

Demystifying the revised merger exemptions and the application of the new thresholds in India

The Ministry of Corporate Affairs (**MCA**), Government of India has made effective certain provisions of the Competition Act, 2002 (**Act**) introduced by the Competition (Amendment) Act, 2023 (**Amendment Act**) as well as the new Competition Commission of India (Combinations) Regulations, 2024 (**Merger Regulations**).

A quick look at how the threshold exemptions will play out with the introduction of the Deal Value Threshold (DVT):

For transactions with consideration below INR 2000 crores (USD 238 million approximately):

The small target exemption (**Small Target Exemption**) for targets with turnover of less than INR 1250 crores (USD 149 million approximately), or with assets of less than INR 450 crores in India (USD 54 million approximately) in the financial year preceding the transaction documents remains available.

For transactions with consideration above INR 2000 crores (USD 238 million approximately):

The Small Target Exemption is no longer available.

The DVT must be read with the Substantial Business Operations in India (SBO) test as it is not intended to capture transactions that have no meaningful presence in India. The SBO test is different for digital services and for other sectors:

SBO test Parameter	Digital services ¹	All other sectors
GMV in India for the 12 months prior to relevant date ²	⌋ 10% or more of its total global GMV	⌋ 10% or more of its total global GMV + ⌋ more than INR 500 crore (USD 60 million approx.)
OR Turnover in India from all products and services during the preceding financial year	⌋ 10% or more of its total global turnover	⌋ 10% or more of its total global turnover + ⌋ more than INR 500 crore (USD 60 million approx.)
OR Number of business users ³ or end users in India ⁴	⌋ 10% or more of its total global number of such users	⌋ N/A

For details on the application of DVT on transactions, please see our **brief Q&A cheat sheet** [here](#).

¹ Digital service means the provision of a service or one or more pieces of digital content, or any other activity by means of an internet whether for consideration or otherwise to the end user or business user, as the case may be.
² Relevant Date means the date on which the board of directors approve a proposal relating to merger or amalgamation or the date of execution of any agreement or any other such document for acquisition (trigger document) or acquiring of control as referred to in the Act.
³ Business user means any natural or legal person supplying or providing goods or services, including through the use of digital services.
⁴ End user means any natural or legal person using digital services other than as a business user, for informational or transactional purpose.

The MCA has also notified the Competition (Criteria for Exemption of Combinations) Rules, 2024 (Exemption Rules) which are intended as a codification of practice.

The Exemption Rules have revised the scope of the exemption for minority investments and intra-group transactions.

Introducing the key concepts in the revamped Amendment Act and the Exemption Rules:

1. The idea of “control” – was broad in any event under the CCI precedents but is now defined in the statute in terms of a “material influence” standard.
2. Competitively Sensitive Information (CSI) – from the Do’s and Don’ts lists guiding clients on information exchange, this idea finds its way into being a relevant determinant of whether or not you would notify the transaction under the Exemption Rules.
3. Observer on the board – the observer now definitely steps out of the shadows and joins a director on the board of the target as someone who allows the acquirer “material influence” or control over the target.
4. The “affiliate” – the “affiliate” constitutes the list of portfolio / controlled entities that the acquirer would list for the purposes of the assessing overlaps with the target’s business. The previous standard was tedious and the revised standard, more so:

Previous definition of an affiliate	Revised definition of an affiliate
<p>Previously, an entity was considered to be an affiliate⁵ of another enterprise if the said enterprise has:</p> <ol style="list-style-type: none"> 1. direct or indirect shareholding of 10% or more; or 2. a right or ability to exercise any right that is not available to an ordinary shareholder; or 3. a right or ability to nominate a director or observer. 	<p>Per the revised definition, an entity will be an affiliate of another enterprise if the said enterprise has:</p> <ol style="list-style-type: none"> 1. 10% or more of the shareholding or voting rights; or 2. a right or ability to have a representation on the board of directors either as a director or an observer; or 3. a right or ability to access commercially sensitive information (CSI).

The broader definition of “affiliate” requires a recalibration of which portfolio companies would be listed by the acquirer for presenting overlaps with the proposed target.

For a detailed discussion on the impact of the revised definition, please see our client alert [here](#).

Category 1: Minority Acquisitions

The Exemption Rules continue to exempt the acquisition of shares or voting rights up to 25%. This is in line with the provisions under the Companies Act, 2013, which provides that a special resolution requires consent of 75% of the shareholders of a company, conferring a “negative” control over the 25% shareholder(s).

⁵ Per Guidance Notes to Form 1.

