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Our File No.	69459
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VIA EMAIL to competitionlaw_review@mca.gov.in; cci-chairman@nic.in

Attention: Competition Law Review Committee
Ministry of Corporate Affairs
5th Floor, A-Wing, Shastri Bhawan
New Delhi, India
110001

Dear Committee Members:

Re: Response to Invitation to Public to Provide Comments on the *Competition Act, 2002*

We write on behalf of the Merger Streamlining Group ("MSG" or the "Group") in response to the public consultation initiated by the Ministry of Corporate Affairs ("MCA") to provide input to the Competition Law Review Committee (the "Review Committee") that has been established to review India's competition laws.

The MSG's membership consists of multinational firms with a common interest in promoting the efficient and effective review of international merger transactions.[1] 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*") of the International Competition Network ("ICN").[2] The Competition Commission of India ("CCI") is a longstanding member of the ICN and the former co-chair of the ICN's Mergers Working Group.

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

[1] The current members of the MSG include Accenture, BHP Billiton, Bosch, Chevron, Cisco Systems, Danaher, GE, Novartis, Oracle, Procter & Gamble, Siemens, and United Technologies.

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

has closely followed the evolution of merger control law in India, and its efforts have included several prior submissions to the MCA and the CCI, including in 2012, 2015 and 2016.

The MSG understands that the MCA has appointed the Review Committee to review Indian competition law "*in view of the changing business environment and to bring necessary changes, if required*." The MSG applauds the MCA 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 Review Committee.

This submission addresses the following four issues which the MSG believes are important to the functioning of an effective merger review process: (1) the adoption of a material local nexus requirement within India's merger notification thresholds (and the consequential abolition of the "*de minimis*" or "small target" filing exemption); (2) the permanent abolition of the 30-day filing deadline; (3) establishment of a definitive and expeditious review period for straight-forward transactions; and (4) concerns regarding the potential adoption of a transaction value-based notification threshold.

I. Adoption of a Material Local Nexus Requirement

We understand that an *ex ante* merger control filing is required in India if any of the following notification thresholds are met:

Parties Test:

(A) Merging entities have assets in India of 20 billion rupees (~US$270 million) or turnover in India of 60 billion rupees (~US$810 million); or

(B) Merging entities have worldwide assets of US$1 billion including assets in India of 10 billion rupees (~US$135 million) or worldwide turnover of US$3 billion including turnover in India of 30 billion rupees (~US$405 million); or

Group Test:

(A) All merging parties and affiliates have assets in India of 80 billion rupees (~US$1.1 billion) or turnover in India of 240 billion rupees (~US$3.2 billion); or

(B) All merging parties and affiliates have worldwide assets of US$4 billion including assets in India of 10 billion rupees (~US$135 million) or worldwide turnover of US$12 billion including turnover in India of 30 billion rupees (~US405 million).

These notification thresholds are inconsistent with the ICN's *Recommended Practices* because they do not ensure a material local nexus with India. As stated in the *Recommended Practices*:

- *"Jurisdiction should be asserted only over transactions that have a material nexus to the reviewing jurisdiction."*[3]
- *"Determination of a transaction's nexus to the reviewing jurisdiction should be based on activities within that jurisdiction as measured by reference to the activities of at least two parties to the transaction in the local territory."*[4]

The current notification thresholds in the *Competition Act* do not achieve this standard because they assess the merging parties' activities on a cumulative basis and because they include the activities of vendors (and affiliated entities) that will not be connected to the merged entity once the merger is completed.

(a) Cumulation of the Parties' Activities

As set out above, both branches of the Parties Test and both branches of the Group Test are measured based on the parties' cumulative assets and/or turnover in India (and, where applicable, worldwide). Thus, every transaction by an acquiror that meets the asset / turnover thresholds on its own would be notifiable in India, even where the target has *de minimis* or no assets/turnover in India (*e.g.*, where a large India-headquartered multinational acquires a company with no presence in or exports to India).[5] Similarly, every acquisition of a target company that, on its own, meets the asset / turnover thresholds would also be notifiable in India, even where the acquiror has *de minimis* or no assets / turnover in India. While the notification thresholds in the *Competition Act* require notification of such transactions, such deals would not involve meaningful overlaps in India that could raise substantive concerns.

