

Part I: CCI approval for minority PIPE deals – to file or not to file?

Key Takeaways

- CCI's recent changes streamline the 'solely as investment' exemption – most relevant for minority PIPE investments
- <25% acquisitions without control, board representation and 'commercially sensitive information' rights exempt if acquirer has no overlapping investments
- What constitutes 'commercially sensitive information' rights has been left open purposely – introducing subjective interpretation
- <10% acquisitions are exempt even if the acquirer has overlapping investments, which until now required approval
- De-minimis threshold continues to be applicable, provided the 'deal value threshold' is not triggered (i.e. INR 2000 cr/ ~USD 250mn)

Buoyed by the performance of India's stock market, private equity and PIPE deals space has been buzzing. By the first half of this year, the PE-VC investments saw an almost 50% jump compared to the same period last year. PIPE deals saw an over 80% increase in the first half of this year, totalling to 75 compared to 41 in the first half of 2023[1].

CCI has recently unveiled its updated merger control regulations, throwing a fresh set of considerations into the mix for financial investors. Much like Macbeth's existential quandary – "To be, or not to be" – dealmakers in India too face a modern-day dilemma of their own: "To file, or not to file?" The question presents itself as investors run the CCI check on their deals.

Broadly, parties to a deal must seek prior CCI approval unless the transaction:

- Involves acquisition of less than 25% of shares/ voting rights of the target and is made 'solely as an investment' and does not lead to acquisition of control; OR

- Meets the de-minimis criteria, that is the target's assets are below INR 450 crore (~USD 56 million) OR turnover is less than INR 1250 crore (~USD 156 million). If the target's assets or turnover are below these thresholds but the deal value is above Rs 2000 crore, a CCI filing will need to be made. The Deal Value Threshold (DVT) has come into effect from Sep 10.

In this piece, we'll zoom in on the changes to the 'solely as an investment' exemption, which is the subject of concern in most PIPE deals. In our subsequent pieces on the changes to the merger control regime, we'll examine the nuances of the DVT.

'Soley as an investment': New rules of the game

So far, CCI has treated minority acquisitions as 'solely as an investment' if they met all these conditions, namely (i) the acquisition was of less than 10% of the total shareholding/ voting rights; (ii) acquirer did not have any rights compared to an ordinary shareholder under law; and (iii) acquirer did not have a right to appoint a director and did not intend to participate in the target's management.

Now, the regulator has expanded, and codified some of its decisional practice, the list of conditions to say that acquisitions of shares/ voting rights of less than 25% will be exempt from CCI filing if:

A. There is no acquisition of control;
B. No right to board representation;
C. No access to commercially sensitive information; and
D. The acquirer group and its affiliates do not compete with the target or its affiliates, that is, they have no horizontal, vertical or complimentary overlaps.

[1] IVCA-EY PE/VC Roundup, H1 2024, https://www.ey.com/en_in/newsroom/2024/07/pe-vc-investments-increase-to-dollor-31-point-5-billion-in-1h-2024-marking-8-percent-year-on-year-growth-ey-ivca-report

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A. No acquisition of control

In line with CCI's decisional practice, the standard to test 'control' will now be 'material influence'.

Until 2022, based on facts, the regulator applied either the 'decisive influence' or 'material influence' standard to test control. That changed in 2022 when, by way of an FAQ, CCI made 'material influence' the standard.

Material influence – the lowest level of control – implies the presence of factors that give an entity the ability to influence the affairs and management of the other entity. It includes factors such as shareholding, special rights, board representation, structural/ financial arrangements, etc.

B. No board representation

A financial investor should neither have the right nor the ability to have representation on the board of any enterprise either as a director or as an observer.

So far, the language of the exemption precluded an investor from getting a board seat in the target. Now, the use of 'any enterprise' suggests that if an investor is coming at the holding company level, a board seat even at the subsidiary company level may result in denial of the exemption.

On the right to appoint an observer, so far, CCI examined it in conjunction with 'special rights other than what an ordinary shareholder has'. But, going forward, this right can standalone disqualify an investor from the exemption and trigger a CCI filing.

C. No Access to Commercially Sensitive Information (CSI)

An investor will not be able seek an exemption from CCI filing if it has the contractual right to access or gains a right to access CSI, a term that remains undefined.

While information rights are crucial for private equity investors to safeguard their investments, they are not primarily intended to influence the target's management. However, CCI's concerns possibly arise from the potential for competitive sensitive information to be exchanged between competing enterprises through common shareholders.

CCI first brought the concept of CSI while examining trade cartels. In various cases like Cement[2], Beer[3], Bearing[4] and Flashlight[5] cartels, CCI identified that information relating

[2] Builders Association of India v. Cement Manufacturers' Association, Case No. 29/2010.
[3] In Re: Alleged anti-competitive conduct in the Beer Market in India, Suo Motu Case No. 06/2017.
[4] In Re: Cartelisation in the supply of Bearings (Automotive and Industrial), Suo Motu Case No. 07 (02)/2014.
[5] In Re: Alleged Cartelisation in Flashlights Market in India, Suo Motu Case No. 01/2017.

