

Reply to the Attention of Casey Halladay
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Our File No. 69459
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VIA EMAIL TO <cci-chairman@nic.in> AND <combination@cci.gov.in>

Ashok Chawla
Chairperson
Competition Commission of India
9th Floor, Office Block - 1
Kidwai Nagar (East)
New Delhi 110023, India

Dear Chairperson Chawla:

**Re: Response to Invitation for Public Comments on the Proposed
Amendment to the Combination Regulations**

We write on behalf of the Merger Streamlining Group (“MSG” or the “Group”) in response to the invitation for public comments initiated by the Competition Commission of India (“CCI”) to provide input on the proposed *The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Third Amendment Regulations, 2019* (the “Proposed Regulations”).¹

The MSG’s membership consists of multinational firms with a common interest in promoting the efficient and effective review of international merger transactions.² It works with competition agencies and governments to help implement international best practices in merger control, with particular focus on the *Recommended Practices for Merger Notification Procedures* (“Recommended Practices”)³ of the International Competition Network (“ICN”). As you know, the CCI is a longstanding member of the ICN, and indeed a former Co-Chair of the ICN’s Mergers Working Group.

The MSG was founded in 2001. Its work to date has included two major surveys on compliance with the *Recommended Practices*, as well as submissions to the European

¹ See <https://www.cci.gov.in/sites/default/files/whats_newdocument/Combination-Regulation-Market-Purchases-For-Public-Comments.pdf>.

² The current members of the MSG include Accenture, BHP, Bosch, Chevron, Cisco Systems, Danaher, GE, Oracle, Procter & Gamble, Siemens, and United Technologies Corporation.

³ International Competition Network, *Recommended Practices for Merger Notification Procedures*, available online at <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf>.

Commission, the U.S. Antitrust Modernization Commission, and competition agencies and governments in over twenty other jurisdictions (e.g., the European Union, the United Kingdom, France, Spain, Russia, China, Japan, Korea, Australia, Brazil, Chile, the United States, Canada and many others) to promote reforms consistent with the *Recommended Practices*. For many years, the MSG has closely followed the evolution of merger control in India, and its efforts have included numerous prior submissions to the Indian Ministry of Corporate Affairs and the CCI, in 2012, 2015, 2016 and 2018.

The MSG applauds the CCI for its ongoing efforts to improve the merger control process in India, and in particular for its willingness to consult with stakeholders on these important issues. We hope that this submission, which draws upon the MSG members' very substantial experience with multinational merger transactions, will prove useful to the CCI.

I. The Proposed Regulations

Currently the *Competition Act, 2002* and the *Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011*, as amended (the "Combination Regulations") require that proposed acquisitions (of control, shares, voting rights or assets), mergers, and amalgamations which meet the specified jurisdictional thresholds (collectively, "combinations") must be notified to the CCI and the parties cannot give effect to such proposed combinations until the CCI provides affirmative clearance.

The requirement to obtain prior CCI clearance present particular challenges for public market combinations, especially hostile takeover transactions, for which parties have legitimate and heightened needs for confidentiality and speed. Market contacts conducted by the CCI in the course of its review of a combination may influence the share price of the target, and the short time window for such transactions is often not long enough for a full CCI review.

The Group welcomes the Proposed Regulations as a measure to mitigate the challenges faced by public market transactions. We understand that under the Proposed Regulations, an acquisition of shares "*pursuant to a public bid or in a stock exchange*" would be permitted to proceed before the CCI's clearance and would not amount to giving effect to the combination, provided that:

- (a) the acquiror gives notice of the proposed combination to the CCI as required under the Combination Regulations without delay; and
- (b) the acquiror "*does not exercise any right attached to the shares and/or influence the target enterprise, in any manner*" (the "section 5B(b) requirement").

The Proposed Regulations would facilitate public market transactions, while still ensuring that the CCI has an opportunity to review such combinations for their potential effects

on competition.⁴ They would also bring Indian merger control into closer conformity with international best practices, as similar treatment is given to public market transactions in, for example, European Union merger control⁵ and in German merger control.⁶

II. Recommendations

As noted above, the Group supports the Proposed Regulations which, in our view, will make positive incremental changes to Indian merger control laws. However, we believe there are two specific instances in which the Proposed Regulations would be improved by the inclusion of further guidance two particular sets of circumstances.

First, the section 5B(b) requirement of the Proposed Regulations does not expressly address whether, or how, the acquiror in a public market combination may take actions to safeguard the value of the acquired business after the acquisition of shares, but while the CCI continues its review and a CCI clearance is pending. Guidance, for example, on whether an acquiror may impose limits on the activities of the target that are reasonably related to protecting the value of the acquiror's investment would improve the Proposed Regulations.

Second, where the acquired business is in dire financial circumstances (*e.g.*, an immediate cash injection is required to avoid insolvency or bankruptcy), the acquiror may legitimately need to take actions that are currently prohibited under the Proposed Regulations. Further clarification of the circumstances and processes where this may be allowed to occur would also enhance the Proposed Regulations.

* * *

Thank you for considering this submission. We would be pleased to respond to any questions, or discuss this submission with you in greater detail, at your convenience.

⁴ We understand that, in August 2019, the CCI introduced a “*green channel*” for combinations where the parties and their respective corporate groups do not have any horizontal, vertical or complementary overlaps under any plausible market definition. Under the “*green channel*”, upon filing the required notice and receiving acknowledgement thereof, the proposed combination is deemed to have received CCI approval. We assume where a public market combination is also eligible for “*green channel*” treatment, parties may — at their option — determine whether to avail themselves of the “*green channel*” or the treatment available under the Proposed Regulations.

⁵ Article 7(2) of the EC Merger Regulation provides that the suspensory obligation for a notifiable transaction: “*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 [...] 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*”; Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, Official Journal L 24, 29.01.2004, p. 1-22 (emphasis added).

⁶ Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*), § 41(1)(a).

Yours very truly,

A handwritten signature in black ink, appearing to read 'Casey W. Halladay', with a stylized, overlapping loop at the end.

Casey W. Halladay

Copy to: Members of the Merger Streamlining Group
 W. Wu, McMillan LLP