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Draft Rules on Transactions Exempt from Indian Merger Control

INTRODUCTION

On 11 March 2024, the Ministry of Corporate Affairs, Government of India (**MCA**) released draft rules for public comments on (i) transactions exempt from notification requirements, (ii) the *de minimis* exemption, and (iii) green channel transactions. These are discussed in detail below.

EXEMPT TRANSACTIONS

Schedule I to the *Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011* (**Combination Regulations**) identifies certain transactions which are “ordinarily not likely to cause an appreciable adverse effect on competition (**AAEC**) in India”. Effectively, such transactions, which include minority acquisitions, creeping acquisitions, intra-group transactions, are not required to be reported to the Competition Commission of India (**CCI**) for its approval.

As discussed in our update [here](#), the CCI proposes to replace the Combination Regulations with the *Competition Commission of India (Combinations) Regulations, 2023* (**Draft Combination Regulations**). Since the Competition (Amendment) Act, 2023 (**Amendment Act**) no longer allows the CCI to identify transactions which are unlikely to cause AAEC, the Draft Combination Regulations do not identify such transactions. Under the Amendment Act, the Central Government will now identify exempt transactions through rules. Accordingly, the MCA has issued the *Draft Competition Commission of India (Exempted Combinations) Rules, 2024* (**Exemption Rules**). Salient features of the Exemption Rules are set out below.

1. **Jurisdiction of the CCI:** Identified transactions under the Exemption Rules are formally exempt from notification requirements. Therefore, the CCI cannot exercise jurisdiction over them. In contrast, the CCI currently has jurisdiction to review transactions identified under the Combination Regulations. Although, as a practical matter, the CCI typically did not assume jurisdiction over such combinations.

2. **Transactions in the Ordinary Course of Business:** Item #1 of the Schedule to the Exemption Rules (**Schedule**) proposes to exempt acquisitions of shares made in the ordinary course of business from filing requirements.

The explanation to item #1 of the Schedule states that the following transactions shall be “*transactions in the ordinary course of business*”:

- an acquisition of shares by an underwriter if the total shareholding held by the underwriter is less than 25%;
- an acquisition of shares by a stockbroker if the total shareholding held by the stockbroker is less than 25%; and
- an acquisition of shares by a mutual fund if the total shareholding held by the mutual fund is less than 10%.

In this respect, it is not out of place to mention that as per settled principles of interpretation of statutes (and by extension, delegated legislations), an explanation cannot limit the scope of the main provision. Therefore, it could be argued that (i) aforementioned transactions above the specified thresholds, and/or (ii) other categories of transactions, still qualify as being “*in the ordinary course of business*.”

For comparison, the Combination Regulations exempt all share acquisitions by a stockbroker or underwriter in the ordinary course of their business (potentially without any shareholding ceiling) from reporting obligations. For completeness, a specific exemption regarding mutual funds is not present in the Combination Regulations. Generally, acquisitions by mutual funds largely fall under the broad umbrella of exemptions afforded to share acquisitions in the ordinary course of business.

3. **Transactions Made Solely as an Investment:** Item #2 of the Schedule classifies a <25% shareholding acquisition as “solely as an investment” if: (i) the

acquirer cannot appoint any director or observer on the target's board, (ii) the acquirer does not gain the right or ability to access "commercially sensitive information" of the target, and (iii) the business activities of the acquirer group (including its affiliates¹) do not exhibit any horizontal, vertical or complementary overlaps with those of the target. Importantly, condition #(iii) will not be applicable where the acquirer will hold <10% shareholding pursuant to the transaction.

Pertinently, a transaction made "solely as an investment" cannot result in acquisition of control. While the Combination Regulations also exempt transactions made solely as an investment not involving acquisition of control, the Exemption Rules greatly clarify the scope of the term "solely as an investment", which has previously been the bone of contention in many merger control matters.

4. **Creeping Acquisitions:** Item #3 of the Schedule exempts the acquisition of further shares or voting rights, where the acquirer already exercises certain shareholding / voting rights in the target and will continue to hold <25% shares or voting rights post the acquisition. A prerequisite for this exemption is that the transaction cannot result in "acquisition of control".

