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September 22, 2023

Via Website: https://cci.gov.in/stakeholders-consultations/15

SUBJECT: Joint Section Comments to the to the Competition Commission of India on the Combination Regulations Draft

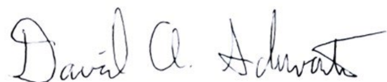
Dear Sir/Madam:

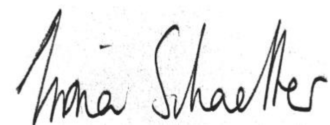
On behalf of the American Bar Association Antitrust Law and International Law Sections, we respectfully submit these comments in response to the to the Competition Commission of India on the Combination Regulations Draft.

The views expressed herein are being presented on behalf of the Sections of Antitrust Law and International Law. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

If you have any questions after reviewing this report, we would be happy to provide further comments.

Sincerely,





COMMENTS OF THE AMERICAN BAR ASSOCIATION'S ANTITRUST LAW SECTION AND INTERNATIONAL LAW SECTION ON THE DRAFT MERGER REGULATIONS UNDER INDIA'S COMPETITION ACT

Date: September 20, 2023

The views stated herein are presented on behalf of the Sections of Antitrust Law and International Law. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the American Bar Association.

The American Bar Association Antitrust Law and International Law Sections (the Sections) welcome the opportunity to submit these comments to the Competition Commission of India (the CCI) on the draft Competition Commission of India (Combination) Regulations, 2023 (the Draft Regulations), published for public consultation on September 5, 2023. These comments reflect the expertise and experience of the Sections' members with competition law and economics. Where relevant, the comments refer to provisions of the Competition Act, 2002 (the Act) as amended in April 2023.

The Antitrust Law Section is the world's largest professional organization for antitrust and competition law, trade regulation, consumer protection and data privacy as well as related aspects of economics. Section members, numbering over 9,000, come from all over the world and include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as judges, professors, and law students. The Antitrust Law Section provides a broad variety of programs and publications concerning all facets of antitrust and the other listed fields. Numerous members of the Antitrust Law Section have extensive experience and expertise regarding similar laws of non-U.S. jurisdictions. For nearly thirty years, the Antitrust Law Section has provided input to enforcement agencies around the world conducting consultations on topics within the section's scope of expertise.[1]

The International Law Section (the ILS) focuses on international legal issues, the promotion of the rule of law, and the provision of legal education, policy, publishing, and practical assistance related to cross-border activity. Its members total approximately more than 11,000, including private practitioners, in-house counsel, attorneys in governmental and inter-government entities, and legal academics, and represent over 100 countries. The ILS's over fifty substantive committees cover competition law, trade law, and data privacy and data security law worldwide as well as areas of law that often intersect with these areas, such as mergers and acquisitions and joint ventures. Throughout its century of existence, the ILS has provided input to debates relating to international legal policy. With respect to competition law and policy specifically, the ILS has provided input for decades to authorities around the world.[2]

[1] Past comments of the Antitrust Law Section are available online at https://www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs. The Antitrust Law Section positions expressed in this submission have been adopted by a majority of the Section's Council after debate reflecting the diversity of viewpoints among the Section's members.

[2] *About Section Policy*, AM. BAR ASS'N, https://www.americanbar.org/groups/international_law/policy/about/.

EXECUTIVE SUMMARY

The Sections commend the CCI for proposing guidance and streamlined processes in respect of the Indian merger control regime, and for providing an opportunity for public comment on the Draft Regulations. For the reasons set forth below, the Sections respectfully recommend that CCI revise the Draft Regulations as follows:

1. *Deal Value Threshold (DVT): Inclusion of "incidental arrangements" to be reevaluated* - The definition of "incidental arrangements" could potentially include transactions not contemplated at the time of entering into the transaction, making notifiability assessments uncertain. The need for this provision should be reevaluated; should the CCI decide to retain this provision, "incidental arrangements" may be limited to those anticipated and enumerated in the transaction documents at the time of their execution and the CCI's approval order for such transactions should extend to all such incidental arrangements.

2. *DVT: Ambiguity in valuation of non-compete clauses* - The value of non-compete clauses is usually reflected in deal consideration; if not, it is difficult to attribute a value to a non-compete clause, which would undermine the certainty and predictability of the DVT itself. The CCI should attribute value to a non-compete arrangement only where the transaction documents or the board of directors of the transacting parties acknowledge such additional value. Further, the Draft Regulations should be amended to delete the words "or otherwise" which suggests a wider, undefined category of arrangements, to avoid uncertainty.

3. *DVT: Computing value of options and securities assuming full exercise is unwarranted* - By including the full value of options acquired as part of a transaction, that may or may not be exercised in the future, the Draft Regulations inflate the value of the transaction. The value of such options may change at the time of their exercise and the full value of such options should be considered only at the time of their exercise.

4. *DVT: Mandate to notify where transaction value cannot be precisely determined* - The Draft Regulation requires parties to assume that the value of the transaction exceeds the DVT and submit a notification wherever there is any computational uncertainty. This imposes a significant regulatory burden on transacting parties, and the Draft Regulations should provide specific guidance and methods for resolving computational uncertainty rather than assuming that the DVT is breached.

5. *DVT: Explanation on interconnected transactions is unnecessary* - The Draft Regulations require parties to include the value of subsequent "interconnected" transactions as being part of the transaction value for DVT computation, where the acquirer or a company in its group is transacting with the target enterprise during the 2-year period prior to the date on which the transaction is entered. This "deemed interconnection" could create onerous filing obligations, based on a transaction value which will only be determined at the end of 2 years. The provision should either be deleted or alternatively, amended to replace the term "group entities" with either "*parties',*

parties' parent entities, and their subsidiaries, joint ventures" or in the alternative, "*group*" as defined under the Companies Act, 2013.

