

REGULATION OF COMBINATIONS IN INDIA

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ABSTRACT

Competition has taken different shapes over the years. Over the years there is a huge development in the market as there are more consumers as well as there are more manufacturers or suppliers or producers. So, to stop the abuse of dominant position or anti-competitive agreements, the Competition Commission of India has taken various steps from time to time. The Competition Act has also enacted provisions to control the competition in the market including combinations between enterprises or person. To understand these Combinations, we need to resolve these questions which are discussed herewith: - What are Combinations? How these Combinations are regulated? What are the limits over which an enterprise would be scrutinized?

CHAPTER I - INTRODUCTION

At the end of the 20th Century, business entities were in a worry as how to survive and compete in the new economic environment. In the wake of liberalization of economy, India was now open up for foreign investment and was seeing a dip in governmental control regarding investment decisions. Multinational Corporations were now operating in India with help of huge foreign investment. These new economic developments were the result of acceptance of two international agreements: -

General Agreement on Tariffs and Trade (GATT)

Trade Related Aspects of Intellectual Property Rights (TRIPS)

The agreements made the Monopolies and Trade Practices Act, 1969 less important, as a result a new legislation was a need for the Indian Economy. As a result, the Government of India constituted a High-Level Committee on Competition Law and Competition Policy known as the Raghavan Committee (chaired by Mr. S.V. S Raghavan). The Committee agreed to the view that

Monopolies and Trade Practices Act, 1969 had become obsolete and wouldn't be effective for fair competition in the market economy, so a new legislation was necessary. The Committee submitted its report with a stating what the law should focus, it stated that these are the three areas where the Competition Law in today's scenario should Focus: -

- Agreement among enterprises
- Abuse of Dominance
- Mergers or, more generally, Combinations among enterprises¹

These points were considered by the Government and were enacted by the Competition Act, 2002. Enactment of this act is a tool for the government to control and regulate the players in the market. Competition law is designed to protect business and consumers from anti-competitive behavior of producers or manufacturers or wholesalers or multinationals or domestic companies.

As we can see that globalization of trade and commerce has been rapidly increasing multinational companies are preferring transnational mergers or mergers to overtake the market. The Competition Act with this as one of the objectives is keeping an eye on these types of mergers or combinations as they do not disturb the market.

Mergers and Acquisitions

Merger and Acquisition is one of the growth strategies for a business enterprise. Two or companies merge or combine together: -

To improve the operational performance or

For expansion of business or

To create a dominant position in the market or

To reduce the number of competitors in the market.

But there is a distinction between merger and Acquisition, Merger is when two or more individual businesses consolidate to form a new enterprise whereas Acquisition is when one company take over the another. ²

¹Report of High-level Committee on Competition policy law- Raghavan Committee Report, https://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf

Types of mergers

1. Horizontal Merger

In these types of mergers, the companies which are in direct competition with each other on the basis of product lines and markets.

2. Vertical Merger

In a vertical merger, companies are at different levels in supply chain.

3. Conglomerate Merger

In this type of merger there is a union of two companies who are in different industries or different geographic areas.³

However, be it a merger or an acquisition there can be a motive by the companies to create Anti-Competitive Agreements⁴, so to curb these motives or objectives it was necessary to frame Anti-Competitive measures as to safeguard the Indian Market. Nippon Steel Corporation and Sumitomo Metal Industries is one of the interesting cases among the pure merger. The company stated this notification is in relation to the integration of the entire businesses of Nippon Steel Corporation and Sumitomo Metal Industries. The Parties contended that given the intense nature of competition in the market, strong countervailing buyer power of customers, low barriers to entry, and other competitive characteristics of the relevant markets, the notified Merger will not result in a substantial lessening of competition. The Court also held that this proposed merger will not affect the market.⁵ In India, Mergers were regulated by the Companies Act and also under Security and Exchange Board of India Act for private individuals, but after the enactment of Competition Act the players including the consumers came under the ambit of Competition Act. Companies Act and also under Security

² What is merger vs Acquisition, Corporate Finance Institute

<https://corporatefinanceinstitute.com/resources/knowledge/deals/merger-vs-acquisition/>

³ What is a merger? Corporate Finance Institute

<https://corporatefinanceinstitute.com/resources/knowledge/deals/types-of-mergers/>

⁴ Anti-Competitive Agreements as such are not defined under the Act. These Agreements under the Competition Act are in the nature of restrictive trade practices. Agreements for price fixing, limiting supply of goods and services etc. would be termed as Anti-Competitive if the competition is adversely affected. These are agreements mostly among competitors to prevent, restrict or distort competition.