The *Recommended Practices* explicitly reject the exclusive use of cumulative asset / turnover notification thresholds:

> "*[n]otification should not be required solely on the basis of the acquiring firm's local activities, for example, by reference to a combined local sales or local assets test that may be satisfied by the acquiring entity alone irrespective of any significant local activity by the business to be acquired.*"[6]

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[3] *Recommended Practice* II.A (emphasis added).

[4] *Recommended Practice* II.C (emphasis added).

[5] We note the existence of the five-year *de minimis* or "small target" filing exemption; we address this issue separately at Part I(d) below.

[6] *Recommended Practice* II.C, Comment 5 (emphasis added).

The MSG therefore respectfully suggests that the Review Committee recommend the revision of India's notification thresholds to require that at least two parties to the transaction have material assets or turnover within India.

(b) Vendor-Related Assets

In order to design a threshold which ensures a meaningful local nexus, it is essential that only the assets and/or turnover of the assets / entity / business being acquired — rather than the vendor's entire corporate family — be captured by the notification threshold. The irrelevance of vendor-retained assets and revenues is specifically highlighted in the *Recommended Practices*, which indicate that, for notification purposes:

> "*the relevant activities of the acquired party should be limited to the sales or assets of the business(es) being acquired in the proposed transaction*."[7]

The MSG therefore respectfully suggests that the Review Committee recommend that India's notification thresholds be adjusted to focus only on assets and revenues that are related to the merger (*i.e.*, vendor-retained assets and sales should be excluded from the calculations).

(c) The Importance of Appropriate Nexus

The proposed changes will allow the CCI to remain focused on its core mission of protecting Indian consumers and not divert precious resources to transactions with little relevance to that mission. In the absence of a material local nexus element, the CCI will receive — and devote substantial time and resources to reviewing — a substantial volume of merger notifications involving transactions with little local nexus to India and that are therefore unlikely to raise serious competitive concerns in India.[8] Requiring the CCI to review merger notifications for transactions with no meaningful commercial overlap in India would not only move away from international best practices, it also would have the unintended consequence of directing the CCI away from its core focus on transactions that may negatively effect Indian consumers.

As noted in the *Recommended Practices*, the use of thresholds that require the notification of transactions that are "*unlikely to result in appreciable competitive effects within [a country's] territory [...] imposes unnecessary transaction costs and commitment of competition agency resources without any corresponding enforcement benefit*."[9]

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[7] *Recommended Practice* II.C, Comment 2 (emphasis added).

[8] We note that the number of merger notifications the CCI has received every year has steadily increased, from 48 in the 2011-12 fiscal year to 111 in the 2016-17 fiscal year. See CCI, *Annual Report, 2016-17*, at page 35.

[9] See *Recommended Practice* I.B, Comment 1 (emphasis added).

(d) Consequential Elimination of the "*De Minimis*" or "Small Target" Filing Exemption

In an effort to address — at least in part — the local nexus issue discussed above, the MCA introduced in 2011 a "*de minimis*" or "small target" filing exemption whereby only transactions involving the acquisition of assets with substantial value or turnover in India would require merger filings to, and approvals from, the CCI. The exemption was introduced on a 5-year trial basis. Following requests from numerous stakeholders, including the MSG, the exemption was extended and broadened (to include non-asset-based transactions) in March 2016.

The exemption currently plays an essential role in Indian merger control by eliminating the notification of numerous transactions lacking local nexus to, and thus any likely competitive harm in, India. Nevertheless, it remains a temporary solution of a "stopgap" nature. The present exemption will require further re-authorization and extension, and does not provide the level of legal certainty and predictability required in a well-designed merger notification regime.

With the suggested revision of India's merger notification thresholds to require that at least two parties to the transaction have material assets or turnover in India, as described above, this temporary exemption would no longer be required. To promote legal certainty that qualified transactions that lack local nexus to India do not have to be notified in India, if the foregoing recommendation is not adopted, the MSG respectfully suggests that the *Competition Act* should be amended to make the "*de minimis*" or "small target" exemption permanent, rather than relying upon periodic or *ad hoc* renewals of temporary exemptions.

II. Permanent Abolition of 30-Day Filing Deadline

The MSG has previously expressed concerns regarding the filing deadline under India's merger control regime. The *Competition Act* requires parties to notify the CCI within 30 days of the board of directors' approval of the merger or amalgamation, or the execution of any transaction agreements or other documents conveying a decision or agreement for the acquisition.