6. *DVT: Thresholds for Substantial Business Operations (SBO) in India require greater specificity* - The Draft Regulations do not provide adequate guidance on the computation of DVT or establishing SBO in India. The Draft Regulations should provide clear guidance required to establish India nexus through the following amendments:
    a. The local nexus materiality thresholds of 10% ought to be increased to 20%, accounting for the size of India's market and a possibility of overstatement.
    b. The SBO thresholds should be modified to apply to the assets being acquired (rather than applying to the seller enterprise as a whole), in the case of asset acquisitions.
    c. The SBO threshold pertaining to "users, customers, subscribers and visitors" should be limited to "average active users". The threshold pertaining to "gross merchandise value" should be deleted since it is part of a company's turnover, or alternatively, further guidance should be issued on the scope of the term "gross merchandise value".
    d. The thresholds relating to the number of users, customers, subscribers, or visitors and gross merchandise value should clearly reference "in India".
    e. The SBO thresholds should specify a *de minimis* turnover value below which the target company is assumed not to have sufficient nexus in India.

7. *Pre-Filing Consultation (PFC) outcomes should be documented and shared with parties* - The Draft Regulations should be amended to allow for confidential treatment of materials during a PFC. Further, the CCI may consider publishing the guidance provided to parties during a PFCR on a no-names, non-binding basis.

8. *Scrutiny of notice - additional guidance required on removal of "defects" and additional information requirements* - The Draft Regulations require that the CCI communicate any "defects" in the merger filing within 10 working days of the filing. The CCI should clarify the nature of "defects" which parties may be required to remove and communicate all defects to the parties within this period.

9. *Prior to invalidating for material changes, parties to receive opportunity to be heard* - The Draft Regulations permit the CCI to invalidate a notice (after recording reasons), but without providing an opportunity to be heard if there is any change in the information filed by notifying parties. The Draft Regulations should be modified to reinstate the opportunity to be heard prior to the CCI determining whether to invalidate a filing on account of such material changes in facts.

10. *Ambiguity in the restriction on acquirers from exercising "influence" in on-market share acquisitions, including open offers* - The Draft Regulations restrict the acquirer or any of its affiliates from directly or indirectly "*influenc*[ing]...*in any manner whatsoever*" the target

enterprise in an on-market acquisition. The Draft Regulations should be modified to permit the acquirer to exercise its voting rights attached to the securities without any further precondition.

11. *Market share threshold for Form II filings ought to be revised* - The Draft Regulations indicate that the 15% horizontal overlap threshold and 25% vertical overlap threshold for filing Form II (long form) are applicable with reference to "any relevant market". To reduce the regulatory burden on filing parties as well as the administrative burden on the CCI, the Draft Regulations should be modified to require that parties provide details in Form II *only* for markets where overlaps exceed the 15% horizontal overlap threshold or the 25% vertical overlap threshold.

12. *Exemptions for categories of combinations not ordinarily likely to raise competition concerns in Schedule I to be replaced* - The Draft Regulations have deleted the exemptions available to certain ordinary course combinations. The CCI and the Central Government should issue draft rules for exemptions reinstating the exemptions that were earlier available and should do so after public consultation.

SPECIFIC RECOMMENDATIONS

I. Deal Value Threshold (DVT): Inclusion of "incidental arrangements" to be reevaluated

The Draft Regulations require the inclusion of the value of all consideration from any arrangement(s) entered into, either as a part of the transaction or as an "incidental arrangement(s)" within a two year period from the date on which the transaction would come into effect, in the calculation of the DVT.[3] Such "incidental arrangements" include technology assistance, the licensing of intellectual property rights, usage rights to any product, service or facility, supply of raw materials or finished goods, branding and marketing.

The Sections respectfully suggest that the current description of an "incidental arrangement" is ambiguous and overly broad. If adopted in its present form, an incidental arrangement could also include unrelated transactions that were not contemplated at the time of the transaction and would make evaluating the notifiability of a transaction fraught with uncertainty. To provide transacting parties with certainty and remove the ambiguity of the types of arrangements whose value would be included in computing the transaction value, the Section recommends that the "incidental arrangements" referred to in this Regulation, be limited to subsequent transactions that were contemplated by the parties at the time of entering into the transaction and recorded as such in the transaction documents. This is in line with international best practice, which provides that notification thresholds be based on objectively quantifiable criteria and information that is readily accessible to parties in the ordinary course of business.[4] Further as discussed below, Regulations 9(4) and 9(5) respectively, read along with Regulation 4(1)(b) provide the CCI with adequate tools to review interconnected steps of a single transaction, provided that such transactions meet its well-

[3] Draft Regulations, Regulation 4(1)(c).

[4] INT'L COMPETITION NETWORK, Recommended Practices for Merger Notifications and Review Procedures (2018), §§ II.D and II.E, at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf [hereinafter ICN RECOMMENDED PRACTICES].

established test for interconnection.[5] Consequently, if "incidental arrangements" are interconnected to the transaction, the CCI may include the value of such subsequent arrangements which renders this proposed provision redundant.

The Section recommends that (a) the CCI re-evaluate the need for a provision which includes the value of an "incidental arrangement" given its existing powers to include the value of interconnected steps of a transaction; (b) should the CCI decide to retain this provision then "incidental arrangements" included in calculating deal value, may be limited to those anticipated and enumerated in the transaction documents at the time of their execution; and (c) should the CCI decide to include the value of such "incidental arrangements" while evaluating the transaction, then its approval order for the transaction may extend to all such "incidental arrangements".

II. DVT: Ambiguity in valuation of non-compete clauses

Regulation 4(1)(a) of the Draft Regulations requires that the consideration for DVT include the value of any non-compete restriction or any other covenant imposed on the seller or any other person.

The Sections note the following concerns with respect to this provision:

- Difficulty in determining the value attributable to a non-compete clause: The value attributable to such non-compete restrictions is usually reflected in the deal consideration.[6] It is difficult to attribute a value to the non-compete clause, where none is listed in the transaction documents and to do so, would undermine the certainty and predictability of the DVT itself. This would run contrary to ICN Recommended Practices which emphasize the importance of clear, simple, and transparent rules in merger control systems, especially given the increasing prevalence of transactions with multi-jurisdictional dimensions.[7]

- The value to be attributed, if any, cannot be based on speculation: While the value attributed to a non-compete clause is usually part of the transaction value and is listed in the definitive documents. If the CCI considers attributing a distinct value to the non-compete agreement beyond the listed transaction value, it must not do so speculatively. Instead, the CCI may attribute such a value to the non-compete only where the board of directors of either the acquirer or the seller assigns a distinct non-compete value at the time of entering into the transaction.

