



# ***Competition Commission of India***

## **Introduction to Procedure For Investigation Of Combinations**

*by*

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*28.09.2007*



## Broad Outlines

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- Introduction
- Importance of Regulation of Combinations
- Comparison with other enforcement work
- Difficulties in enforcement
- Indian law – CA02 as amended
- Related Sections
- Thresholds



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- Compulsory Notification
  - Form of Notification
  - Timings of Notification
  - Consequences of not filing notification
  - Procedure
  - Best International Practices
  - Food for thought



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- **Introduction**

- Economy is dynamic
- Change is the permanent feature of economy
- Agency has to be watchful of these changes
- Implies regulation of combinations by the agency to maintain/restore competition

- **Relative importance**

- An active participant in the market
- Ex-ante and not ex-post
- Absolute correctness not possible
- Open to criticism



- 
- Comparison with other enforcement work
    - Other two pillars of competition law, namely, anti competitive agreement and abuse of dominance are amenable to more definitive actions and results
    - Tough job being a soothsayer / fortune teller/ astrologer
    - Unlike other components of competition law, difficult to evaluate the final outcome ( advocacy is important)
    - Constant improvisation of procedures / outcomes only way



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- Learning by experience
  - Can be a boon for or curse on economy
  - Open to criticism either way
  - Need for absolute transparency
  - Predictability
  - Confidence of the business



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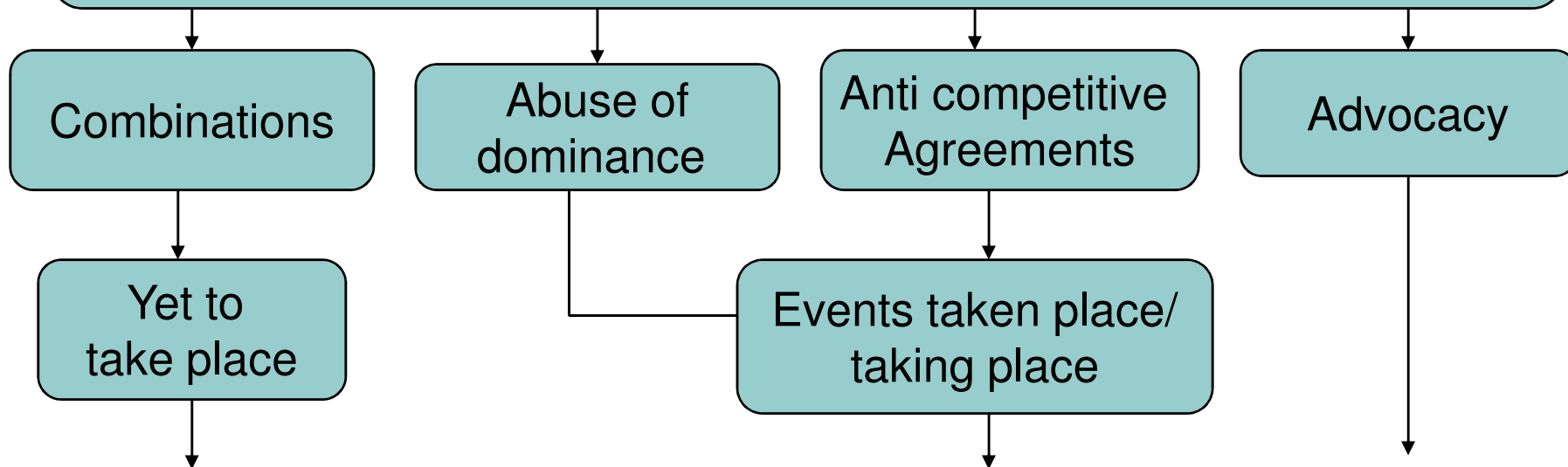
- Difficulties in enforcement

- Economy is not static even during the process of review of combinations
- The viability of proposed combination may undergo a change in the review period (very important)
- Challenge to ensure that combination remains viable after review
- The review periods should gradually be brought down