Filing deadlines are unnecessary in jurisdictions that require transactions to be reviewed and approved prior to closing. As the *Recommended Practices* clearly state, "*[j]urisdictions that prohibit closing until there has been an opportunity for the competition agency to review the transaction ("suspensive jurisdictions") should not impose a deadline upon the parties to file notification within a specified time after reaching an agreement.*"[10] There is no need to impose a mandatory filing deadline in such jurisdictions because "*[p]arties have the incentive to file promptly after reaching an agreement since they are prohibited from closing their transaction until it has been cleared*".[11] Moreover, the imposition of filing deadlines may

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[10] See *Recommended Practice* III.B, Comment 1 (emphasis added).

[11] *Ibid.*

be difficult for merging parties to comply with in some situations, including multi-jurisdictional transactions which may have filing requirements in a large number of countries.

In 2017, the MCA issued a notice providing a 5-year exemption for transaction parties to the 30-day filing deadline, until June 2022. While this was a positive development, the MSG suggests that the current review process provides an opportunity to amend the *Competition Act,* by permanently removing the filing deadline rather than relying upon *ad hoc* renewals of temporary exemptions. Doing so would provide important transparency and flexibility to merging parties, reduce unnecessary burdens for parties when coordinating global merger filings, along with other post-signing obligations, and eliminate the need for renewals of a temporary exemption. It would also bring India's competition law into greater convergence with international best practices.

III. Establishment of a Definitive and Expeditious Review Period for Straight-forward Transactions

Under India's current regime, merging parties cannot consummate a notifiable transaction until 210 days after the date of notification, unless the CCI provides approval before the expiration of this period.

A 210-day review period within which parties cannot consummate a merger without CCI approval, but lacking a statutory requirement for a time-limited initial review phase, is inconsistent with international best practices. The *Recommended Practices* state that:

- "*In suspensive jurisdictions, initial waiting periods should expire within a specified period following notification and any extended waiting periods should expire within a determinable time frame.*"[12]

- "*Initial waiting periods should be subject to definitive and readily ascertainable deadlines to permit transactions that do not present material competitive concerns or present concerns that can be readily identified and effectively addressed in the initial period to proceed with minimal delay. While certain transactions will require more extended reviews, waiting periods associated with such reviews also should expire within determinable time frames[...]*"[13]

In most merger review systems, the large majority of mergers can readily be identified as not raising significant competition concerns while a smaller number require in-depth analysis in order to determine whether there are likely anti-competitive effects that warrant remedial action. A well-designed merger review process will ensure that the transactions not requiring in-depth review are identified and cleared expeditiously within a relatively prompt initial review period. (For example, both the United States and Canada employ an initial review

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[12] See *Recommended Practice* IV.C (emphasis added).

[13] See *Recommended Practice* IV.C, Comment 1 (emphasis added).

period of thirty calendar days; the European Union employs an initial period of twenty-five working days (or thirty five days, where commitments are offered), and the *Recommended Practices* state that "*[i]nitial review periods should expire within six weeks or less*."[14] Expeditious phase one reviews have important efficiency benefits for both the competition authority, which can focus its resources on the areas where there is the greatest likelihood of actual harm to markets, and also in avoiding unnecessary time, cost and uncertainty for merging parties as well as the shareholders, employees, suppliers and customers who may be impacted by unnecessarily long merger reviews.

While the CCI is committed to complete its Phase I review of a notifiable merger within 30 working days of the date of notification, a significant proportion of notified mergers take much longer to receive approval (*e.g.*, because of consultations with third parties or other authorities, which extends the time limit by 15 working days, or as a result of "stop-the-clock" actions such as information requests). For example, of the 106 mergers approved by the CCI in the 2016-17 fiscal year, only 11 mergers (10%) were approved within 30 working days and 40 mergers (38%) required more than 60 days before receiving approval.[15]

The MSG is respectfully of the view that the wide flexibility and the relatively light time pressure arising from a 210-day review period may in part have contributed to CCI's pace of review for transactions that do not warrant a Phase II review.

