M&A AND PE IMPACT DUE TO THE CHANGES TO INDIA'S COMPETITION LAW REGIME

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The Competition (Amendment) Act, 2023 (the "**2023 Amendment**") was introduced on April 11, 2023, to amend the Competition Act, 2002 (the "**Act**") and, *inter alia*, establish a new threshold for assessing transactions, known as the Deal Value Threshold (the "**DV Threshold**"). On September 10, 2024 (the "**Effective Date**"), India's Ministry of Corporate Affairs (the "**MCA**") and the Competition Commission of India (the "**CCI**") gave effect to the DV Threshold, which is particularly relevant for transactions in the digital markets, and notified the following: (i) the CCI (Combinations) Regulations, 2024 (the "**Combination Regulations**"); (ii) the Competition (Minimum Value of Assets or Turnover) Rules, 2024 (the "***De Minimis* Threshold Rules**"); (iii) the Competition (Criteria of Combination) Rules, 2024 (the "**Green Channel Rules**"); (iv) the Competition (Criteria for Exemption of Combinations) Rules, 2024 (the "**Exemption Rules**"); and (v) an FAQ on the Combination Regulations. In addition, certain provisions of the 2023 Amendment were notified, and the CCI issued a general statement on the Combination Regulations giving clarifications and addressing feedback received during the review process.

This update highlights the key changes introduced by the CCI and their impact on transactions.

Key changes

Transactions involving acquisitions of control, shares, voting rights, or assets of a target entity, mergers or amalgamations (a "**Transaction**") have to be assessed under the Act as potential "combinations." Once classified as such, the parties to the Transaction are required to issue a notification to the CCI (the "**Notification Requirement**") for its clearance against any potential appreciable adverse effect on competition. In this context, several significant changes have been introduced.

(i) DV Threshold: Before the Effective Date, Transactions were assessed as "combinations" and triggered the Notification Requirement if they exceeded the assets and turnover thresholds stipulated under the Act. In assessing this, the assets and turnover of the entities involved in the Transaction, such as the acquirer, the target, the group of the target after acquisition, and the entity remaining after merger (as applicable), were considered. However, the Notification Requirement did not apply if the target was subject to the *de minimis* exemption (*as discussed below*), which is commonly referred to as the "small target exemption."

Now, an additional DV Threshold has been introduced. After the Effective Date, if the value of the Transaction itself exceeds INR 20 billion (~US$240 million) and the target entity, or the entity involved in the merger or amalgamation, has "substantial business operations in India" (the "**SBO Threshold**"), it will be considered a combination and

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must be notified to the CCI. Further, the *De Minimis* Threshold Rules do not apply to Transactions that breach the DV Threshold. Therefore, Transactions which were previously exempt because they did not breach the assets and turnover thresholds, or met the small target exemption, will now be subject to the Notification Requirement if the size of the Transaction exceeds INR 20 billion (~US$240 million) and they have "substantial business operations in India." This change is particularly relevant to companies operating in the digital and technology sectors, where companies often have minimal assets but significant data and market power.

The manner in which to compute and assess the value of the Transaction and the SBO Threshold is set out below:

(a) *Value of Transaction*

The "value" of a transaction includes every valuable consideration, whether direct or indirect, immediate, or deferred, in cash or otherwise. This includes consideration:

(A) agreed separately for covenants, undertakings, obligations, or restrictions imposed on seller or others. In this regard, the CCI has clarified that if no separate consideration has been ascribed to the non-compete covenants, or if such consideration is already included in the overall consideration, nothing further needs to be added to the value of Transaction;

(B) for all inter-connected steps and transactions;

(C) payable within two (2) years from the effective date for arrangements related to or incidental to the Transaction, such as technology assistance, licensing of intellectual property, usage rights for products, service or facility, supply agreements, or branding rights;

(D) for call options and shares to be acquired through exercise of such options. In this regard, the CCI has clarified that where the option exercise price is pre-determined, such price will be considered. However, if the exercise price is contingent, then a best estimate will be considered; and