⁵ Nippon Steel Corporation and Sumitomo Metal Industries CCS 400/010/11

and Exchange Board of India Act are sub sets of Competition Act as in relation to legal scrutiny of mergers is concerned. Merger control provisions were made under the Competition Act so as to provide for an appropriate competition policy. These provisions came into effect from 1st June 2011 and came to be known as “Regulation of Combinations.”

CHAPTER II-COMBINATIONS

Section 5 of the Competition Act, 2002 defines ‘Combinations’, it means: -

“the acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises”.

Combinations includes acquisition of control, shares, voting rights or assets, acquisition of control by a person having direct or indirect control over another enterprise engaged in production, distribution or trading in a similar identical or substitutable goods or provisions of a similar or identical or substitutable service, person having control over another enterprise engaged in competing businesses and mergers and amalgamations between or amongst enterprises where these exceed the threshold specified in the Act in terms of assets or turnover.

Section 5 specifies threshold limits in terms of assets or turnover below which a merger, acquisition or acquiring of control is not regarded as acquisition, but if the limit exceeds Competition Commission of India would scrutinize the merger or acquisition as it would likely have an appreciable adverse effect on competition within the relevant market in India. To understand whether a particular transaction is a ‘combination’ and whether it falls under the ambit of provisions of Competition Act, 2002, we have to understand the nature of Transactions and Threshold Limits.

Nature of Transactions

There are three types of transaction included in Combinations under Section-5: -

Acquisition

Section-2(a) of the Competition Act, 2002 states that acquisition means acquiring or agreeing to acquire: -

- Shares, voting rights or assets of an enterprise; or

- Control over the management; or
- Control over the assets of an enterprise.

Acquiring of Control by a person over an Enterprise

The Act further covers any acquisition of 'Control' by a 'Person' over an 'Enterprise' where: -

Such person has direct or indirect control on any other enterprise and

- That any other enterprise is also in production, distribution or trading of:
 - Similar goods or services; or
 - Identical goods or services; or
 - Substitutable goods or services

As that of Enterprise whose control is being acquired. To understand the above definition precisely the terms used are discussed herewith: -

Explanation to *Section 5 of the Competition Act, 2002* defines 'control' it states that 'Control' includes controlling the affairs or management by: -

- One or more enterprises, either jointly or singly, over another enterprise or group;
- One or more groups, either jointly or singly, over another group or enterprise.

Explanation to *Section 5 of the Competition Act, 2002* also defines 'group' it states that 'group' means two or more enterprises which directly or indirectly are in a position to: -

- Exercise twenty six percent or more of voting rights in other enterprise; or
- Appoint more than fifty percent of the members of the board of directors in the other enterprise; or
- Control the management or affairs of the other enterprises.

Section-2(l) of the Competition Act, 2002 of the Act defines 'Person' includes an individual or body corporate as defined under the Act.

Meaning of Control

The term 'control' in *Section 5 of the Competition Act, 2002* has been include to controlling the affairs and management of one or more enterprises or group either jointly or individually. The

Competition Commission of India has clarified that the ability that or material influence including the lowest degree of control is considered enough to be control under this Act.⁶ The definition of control under the Competition At, 2002 is much wider import than the Securities and Exchange Board of India Takeover Regulations, 2011 which includes the right to appoint majority of the directors or controlling 'the management or policy decisions.'⁷

Merger or Amalgamation in relation to Transactions

We have understood the term 'merger' as defined above, as of amalgamation it has not been specifically defined under this Act. *Section 2(1B) of the Income Tax Act, 1961* defines amalgamation as follows: -