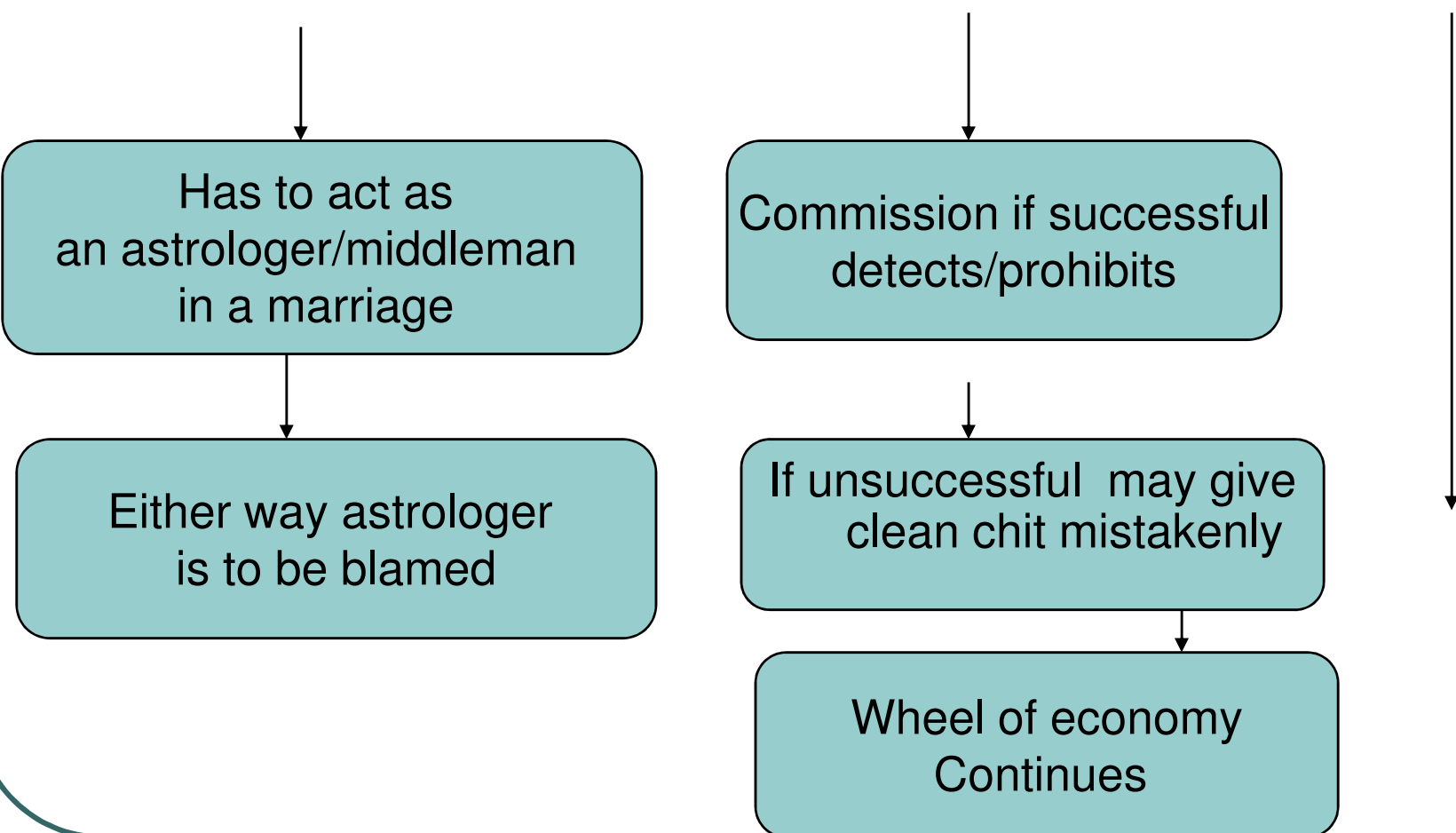


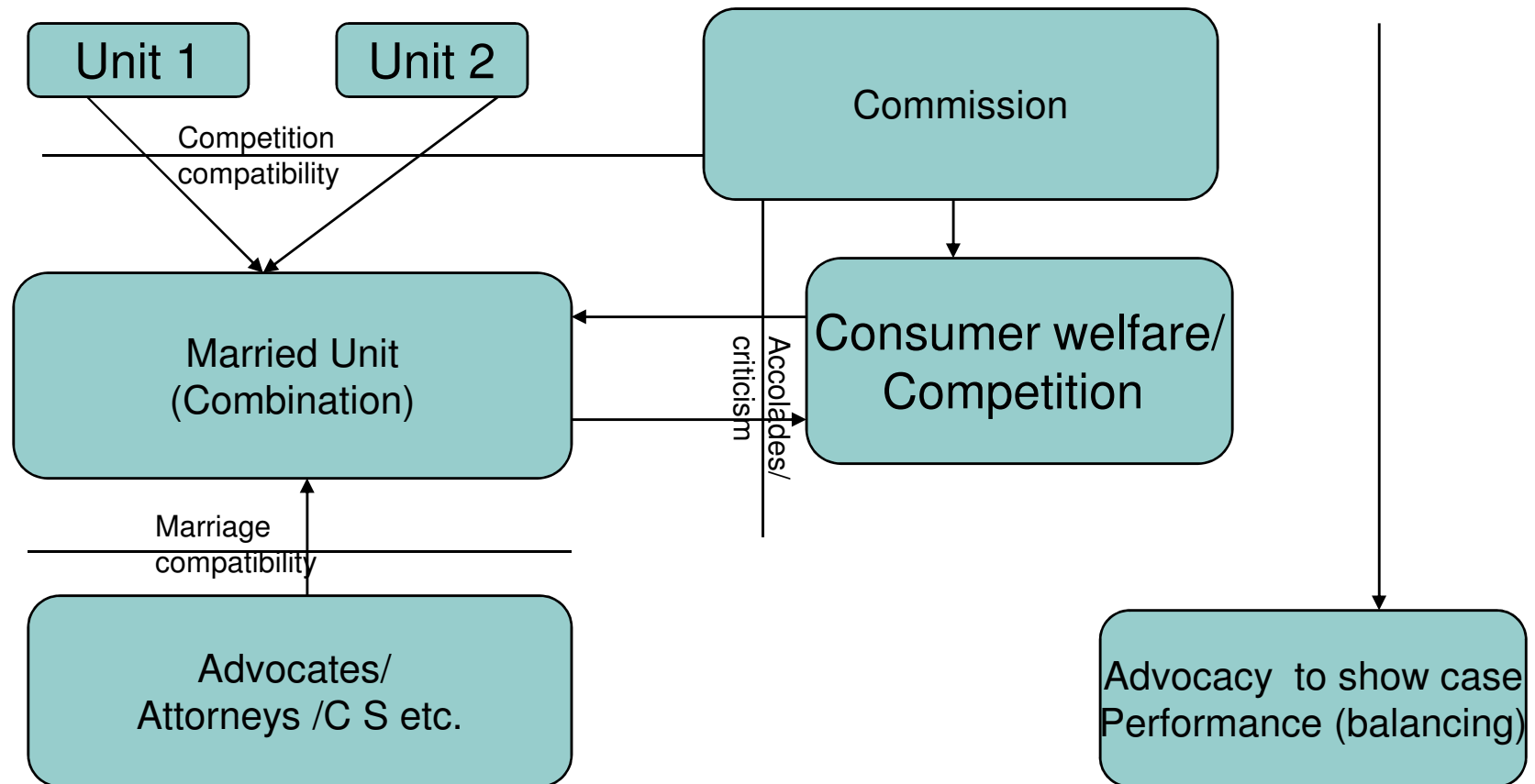
# Comparison

## Competition Law











# Indian law

## Combinations S 5

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- (a) The acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises if
- (i) the parties to the acquisition, jointly have assets /turnover as per thresholds
  - (ii) the group to which the enterprise, whose control has been acquired or are being acquired, would belong after the acquisition jointly have or would jointly have assets / turnover as per thresholds



- 
- (b) Acquiring of control by a person over an enterprise when such person has already direct or indirect control over any enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service if;
- (i) the enterprise over which control has been acquired along with the enterprise over which the acquirer already has direct or indirect control jointly have asset/turnover as per thresholds
  - (ii) the group, to which enterprise, whose control has been acquired, or is being acquired, would belong after the acquisition jointly have or would jointly have assets/turnover as per thresholds



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(c) Any merger or amalgamation in which

- (i) the enterprise remaining after merger enterprise created as a result of the amalgamation have assets/turnover as per thresholds
  
- (ii) the group to which the enterprise remaining after the merger or the enterprise created as a result of the amalgamation, would belong after the merger or amalgamation have or would have the assets/turnover as per thresholds

# Thresholds

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## Assets /Turnover

	<u>In India</u>	<u>all over</u>
	(Rs. In Cr.)	(In Million)
1. Acquisition	1000/3000	U.S \$ 500/1500
5(a) (i) (A)&(B):		(in India>Rs. 1500 cr)
2. Acquisition (by group)		
5(a) (ii) (A)&(B):	4000/12,000	U.S.\$ 2000/6000
		(in India>1500 Cr)