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[5] See the CCI's decision under Section 43A of the Act in *Canada Pension Plan Investment Board / ReNew Power,* (2019) https://www.cci.gov.in/combination/order/details/order/1137/0/orders-section43a_44 and the decision of the Supreme Court of India in *Competition Commission of India v. Thomas Cook*, Civil Appeal No. 13578 of 2015 (2018) https://main.sci.gov.in/supremecourt/2015/35723/35723_2015_Judgement_17-Apr-2018.pdf/

[6] This has been recognised by the German and Austrian regulators in their guidance on computing transaction value thresholds under German and Austrian merger control rules. See BUNDESKARTELLAMT AND BUNDESWETTBEWERBSBEHÖRDE, JOINT GUIDANCE ON TRANSACTION VALUE THRESHOLDS FOR MANDATORY PRE-MERGER NOTIFICATION, 2022, https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionswertschwelle.pdf;jsessionid=30E8A1B5BB750A9196A444225ED05855.1_cid381?__blob=publicationFile&v=2 [hereinafter GERMAN AND AUSTRIAN GUIDANCE ON TRANSACTION VALUE THRESHOLDS]

[7] ICN RECOMMENDED PRACTICES, § II.E.

- <u>Uncertainty in current framing:</u> The language of the Draft Regulation suggests that the inclusion of the value of non-compete clauses as part of the DVT extends to clauses which are in the "nature of non-competition or otherwise". The use of the words "or otherwise" in the Draft Regulation suggests a broader category and introduces uncertainty.

The Sections recommend that the Draft Regulations be amended and that the CCI include the value of a non-compete clause as part of the DVT as it is listed in the transaction documents. Further, the Draft Regulations should clarify that the CCI may only attribute a value to a non-compete agreement if the board of directors of either the acquirer or the target companies have considered and acknowledged it. Further, the Sections recommend that the scope of this clause be limited to non-compete clauses alone, and that term "or otherwise" at the end of Regulation 4(1)(a) be deleted, to avoid uncertainty.

III. DVT: Computing value of options and securities assuming full exercise is unwarranted

The Draft Regulations require that the consideration for the DVT for a transaction should include the full value of the options and securities to be acquired and assume that such options will be exercised to the full extent.[8]

The Sections note that by including the full value of the options that may or may not be exercised in the future, the Draft Regulations effectively inflate the value of the transaction making it more likely that the DVT will be breached even for relatively small transactions. Further, it is possible that by including the full value of the options that may be exercised, the value of such options may be either overstated or understated, since the price at the time of exercise may differ from the price of the option at the time it is awarded. For instance, in the United States, the Hart-Scott-Rodino (HSR) rules require that valuation reports presented to the board of directors contemporaneously to entering into the transaction be relied on as the reference point to determine value for elements of consideration that are not known but capable of being estimated at the time of notification.[9] Further, informal guidance from the Federal Trade Commission (the FTC) indicates that discounting to present value is only permitted where the value of a future contingent earnout cannot be estimated at the time of entering into the transaction.[10]

The Sections recommend that the Regulation 4(1)(d) in its current form be deleted, and that the full value of shares acquired upon exercise of an option only be taken into account if and when the option is exercised, consistent with the position in other jurisdictions, and the CCI's own practice on this issue.[11] Alternatively, the Sections recommend that the CCI only considers the full value of an option as part of the transaction consideration only if they are exercised at the per-share price paid to shareholders (potentially as a means to allocate a portion of transaction value to certain individuals) limiting any uncertainty as to their value. .

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[8] Draft Regulations, Regulation 4(1)(d).

[9] § 801.10(c) of the Rules, Regulations, Statements and Interpretations Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

[10] FTC Informal Interpretation, 1506001 https://www.ftc.gov/legal-library/browse/hsr-informal-interpretations/1506001, 2015.

[11] See the CCI's order under Section 31 of the Act under *<u>Reliance Industries Limited / Bharti AXA</u>*, 2011

IV. DVT: Mandate to notify where transaction value cannot be precisely determined

The Draft Regulations stipulate that where the precise value of the transaction cannot be determined with reasonable certainty, the acquirer may assume that the value would exceed the DVT and notify the transaction.[12] The Sections understand that Explanation (g) provides parties an *option* to notify even when it is uncertain whether the thresholds are met. However, as currently worded, Explanation (g) could leave the impression that in all cases where the value of transaction is uncertain, the parties should assume that the value exceeds the DVT and notify the transaction. Such a presumptive rule would impose a significant regulatory burden on transacting parties, since it essentially requires parties to notify any transaction for which the deal value is subject to any degree of computational uncertainty.

The Sections suggest that Explanation (g) be clarified accordingly. Should Explanation (g) be intended to *require* a filing if the precise value of the transaction cannot be determined, the Sections suggest that the Draft Regulations provide specific guidance to address particular situations that may arise or at the very minimum, allow for a mechanism where parties can approach the CCI to resolve such computational uncertainty. The CCI must rely on the value of the transaction as reflected in the transaction documents, and where such documents are ambiguous, the CCI may refer to the value of the transaction as reflected in the documents presented to the board of directors or approving authority for a transaction. This provides both certainty for a filing party in computing the deal value based on transaction documents, and the flexibility for the CCI to look beyond the transaction documents if they are unclear or ambiguous. This approach is in line with international best practices,[13] and adheres to the ICN's Recommended Practices which mandate that notification thresholds be based on information that is readily accessible to parties in the ordinary course of business.[14]

In order to retain the predictability required of filing thresholds, and to provide sufficient and clear guidance to parties where there might be some ambiguity behind the computation of such deal value the Sections recommend that the CCI consider deleting the existing presumptive rule in Regulation 4(1)(g) and instead, clarify that parties and the CCI may, ascribe a value to the transaction based on their valuation reports or internal documents that were placed before the board of directors.