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to details of production, dispatch, retail prices, wholesale prices, price increase proposals, base price, sales data, sales target, sourcing locations, margins, promotional schemes, launch of new products will be seen as CSI.

Additionally, CCI's Compliance Manual[6] lists the following as commercially sensitive information: a) cost of manufacturing products or services; b) proposed quantity; c) credit/ sale/ purchase/ billing terms; d) discounts; e) profits, margins, profitability; f) transportation/ cartage/ freight/ distribution charges; g) commissions/ rebates/ surcharges; h) fares, rates, tariffs or any other direct or indirect charges; and i) any other business sensitive information which should not be shared with a competitor.

Thus, when negotiating an information package, PIPE investors will need to apply the test of information asymmetry, ensuring that they do not end up getting rights which give them access to commercially sensitive information.

D. Overlaps with the target

<25% acquisitions. First up, an investor acquiring less than 25% will not need to file with CCI if it meets conditions A to C above, and there exists no horizontal, vertical or complementary overlap between the acquirer group (including affiliates) and the target (or its downstream group and affiliates).

<10% acquisitions. But if an investor meets conditions A to C but has an overlap with the target, it can still avail the exemption as long as its acquisition of shares/ voting rights is less than 10%. In essence, financial investors can build positions up to 10% in overlapping entities without triggering a CCI filing.

To reiterate, conditions A to C will still need to be met. This is a significant relief considering there have been cases where parties have filed with the CCI for acquisitions of even 1% because of the overlaps condition being breached.

Creeping acquisitions/ Acquisitions between 0.1% - 25%. Any additional acquisitions by an existing investor – commonly known as creeping acquisition – up to 25% will be exempt from filing as long as conditions A to C are met. If overlaps exist, then incremental or additional acquisition (single or through a series of smaller inter-connected acquisitions) cannot exceed 5%. This restriction appears counterintuitive, given that a fresh acquisition allows for a direct build of up to 10%.

Also, in creeping acquisitions, the overall cap of 10% will continue to apply – i.e. if the acquirer's shareholding crosses 10%, the exemption would not apply.

[6] Competition Commission of India, Compliance Manual for Enterprises (2017).

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Overlaps of Affiliates. The second significant change while assessing overlaps is the determination of who will be seen as an "affiliate". While assessing overlaps, the checks need to be done with respect to the acquirer group and its affiliates on one hand, and the target and its affiliates on the other.

The change in who will be seen as an 'affiliate' is as follows:

So Far	What's Changed?
An entity is said to be an '**affiliate**' of another if the latter has:	
a. 10% or more direct or indirect shareholding; or	a. 10% or more direct/indirect shareholding or **voting rights**; or
b. Right or ability to exercise any right that is not available to an ordinary shareholder; or	b. Right or ability to access **commercially sensitive information**; or
c. Right or ability to nominate a director or observer	c. Right or ability to have **representation** on the board of directors or an observer seat

Conclusion

Have the recent amendments to the merger control regime provided clarity while assessing approval requirements for minority PIPE investments? On-balance, yes, especially since its decisional practice around overlaps assessment has also been codified. The biggest challenge until now was whether or not an approval was required, since overlaps analysis was largely based on different CCI decisions and inputs provided by CCI from time to time. So, in large part, the revised law should permit most minority PIPE investors investing <10% to proceed without a CCI filing (or, at the least, provide the necessary clarity to identify whether a CCI approval is required or not). However, for creeping acquisitions and acquisitions >10% but <25%, the exemption window seems fairly narrow given the practicalities of deal-making – effectively requiring a CCI approval in such cases.

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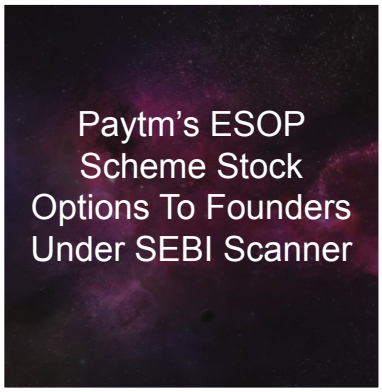
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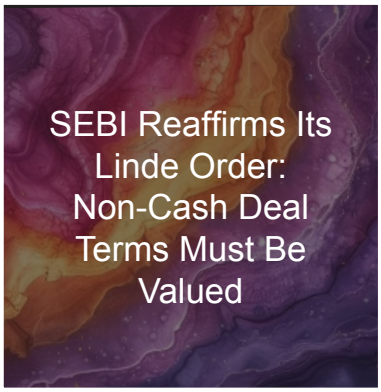




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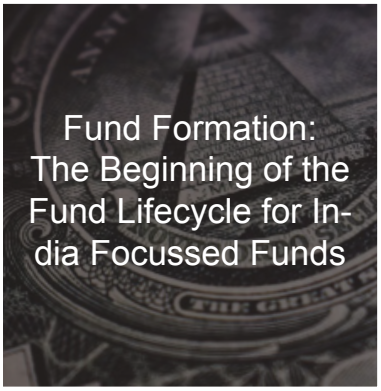






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