TREATMENT OF

COMBINATIONS

(UNDER COMPETITION ACT, 2002)

State Level Seminar

On

" Competition Policy and Law"

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By

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DUTIES OF COMPETITION COMMISSION

Competition Act,2002 notified in Gazette in January, 2003. Preamble's stated objective is to establish the Commission which has the duty to:

- **Eliminate practices having adverse effect on competition;**
- **Promote and sustain competition**
- **Protect consumers' interests**
- **Ensure freedom of trade carried on by other participants in markets, in India**

[Section 18]

MAIN FEATURES OF COMPETITION ACT

With the above objective, the Act:

- Prohibits Anti-Competitive Agreements.
- Prohibits Abuse of Dominant Position.
- Provides for Regulation of Combinations, and
- Enjoins Competition Advocacy

[Sections 3, 4, 5, 6 and 49(3)]

COMBINATIONS
(MERGERS +) (Sec 5, 6)

- Combination covers
  - **Merger & Amalgamation**
  - **Acquisition**
  - **Acquiring control**
- Any combination which causes or is likely to cause appreciable adverse effect on competition (AAEC) in markets in india is void

WHY REGULATE MERGERS? - 1

I. Mergers are likely to have adverse effect on competition

- **Unilateral effects:** Due to increase in market power of the merged entity. Higher concentration is associated with higher market power, which enables post-merger prices to move up, in spite of efficiency gains of merger.

  A merger may be profitable even in the absence of efficiency gains

- **Coordinated effects:** Merger may raise the prospects of coordinated effects arising in which a reduction in the number of industry participants increases the threat of tacit coordination

WHY REGULATE MERGERS ? - 2

II. Avoid Heavy Social Cost

- **Easier to deal with proposed merger than to *post facto* control market power or collusion**
- De-merger could have high social and economic costs
- Collusive enterprises could escape punishment by resorting to merger, thereby defeating purpose of law
- Mergers then would have to be dealt with as agreements under Sec. 3
- For such reasons older jurisdictions like USA & EU introduced merger regulations

WHY REGULATE MERGERS? - 3

III. Market power from merger not same as that gained through fair competition /sheer efficiency in operation. Sec 4 does not suffice

- Merger involves willful acquisition of market power as distinct from growth or development on account of superior product, business acumen or historical accident (*á la* dominance)
- When two enterprises combine to increase their profitability the source of profitability may be **increased 'market power'** and **not increased 'efficiency'**

WHY REGULATE MERGERS? - 4

IV. Conglomerate mergers can harm competition through agreement to remove potential competitors

- Conglomerate mergers in neighbouring markets (markets for substitutes or complements) results in leveraging problems like:
  - Tying
  - Pure bundling
  - Foreclosure
  - Financial leverage and predation (in imperfect financial markets)
- Market extension/ product extension mergers

WHY REGULATE MERGERS? - 5

V. **While horizontal merger works through higher market power, vertical mergers give rise to market fore-closure**

- **For example, depriving rival producer of a distribution network if a producer merges with a retail chain (Case of vertical integration)**
- **Or "foreclosure of a share of the market otherwise open to competitors" e.g. the acquisition of ready mixed concrete firms by cement suppliers was said to foreclose the market for cement to non-integrated cement suppliers**
- **Or by raising rival's costs, through:**

> **Input fore-closure; *or***
> **Customer fore-closure**

WHY REGULATE MERGERS? - 6

VI. Anti-competitive issues raised by vertical mergers are similar to exclusive dealing

Vertical Merger: Anti-competitive theories:

- Vertical mergers may put potential competition at a disadvantage by raising the cost of entry (entry deterrence)
- A vertical merger may put existing competitors at a disadvantage by raising their costs (Raising rival's costs) (e.g. by locking up rival's necessary inputs)

WHY REGULATE MERGERS? - 7

Vertical Merger: Potential Competition Theory

Harm to consumers by removing a potential entrant. This can affect competition and consumer welfare in two ways:

- Potential competition would have put pressure on the incumbent(s), reducing their market power, benefiting
- Actual entry at a later stage would bring more competition in the market (Benefits to consumers in the future: Can be estimated in the form of present value)

COMBINATIONS
THRESHOLD LEVELS

		Assets	Turn over
India	No Group	Rs. 1000 cr	Rs. 3000 cr
	Group	Rs. 4000 cr	Rs. 12000 cr
In India and Outside India		Assets	Turn over
		Total In India	Total In India
	No Group	US $ 500 ml Rs. 500 cr	US $ 1500 ml - Rs. 1500 cr
	Group	US $ 2000 ml Rs. 500 cr	US$ 6000 ml Rs. 1500 cr