V. DVT: Explanation on interconnected transactions is unnecessary

The Draft Regulations require parties to include the value of subsequent "interconnected" transactions as being part of the transaction value for DVT computation, where the acquirer or a company in its group is transacting with the target enterprise during the 2-year period prior to the date on which the transaction is entered into.[15]

The Sections understand that the legislative intent behind categorizing two or more distinct transactions as being "interconnected" to determine notifiability, is essentially to prevent parties from

[12] Draft Regulations, Explanation (g) of Regulation 4(1).

[13] GERMAN AND AUSTRIAN GUIDANCE ON TRANSACTION VALUE THRESHOLDS, ¶¶ 20-22.

[14] ICN RECOMMENDED PRACTICES, § II.F.

[15] Draft Regulations, Explanation (e) of the Regulation 4(1).

"structuring around" the merger notification requirement by splitting a single notifiable transaction into smaller parts. The Draft Regulations, through Regulations 9(4) and Regulation 9(5) respectively, specify when such transactions may be treated as being interconnected, and the CCI has through its decisional practice, developed a clear test of establishing such interconnection.[16] The Draft Regulations also allow the CCI to include the value of all "interconnected steps" as part of the value of the transaction in Regulation 4(1)(b). The meaning of "interconnected steps" in that provision is cross-referenced to Regulations 9(4) and Regulation 9(5) which provides clear and unambiguous guidance. To the best of the Sections' understanding, there appears to be no useful reason for Regulation 4(1)(c) of the Draft Regulations to deem all transactions within a 2-year time frame as being "interconnected", particularly when the current test of interconnection is well-established and unambiguous.[17]

The Sections believe that the two year "deemed interconnection" could also create potentially unintended and onerous filing obligations, for instance where an investor makes a number of stand-alone investments in the course of a 2-year period, each of which is unrelated and independent of the other, but the value of all collectively exceeds the DVT. The deeming provision will effectively create a filing obligation based on a transaction value which will only be determined at the end of 2 years. As such, the Sections recommend deleting Explanation (e) to Regulation 4(1) altogether.

In the event that Explanation (e) is retained, the Sections suggest that the term "*group entities*" be replaced with "*parties', parties' parent entities, and their subsidiaries, joint ventures*" or in the alternative, "*group*" as defined under the Companies Act, 2013 since a greater degree of control ought to be required to determine an whether two or more transactions are interconnected. For instance, in PE/financial investments, acquirers have little or no interest or involvement in the day-to-day functioning of the investee companies, and in that respect exercise no control over the target companies. These investments are typically in the nature of minority non-control-conferring investments. Not only is such value fundamentally difficult to compute and therefore uncertain, the failure to notify a transaction that breaches this deemed value at the end of 2 years, would also create a risk of a gun-jumping, non-compliance penalty under Section 43A of the Act.

VI. DVT: Thresholds for Substantial Business Operations (SBO) in India require greater specificity

The Draft Regulations states that an enterprise would have SBO in India if, in the preceding 12 months from the date of entering into the transaction, it has derived 10% or more of its (a) global number of users/subscribers/customers/visitors; (b) global gross merchandise value; and (c) global turnover from all its goods and services, in the preceding financial, from India[18].

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[16] See the CCI's decision under Section 43A of the Act in Canada Pension Plan Investment Board / ReNew Power, (2019) https://www.cci.gov.in/combination/order/details/order/1137/0/orders-section43a_44 and the decision of the Supreme Court of India in Competition Commission of India v. Thomas Cook, Civil Appeal No. 13578 of 2015 (2018) https://main.sci.gov.in/supremecourt/2015/35723/35723_2015_Judgement_17-Apr-2018.pdf/.

[17] *Supra* note 4.

[18] Draft Regulations, Regulation 4(2).

In line with international best practices which suggest that competition agencies assert jurisdiction only over transactions that have a material nexus to the reviewing jurisdiction,[19] the Sections note that having a sufficient nexus with India is crucial to ensure that the DVT does not result in increased burden for the regulator and for filing parties. The Sections welcome the target-only approach for determining local nexus in the proviso to Section 5(d) of the Act. However, to further ensure that transactions with limited nexus to Indian markets are appropriately filtered out, the Sections recommend the following:

- Increasing the local nexus materiality thresholds: The Sections believe that the implementation of the DVT in India would benefit from greater clarity to Regulation 4(2). In the first instance, given India's vast population[20] and growing number of internet users, it is likely that a 10% threshold for SBO in India will be breached in most instances, and therefore, ought to be reconsidered.[21]
  Further, specifically for the materiality threshold pertaining to the number of "users", a single digital player might have multiple products under a single company and a user could be using more than one service offered by the said company. For the purposes of the 10% user threshold, if one were to simply take the sum of all users (across different products), the total number of users would likely be significantly overstated.
  Therefore, to accurately demonstrate India nexus, the Sections recommend that either (a) the threshold percentage number for users, subscribers, customers and visitors be increased to 20% across all three categories in Regulation 4(2).

- Appropriately accounting for asset acquisitions: The Sections note that the DVT is equally applicable to asset acquisitions , although the SBO thresholds in Regulation 4(2) refer only to the "enterprise" (i.e. the target) as a whole. Conflating the acquisition of assets with the acquisition of an enterprise inflates the value of the transaction and is contrary to international best practices.[22] The Sections note that the CCI's own decisional practice and combination rules have consistently distinguished between asset and enterprise acquisitions .[23]
  The Sections recommend that the SBO thresholds should be modified to account for the number of users, subscribers, customers, or visitors, gross merchandise value or turnover of the assets *being acquired*, to ensure that the entire value of the seller enterprise is not considered when the subject matter of the acquisition is only a part of the seller's enterprise.

- Refining thresholds to account for average active users: The Sections believe that it might be an overstatement to consider every download as a user, and therefore the threshold relating to "users, subscribers, customers, visitors" may be excessively broad, and is very likely to result in double-

[19] ICN Recommended Practices at § II.A, B and C and Organization for Economic Cooperation and Development (OECD), Recommendation of the Council on Merger Review, OECD/LEGAL/0333, at ¶ 1.2 (2021), https://www.oecd.org/daf/competition/mergers/40537528.pdf [hereinafter OECD Recommendation on Merger Review]

[20] India's population is estimated at 1,428.6 million out of 8,045 millions world population. Given this, India's population is equivalent to 17.76% of the total world population. See United Nations Population Fund, "World Population Dashboard", 2023 https://www.unfpa.org/data/world-population-dashboard.

