



# REGULATIONS OF COMBINATIONS UNDER COMPETITION ACT 2002 (Act) LEGAL & PROCEDURAL ASPECTS

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Presentation before Competition Forum

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# Introduction

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- Regulation of Combination - an important aspect of Competition Regimes world over.
- Act aims at Regulating Combinations instead of curbing combinations or letting them loose.
- Under the MRTP Act, the combinations were regulated by the Central Government till 27.09.1991.



# NEED FOR AND USEFULNESS OF RESTRUCTURING THROUGH COMBINATIONS

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- Synergistic operational advantages
- Economies of scale (Scale Effect)
- Reduction in expenses
- Benefits of integration
- Optimum utilization of resources
- Tax advantages
- Financial impetus for expansion



# PROVISIONS REGULATING COMBINATIONS

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- Section 5 of the Act provides framework for the combinations
- Combinations includes:
  - acquisition by persons of control, shares, voting rights, or assets of other enterprise.
  - Acquiring of control by a person of an enterprise engaged in identical business when the acquirer has control over the similar business and the enterprise.
  - merger or amalgamations of enterprises.

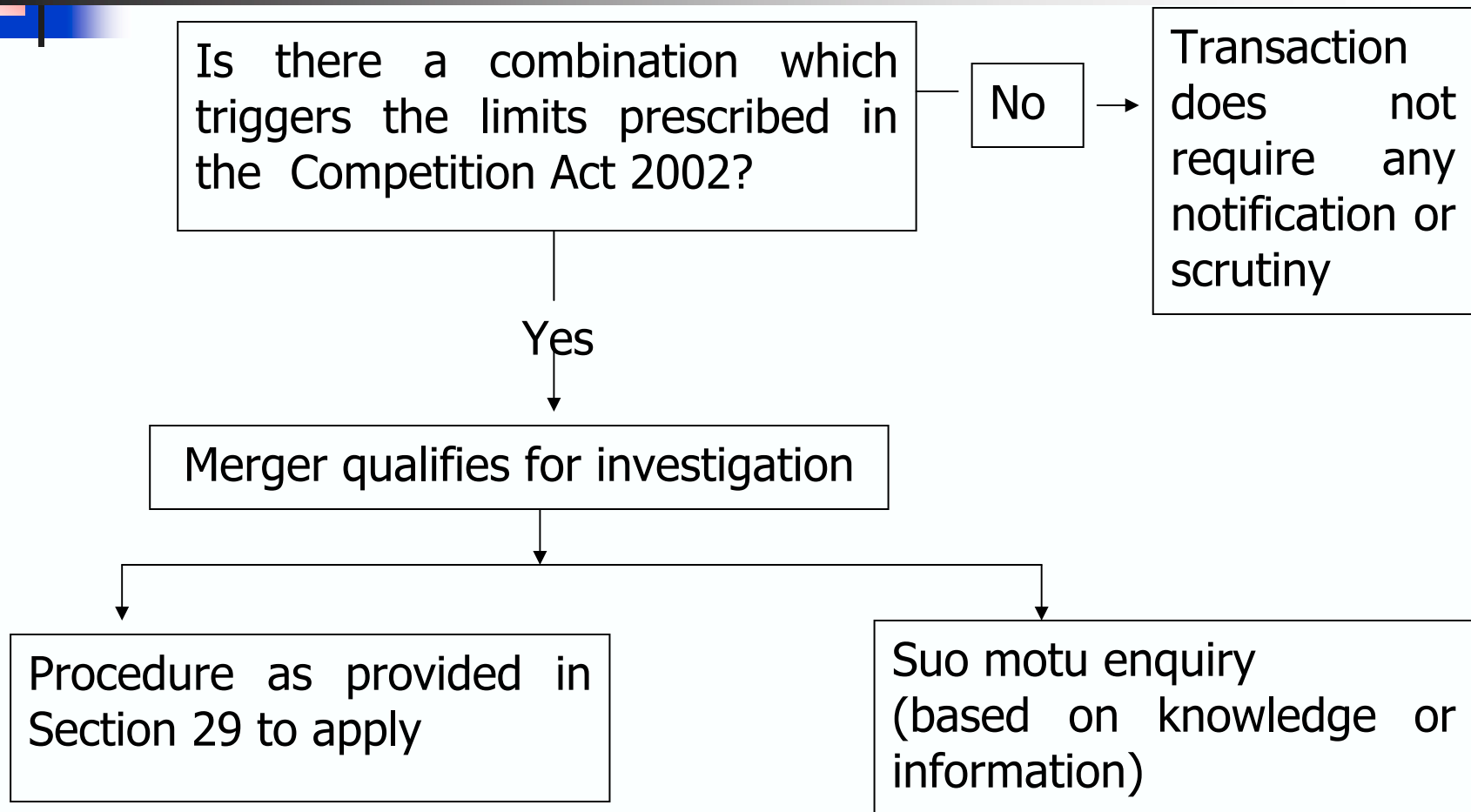


# Effect of section 6

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- Section 6 provides that no person or enterprise with certain exceptions shall enter into a combination (including acquisition), which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such combination shall be void.
- Notification to Competition Commission of India not mandatory..
- If notice given, the provisions of sections 29,30 and 31, to apply.