COMBINATIONS

APPRECIABLE ADVERSE EFFECT

While determining whether a combination has appreciable adverse effect on competition in the relevant market Commission shall have due regard for all or any of the following factors:

- Actual and potential level of competition through imports
- Extent of barriers to entry into the market
- Level of concentration in the market (HHI, CR)
- Degree or countervailing power in the market
- Likelihood of post combination price/profit increase

COMBINATIONS

APPRECIABLE ADVERSE EFFECT *(Contd.)*

- Extent of effective competition in the market - post combination
- Removal of vigourous and effective competitor from the market
- Nature and extent of vertical integration in the market
- Possibility of failing business
- Nature and extent of innovation
- Contribution to economic development
- Whether the benefit of combination outweigh adverse effect of combination

ISSUES IN COMBINATION REGULATION

MANDATORY NOTIFICATION

- Mandatory notification is the norm internationally. Only 8 out of the 106 jurisdictions have voluntary notification

- Voluntary system results in uncertainty and is costly for enterprises in long run.

- Cost of such unscramling would be enormous for the merging parties, the economy

TIME PERIOD FOR CLEARANCE

- Outer time limit of 210 days for CCI to clear combination notifications as per the Act
- This would be reserved for cases where *prima facie* competition angle exist (10 – 15% of cases)
- CCI regulation of combinations will have time lines for clearance of cases with no *prima facie* completion angle. Such cases would be cleared in < 30-60 days (Deemed approval)
- Time limit of 210 days compares well with mature jurisdictions like EU, Japan and with South Africa, China etc.

ISSUES IN COMBINATION REGULATION

OTHER ISSUES & DEFINITIONS

- Domestic nexus to exclude cross border combinations having no AAEC in India
- Indian threshold for notification and coverage under combination regulation among highest in the world
- Draft regulations address the issue of minimum threshold for transaction size

DEFINITIONS

COMBINATION

- Acquisition of control, shares, voting rights or assets (s 5(a))
- Acquiring of control – already having direct or indirect control over another enterprise in identical or substitutable goods/services (s 5(b))
- Merger or amalgamation (s 5(c))

DEFINITIONS

ACQUISITION

- Means, directly or indirectly, acquiring or agreeing to acquire
  - Shares, voting rights or assets of an enterprise; or
  - Control over management or control over assets of any enterprise; (s 2(a))

DEFINITIONS
CONTROL

- Inclusive definition
- 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

(Expln (a) to s 5)

DEFINITIONS
GROUP

'Group' means two or more enterprises which, directly or indirectly, are in position to:

- exercise 26% or more of voting rights in other enterprise or
- appoint more than 50% of members of the board of directors in the other enterprise
- control the management or affairs of the other enterprise

(Expln (b) to s 5)

DEFINITIONS

VALUE OF ASSETS

- **By taking book value of the assets shown in audited books of accounts in the immediately preceding financial year (FY), w.r.t. FY of date of merger**

  And Adjusted for depreciation

- **Value of assets to include**

  Intangibles - brand value, goodwill, copyright, patent, registered trade mark or similar other commercial rights

(Explan. (c) to s 5)

CONSEQUENCES OF NOT NOTIFYING

- Failure to notify a combination will attract penalty, which may extend to one percent of the total turnover or of the assets, whichever is higher, of such a combination (s 43A)

SUSPENSE REGIME

- Waiting period of 210 days before consummation of combination (s 6 (2A))
- Combination coming into effect, before 210 days, unless having approval of the Commission by then, is void
- Deemed approval, if no order of Commission up to 210 days (s 31(11))
- Through regulation, Commission can fix lower time limits within the overall limit of 210 days

TIME CAPS FOR REVIEW ELSEWHERE

COUNTRY	STAGE ONE	STAGE TWO
EU	25-35 W days	90-125 W days (35+125=160 W days or 224 days in the least)
France	5-8 weeks	Additional 4 months. Further extended by 4 more weeks (thus 5 ½ Months in total)
Spain	1 month	7 months
Singapore	30 W days	120 W days (30+120=150 W days)
China	30 W days	90-150 W days
Mexico	40 C days	145 (in complex cases)
Japan	30 C days	120 C days (more if information is late)
USA	30/15 C days	-----
Germany	1 month	3 months (1+3= 4 months)
India	30 c days (draft regulations)	210 C days (150 w days)

THANK YOU