[21] ICN RECOMMENDED PRACTICES, § II.C which states that, "*jurisdictions with notification thresholds based solely on the activities of the acquired business should set their thresholds at a substantially higher level to ensure that the transaction has a material nexus to the reviewing jurisdiction*"

[22] ICN RECOMMENDED PRACTICES, § II.C.

[23] See newly introduced explanation (f) to Section 5 of the Act.

counting of users. In fact, a single product offered by a company, e.g. a social networking website, may have a different number of subscribers as compared to users or visitors - in addition, these may or may not be active subscribers, users or visitors. Such "visitors" or inactive users likely do not contribute in a lasting manner to the economic value of the target enterprise and should not be counted towards this threshold. It is also time-consuming and resource intensive to collate data on "visitors" (over and above existing information on customers and subscribers). The Sections note that detailed guidance is provided on the methodology for computation of alternate thresholds for use in digital markets, as in the Annex to the EU's Digital Markets Act[24] (DMA), the guidance to the EU's Digital Services Act[25] and German and Austrian guidance on transaction value threshold.[26]

Additionally, the Sections note that the German and Austrian guidance on transaction value threshold set out different criteria to measure activities in *different sectors*.[27] The DMA also provides specific definitions of 'active end users' and 'active business users' for different products/services (e.g., online intermediation services, online search engines, online social networking services, video sharing services, etc.).[28] Since it is difficult to provide a definitive list of possible criteria, the measurement should be carried out in line with industry standards that cannot be easily manipulated.

The Sections recommend that reference to users/subscribers/customers/visitors should be deleted and this threshold be limited to "active business users and active end users", to be identified through a clearly specified methodology. Further, the Sections recommend that the Draft Regulations may also provide guidance on the computation of "active end users" or "active business users" across various sectors.

Finally, the Sections recommend that the threshold should be modified so that the condition of SBO is met only if the *average* of the active end users or active business end users for the previous 12 month period exceeds the specified limit. The current formulation ("*at any time* in the previous 12 months") would include instances where the target's active end users may temporarily exceed this limit or do so only briefly within the 12-month period.

- Scope of "gross merchandise value": Given the SBO parameters already include a turnover threshold, it is unclear how the term "gross merchandise value" is distinct from turnover. The Sections note that the CCI's existing practice and guidance on "turnover" requires notifying parties to calculate revenues on the basis of accounting standards (including internationally accepted measures such as IFRS), which allow for non-cash consideration to be included in financial reporting of revenues.

  As such, the Sections recommend that the CCI either dispense with the "gross merchandise value" threshold or alternatively, issue further guidance on the scope of the term "gross merchandise

[24] Digital Markets Act, Regulation (EU) 2022/1925, (2022), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R1925 [hereinafter the DMA].

[25] Questions 5 and 6, European Commission, "Questions and Answers on identification and counting of active recipients of the service under the Digital Services Act", 2023, https://digital-strategy.ec.europa.eu/en/library/dsa-guidance-requirement-publish-user-numbers.

[26] German and Austrian Guidance on Transaction Value Thresholds, ¶ 67.

[27] German and Austrian Guidance on Transaction Value Thresholds, ¶ 66.

[28] Annex, DMA.

value" and clearly distinguish it from "turnover" as understood under the Act, either as a part of the Draft Regulations or as part of its FAQs.

- Clarifying thresholds as being limited to India: As with the threshold relating to turnover, the thresholds relating to the number of users, customers, subscribers, or visitors and gross merchandise value should clearly reference "in India".

- Adding a *de minimis* turnover exemption for transactions where turnover adequately reflect competitive positions: The Sections note that the DVT is currently sector-agnostic, and is not subject to the overall *de minimis* exemption applicable to the existing asset or turnover jurisdictional thresholds. This is not the case in other jurisdictions that have adopted a transaction value threshold - for example, in Germany, the guidance published by the Bundeskartellamt to interpret transaction value thresholds, stipulates that the transaction will not be significant in the domestic markets if the target company generated a turnover below €17.5m (~INR 155.86 crores) in Germany, provided that the company's turnover adequately reflects its market position and competitive potential.[29] For Austria, while lawmakers have not set an absolute threshold, the Bundeswettbewerbsbehörde routinely finds that there is no domestic activity if the turnover of domestic target companies is below €1 million (~INR 8.89 crores),[30] provided that this turnover adequately reflects the market position and the competitive potential of the target company; alternatively, a market share of greater than 10% is considered to be sufficient to satisfy local nexus under Austrian jurisprudence.[31] In the United States, in certain circumstances, the HSR transaction value threshold also incorporates a "size of person" test, which requires that the parties to a transaction meet a certain asset / turnover threshold.[32]
  The Sections respectfully recommend that the SBO thresholds should specify a *de minimis* turnover value below which the CCI assumes that the target company does not have SBO in India, if this turnover adequately reflects the companies' market position and competitive potential in India. Such an exemption could provide relief to the otherwise onerous filing burden for parties whose Indian turnover in the preceding financial year from the date of signing, is below the *de minimis* turnover threshold.

VII. Pre-Filing Consultation (PFC) outcomes should be documented and shared with parties

The Draft Regulations have proposed formalizing the informal consultation process that notifying parties engage in with the CCI prior to a merger filing.[33] This formal recognition is on par with international best practices, such as the ICN's recommendations,[34] and will enhance transparency and predictability in India's merger control regime. The CCI's existing PFC Guidance Note states that consultations shall be held in strict confidence and without prejudice to the substantive assessment of the

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[29] GERMAN AND AUSTRIAN GUIDANCE ON TRANSACTION VALUE THRESHOLDS, ¶ 82.

[30] 1 Euro = INR 88.89, as on 12 September, 2023.

[31] GERMAN AND AUSTRIAN GUIDANCE ON TRANSACTION VALUE THRESHOLDS, ¶ 83.