Fresh minority investors

Where the acquirer takes shares or voting rights within the Zero to 25% range in the target

The new name for such minority acquisitions is Solely as an Investment (SOI)

SOI falls in 2 buckets, detailed as follows:

Conditions for the SOI Exemption		
<p>Bucket 1: Acquisition of less than 10% shares or voting rights.</p>	<p>Exempt if:</p> <ol style="list-style-type: none"> 1. There is no acquisition of “control” over the target; and 2. The acquirer does not gain a right or ability to: <ol style="list-style-type: none"> a. have board representation (a director or observer); or b. access competitively sensitive information (CSI) 	<p>Notes:</p> <p>⌈ “control” is a broadly defined concept under the Competition Act, 2002 and the Amendment Act defines it as a “material influence standard”;</p>
<p>Bucket 2: Acquisition of shares or voting rights between 10-25%</p>	<p>Exempt if:</p> <ol style="list-style-type: none"> 1. There is no acquisition of “control” over the target; 2. The acquirer does not gain a right or ability to: <ol style="list-style-type: none"> a. have board representation (a director or observer); or b. access CSI and; 3. The acquirer group (including affiliates) does not have any horizontal or vertical or complementary overlaps with the target group (including target’s downstream group entities and affiliates) 	<p>⌈ “competitively sensitive information” remains largely undefined and is likely to evolve with illustrative lists of information that may be categorized so.</p>

For a detailed discussion on the impact of the exemption for minority acquisitions, please see our client alert [here](#).

Existing minority investors

Where the acquirer already holds shares in the target but acquires additional shares and remains under 25%

Additional or incremental acquisitions by existing minority investors, including their group entities (holding less than 25% shares/ voting rights) would be exempt if the conditions below are satisfied:

Condition 1	Post acquisition shareholding should remain less than 25%	
Condition 2	No acquisition of control	
Condition 3	Pursuant to the acquisition, the acquirer (or group) should not gain representation on the board of directors (director or observer) for the first time	
Condition 4	The acquirer (or group) must not gain any CSI for the first time except when the acquirer (or group) already has a representation on the board of directors as a director	
Condition 5	Scenario A	Scenario B
	<p>There are (vertical, horizontal, or complementary) overlaps</p> <p>The exemption will not be available in case the incremental acquisition exceeds 5% or the acquirer's shareholding crosses 10% because of the additional acquisition</p>	<p>No overlaps</p> <p>No cap on the incremental acquisition (provided the acquirer (or group) continues to hold less than 25%)</p>

Category 2: Acquisitions where the acquirer holds more than 25% but less than 50% of the target

Category 3: Acquisitions where the acquirer holds more than 50% of the target

Such acquisitions would be exempt as long as the transaction does not result in a change in control of the target.

Note: a change in the quality of control over the target, such as the acquisition of additional voting rights or, the ability to nominate more members on the board of the target have been treated as the “acquisition of additional control” or “change in control” by the CCI.

Category 4: Demergers

No specific exemption was available for demergers previously. These were treated as acquisitions when applying available exemptions.

The Exemption Rules incorporate a specific provision, exempting demergers where the resulting company issues shares to the demerged company (or its shareholders) **in proportion to their existing shareholding in the demerged company**.

Category 5: Intra-group asset acquisitions, mergers and amalgamations

Intra-group: (i) mergers and amalgamations, and (ii) asset acquisitions will be exempt under sub-rules 9 and 10 of the Schedule to the Exemption Rules, provided there is no change in control.

Category 6: Acquisitions of shares / voting rights in the ordinary course of business (OCB)

The ordinary course of business (OCB) exemption is now available only to a limited category of acquisitions of shares or voting rights involving acquisition of unsubscribed shares by underwriters, acquisition of shares by stockbrokers and acquisition of shares by mutual funds, subject to certain conditions. In such cases, the underwriters, stockbrokers and mutual funds must be registered with the Indian securities regulator, the Securities and Exchange Board of India (SEBI).

Category 7: Acquisitions of assets

Transactions involving acquisition of assets in the following two categories are exempt:

- i. Assets in the ordinary course of business – acquisition of assets involving stock-in-trade, raw materials, stores and spares, trade receivables or similar current assets not constituting the business;
- ii. Assets not directly related to the business – acquisition of assets which are not directly related to the business activity of the acquirer and not leading to acquisition of “control” in the target. However, the exemption is not available in cases where the acquired assets represent substantial business operations in a particular location or for a particular product or service of the target. The assessment of what “substantial business operations” means, is bound to be subjective and one may require specific guidance from the CCI before availing this exemption.

Category 8: Miscellaneous acquisitions

The remaining exemptions pertain to acquisition of shares pursuant to a bonus issue or stock splits or buy back of shares, not resulting in a “change in control” and acquisition of shares, control, voting rights or assets by a purchaser approved by the CCI pursuant to an approval order under the Act.

For a detailed discussion on the impact of these exemptions please see our client alert [here](#).

Please see our previous client alert covering the ***new provisions of the Amendment Act*** notified by the MCA and a ***brief Q&A cheat sheet*** on the deal value threshold (DVT) [here](#) and [here](#), respectively.

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