"amalgamation", in relation to companies, means the merger of one or more companies with another company or the merger of two or more companies to form one company (the company or companies which so merge being referred to as the amalgamating company or companies and the company with which they merge or which is formed as a result of the merger, as the amalgamated company) in such a manner that—

(i) all the property of the amalgamating company or companies immediately before the amalgamation becomes the property of the amalgamated company by virtue of the amalgamation;

(ii) all the liabilities of the amalgamating company or companies immediately before the amalgamation become the liabilities of the amalgamated company by virtue of the amalgamation;

(iii) shareholders holding not less than three-fourths in value of the shares in the amalgamating company or companies (other than shares already held therein immediately before the amalgamation by, or by a nominee for, the amalgamated company or its subs-diary) become shareholders of the amalgamated company by virtue of the amalgamation, otherwise, then as a result of the acquisition of the property of one company by another company pursuant to the

⁶ Notice given under Section 6(2) of the Competition Act, 2002 by UltraTech Cement Limited: Combination Registration. No. C-2015/02/246, https://www.cci.gov.in/sites/default/files/246_44_PublicV.pdf

⁷ In Re, Jet Airways (India) Ltd. (Case No.30/2013(CCI))

purchase of such property by the other company or as a result of the distribution of such property to the other company after the winding up of the first-mentioned company⁸

CHAPTER III-THRESHOLD LIMITS AS TO THE TRANSACTION INVOLVED

India is a growing economy attracting huge investments. The growth process is driven by both organic and inorganic growth of enterprises. ⁹There are enormous mergers taking place in India and it is not feasible for the Competition Commission of India to regulate all transactions. As a presumption that small size transactions would not affect the market competition, certain threshold limits are set up the Competition Commission of India which require mandatory notification by the persons to the Competition Commission of India. The Act also provides for revision of threshold limits *every two years* by the government in consultation with the Commission. The current thresholds as notified (S.O. 675 (E) 4th March 2016) are as follows: -

	APPLICABLE TO	ASSETS		TURNOVER	
In India	Individual	1,000 Cr.		3,000 Cr.	
	Group	4,000 Cr.		12,000 Cr.	
In India and Outside India		ASSETS		TURNOVER	
		TOTAL	<u>MINIMUM INDIAN COMPONENT</u>	TOTAL	<u>MINIMUM INDIAN COMPONENT</u>
	Individual Parties	500 m	500 Cr	1500 m	1500 Cr.
	Group	2 billion	500 Cr.	6 billion	1500 Cr.

⁸ Income Tax Act, 1961, <https://www.incometaxindia.gov.in/pages/indiacode/income-tax-act.aspx>

⁹Provisions relating to Combinations, Competition Commission of India
https://www.cci.gov.in/sites/default/files/advocacy_booklet_document/combination.pdf

THRESHOLDS FOR FILING NOTICE				
		Assets		Turnover
Enterprise Level	India	> 2000 INR crore	OR	>6000 INR crore
	Worldwide with India leg	>USD 1 bn with at least >1000 INR crore in India		>USD 3 bn with at least >3000 INR crore in India
OR				
Group Level	India	>8000 INR crore	OR	>24000 INR crore
	Worldwide with India leg	> USD 4 bn with at least >1000 INR crore in India		> USD 12 bn with at least >3000 INR crore in India

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Explanation to *Section 5 of the Competition Act, 2002* clarifies for the purposes of determining asset value as shown in the audited book of accounts of the enterprise in the financial year preceding the financial year of the combination must be taken.

Exemptions to threshold limits

The Central Government has exempted an enterprise whose control, shares, voting rights or assets being acquired if it has either assets of the value of not more than Rs. 350 Crore in India or turnover of not more than Rs. 1000 Crore in India for a period of Five years from the date of publication of the notification in the official gazette.¹¹

CHAPTER IV - REGULATIONS OF COMBINATIONS

Section 6 of the Competition Act, 2002 relates to the for regulation of combinations.

For the application of *Section 6 of the Competition Act, 2002* the combination under *Section 5 of the Competition Act, 2002* should be the one which causes or is likely to cause an appreciable adverse effect on combination within the relevant market in India and such a combination would be void. (*Section 6(1)*) of the *Competition Act, 2002*).

