a series of steps or transactions that individually do not trigger the notification threshold, thereby avoiding the scrutiny of the CCI. Regulation 4(1)(b) along with Regulation 9(4), (5), provide guidance on these series of transactions that should be considered as a single combination and thus necessitate a notification. However, under Explanation (e) to Regulation 4(1) any acquisition by one of the parties or its group entity in the target enterprise, anytime during the two years before the relevant date is deemed to be an inter-connected transaction. This requirement can prove to be onerous for enterprises that may not have executed the acquisition as a precursor to or in the planning of the eventual combination. The inclusion of factors to be considered while determining whether acquisitions under Explanation (e) form a part of the relevant transaction would be advisable. The German merger notification regime[4] recommends a case-by-case assessment to ascertain if already held or previously exchanged company shares were materially connected with the relevant transaction. A similar approach can be adopted while evaluating if transactions and arrangements detailed under Explanation (e) to Regulation 4(1) ought to be included in the value of the transaction.

Furthermore, the Draft Regulations analyse a combination not only with respect to the past transactions between the parties but also require the inclusion of future transactions to calculate the transaction value. Regulation 4(1)(c) includes in the transaction value, incidental arrangements entered into as far as two years after the date on which the transaction comes into effect. This inclusion would be essential to guard against transactions that are divided into interconnected steps to avoid the notification obligation. However, the provision lacks any guiding criteria to evaluate whether the arrangements are independent business transactions or if they can be attributed to the relevant transaction.

Additionally, Regulation 4(1)(e) includes the consideration for the "occurrence or non-occurrence of any uncertain future event" as a part of the calculation of the value of the transaction. The vagueness of this provision heightens the lack of clarity on how to ascertain the value of uncertain and future events that may lead to future payments. It may lead to enterprises filing notifications as a precaution to avoid inadvertent non-compliance, considerably increasing the number of notifications placed before the CCI. The joint guidance published by the German and Austrian competition authorities has detailed explanations along with illustrations to demonstrate

4. https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?_blob=publicationFile&v=2

the calculation of deal values. For example, the guidance explains how future payments for uncertain events like turnover targets can be recorded and specified with the aid of valuation reports. These uncertainties regarding the inclusion of consideration for future events in the value of the transaction can be overcome if guidance is provided regarding the evaluation criteria.

Finally, the Draft Regulations through Explanation (g) to Regulation 4(1) require that if the precise value of the transaction cannot be established with reasonable certainty, then it should be deemed to exceed the threshold value under Section 5(d) of the Competition Act. This provision intends to filter out attempts by enterprises to evade notification requirements, however, read along with Regulation 4(1)(e) it can lead to a near default notification requirement. It is recommended that Explanation (g) to Regulation 4(1) is omitted, as it not only creates a presumption increasing the compliance burden on enterprises but also places a strain on the resources of the CCI with a large number of transactions falling under the purview of notified transactions.

Regulation 4(1) includes several important categories of transactions and arrangements that form a part of combinations, especially when digital markets are taken into consideration. However, the absence of explicit factors to be considered in calculating the transaction value may result in hardship for the enterprises involved in such transactions. Thus the Draft Regulations should be accompanied by guidance that provides detailed explanations and illustrations on the methodology for calculating the transaction value.

2. Substantial Business Operations in India (Regulation 4)

A local nexus test qualifies the transaction value threshold for merger notifications to ascertain if the target enterprise has any significant domestic presence. Regulation 4(2) of the Draft Regulation elaborates on the local nexus test required under the proviso to Section 5(d) introduced by the Competition (Amendment) Act 2023. The proviso limits the combination notification requirement to transactions where the target enterprise has substantial business operations in India. Regulation 4(2) provides that an enterprise is 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 the twelve months preceding the relevant date is 10% or more of its global users, subscribers customers or visitors, respectively; or

(b) its gross merchandise value for the twelve months preceding the relevant date is 10% or more of its global gross merchandise value; or

(c) its turnover during the preceding financial year, in India, is 10% or more of its global turnover derived from all the products and services.

The provision's language, while delineating the threshold of the User base of the target enterprise, is imprecise as the unqualified term "user" can include passive users who do not contribute to the market presence of the enterprise in India. Similarly, the term "visitors" cannot truly represent the activities of individuals visiting the web resources of a multinational enterprise that does not have any significant business operations based in India. The terms "subscriber" and "customer" must also be clearly defined to avoid any ambiguity in the compliance criteria. Furthermore, Regulation 4(2)(a) calculates this user threshold across a wide period, namely at any point in the 12 months preceding the relevant date of the transaction. This would signify that even if the threshold of 10% is crossed for a brief period, including a single day, it would trigger the notification obligation attached to the transaction. Thus, a more appropriate method to calculate the user base could involve "average active users" exceeding 10% of the global active user base in the designated 12 month period. This would also be in line with the practices followed in jurisdictions like Germany and Austria that apply different criteria regarding local nexus for different sectors, in the digital sector, they refer to monthly active users as an indicative factor[5].

