

M&A Hotline

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CHANGE IN MERGER CONTROL THRESHOLDS

- Thresholds for pre-merger notification increased by 100%.
- Target de-minimis threshold increased for a pre-merger notification

A. BACKGROUND

Under the Competition Act, 2002 ("**Act**"), the Government is required to enhance or reduce the financial thresholds triggering a pre-merger notification before the Competition Commission of India ("**CCI**"), every two years on the basis of the wholesale price index or fluctuations in exchange rate of rupee or foreign currencies. The Government has also the power to provide exemptions to certain enterprises from the provisions of the Act in public interest. Based on these powers conferred on the Government, on March 4, 2011 the Government had (a) increased the thresholds under section 5 of the Act by fifty percent and (b) provided exemption from pre-merger notification for targets which did not meet certain de-minimis thresholds ("**2011 Notification**"). The present notifications dated March 4, 2016 increases (a) the thresholds for the purposes of section 5 of the Act by 100% and (b) the target de-minimis exemption threshold ("**2016 Notification**").

B. KEY CHANGES AND ANALYSIS

1. Thresholds mentioned under Section 5 of the Act to be increased by 100%

Position previously	Present Position (Post 2016 Notification)
Thresholds under Section 5 of the Act were increased by 50% by the Central Government under the 2011 Notification.	The thresholds under Section 5 of the Act are increased by 100%.

Based on the language of the 2016 Notification, it is not entirely clear whether the 100% increase in the thresholds is to be applied to the revised thresholds after the 2011 Notifications or should it be applied to the original thresholds under section 5 of the Act. The 2011 Notification on the section 5 thresholds did not have a time horizon (unlike the target de-minimis exemption which was valid for a period of five years) and therefore in the absence of a notification revoking the 2011 Notification, it would be deemed to be in force. Having said that, legally it may be argued that the 100% increase should be applied to the original section 5 thresholds as (a) the wording of the 2016 Notification makes a reference only to section 5 of the Act and not the 2011 Notification and (b) the 2011 Notification was not an amendment to the Act and therefore a reference to section 5 of the Act cannot be construed to include the increase in the thresholds prescribed by the 2011 Notification.

In light of the 2016 Notification, the section 5 thresholds are provided in the table below:-

Person/ Enterprise	In USD (1 USD= INR 65)		In USD (1 USD= INR 65)	
	In India		Outside India (Including in India)	
	Assets	Turnover	Assets	Turnover
Parties to the Combination	>INR 2000 crores (USD 307.69 million)	>INR 6000 crores (USD 923.0777 million)	>USD 1 billion including at least INR 1000 crores in India (USD 153.846 million) in India.	>USD 3 billion including at least INR 3000 crores (USD 461.538 million) in India.
Group to which the enterprise would belong after the acquisition, merger or amalgamation.	>INR 8000 crores (USD 1.231 billion)	>INR 24000 crores (USD 3.692 billion)	>USD 4 billion including at least INR 1000 crores (USD 153.846 million) in India.	>USD 12 billion including at least INR 3000 crores (USD 461.538 million) in India.

2. De-minimis target threshold exemption enhanced.

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Position previously

Even if the section 5 thresholds were met, if the target whose assets, shares or voting rights were acquired, did not have assets or turnover of the value of more than INR 250 crores (USD 38.461 million) and INR 750 crores (USD 115.384 million) in India respectively, then a pre-merger approval was not required.

Present Position (Post 2016 Notification)

The thresholds for the assets and turnover has now been increased to INR 350 crores (USD 53.846 million) and INR 1000 (USD 153.846 million) crores in India respectively.

The above exemption only increases the thresholds. However, the application of the exemption in all other aspects remains the same. Consequently any acquisition of shares, voting rights or assets of a company which either has assets or turnover of less than INR 350 crores (USD 53.846 million) and INR 1000 crores (USD 153.846 million) respectively in India will be exempted from a pre-merger notification even if the section 5 thresholds are met.

C. MISSED OPPORTUNITIES

While the 2016 Notifications are around expected lines, there are a couple of other reliefs that should have been considered and included-:

- 1. The de-minimis target exemption threshold should be party neutral/agnostic and it should not just apply to the target but should also apply to the acquirer's group i.e. if the group to which the acquirer belongs does not meet the de-minimis thresholds then such transaction should also not require a pre-merger approval.
- 2. The de-minimis target exemption threshold should have also been extended to merger and amalgamations as contemplated in section 5(c) of the Act and not just acquisition of assets, shares and voting rights as is currently the case.

– Vinay Shukla, Ankit Mishra & Simone Reis

You can direct your queries or comments to the authors

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