(E) payable, as per best estimates, contingent on future outcomes specified in the Transaction documents. In this regard, the best estimate will be the estimate of the board of directors (the "**Board**") or the approving authority of the person obligated to file the notice. However, if the best estimate has not been recorded by them, then the "maximum payable amount" will be treated as the best estimate. The manner in which to compute this maximum payable amount has not been specified in the Combination Regulations. That said, it appears that in case a Transaction contemplates contingent payments or adjustments to purchase price based on future

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performance, the Board and the approving authority must now make a reasonable best estimate at the time of entering the Transaction considering all reasonable predictions of future outcomes. However, if such a "best estimate" has not been recorded by the foregoing parties, then the law will likely consider the largest possible payment under the most favourable future outcomes.

Further, in the calculation of the "value": (I) future payments cannot be discounted at the present value; (II) the value should include consideration for any acquisition by a party or its group entity in the target within two (2) years prior to the relevant date (i.e., the date on which the Board accords its approval to the proposal of merger or amalgamation, or the date of execution of agreement or such other document for acquisition, the "**Relevant Date**"); (III) Transaction costs, such as legal, investment banking, or regulatory fees, are to be excluded; and (IV) in case of Transactions where the true and complete value is not recorded in the Transaction documents, the value will be as considered by the Board or any approving authority of the person obligated to file the notice, and if the value cannot be reasonably determined by the Board or the approving authority, the value may be considered as exceeding the DV Threshold. Therefore, the new rules prescribe that if the deal value is uncertain or cannot be precisely determined, the parties should assume that the DV Threshold will be breached and file a notice with the CCI.

(b) SBO Threshold

For a digital services provider, the SBO Threshold will be met if: (A) 10% or more of its global business or end users are located in India; (B) its gross merchandise value ("**GMV**") for the period of twelve (12) months before the Relevant Date in India is 10% or more of its global GMV; or (C) its turnover during the preceding financial year in India is 10% or more of its global turnover derived from all products and services. Further, the proportion of business users or end users is to be computed on the basis of the average number of such users for a period of twelve (12) months preceding the Relevant Date. These changes will bring global technology transactions to the CCI's scrutiny if any of the foregoing SBO Thresholds are met.

For a non-digital entity, the SBO Threshold will be met if: (I) its GMV value for the period of twelve (12) months before the Relevant Date in India is 10% or more of its global GMV and more than INR 5 billion (~US$59,700,000); or (II) its turnover during the preceding financial year in India is 10% or more of its global turnover derived from all products and services and more than INR 5 billion (~US$59,700,000). The additional threshold of INR 5 billion for non-digital entities will ensure that only entities with significant operations in India become subject to the DV Threshold.

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The CCI has also imposed a gun-jumping penalty of up to 1% of the deal value of the Transaction or up to 1% of the total assets or turnover, whichever is higher. Therefore, if parties to the Transaction proceed to consummate an otherwise notifiable Transaction without obtaining the CCI's prior approval, they can be subjected to the foregoing penalties.

(c) *Transition Provisions*

The Notification Requirement will apply to a Transaction that comes into effect, wholly or partly, on or after the Effective Date. Accordingly, the Notification Requirement will not apply to Transactions that have been consummated prior to the Effective Date. However, Transactions that have been signed (i.e., agreements or other documents executed prior to the Effective Date) but not consummated on the Effective Date, will have to immediately be reassessed for the Notification Requirement and must adhere to the standstill obligations (i.e., no implementation of the Transaction before receiving the CCI's approval) to avoid gun-jumping penalties. Transactions that have been signed and partly consummated as of the Effective Date will have to immediately be reassessed for the Notification Requirement for the pending portions. That said, actions for partial consummation before the Effective Date will not be penalised for gun-jumping.

(ii) Definition of control: In the context of a Transaction involving acquisition of control, the term "control" has been redefined to mean the ability to exercise "material influence," in any manner whatsoever, over the management, affairs, or strategic commercial decisions (the "**Material Influence Threshold**") of the target. Originally, the definition of "control" was inclusive in its ambit, as well as silent on the standard to be used to assess its existence.

