Asia Internet Coalition (AIC) Industry Submission on
Draft Competition Commission of India (Combinations) Regulations, 2023 ("Draft Combination Regulations")

25 September 2023

To
Mrs Ravneet Kaur
Chairperson, The Competition Commission of India (CCI)
9th Floor, Office Block - 1, Kidwai Nagar (East),
New Delhi: 110023, India.

On behalf of the Asia Internet Coalition (AIC) and its members, I am writing to express our sincere gratitude to the Competition Commission of India (CCI) for the opportunity to submit comments on the Draft Competition Commission of India (Combinations) Regulations, 2023 ("Draft Combination Regulations"). AIC is an industry association comprising leading internet and technology companies. We seek to promote technology and policy issues in the Asian region, and we are fully committed to the cause of a safe and open internet.

The CCI's implementation of the Competition Act over the last 14 years has put in place "best in class" antitrust enforcement and merger control mechanisms which are in line with global best practices, including those recommended by the International Competition Network (ICN) and the OECD.

The CCI has set high benchmarks by incorporating mechanisms like Green Channel deemed approval to improve ease of doing business in India . We understand that the merger control regime is now at the cusp of a major overhaul and we would like to thank the CCI for its initiative to seek public comments at this stage. We are grateful for this opportunity to provide our suggestions.

Detailed comments and recommendations on Draft Competition Commission of India (Combination) Regulations, 2023

1. **Sub-regulation 4(2):** 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.

Issue: There are estimated to be 4 to 5 billion internet users in the world and India is estimated to reach 0.9 billion internet users by 2025. Hence, the percentage, of Indian internet user of the total global internet user by 2025 can be said to be 18-23%. Further, around 20% of total global internet users are from China who in many cases use localised apps or local equivalent. Given this scenario, it is highly probable that a 10% threshold for Substantial Business Operations (SBO) in India will be breached in most instances.

Secondly, it would be inaccurate to consider every download as a user. Mere 'visitors' or inactive users are not likely to add commercial value to the target enterprise, and including them would lead to double counting. The German & Austrian Guidance also refers to "active users" as potential measurement metrics.

Recommendation: Firstly, to ensure accurate consideration of SBO in India, we recommend increasing the threshold to 25% across the three different aspects covered.

Secondly, in line with CCI's own practice on the treatment of asset acquisitions under the existing merger control rules, we 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, as opposed to the entire seller enterprise.

Thirdly, for accuracy, only 'active users' be considered as a metric instead of mere 'visitors'.

Lastly, given that DVT is not industry specific, the SBO thresholds could include a *de minimis* exemption, which will ensure that transactions with no probable impact on market are not inadvertently captured.

2. **Sub-regulation 4(1)(a):** The value of transaction shall include … consideration for any covenant, undertaking, obligations, or restriction imposed on seller or any other person, other than the acquirer, in the nature of non-competition or otherwise.

Issue: Non-compete clauses do not have an assigned specific value, as the execution of deals is contingent upon the presence of such clauses. Non-compete clauses are

meant to protect the commercial viability of the transaction. The inclusion of non-compete clauses in the calculation of deal value shall increase uncertainty for parties as no set value can be assigned to the non-compete clauses. The inclusion of the words "nature of non-competition or otherwise" in the current regulation increases uncertainty and ambiguity for parties, as it is not clear what is to be included under the purview of 'otherwise'.

Recommendation: It is suggested that sub-regulation 4(1)(a) may be deleted. Alternatively, the value of non-compete may be taken into consideration as a part of a deal value if a specific value is ascribed to a 'non-compete' clause. This will reduce uncertainty in the calculation of deal value. It is also suggested that the term "or otherwise" be removed to avoid uncertainty.

3. **Sub-regulation 4(1)(b)**: The value of transaction shall include … consideration for all inter- connected steps as read in sub-regulation (4) and (5) of regulation 9 of these regulations.

Issue: The draft Sub-regulations 9(4) and 9(5) specify how a transaction may be seen as interconnected. Further, the Competition Commission of India's (CCI's) decisional practice has also been able to discern inter-connected transactions by developing steps for identifying such transactions. Considering the same, the inclusion of a two-year 'deemed interconnection' rule is unnecessary and is likely to create several false positives, burdening parties with onerous filing obligations, increasing transaction costs, and leading to a significant increase in non-problematic notifications for the CCI to assess. The broad scope of the sub-regulation read with Explanation (e) would likely lead to unintended consequences, such as investors having to notify for unrelated standalone investments over a two-year period due to exceeding the threshold under Section 5(d) of the Competition Act, 2002 (Act). Additionally, the inclusion of the term "or its group entities" in Explanation (e) would lead to a number of technical notifications and increase the likelihood of a gun jumping violation. This is due to CCI's wide definition of 'group' and the diluted test of control under Explanation (a) to Section 5 of the Act which now provides for material influence.