To understand the concept of relevant market in India, let us discuss the different relevant markets in India: -

¹⁰ Revised Threshold, Competition Commission of India

https://www.cci.gov.in/sites/default/files/whats_newdocument/Revised%20thresholds.pdf

¹¹ Revised Threshold, Competition Commission of India

https://www.cci.gov.in/sites/default/files/whats_newdocument/Revised%20thresholds.pdf

Section 2(r) of the Competition Act, 2002 defines Relevant market, it means the market which may be determined by the Commission with reference to the relevant product market or relevant geographic market or with reference to both the markets.

Relevant market may further be divided into two parts

Relevant Product market

Section 2(t) of the Competition Act, 2002 defines *Relevant Product market*, it means a market comprising of goods or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the product or services, their prices and intended use.

Section 19 (6) of the Competition Act, 2002 states that The Commission shall, while determining the “relevant geographic market”, have due regard to all or any of the following factors, namely:

—

- (a) regulatory trade barriers;
- (b) local specification requirements;
- (c) national procurement policies;
- (d) adequate distribution facilities;
- (e) transport costs;
- (f) language;
- (g) consumer preferences;
- (h) need for secure or regular supplies or rapid after-sales services.¹²

Relevant Geographic Market

Section 2(s) of the Competition Act, 2002 defines *Relevant Geographic Market*, it means a market which describes the locations of the producers or sellers of the product or service.

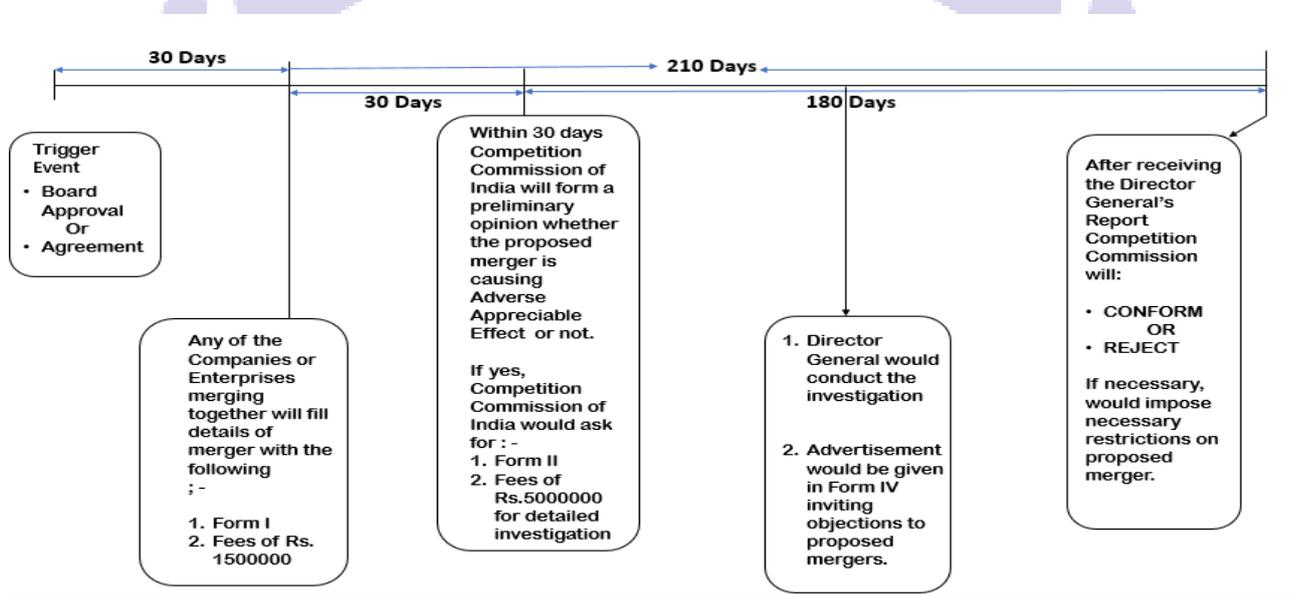
Section 19 (7) of the Competition Act, 2002: - The Commission shall, while determining the “relevant product market”, have due regard to all or any of the following factors, namely: — (a)

¹² *The Competition Act, 2002, Competition Commission of India*
http://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf

physical characteristics or end-use of goods; (b) price of goods or service (c) consumer preferences; (d) exclusion of in-house production; (e) existence of specialised producers; (f) classification of industrial products.