The MSG respectfully recommends that the Review Committee propose that the *Competition Act* be amended to provide that, at the end of an initial Phase I review period of 30 to 45 days, the transaction is deemed to be approved unless the CCI initiates a Phase II review. This subtle but important shift in the review process would provide incentives for the CCI to complete its initial reviews in a timely manner, and allow it to focus its scarce enforcement resources on transactions that are likely to be competitively significant. It would also bring India's regime into greater conformity with international best practices.

IV. Concerns Regarding the Potential Adoption of Transaction Value-Based Notification Threshold

Although not explicitly raised in its public consultation document, the MSG understands that the Review Committee may consider the addition of an alternative notification threshold based on the overall value of a transaction, regardless of the local nexus to India. For the reasons set out below, the MSG believes the adoption of such a threshold would be inconsistent with international best practices, and unlikely to further the cause of effective merger review in India. While such a model has been adopted in Germany and Austria, it has been considered and rejected in various jurisdictions, including at least Belgium, France and Sweden.

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[14] *See* Recommended Practice IV.A, Comment 2 (emphasis added).

[15] See CCI, *Annual Report, 2016-17*, page 36.

The *Facebook / WhatsApp* transaction has been identified in Germany and elsewhere as a catalyst for the consideration of transaction value thresholds. Both Facebook and WhatsApp are companies based in California, USA. This transaction between two US companies was subject to review in the US as well as the European Union, and cleared in the first phase in both jurisdictions without any remedies being required. There is no reason to expect that it would have been problematic under the substantive regime in Germany, India or elsewhere had it been reviewed in additional jurisdictions in which filings were not triggered under existing thresholds. A notification in India triggered by worldwide deal value would simply have added costs for the parties and consumed CCI resources, with no enforcement benefit.

Apart from the *Facebook / WhatsApp* transaction, there has been a dearth of examples of problematic high-deal value transactions that were small enough to avoid mandatory notification and review — let alone any transactions which caused any competitive harm and which escaped a review by CCI. Consequently, the MSG suggests that there is no evidence of a need for, or expected benefits from, adopting a transaction value-based threshold in India. Subjecting many further transactions to *ex ante* merger control is a step that should not be undertaken without a full cost / benefit assessment.

We note that there is no indication that the transaction value thresholds introduced in Germany and Austria in 2017 have had benefits that would justify their cost burdens on the competition authorities and merging parties. The French Competition Authority recently conducted a public consultation in which it considered the possibility of adding a transaction value-based threshold to its merger control regime, but ultimately decided against introducing such a threshold after concluding that such changes would constitute a disproportionate response to a limited number of potentially problematic transactions.[16]

Recognizing that there is no specific proposal for a transaction value threshold being considered in India at the present time, it is difficult to predict how many additional transactions would be subject to notification under any potential new threshold. However, the MSG is concerned that, depending on the specific level or scope of a transaction value-based threshold, the number of transactions subject to review by the CCI may be significantly increased,[17] at considerable time and cost to both merging parties and the CCI. This would potentially require the CCI to be provided with substantial additional resources, as it already has a significant workload and is not able to consistently meet target timelines for merger reviews under the present notification regime. As a result, the MSG encourages the Review Committee

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[16] French Competition Authority, Press Release "07 June 2018: Modernization and simplification of merger control," available at <http://www.autoritedelaconcurrence.fr/user/standard.php?lang=en&id_rub=684&id_article=3182>.

[17] Indeed, the German Bundeskartellamt significantly underestimated the number of additional transactions that would be caught by its new transaction-value threshold. When Germany was considering the adoption of such a threshold in 2016, the Bundeskartellamt suggested that the proposed transaction value (which was raised after consultations with stakeholders) would subject as few as three additional transactions per year to pre-merger notification. During the recent ICN Merger Workshop in Tokyo on November 7-8, 2018, the Bundeskartellamt reported that more than 20 transactions have been notified under the new transaction-value threshold since its adoption in June 2017.

to follow the example of France, and avoid the adoption of such a burdensome additional threshold with uncertain enforcement benefits.

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Thank you for considering these submissions. The Group encourages the Review Committee to use the ICN *Recommended Practices* as a guide for updating any aspects of the *Competition Act* regime that could make merger review in India more effective and efficient.

We would be pleased to respond to any questions or discuss this submission with the Review Committee or the MCA at your convenience.

Yours very truly,

Casey W. Halladay

Copy to: Members of the Merger Streamlining Group
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