CCIA Comments on the Draft Competition Commission of India (Combinations) Regulations, 2023

The Computer & Communications Industry Association ("CCIA")[1] welcomes the opportunity to submit comments to the Competition Commission of India ("CCI") regarding the draft Competition Commission of India (Combinations) Regulations, 2023 ("Draft Combination Regulations").[2] CCIA appreciates the continued work of the Honorable Ministry of Corporate Affairs and the CCI to develop a forward-thinking regulatory framework for the development of fair and competitive markets in India.

However, CCIA is concerned that, if adopted, the Draft Combination Regulations could present significant practical compliance burdens and challenges to businesses operating in India.

Therefore, these comments discuss substantive issues raised by the proposed changes and CCIA's concerns regarding the burden of certain provisions upon the industry.

1. Codifying reliance on the value of non-competes will increase regulatory uncertainty.

The Draft Combination Regulations propose that "The value of transaction for the purpose of clause (d) of section 5 of the Act shall include every valuable consideration (…) (i) for any covenant, undertaking, obligation, or restriction imposed on seller or any other person, other than the acquirer, in the nature of non-competition or otherwise(...)."[3]

Although CCI has a legitimate interest in ensuring accurate valuations, CCIA believes that non-compete clauses should not be seen as part of deal 'consideration' given that they are not typically part of any value paid to the seller or the target enterprise. The purpose of non-competes in the M&A context is to protect the commercial viability of the transaction, especially with respect to founders and other key executives. For this reason, CCIA believes that the inclusion of non-compete clauses in the calculation of deal value will increase uncertainty and unpredictability for parties.

---

[1] CCIA is an international, not-for-profit association representing a broad cross-section of technology and communications firms. For over fifty years, CCIA has promoted open markets, open systems, and open networks, advocating for sound competition policy and antitrust enforcement. CCIA members employ more than 1.6 million workers, invest more than $100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. For more, visit www.ccianet.org.

[2] Background Note: Draft CCI (Combinations) Regulations, 2023, Competition Commission of India (CCI), (Sep. 5, 2023), https://www.cci.gov.in/images/whatsnew/en/background-note-draft-combination-regulations-20231693886977.pdf.

[3] Draft Combination Regulations, 4 (1), at 2, https://cci.gov.in/images/stakeholderstopicsconsultations/en/draft-combinations-regulations1693891636.pdf.

In addition, reasonable non-compete agreements that are ancillary to transactions are typically neither exploitative nor coercive and should not impact CCI's merger analysis.

2. The Draft Combination Regulations' approach to uncertainty will impair the pace of dealmaking and have a deterrent effect on procompetitive and competitively benign transactions.

Under the Draft Combination Regulations, uncertainty triggers a presumption regarding the obligation to report the deal. For example, Explanation (g) to sub-regulation 4(1) notes that "[i]f the precise value of a transaction cannot be established with reasonable certainty or otherwise, the person required to give notice may consider that the value of the transaction exceeds the amount specified in clause (d) of section 5 of the Act."[4]

Such a presumptive rule would increase uncertainty for notifications as it essentially requires parties to file any transaction in which the deal value is subject to any degree of computational uncertainty. It is possible that some transactions may present certain peculiar computational issues and would have to be notified based on this technicality.

Similarly, sub-regulation 4(1)(e) proposes that the value for "any uncertain future event"[5] should be included in the valuation. This provision is extremely ambiguous and will only create serious uncertainties for parties and raise transaction costs.

CCIA is concerned that these substantive changes will have a deterrent effect on merging parties as they will need to engage in more extensive negotiations to fully clarify the terms of the deal. This will make transactions more expensive, time consuming, and risky, and could harm the overall business ecosystem. These changes are also likely to flood the CCI with a number of technical notifications and draw attention away from transactions that do raise competitive concerns.

3. The proposed approach to interconnected transactions will raise regulatory uncertainty and is unnecessarily onerous.

The draft regulation specifies that "any acquisition by the one of the parties or its group (…) anytime during the period of two years before the relevant date shall also be deemed to be an inter-connected transaction."[6]

CCIA is concerned that this proposed regulation will lead to significant regulatory uncertainty and will create onerous filing obligations in instances in which there are no real competitive risks. As a result, CCI's workload would significantly increase due to the need to

[4] *Id.*, Explanation (g), at 3.
[5] *Supra* n. 3, at 3.
[6] *Supra* n. 3, Explanation (e), at 3.

review non-problematic filings that will place an undue burden on the limited time and resources of the regulator.

Moreover, the broad language of this regulation likely will lead to significant unintended consequences in situations when an investor (*i.e.*, a private equity firm) makes a number of unrelated standalone investments over a two-year period and the value of those investments collectively exceeds the thresholds. Even if the transactions are not related to each other, the language of the regulation would require the private equity firm to report the transactions to CCI, further delaying the review of the specific transaction and increasing the regulator's workload in an unnecessary and unwarranted way. To address this situation, CCIA recommends that the definition of 'group entities' be clarified to limit investments made by entities where there is a suitable degree of control - such as subsidiaries, joint ventures, and holding companies. This would preserve certainty for merging parties while also prevent any possible circumvention of filing requirements.

4. The proposed minimum percentage threshold is unnecessarily low, causing a substantial increase in reported transactions that will needlessly burden parties and the Commission.

The Draft Combination Regulations define "substantial business operations" to mean that Indian users account for 10 percent or more of global users or Indian gross merchandise value or turnover is 10 percent or more of global gross merchandise value or turnover.[7]

Given India's population and growing number of internet users (estimated at 1.2 billion in 2023),[8] CCIA is concerned that this 10 percent threshold will be triggered in most instances. Increasing the threshold to 20 percent would be more appropriate and impactful given India's population relative to other jurisdictions. This higher threshold would better reflect whether a given enterprise has substantial business operations in India.