Procedure for Regulating mergers

Section 6 when read with Section 29, 30, 31 and Competition Regulations, 2011 gives us detailed provisions regarding the procedure for Regulating mergers or combinations. Let us understand the provisions with help of a diagram: -



FORM I – Short Form

FORM II – Long Form

FORM III- Exempted Enterprises

FORM IV- Advertisement

Sub-Section (2) of Section 6 makes it mandatory for a person or enterprise proposing to enter into combination to give a notice to Competition Commission of India within 30 days of : -

- Approval of the proposal by the Board of Directors in relation to the merger or amalgamation
- Execution of any agreement or other document for acquisition

After Receipt of the notice by the Competition Commission of India, *Sub-Section (3) of Section 6* states that Competition Commission of India shall deal with such notice as in accordance with the provisions contained in Section 29, 30, 31. The Commission has the power to investigate such combination from the date of its effect within 1 year (Section 20(1)).

Procedure in case of notice under sub section (2) of Section 6 : -

When any person or enterprise is given a notice under sub-section (2) of Section 6, the Commission shall examine such notice and form its prima facie opinion in sub-section (1) of Section 29 and proceed as per provision contained in that section.

Procedure for Investigation of Combinations

Section 29 of Competition Act, 2002 states that when the monetary threshold limits have been crossed under Section 5 of the Competition Act, 2002 and a mandatory notice is given regarding proposed combination the Commission as per Combination Regulations and this Section act as follows : -

- When the Commission is of the opinion that a combination is likely to cause a appreciable adverse effect on competition within the relevant market in India, the Competition Commission of India shall issue a show cause notice to the party to respond within 30 days as to why this investigation should not be conducted. After receipt of response from the parties to the combination, the Competition Commission of India would direct a report from Director General in a given time.
- If an opinion is there as the combination is likely to have an appreciable adverse effect on competition it shall within seven working days from the receipt of response or from the Director General's report publish the details of such combination with Ten working days as to bring in the knowledge to those persons who are affected or are likely to be affected by such combination.
- The Competition Commission of India may invite any person who is affected or is likely to be affected to file written objections. This could be done within fifteen working days from the date of publication of such details.
- The Competition Commission of India may call for additional details or information from the parties to such combination within fifteen working days after the expiry of the aforesaid period of fifteen working days.

- After the call for additional details the information would be furnished by the parties within fifteen working days.
- After the receipt of information the Commission shall proceed to deal with the case within a period of forty-five working days from the expiry of the said period.

Appreciable Adverse Effect on Competition

The Combination may be stated to be the one that has adverse effect on combination if the effect of such combination is such that it will significantly reduce the level of competition existing at the time the competition is given effect to. While determining whether an agreement has Appreciable Adverse Effect on Competition under *Section 3 of the Competition Act, 2002* the Competition Commission shall have due regard for the following factors:

- Creation of barriers to new entrants in the market
- Driving existing competitors out of the market
- Foreclosure of competition by hindering entry into the market
- Accrual of benefits to the consumers
- Improvements in production or distribution of goods or services
- Promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.¹³

Some of the leading case laws which stated that their combination was having an appreciable adverse effect or not and were approved or not are: -

The Government of India had liberalized its Foreign Direct Investment Policy and had set a cap of 49 percent. Etihad Airways proposed to acquire Jet Airways, the proposal got approved by Securities and Exchange Board of India (SEBI) and Cabinet Committee of Economic Affairs (CCEA). The Agreement was laid for proposal before Competition Commission of India. It was concluded by the majority that the said proposal would not have appreciable adverse effect on market as Jet was facing financial crises and this combination would allow Jet to compete