Jurisdictions like Germany and South Korea have included additional sector-specific criteria in the local nexus test. Research investments in the form of activities like pursuing drug approvals or leasing research and development facilities are given weightage while applying the test to the Pharmaceutical Industry. The Government may consider providing additional guidance regarding specific industries that may not be accurately represented by the thresholds in Regulation 4(2).

Further, Section 5(d) also applies the transaction value threshold to cases where solely assets are being acquired and not the entire target enterprise. Whereas Regulation 4(2) is contingent on the proviso to Section 5(d) that refers to enterprises being acquired, taken control of or amalgamated, i.e. the target enterprise. It is unclear if the local nexus text when applied to asset acquisitions, requires the gross merchandise or turnover value to be calculated based on the relevant assets or the entire target enterprise. Thus,

5. https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2

the Draft Regulations must explicitly mention whether the Regulation 4(2) criteria would apply only to the acquired assets or the whole target enterprise.

3. Open Offers and Open Market purchases (Regulation 6)

India's merger control regime is suspensory in nature, which means that companies cannot finalise or consummate combinations notified to the CCI under the Act. This can only be done after the CCI approves the notified merger. However, such a "standstill obligation" on combinations is not feasible when transactions are confirmed instantaneously, such as mergers and amalgamations resulting from purchasing shares on a stock change or public open offer. The Competition Law Review Committee's report notes that standstill obligations hamper the viability of acquisitions via public bids, and that the dilution of standstill obligations is required in such cases.[6] The International Competition Network's Implementation Handbook for Merger Control similarly states that standstill obligations are unsuited to non-consensual takeovers, such as hostile takeovers, where the acquired party has little incentive to cooperate and share information.[7]

In keeping with the above, the Competition (Amendment) Act, 2023 introduced s. 6A, which allows parties to finalize the acquisition of shares or securities convertible intro securities through a series of transactions on a regulated stock exchange or an open offer without waiting for the CCI's approval. However, the acquisition must be notified to the CCI, and the acquirer must not exercise any ownership or beneficial rights from such shares or securities pending the CCI's approval.[8]

The Draft (Combination) Regulations further clarify the process for derogation from the standstill obligation in cases of public bids. Regulation 5(4) states such an acquisition must be notified to the CCI within 30 days from the date of the first acquisition of shares or securities, along with a declaration of compliance with s. 6(A) of the Act and the requisite fee. Regulation 6 clarifies the ownership and beneficial rights an acquirer can enjoy while approval from the CCI is pending. These include:

> (a) availing economic benefits such as dividend or any other distribution, subscription to rights issue, bonus shares, stock-splits and buy-back of securities;

6. https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf

7. https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_NPImplementationHB.pdf

8. https://prsindia.org/files/bills_acts/acts_parliament/2023/The%20Competition%20(Amendment)%20Act,%202023.pdf

(b) disposing the shares or securities acquired;

(c) exercising voting rights in matters relating to liquidation and/or insolvency proceedings:

Allowing an acquirer to exercise such rights ensures that they can take reasonable actions to maintain the value of their investment while the CCI reviews the transactions. Other jurisdictions, such as the EU and Brazil, also allow acquirers to exercise similar rights before final approval of the combination.[9] For instance, Article 7(2) of the EU Merger Regulations provides that the acquirer may exercise voting rights in the attached securities to maintain the full value of investments.[10] However, such voting rights can only be exercised after the acquirer has obtained a derogation from the European Commission under Article 7(3) of the EU Merger Regulations. Article 7(3) requires the Commission to pass a reasoned order on the derogation application, considering the potential impact of the derogation on parties to the transaction, third parties, and overall competition in the market.[11] As such, the exercise of voting rights by an acquirer is subject to review and approval by the Commission, which has granted derogation in exceptional circumstances, such as severe financial duress of the target company.[12] Article 109 of Brazil's Internal Regulations for the Administrative Council of Economic Defence (CADE), also requires the acquirer to approve

9. https://cdn.cade.gov.br/portal-ingles/topics/legislation/internal-regulation/Internal%20Regulation%20of%20the%20Administrative%20Council%20for%20Economic%20Defese–RICADE.pdf

10. Article 7(2) of the EU Merger Regulation:
Paragraph 1 shall not prevent the implementation of a public bid or of a series of transactions in securities including those convertible into other securities admitted to trading on a market such as a stock exchange, by which control within the meaning of Article 3 is acquired from various sellers, provided that:
(a) the concentration is notified to the Commission pursuant to Article 4 without delay; and
(b) the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of its investments based on a derogation granted by the Commission under paragraph 3.