# Procedure Relating to Notification/Enquiry





# CONTENTS OF REPORT FORM AND GUIDANCE IN FILLING IT UP

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- Need for and usefulness of comprehensive information to be contained in the notification
- Instructions and guidance note must be comprehensive, unambiguous and attached to the Notification Form.
- Detailed manuals needed to ensure predictability, consistency and transparency.





# Implications under other Laws

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- Companies Act 1956(108A to 108H)
- SEBI(Substantial Acquisition of Shares and Takeover) Regulations 1997



## JURISPRUDCENCE

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- **In Hindustan Lever Employees' Union [1994] 4 Comp LJ 267; [1995] 83 Comp Cas 30** the Hon'ble SC held that:

"As a result of the amalgamation, if it is found that the working of the company is being conducted in a way which brings it within the mischief of the MRTP Act, it would be open to the authority under the MRTP Act to go into it and decide the controversy as it thinks fit."
- This decision is reaffirmed in number of cases including the recent case of Re **Larsen and Toubro Limited (2004)121 Com Cases 523**



# Challenges Before CCI

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- Definition of Control( is it complete?)
- Value of Assets
- Significance of Accounting Standards of ICAI
- How to determine factors under section 20(4) (to determine adverse appreciable effect )
- Adherence of strict time frame.
- Resolution of Conflict between Regulatory Authorities and CCI.



# COMPARATIVE ANALYSIS OF US AND EUROPEAN UNION LAW ON COMBINATIONS

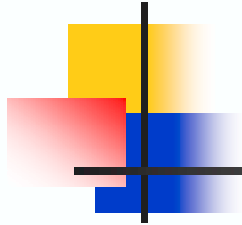
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## United States

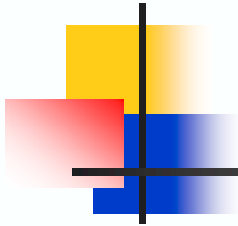
- Clayton Act prohibits any person from acquiring stocks or assets where the effect of such acquisition may be substantially to lessen competition or to tend to create monopoly

## European Union

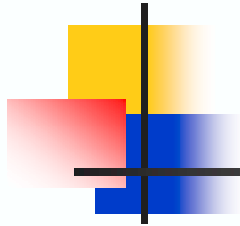
- The substantive test is whether Merger will significantly impede competition as a result of creation or strengthening of dominant position



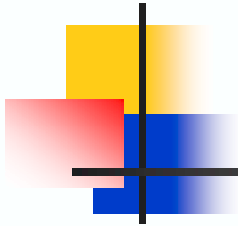
- Filing is mandatory. There is no time limit. Filing fee is linked with value of assets or turnover. Both parties must make filings with the Anti Trust Agencies
- Filing is mandatory before implementation of Scheme. No filing fee is payable Notification must be made jointly by the parties.



- Fine upto US\$ 11000 per day. Divestiture can be ordered. Transaction can be implemented prior to clearance.
- Must satisfy the commerce test – size of parties test and size of transaction test
- Failure to notify attract fine up to 10% of the combined worldwide turnover of the parties plus 1% of the worldwide turnover for supply of incomplete, incorrect or misleading data.
- Size of Transaction (Turnover) is the only criteria for triggering limits.

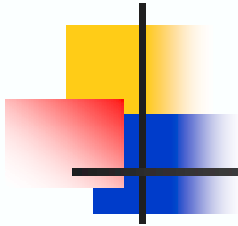


- JVs involving competitors that completely eliminate competition and are intended to exist for more than 10 years are analysed in the same way as all other mergers or acquisitions.
- The Commission assess whether it is the objective of the JV to coordinate the competitive behaviour

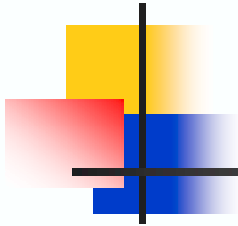


- FTC is more inclined to insist an “upfront buyer” remedy
- EU does not heavily lean on “Upfront buyer remedy”.
- FTC or parties can suggest/propose remedies to competition concern.
- It is for parties to come up with remedies for competition concerns
- The parties need not follow time schedule to suggest remedies
- The parties have to strictly follow time schedule.





Despite differences in substantive test and the procedures, there is increasing convergence in the approach of US and European Commission. In both EU and US the remedies aims at reducing the market power and to restore conditions for effective competition. To achieve this, both the agencies resort to "Structural" and "behavioural" remedies. The significant difference between structural and behavioural remedies is that structural remedy is of immediate and of permanent effect while behavioural remedy will normally operate for a fixed period of time and can be varied or terminated as a result of major change in circumstances.



It also seems the provisions in the Indian law also lean heavily on the provisions and procedure adopted by the European Commission.