The Material Influence Threshold is the lowest level of control, falling below *de facto* control (when someone holds less than 50% of the voting rights but still controls most of the votes cast at meetings) and *de jure* control (when someone holds more than 50% of the voting rights). To establish control, particularly at the Material Influence Threshold, factors such as shareholding, statutory or contractual rights (e.g., veto or consultation rights), and participation in management are key. Other indicators include the status and expertise of the person or entity, Board representation, and structural or financial arrangements. Control can also take forms like negative control (blocking special resolutions) or operational control (through commercial agreements). Control is classified as negative, positive, sole, or joint, with varying degrees recognized in competition law. While the CCI had already, in its prior rulings, begun to adopt the Material Influence Threshold, the formal insertion in the Act should make the combinations regime and the Notification Requirement more predictable for investors and entities. Nevertheless, a further clarification may be necessary on what will qualify as "material influence," and courts may have to step in. Perhaps, the CCI should have identified a set of rights that will not constitute material influence.

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(iii) Exempted combinations:

To sum up the position, after the notified changes, a Transaction triggers the Notification Requirement, if it breaches the asset, turnover, or DV Thresholds. However, if the Transaction gets covered by the small target exemption under *De minimis* Threshold Rules, then the Notification Requirement does not apply, except if the DV Thresholds are breached. Notwithstanding the foregoing, if a Transaction gets covered under the Exemption Rules, then the Notification Requirement does not apply.

(a) *De minimis* Threshold Rules

The 2023 Amendment expressly references the *De minimis* Threshold Rules in the Act, and these rules are aligned with the March 7, 2024 notification of the MCA (which exempted transactions where the target had assets below INR 4.5 billion (~US$ 53,700,000) or turnover below INR 12.5 billion (~US$ 149,000,000) in India). This will ensure greater stability for parties relying on an exemption.

(b) Exemption Rules

The Exemption Rules replace Schedule I of the erstwhile CCI (Procedure in regard to the transaction of Business relating to Combinations) Regulations, 2011. As per the Exemption Rules, the following Transactions, *inter alia*, are exempt:

(A) Acquisitions in the ordinary course of business by underwriters, stockbrokers, and mutual funds (subject to specified thresholds), and those of stock-in-trade, raw materials, trade receivables, or other similar current assets that do not constitute business. As the availability of this exemption has been narrowed, minority investors will not be able to avail of this exemption.

(B) Investment acquisitions if the acquirer does not, after the acquisition, hold (directly or indirectly) more than 25% of the shares or voting rights of the target entity (as a special resolution under the (Indian) Companies Act, 2013, requires a 75% majority and a shareholder with more than 25% voting rights will be able to veto such a resolution), or gain control of the target entity. Investment acquisitions mean acquisitions where the acquirer does not gain by virtue of the acquisition Board representation either as a director or observer or access to commercially sensitive information ("**CSI**") (not yet defined), in any enterprise. However, there should not exist horizontal, vertical, or complementary relations between the acquirer (including its group entities and affiliates) and the target (including its downstream group entities and affiliates), and if there is such an overlap, then the exemption will apply only if the acquisition does not

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result in the acquirer holding 10% or more shares or voting rights post-acquisition.

In relation to the definition of "control," it has been clarified that when a private equity investor invests as a minority shareholder, the CCI may not regard such an investment as a purely passive one if the minority shareholder gets Board representation or information rights. The CCI may view these rights as conferring control, whether intended or not. Moreover, even if there is no change of control, such investments will also not be subject to any exemptions and may, therefore, trigger the Notification Requirements, which can increase costs and lengthen timelines. The CCI's intention is clear, i.e., it seeks to prevent the sharing of CSI *inter se* between funds and their investee companies.