11. Article 7(3), EU Merger Control Regulations:
The Commission may, on request, grant a derogation from the obligations imposed in paragraphs 1 or 2. The request to grant a derogation must be reasoned. In deciding on the request, the Commission shall take into account inter alia the effects of the suspension on one or more undertakings concerned by the concentration or on a third party and the threat to competition posed by the concentration. Such a dero- gation may be made subject to conditions and obligations in order to ensure conditions of effective competition. A deroga- tion may be applied for and granted at any time, be it before notification or after the transaction.

12. https://www.oecd.org/daf/competition/Merger-control-in-the-time-of-COVID-19.pdf

the competition authority's approval before exercising rights in the acquired shares or securities to protect the full investment amount.[13]

Neither s. 6A of the Act or Regulation 6 of the Draft Combination Regulations provides for a review of an acquirer's permitted actions before approval. It is entirely plausible that the acquirer's exercise of voting rights or disposal of shares pre-approval could have material implications for third parties and overall competition. In order to prevent such situations, the Regulations should provide for pre-approval of an acquirer's exercise of voting rights or disposal of shares by the CCI. At the same time, the Regulations should also require the CCI to decide expeditiously on such applications, as an elongated approval process would defeat the purpose of the derogation. Indeed, the European Commission endeavors to resolve derogation requests at the earliest and has decided on derogation applications, such as in the Santander/ Radford-Bingley and Credit Suisse-UBS mergers, within a couple of days.[14] While US merger control law does not allow derogations from notification for open offers and purchase of shares on a stock exchange, it requires the FTC or Department of Justice to decide on merger notifications in 15 days, which is half the period prescribed for initial merger review in other cases.[15] In the same vein, the CCI must endeavor to decide on a derogation application as soon as possible but not later than ten days from the date of the application. It must also publish its application on derogation applications, specifying reasons for its decisions allowing or denying the same.

The proviso to regulation 6 prevents the acquirer or its affiliates from exercising direct or indirect influence over the target entity. However, the Regulations do not shed light on what actions would be considered as exercising influence over the target. While the Competition Amendment Act 2023 introduced "material influence" as the minimum threshold for exercising

13. Without prejudice of the provision of the main section of this article, the exercise of the political rights relative to the interest purchased by means of the public offer shall be forbidden until the approval of the transaction by CADE.
§ 2. CADE may, at the parties' request, grant an authorization for the exercise of the rights referred to by § 1, in cases where such exercise is required for the protection of the full investment amount.

14. https://www.oecd.org/daf/competition/Merger-control-in-the-time-of-COVID-19.pdf; https://ec.europa.eu/commission/presscorner/detail/en/IP_23_2889

15. https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers/premerger-notification-merger-review-process

control over an entity, it did not define the term.[16] The failure to define "influence" in clear and precise terms will create uncertainty for companies looking to effect mergers and amalgamations via public bids, especially since the CCI's jurisprudence sets a low threshold for "material influence." For instance, in the *Meru-Ola* case (Case No. 25, 26, 27 & 28 of 2018), the CCI held that Softbank, despite only being a minority shareholder in both Uber and Ola, could exercise material influence and, hence, control over them.[17]

Other jurisdictions that rely on influence as a determinant of control have issued documentation explaining the term and identifying actions that would fulfil its requirements. For instance, the European Commission published a Consolidated Jurisdictional Notice under its Merger Regulations to specify what control and influence mean and how they may be acquired.[18] In keeping with such best practices, the Regulations should be accompanied by additional guidance that explains what influence means and identifies the actions that would constitute exercising influence over the target company.

4. Consultation with relevant Ministries and Departments

Mergers may often be governed or protected by bilateral arrangements between nations. In addition, a merger may take place as a response to an industrial promotion or technology development scheme put out by the Government. As such, the CCI may consider including a provision that requires it to consult with ministries such as the Ministry of Commerce and Industry, the Ministry for Electronics and Information Technology, and the Ministry of External Affairs when undertaking decisions regarding combinations.

16. (a) "control" means the ability to **exercise material influence**, in any manner whatsoever, over the management or affairs or strategic commercial decisions by—
(i) one or more enterprises, either jointly or singly, over another enterprise or group; or
(ii) one or more groups, either jointly or singly, over another group or enterprise;
(b) "group" means two or more enterprises where one enterprise is directly or indirectly, in a position to—
(i) exercise twenty-six per cent. or such other higher percentage as may be prescribed, of the voting rights in the other enterprise; or
(ii) appoint more than fifty per cent. of the members of the board of directors in the other enterprise; or
(iii) control the management or affairs of the other enterprise;

17. https://www.cci.gov.in/images/antitrustorder/en/252017-262017-272017-and-28201716523321 38.pdf

18. https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:095:0001:0048:EN:PDF

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