[32] FTC, Introductory Guide II: To File or Not to File - When You Must File a Premerger Notification Report Form", §5.(2).C, page 12, (2008), https://www.ftc.gov/sites/default/files/attachments/premerger-introductory-guides/guide2.pdf.

[33] Regulation 7, Draft Regulations.

[34] ICN RECOMMENDED PRACTICES, § III. D, Comment 1, and § V.C, Comment 1.

transaction on receipt of the formal notice.[35] However, the Sections note that the Draft Regulations do not expressly protect confidential materials exchanged, or verbal discussions engaged in as a part of the PFC or the outcome of the PFC process. Extending such protection to PFC discussions under the new Regulation 7 would encourage parties to be more forthcoming during the consultation process and facilitate a frank and open discussion with case officers to resolve any queries, at pace with the ICN's recommendations.[36] This will also render the PFC process more effective, and may lead to lower requests for (additional) information from the CCI / identification of defects by the CCI.

Further, the Sections note that per the Draft Regulations, the guidance provided during a PFC remains non-binding on the CCI.[37] The Sections understand that the CCI's current practice does not provide the parties to a PFC with any written guidance documenting the outcome of the consultation. The ICN recommends that merger control rules should foster consistency, predictability and fairness, and ensure transparency with respect to the policies, practices and procedures involved in merger review.[38] Written guidance would provide adequate clarity on the outcome of the PFC, ensure consistency in the approach adopted during PFCs and significantly increase certainty for parties. The Sections believe that adopting this practice will expedite transaction clearance as notifying parties will be better equipped to make filings in compliance with the available guidance, as applicable to their transaction, and ultimately save the CCI's institutional resources. For instance, the FTC publishes informal interpretations on a no-names basis, offered by its staff on the applicability of the HSR rules to specific fact situations, as a reference tool.[39]

With a view to improve transparency, predictability and the overall outcome of the PFC process, the Sections respectfully recommend that (a) in line with the ICN's recommended practices,[40] Regulation 7 of the Draft Regulations should replicate the reference with respect to protection of confidential material, discussions and the outcome of the PFC process, currently contained in the CCI's PFC Guidance Note; and (b) the CCI should document the outcome of a PFC in writing and may consider publishing these on a no-names basis (subject to requisite protection of confidential information), even if such outcomes are not binding on the CCI.

VIII. Scrutiny of notice - additional guidance required on removal of "defects" and additional information requirements

The merger review procedure under the Draft Regulations empowers the CCI to direct notifying parties to remove any defects in the filed notice, and furnish required information or documents, if the

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[35] COMPETITION COMMISSION OF INDIA, Guidance Note on Pre-Filing Consultation, https://www.cci.gov.in/images/combinationprefillingconsultation/en/pfc-guidence-note1651833852.pdf

[36] ICN RECOMMENDED PRACTICES, § VI. A, Comment 2.

[37] Draft Regulations, Regulation 7(3).

[38] INT'L COMPETITION NETWORK, GUIDING PRINCIPLES FOR MERGER NOTIFICATION AND REVIEW, ¶ 2 (2018), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_GuidingPrinciples.pdf [hereinafter ICN GUIDING PRINCIPLES].

[39] FTC, About Informal Interpretations, https://www.ftc.gov/enforcement/premerger-notification-program/hsr-informal-interpretations/about-informal-interpretations

[40] ICN RECOMMENDED PRACTICES, § III. D, Comment 1.

notice appears to be incomplete in any respect, within a 10-working day period.[41] Further, the CCI is empowered to direct parties to submit such additional information as may be required during the merger inquiry.[42] The merger review period is subject to clock-stops, until the parties submit such additional information.[43]

However, the Sections note that with respect to "defects" in the merger filing, the CCI's review period does not commence until parties comply with the CCI's directions under Regulation 14(2).[44] The CCI is required to communicate any directions under Regulation 14(2) to parties within 10 working days of the receipt of the merger notice.[45] The 10-working day period ensures that notifying parties are informed whether their filing is complete or whether there are deficiencies in their submissions within a reasonable time frame, in line with the ICN's recommendations.[46]

The ICN also recommends that merger investigations should be conducted in a manner that promotes an effective, efficient, transparent, and predictable merger review process.[47] Further, a competition agency should manage the merger review process to ensure that the process is implemented fairly, efficiently, and consistently, both procedurally and substantively.[48] The ICN also indicates that merger control law must permit ready determination of information that is required to be provided while filing a notice.[49]

The Sections note that: (a) the merger review period under the Draft Regulations does not begin until notifying parties remove defects and furnish the required information and documents sought by the CCI[50], and (b) the merger review period is in any event subject to clock-stops (until the parties submit such additional information[51] which includes defects of the nature CCI aims to cure through Regulation 14(2)). Adding an additional timeline for clearing defects could considerably delay approval timelines, especially in the absence of guidance on the nature of "defects" and information that could be requested at this stage. The ICN Recommended Practices highlight that ensuring procedural fairness should be a basic attribute of all merger review procedures.[52] Clarifying guidance could in-turn reduce the merger approval timelines, enhancing the ease of doing business in India. This is in line with international best practices to ensure and improve transparency in merger regulations.[53]

As such, the Sections recommend that: (a) the CCI re-evaluate the need for a provision which adds uncertainty to the merger review process; in the alternative, should the CCI decide to retain this provision,

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[41] Draft Regulations, Regulation 14(2),
[42] Draft Regulations, Regulation 14(3).
[43] Draft Regulations, Regulation 14(5).
[44] Draft Regulations, Regulation 14(4).
[45] Draft Regulations, Proviso to Regulation 14(4).
[46] ICN RECOMMENDED PRACTICES, § IV. C, Comment 2.
[47] ICN RECOMMENDED PRACTICES, § VI.A.
[48] ICN RECOMMENDED PRACTICES, § VII. D.
[49] ICN RECOMMENDED PRACTICES, § VIII. B, Comment 2.
[50] Draft Regulations, Regulation 14(2).
[51] Draft Regulations, Regulation 14(5).
[52] ICN RECOMMENDED PRACTICES, § VII. A. Comment 1.
[53] ICN RECOMMENDED PRACTICES, § VIII.