The acquisition also remains unavailable if the acquirer group (including its affiliates) is engaged in any business activity which exhibits horizontal, vertical, or complementary overlaps with the activities of the target. However, this disqualification does not apply if the acquisition of shares (i) is less than 5% (either as a single acquisition or as a "series of smaller acquisitions"), and (ii) does not result in the acquirer moving from <10% shareholding in the target to >10% shareholding. Interestingly, the Exemption Rules do not provide any

guidance on the timeframe or intent to identify a "series of smaller acquisitions".

Items #4 and #5 of the Schedule retain the current exemptions for creeping acquisitions between, (i) 25% and 50%, and (ii) above 50%; as long as the acquisition does not result in change in control of the target. Compared to the exemption in Item #2 of the Schedule, the disqualifier for Items #4 and #5 has been modified from "acquisition of control" to "change in control".

5. **Asset Acquisitions:** Items #6 and #7 of the Schedule also retain the current exemptions for the acquisition of (i) current assets in the ordinary course of business, (ii) assets not related to the acquirer's business activities, and (iii) assets solely as an investment, if such acquisition does not result in acquisition of control in the seller.

Item #9 of the Schedule exempts asset acquisitions if there is no change in control *vis-à-vis* the asset. This is a new addition to the exemptions currently provided in the Combination Regulations.

6. **Bonus Issues, Stock Splits, Buybacks and Rights Issues:** Item #8 of the Schedule continues to exempt acquisitions of shares (without the acquisition of control) through bonus issues, stock splits, buybacks, rights issues, etc.
7. **Intra-Group Transactions:** While a specific exemption for intra-group acquisitions does not find a place in the Exemption Rules, intra-group mergers continue to be exempt under Item #10 of the Schedule. The scope of the existing intragroup acquisition exemptions, as contained in the Combination Regulations, have been retained in the Exemption Rules through various exemptions for share acquisitions.
8. **Merger Control Remedies:** Item #11 of the Schedule continues to exempt transactions undertaken pursuant to a

¹ Under the Exemption Rules, an entity will be considered to be an affiliate of an enterprise if that enterprise has, (a) 10% or more of the shareholding or voting rights of the entity; or (b) right or ability to have a representation on the

board of directors of the entity either as a director or as an observer; or (c) right or ability to access commercially sensitive information of the entity.

divestment order / a remedies package by the CCI.

9. **Spin-Offs or Demergers:** Item #12 of the Schedule, as an exciting addition, proposes to exempt spin-off transactions or demergers from notification requirements. The language in the Exemption Rules may cause some confusion on the application of the exemption for acquisitions of shares *vis-a-vis* fractional shareholding.

DE MINIMIS EXEMPTION

As available [here](#), the MCA has recently revised the small target / *de minimis* thresholds exempting transactions where a target's assets in India are equal to or less than INR 450 crore (USD ~54 million), or its turnover attributable to India is less than or equal to INR 1,250 crore (USD ~151 million). This exemption has been captured in the *Draft Competition Commission of India (De Minimis) Rules 2024 (De Minimis Rules)* in accordance with the Amendment Act. The exemption under the *De Minimis* Rules is consistent with the current regime.

GREEN CHANNEL TRANSACTIONS

The Combination Regulations set out criteria identifying transactions that are eligible for a filing under the green channel route. Transactions notified under the green channel route are deemed approved

immediately upon filing the merger notice with the CCI. This criterion is excluded from the Draft Combination Regulations, and in accordance with the Amendment Act, is now captured in the *Draft Competition Commission of India (Green Channel) Rules 2024 (Green Channel Rules)*. The suggested criteria are consistent with the current prerequisites for a green channel notification.

COMMENT

The revisions to the De Minimis Rules and the Green Channel Rules primarily involve organizational changes necessary for enforcing the Amendment Act. While the Exemption Rules also share this objective, they propose to expand exemption criteria and provide some clarity on contentious issues which will minimise ambiguous interpretation that previously led to some differing views. However, despite an attempt to streamline exemptions, certain stakeholders might complain of over regulation particularly underwriters, stockbrokers, and mutual funds should the finalised rules suggest that their acquisitions above the identified thresholds shareholding percentages are potentially notifiable.

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