Recommendation: This provision effectively creates a filing obligation based on the transaction value that shall be determined at the end of two years. This adds considerable regulatory uncertainty to a transaction and unnecessary burden on both the parties and the CCI, as the CCI will receive multiple non-problematic filings, placing a burden on the time and resources of the regulator. It is suggested that the 'deeming provision' of two years be removed. If not, the definition of 'group entities' must be limited to entities where there's a suitable degree of control, for example – subsidiaries, joint ventures and holding companies. This would ensure certainty for

parties and prevent bypass of filing requirements. Further, the term 'acquisition' must be attributed the same meaning as under Section 2 of the Act to ensure certainty.

4. **Sub-regulation 4(1)(c)**: The value of consideration shall include … arrangement(s) entered into as a part of the transaction or incidental arrangement(s) entered into anytime during two years from the date on which the transaction would come into effect including but not limited to technology assistance, licensing of intellectual property rights, usage rights to any product, service or facility, supply of raw materials or finished goods, branding and marketing.

   Issue: It is unnecessary to include a two-year period for additional arrangements that are part of the transaction, as Sub-regulation 4(1)(b) read with Explanation (e) already includes inter-connected transactions. The term "incidental arrangement" is vague and overly broad in scope. In its present form, this would increase the uncertainty for parties in assessing whether any transaction would be notifiable under the DVT.

   Recommendation: It is suggested that Sub-regulation 4(1)(c) is removed, provided that Sub-regulation 4(1)(b) read with Explanation (e) always contains inter-connected transactions. It is suggested that the term "incidental arrangements" is removed and if not, replace with arrangements that are anticipated and enumerated in the transaction documents at the time of signing, given they aren't in the ordinary course of business.

5. **Sub-regulation 4(1)(d)**: The value of consideration shall include … option(s) and securities to be acquired thereof assuming full exercise of such option(s).

   Issue: The inclusion of the full value of options that may or may not be exercised in the future inflates the value of transactions, making the breach of DVT more likely, even in smaller and non-problematic transactions. The broad scope of the regulation does not clarify whether the acquirer is seen as the acquirer in the transaction. A clarification on the same would eliminate scenarios where employees of the target company are offered stock options in the acquiring company, given they accept employment under new management. Such employee retention incentives are commonplace and should not be perceived as part of 'deal value'. Such incentives are not payments but reflect time deferred compensation for future employment services. The ambiguity of this regulation could discourage companies from utilizing incentive schemes to retain employees, particularly in the tech industry where such schemes are common.

   Recommendation: It is suggested that there should be a clarification that specifies the options and securities referred to as pertaining to the acquirer in the transaction. If such options and securities are converted, it would allow the acquirer to hold additional equity shares of the target enterprise. It is suggested that only the value of

fully exercised options be considered, which is also in line with CCI's decisional practice.2 If not, it is suggested that if the full value of an option is computed on the date of signing the binding transaction documents and, is included while computing the transaction value for the DVT, the options, when exercised must not require a separate notification to, or approval from the CCI, as any value and economic impact will have been evaluated in the initial transaction itself.

6. **Sub-regulation 4(1)(e)**: The value of consideration shall include …(the) occurrence or non-occurrence of any uncertain future event as per estimates of the acquirer.

   Issue: The inclusion of value of "any uncertain future event" for computing notifiability under DVT creates is not practical. The addition of the Explanation (g), which creates a presumption that all transactions would cross the DVT if the deal value cannot be computed with "reasonable certainty", further aggravates the impact of the regulation. This may lead to parties notifying all transactions which the regulations do not intend to cover.

   Recommendation: The language of Regulation 4(1) may be amended to account for contingent and fixed events.

7. **Explanation (g) to Sub-regulation 4(1)**: If precise value of 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.

   Issue: This provision would lead to greater filing uncertainty as it requires parties to file any transaction where the deal value threshold is subject to any form of computational uncertainty. It is a possibility that certain transactions with computational uncertainty would require to be notified due to their peculiar nature. Further, Explanation (g) is redundant since Explanation (c) already provides that in cases where value of transaction cannot be determined with certainty, the value of transaction shall be the same as considered by the board of the acquirer.

   Recommendation: It is suggested that Explanation (g) be deleted.

As responsible stakeholders, we appreciate the ability to participate in this discussion and the opportunity to provide inputs into the policy-making process in India. **As such, we would like to respectfully request CCI to consider the above mentioned comments and recommendations**

Should you have any questions or need clarification on any of the recommendations, please do not hesitate to contact me directly at Secretariat@aicasia.org or +65 8739 1490.

Thank you for your time and consideration and we look forward to hearing from you.

Sincerely,

Jeff Paine
Managing Director
Asia Internet Coalition (AIC)