(b) in line with the ICN's Recommended Practices,[54] the Draft Regulations should clarify the scope of any "defects" which parties may be required to remove in Regulation 14(2); (c) the Sections recommend that the scope of any "required information or documents" which parties may be required to be provide under Regulation 14(2), should be related to clearing the "defects" to the extent parties are responsive to questions listed in the Forms provided under Schedule 1 of the Combination Regulations; and (d) *all* defects should be communicated within the 10-working day period from the date of initial submission, instead of on a rolling basis so that the filing parties can work to remove all defects in one revision, rather than risking restarting the clock multiple times.

IX. Prior to invalidating for material changes, parties to receive opportunity to be heard

The Sections note that the CCI currently has the power to invalidate a notice (after recording reasons), if there is any change in the information filed by notifying parties that materially alters the CCI's analysis of whether the transaction is likely to have an appreciable adverse effect on competition (AAEC) in India. While this provision has been retained in substance, the Draft Regulations dispense with the requirement to grant parties an opportunity to be heard before the CCI determines whether to invalidate the filing.[55]

The Sections emphasize the need to provide parties with predictability and certainty in a merger filing process and understand that the requirement for procedural fairness is built into the statutory provisions of the Act.[56] The Sections believe that providing filing parties with an opportunity of being heard before a notice is invalidated, would be in keeping with fairness and due process requirements. This is also consistent with international best practices, as has been noted in the ICN's Guiding Principles for Merger Notification and Review - "*Prior to a final adverse decision on the merits, merging parties should be informed of the competitive concerns that form the basis for the proposed adverse decision and the factual basis upon which such concerns are based, <u>and should have an opportunity to express their views in relation to those concerns</u>.*"[57] Similarly, the OECD's Recommendation of the Council on Merger Review notes that "*Merger laws should ensure procedural fairness for merging parties, including the opportunity for merging parties to obtain sufficient and timely information about material competitive concerns raised by a merger, <u>a meaningful opportunity to respond to such concerns</u>, and the right to seek review by a separate adjudicative body of final adverse enforcement decisions on the legality of a merge*r".[58]

Accordingly, the Sections recommend that the Draft Regulations reinstate the provision that currently provides notifying parties with an opportunity to be heard by the CCI before it decides to invalidate a notice.

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[54] ICN RECOMMENDED PRACTICES, § IV. C, Comment 2.
[55] Draft Regulations, Regulation 15(4).
[56] Section 36 of the Act.
[57] ICN GUIDING PRINCIPLES, ¶ 4.
[58] OECD RECOMMENDATION ON MERGER REVIEW at ¶ 3..

X. Ambiguity in the restriction on acquirers from exercising "influence" in on-market share acquisitions, including open offers

The Sections note that under the newly introduced Section 6A of the Act, the suspensory, standstill obligation under the Act is no longer applicable to the implementation of an open offer or acquisitions of shares or convertible securities through a series of transactions on a regulated stock exchange, subject to two conditions: (a) that the transaction is notified to the CCI within the prescribed 30-day timeline and in the prescribed form; and (b) the acquirer does not "exercise any ownership or beneficial rights or interest in such shares or convertibles, except as permitted by regulations".

The Sections note that the Draft Regulations indicate that acquisitions under Section 6A must be notified within 30 days of completing the first acquisition of shares, accompanied by a declaration that the acquirer is in compliance with Section 6A and the conditions listed in Regulation 6.[59] Further, Regulation 6 lists various categories of permitted benefits and activities, including (a) availing of economic benefits such as dividends and other distributions, participation in rights issues, bonus issues, stock splits and buy-backs; (b) disposal of shares or securities acquired; or (c) exercising voting rights in respect of insolvency or liquidation proceedings. The Sections welcome these clarifications as they facilitate on-market acquisitions and public offers under Indian law, in line with global best practices in this regard.

However, the Sections note that the proviso to Regulation 6 imposes a restriction on the acquirer or any of its affiliates from directly or indirectly "*...influenc[ing]... in any manner whatsoever*" the target enterprise.[60] The Draft Regulations are unclear on the nature of activities that may be viewed as "influencing" the target enterprise. This could lead to greater ambiguity, particularly since the CCI now considers the exercise of "material influence" over an enterprise as constituting "control" under the Act.[61]

While the newly introduced Section 6A appears similar to the derogation from standstill obligations in the EUMR, the Draft Regulations propose an additional restriction on the actions that an acquirer may not take that "influence" the target. Instead, the EUMR only requires notifying parties to refrain from exercising the voting rights attached to the securities in question. The EUMR also permits transacting parties to seek a derogation from the EC if they require additional actions in the target (other than exercising usual shareholder voting rights) to maintain the full value of the investment.[62] This is also the case in Germany.[63] As indicated above, the importance of clear, objective and unambiguous obligations in merger control rules has been emphasized by both the ICN[64] and the OECD.[65]

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[59] Draft Regulations, Regulation 5(4).

[60] Draft Regulations, Proviso to Regulation 6.

[61] COMPETITION COMMISSION OF INDIA, *"What is meant by control?"*, Frequently Asked Questions.

[62] EUMR, Article 7(2).

[63] Section 41(1a) the German Act against Restraints of Competition.

[64] ICN RECOMMENDED PRACTICES, §§ II.D and II.E.

[65] OECD, Local Nexus and Jurisdictional Thresholds in Merger Control - Background Paper by the Secretariat, at ¶ 6 (2016), https://one.oecd.org/document/DAF/COMP/WP3(2016)4/REV1/en/pdf [hereinafter OECD Local Nexus Background Paper].

As such, the Sections recommend that, consistent with global practice, the Draft Regulations should be modified to only permit the acquirer to exercise its voting rights attached to the securities without introducing an additional element of subjectivity through the "influence…in any manner whatsoever" requirement. Alternatively, the CCI may consider issuing FAQs with illustrations of conduct that may be considered to "influence" the target enterprise.