(C) Incremental acquisitions where the acquirer or its group entities do not hold more than 25% of the shares or voting rights prior to or after the acquisition. However, the acquisition should not result in the acquisition of control, and after the acquisition, the acquirer or group entities should not, for the first time, gain Board representation or access to CSI. Further, in case of horizontal, vertical, or complimentary overlaps, the incremental shareholding or voting rights acquired by a single acquisition or a series of smaller inter-connected acquisitions should not exceed 5%, and such acquisition should not result in the shareholding or voting rights of the acquirer or group entities increasing from less than 10% to 10% or more.

(D) In a scenario where there is no change of control, the following are exempted: (I) additional acquisitions where the acquirer or group entities hold more than 25% (prior to acquisition) but less than 50% (prior or after acquisition) of the shares or voting rights; (II) additional acquisitions where the acquirer or group entities hold more than 50% of the shares or voting rights; (III) acquisitions through bonus issues, stock splits, buyback of shares, etc.; and (IV) intra-group asset acquisitions, mergers and amalgamations.

(E) Demerger and issuance of shares by the resulting company in consideration of the demerger, either to the demerged company or to the shareholders of the demerged company. The exemption simplifies the process for companies seeking to demerge a division or unit into a separate entity with either direct or mirrored shareholding in the resulting company because reorganizations, typically, do not raise any anti-competitive concerns.

(iv) Definition of "affiliate": The definition of "affiliate" has been revised to mean entities: (a) holding 10% or more of the shareholding or voting rights; (b) having the right or ability to access CSI; or (c) having the right or ability to have a representation on the

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Board either as a director or an observer. Earlier, the CSI criterion was not there. The revised definition is relevant to both the Green Channel Rules and the Exemption Rules.

In order to avail of the benefit of the Green Channel Rules, parties along with their group entities and affiliates must not produce or provide similar, identical, or substitutable products or services. Additionally, they must not be involved in activities that are at different stages or levels of production or that are complementary to each other. If these criteria are not satisfied, the combination will not receive deemed approval under the Green Channel Rules. For instance, if Company A is acquiring Company B, the overlaps assessment will need to evaluate the relationship between Company A (including its ultimate controlling person, group entities, and affiliates such as a minority investor with access to CSI) and Company B (including its downstream group entities and affiliates). The revised definition means that the overlaps assessment must now cover a wider range of entities, potentially including those without direct influence over the involved parties. The broader scope will ensure a more thorough evaluation of potential overlaps but will also increase the due diligence burden on entities.

If the CCI finds that the combination does not fulfil the criteria, or the information or declarations provided are materially incorrect or incomplete, the automatic approval shall be void *ab initio*, and the CCI may then issue any orders it considers fit. However, no such orders will be issued without first providing the parties involved an opportunity to be heard. Moreover, the CCI will not initiate any inquiry more than one (1) year after the combination has taken effect. Additionally, the acquirer or other parties to the combination may submit a further notice in Form I within thirty (30) days of the CCI's order to avoid penalties.

(v) Miscellaneous: The previous rule allowed two hundred and ten (210) days for a combination to take effect after notifying the CCI. This has now been shortened to one hundred and fifty (150) days or until the CCI issues an order of approval, whichever happens first. Further, the CCI must now give a *prima facie* opinion on a combination within thirty (30) calendar days, which was earlier thirty (30) working days. If no opinion is issued within this timeframe, the combination will be deemed to be automatically approved. Furthermore, the filing fees for Form I (short form notification) and Form II (a more detailed form) have been increased. Form I fees have risen from INR 2 million to INR 3 million (~US$ 35,800), and Form II fees have gone up from INR 6.5 million to INR 9 million (~US$ 107,400).

Conclusion

Although many of the changes introduced by the MCA and the CCI are welcome, in our view, certain amendments such as the expanded definition of control, the introduction of the DV Threshold, and the restrictions in the Exemption Rules, are likely to increase the costs and lengthen the timelines for investors, as it will be necessary to undertake a detailed analysis of both, quantitative and qualitative factors. Going forward, PE investors must

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carefully negotiate agreements and ensure that the rights sought by them do not unintentionally act as a trigger of the Act and the Combination Regulations.

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