¹³ 'COMPETITION ASSESSMENT' By AUGUSTINE PETER, ECONOMIC ADVISER, COMPETITION COMMISSION OF INDIA, https://www.cci.gov.in/sites/default/files/workshop_pdf/14peter.pdf

effectively but, in a minority, view held that it would have an adverse appreciable effect on international market and investigation was necessary.¹⁴

The Competition Commission of India had received a notice from PVR Ltd. relating to acquisition of DT Cinemas. The proposal was allowed by Competition Commission of India with some modification and commitments to be taken by PVR Limited as not to acquiring more multiplexes for some period of time and according to some relevant geographic markets PVR was proposed some more commitments.¹⁵

Order of Combination on certain Combinations (Section -31 of Competition Act,2002)

After the investigation procedure if the Commission if of the opinion that combination is not likely to have an appreciable adverse effect on combination it shall by order approve such combination, if it is likely to have an appreciable adverse effect on combination it shall direct the combination to not take effect. But if some suitable modification can be made so as to remove the defect of appreciable adverse effect on competition, the Competition Commission of India shall direct such suitable modification to be made within a specified period. If the parties to the combination do not accept such modification proposed by the Competition Commission of India such parties within thirty working days of the proposed modification submit amendment to the modification to the Competition Commission of India. If Competition Commission of India agrees then by order approve the Combination and if they do not accept then the parties shall be allowed further thirty working days to accept the modification without amendment as proposed before. If the parties still do not accept within thirty working days then the combination would be deemed to have an appreciable adverse effect on competition. The Competition Commission of India may impose a penalty or initiate a prosecution on the combination which has or is likely to have appreciable adverse effect on competition.

Even if on the expiry of Two hundred- and Ten-days Competition Commission of India from the date of notice given to the Competition Commission of India pass an order or issue directions in accordance with provisions sub-section (1) or sub-section (2) or sub-section (7), the combination shall be deemed to have been approved by the Competition Commission of India.

¹⁴ Etihad Airways and Jet Airways Combination Order dated 12 November,2013

¹⁵ PVR and DT Cinemas Combination Order Dated 4 May,2016

Exceptions (Section 6(4) and Section 6(5) of Competition Act, 2002)

Banks and other Financial Institutions are exempted but they have to file their details of merger with Competition Commission of India under Form-III without any fees within seven days from the date of the acquisition including the details of control, the circumstances for exercise of such control and the consequences of default arising out of such loan or investment agreement as the case may be.

CONCLUSION

The main aim of the Competition Act, 2002 is to protect the interests of the Consumer as understood in the commercial sense of the term as “Purchaser of goods “and in the larger sense as user of services. The same concept was explained by the Supreme Court as follows “The consumer is a comprehensive expression and it extends from a person who buys any commodity to consume either as eatable or otherwise from a shop, business house, corporation, store, fair price shop to use private or public services.¹⁶

With the change in the international economic environment the competition standards of the country also change. Mergers and Acquisitions are taking place at a more pace than before. Companies are finding out ways to hold a dominant position in the market. Regulations of Combinations is a necessary implication as the consumers are not affected. Society is not static and hence for a dynamic society the law must be dynamic. Our Competition Act, 2002 though has tried its level best to curb the anti-competitive arrangement in our country but as of now it has not achieved the required success, hence our Competition Act requires few amendments in order to satisfy the present scenario in market, some of them as follows: -

- The inclusion of concept of Commitments in the Competition Act, 2002 would amount to saving of time of the Commission.
- Though Commission itself consists of experts but setting up of an independent advisory committee would help in proper functioning of the competition.
- The power to inspect the undertaking which charged of committing anti-competitive activities is not provided to the Commission, if such power is not given to the Commission then it might vitiate the investigation proceeding, hence such powers should be provided to the Commission.

¹⁶ Lucknow Development Authority v M.K. Gupta (1994) 80 Comp. Case 714 1 SCC 243

In India, there is no framework for the coordination between the sectorial regulations and the Competition Commission of India. In such situations, businesses are afraid that in such instances there may be conflicting directions from different regulators.

In the Conclusion, we can say that if some more powers are given to the Competition Commission of India, then it can do a great job in protecting the rights of the consumers by increasing healthy competition in the Indian market which is the need of the hour.