XI. Market share threshold for Form II filings ought to be revised

The Draft Regulations now specifically indicate that the 15% horizontal overlap threshold and 25% vertical overlap threshold for filing Form II (long form) are applicable with reference to "any relevant market".[66] In filings involving multiple relevant markets or business segments, if these thresholds are breached in any one market, a Form II filing will be required for all the overlapping markets. While the Sections acknowledge that this regulation merely formalizes the CCI's existing practice, the Sections believe this is still an onerous burden on parties where overlaps are significant in only a few of several markets.

The ICN recognizes that the effectiveness of a merger control regime can be improved by limiting information requirements, especially where transactions do not raise competition concerns.[67] The ICN's Recommended Practices stipulate that initial notification requirements should be limited, among other things, to the minimum information required to verify whether the notification thresholds are met and whether the transaction raises competitive concerns, meriting further investigation. The ICN also states that jurisdictions should adopt mechanisms that allow for flexibility in the content of the initial notification and/or with respect to additional information requirements during the initial phase of review,[68] and recommends mechanisms such as discretionary waivers of extensive information requirements that are not sufficiently relevant to the merger review process to justify the burden that such information requirements pose on parties.[69]

The Sections note that the EC's recently revised procedures (adopted in 2023) to simplify EU merger control regime also allows parties to adopt the new "simplified procedure" and file a short Form CO with respect to markets where overlaps are minimal, while adopting the normal procedure for markets which do not satisfy the qualifying conditions for the simplified procedure.[70] The new simplified procedure also allows parties to request a waiver from information requests from the EC where the parties believe that such information is not necessary for the EC's review.[71]

Further, in many instances, transacting parties may not be able to easily determine market shares in various potentially affected markets, especially if credible third-party industry reports and analyses providing market share estimates are not available for the relevant industry or geography. Requiring parties

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[66] Draft Regulations, Regulation 5(2).

[67] ICN, Setting Thresholds for Merger Review - Report to the ICN Annual Conference, § III, page 5, 2008.

[68] ICN RECOMMENDED PRACTICES, §§ V.A and V.B.

[69] ICN RECOMMENDED PRACTICES, § V.B.

[70] EC, Commission Notice on a simplified treatment for certain concentrations under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, 2023.

[71] Query 21, EC, Questions & Answers, Merger Control in the EU - Further simplification of procedures, 2023.

to provide extensive information at the time of notification, on account of the possibility of combined market shares exceeding 15% in *any* of the overlap markets or 25% in any of the vertically linked markets, would be excessive, onerous and resource-intensive, not only for parties but for the CCI as well. CCI staff would need to parse through large amounts of information (within expedited timelines, as per the amended Act) to identify and analyze the information relevant to whether, on a preliminary basis, the transaction is likely to raise competition concerns.

Considering the above, the Sections recommend that the Draft Regulations be modified to require that parties provide details in Form II *only* for markets where overlaps exceed the 15% horizontal overlap threshold or the 25% vertical overlap threshold.

XII. Exemptions for categories of combinations not ordinarily likely to raise competition concerns in Schedule I to be replaced

The Draft Regulations have deleted the existing Regulation 4 and the accompanying exemptions listed in Schedule I (the Schedule I Exemptions), which exempted certain categories of combinations from being notified to the CCI as they do not "ordinarily" cause an appreciable adverse effect on competition. The Schedule I Exemptions largely covered transactions which are in the ordinary course and/or do not result in a change in control.

The Sections note that the power to issue exemptions now lies with the Central Government, which is required to frame exemptions through rules, as per new Section 6(7) read with Section 63(2)(a) of the Act. However, it is unclear whether these will include equivalents of the Schedule I Exemptions. It is also unclear if any rules issued by the Central Government will be subject to public consultation.

The ICN recommends that transactions that do not raise competitive concerns should be exempt,[72] and highlights some examples of transactions that are usually exempt, including intra-group transactions, minority investment acquisitions, transactions not resulting in any change of control, etc.[73] Both the ICN and OECD[74] recognize that such transactions are considered unsuitable for merger review because they are unlikely to have any durable effects on competition. The ICN also emphasizes the importance of ensuring clarity and ease of access (in a timely manner) to rules on exemptions or exclusions from merger control law.[75] The OECD also highlights the importance of ensuring the review process is not financially and procedurally onerous, while remaining predictable and reasonable for all sides involved.[76]

The Sections are hopeful that the CCI and the Central Government will work together to ensure that this gap is plugged, to avoid the notification of transactions that are not likely to raise any competition concerns. Failure to do so will only increase the CCI's administrative burden and stretch its

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[72] ICN RECOMMENDED PRACTICES, § I.A.

[73] , ICN, Setting Thresholds for Merger Review - Report to the ICN Annual Conference, § IV.C, page 8 2008.

[74] OECD Local Nexus Background Paper, ¶ 7. See also, Clause 2(2)(4), OECD, Recommendation of the Council on Merger Review, 2005, which states: *"Member countries should…provide procedures that seek to ensure that mergers that do not raise material competitive concerns are subject to expedited review and clearance."*

[75] ICN RECOMMENDED PRACTICES, §§ VIII.A - VIII.C.

[76] OECD Local Nexus Background Paper, ¶ 7.

limited resources, while also increasing regulatory compliance burdens on transacting parties, ultimately discouraging M&A in India (if parties do not want to bear this burden). The Sections recommend that the Central Government issue draft rules for exemptions equivalent to the Schedule I Exemptions as soon as possible for public consultation.

CONCLUSION

In summary, the Sections applaud the CCI for its efforts in crafting the Draft Regulations and emphasize that the key concerns arising from the Draft Regulations in current form are the elimination of unduly excessive filing burdens on parties arising from ambiguous and potentially confusing filing thresholds -- which in turn would reduce the likelihood of the CCI being inundated with numerous, cumbersome, and confusing filings that would require the CCI to deploy its time and resources towards review and raise the likelihood of staff error in carrying out reviews. In short, the ABA is motivated by promoting good government that would reduce unnecessary burdens on the CCI, to the benefit of the Indian merger control regime and M&A prospects in India as a whole. The Sections appreciate the opportunity provided by the CCI to comment on the Draft Regulations. We would be pleased to respond to any questions the CCI may have regarding these comments or to provide additional comments or information that may be of assistance to the CCI.

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