In addition, because the deal value threshold is industry-agnostic, the thresholds should include a *de minimis* exemption such that no "significant business operations" would be found if the target company generated a turnover below a certain amount in India in the preceding

[7] Draft Combination Regulations 4(2), at 3 - 4, "For the purpose of proviso to clause (d) of section 5 of the Act, the enterprise referred therein would be 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 a period of twelve months preceding the relevant date is 10% or more of its total global number of users, subscribers, customers or visitors, respectively; or
(b) its gross merchandise value for the period of twelve months preceding the relevant date is 10% or more of its total global gross merchandise value; or
(c) its turnover during the preceding financial year, in India, is 10% or more of its total global turnover derived from all the products and services." https://cci.gov.in/images/stakeholderstopicsconsultations/en/draft-combinations-regulations1693891636.pdf.
[8] "Number of internet users in India from 2010 to 2023, with estimates until 2050," Statista (Jul. 18, 2023), https://www.statista.com/statistics/255146/number-of-internet-users-in-india/.

financial year from the date of signing, if this turnover adequately reflects its market position and competitive potential. For example, as provided in Germany, the Bundeskartellamt will find that "(...) there is no significance if the target company generated a turnover below €5m in Germany and if this turnover adequately reflects its market position and competitive potential.".[9]

Further, CCIA notes that pegging the threshold to "users, subscribers, customers, or visitors"[10] seems excessively broad and is likely to be significantly overstated as mere "visitors" and inactive users do not contribute in a lasting manner to the economic value of the target enterprise. CCIA believes that, for digital services whose scope is a function of their active community, the number of daily active users or monthly active users will be a more accurate metric — recognizing that not all digital services collect the same analytics or measure in the same fashion.

5. **Revisions to the Indian merger process should take into account that most mergers are procompetitive and should not make it harder for acquirers to realize the projected benefits of a transaction.**

CCIA notes that numerous studies have found that the vast majority of mergers are beneficial to competition because they allow companies to better serve consumers and increase efficiencies.[11] It is the exception, and not the norm, that a merger results in a harm to competition. As a result, a primary benefit of mergers is their potential to enhance a merged entity's potential and incentives to compete through significant efficiencies that may result in lower prices, improved quality, enhanced services, or new products.[12]

[9] "Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35 (1a) GWB and Section 9 (4) KartG)," Bundeskartellamt, 82, at 24, https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2.

[10] *Supra* n. 7.

[11] *See* David L. Meyer, Merger Enforcement is Alive and Well at the Department of Justice, U.S. DEP'T OF JUST. (Nov. 15, 2007), https://www.justice.gov/atr/file/519351/download; "The Case for M&A: Evidence of Efficiencies in Consummated Mergers," (Aug. 29, 2023), at 1, https://content.pymnts.com/wp-content/uploads/2023/08/8-THE-CASE-FOR-M-A-EVIDENCE-OF-EFFICIENCIES-IN-CONSUMMATED-MERGERS-Maureen-K-Ohlhausen-Taylor-M-Owings-1.pdf; Mark J. Niefer, Donald F. Turner at the Antitrust Division: A Reconsideration of Merger Policy in the 1960s, 29 Antitrust 53 (Summer 2015) at 57, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2622795.

[12] U.S. Department of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines 1 (2010), https://www.justice.gov/atr/file/810276/download; see also U.S. Department of Justice & Fed. Trade Comm'n, 1997 Merger Guidelines (1997), https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11251.pdf ("Mergers have the potential to generate significant efficiencies by permitting a better utilization of existing assets, enabling the combined firm to achieve lower costs in producing a given quantity and quality than either firm could have achieved without the proposed transaction. Indeed, the primary benefit of mergers to the economy is their potential to generate such efficiencies."); U.S. Department of Justice & Fed. Trade Comm'n, 1992 Merger Guidelines (1992), https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11250.pdf ("The primary benefit of mergers to the economy is their efficiency-enhancing potential, which can increase the competitiveness of firms and result in lower prices to consumers. Because the antitrust laws, and thus the standards of the Guidelines, are designed to proscribe only mergers that present a significant danger to competition, they do not present an obstacle to most mergers. As a

Evaluating the benefits of a proposed merger is a necessary and crucial component of merger analysis. Economies of scale, an increase in efficient management, as well as the R&D benefits that come from the integration of complementary functions are all factors that benefit competition and the economy as a whole and are often achieved through a merger.[13]

Effective merger review should continue giving sufficient weight to the procompetitive benefits that can be achieved through a potential transaction and should not impose undue burdens that would nullify the benefits.

* * * *

CCIA thanks CCI for inviting input on these vital issues and is available to provide any additional information that it may require.

Respectfully submitted,

Krisztian Katona
Vice President of Global Competition and
Regulatory Policy
Computer & Communications Industry Association
kkatona@ccianet.org

consequence, in the majority of cases, the Guidelines will allow firms to achieve available efficiencies through mergers without interference from the Agency.").

[13] "The Case for M&A: Evidence of Efficiencies in Consummated Mergers," at 3 (Aug. 29, 2023), https://content.pymnts.com/wp-content/uploads/2023/08/8-THE-CASE-FOR-M-A-EVIDENCE-OF-EFFICIENCIES-IN-CONSUMMATED-MERGERS-Maureen-K-Ohlhausen-Taylor-M-Owings-1.pdf.