# Thresholds

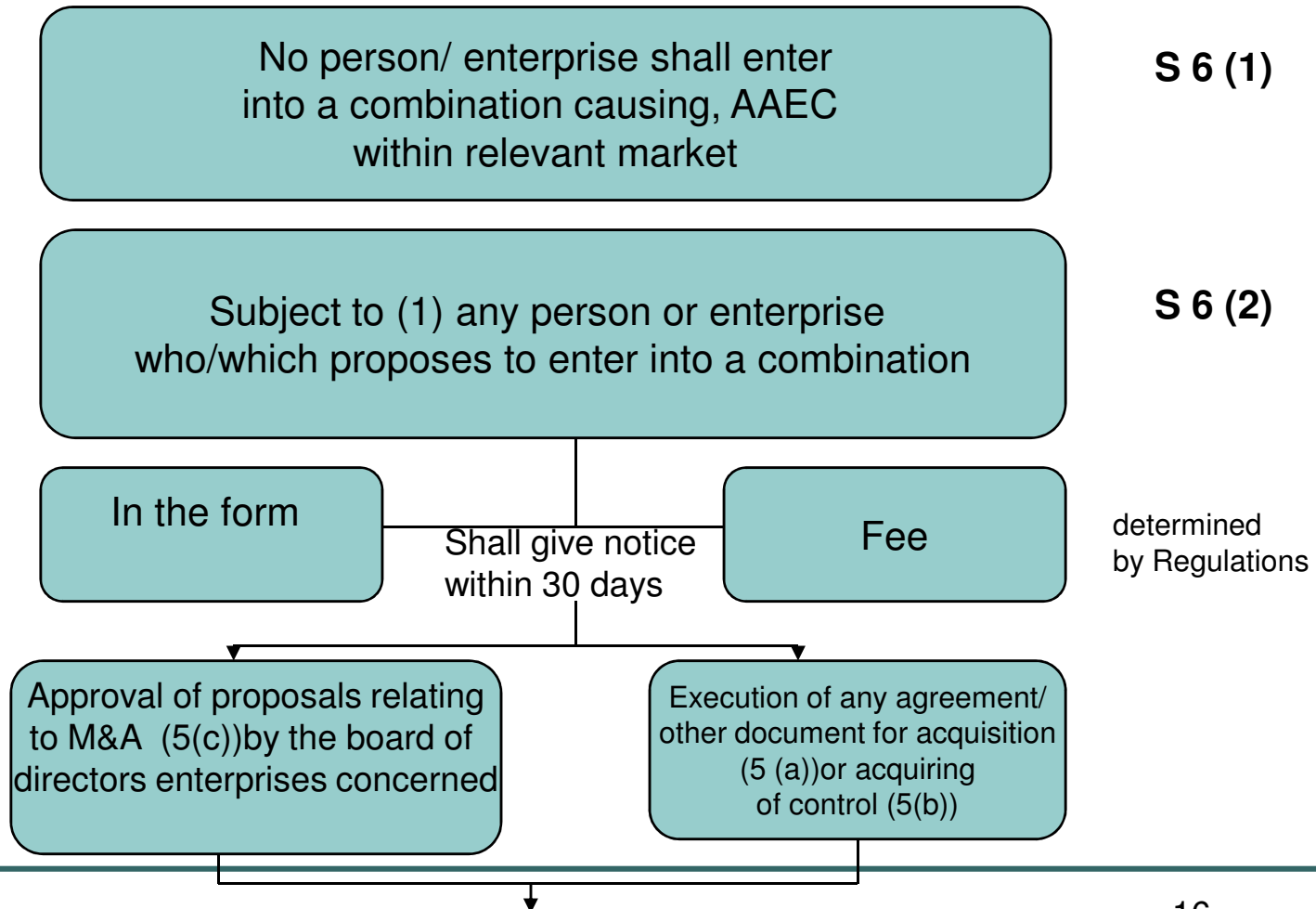
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	<u>In India</u> (Rs. In Cr.)	<u>all over</u> (In Million)
3. Acquiring of control 5(b) (i) (A)&(B):	1000/3000	U.S \$ 500/1500 (in India>Rs. 1500 cr)
4. Acquiring of control (group ) 5(b) (ii) (A)&(B):	4000/12,000	U.S.\$ 2000/6000 (in India>1500 Cr)
5. Merger or amalgamation 5(c) (i) (A)&(B):	1000/3000	U.S \$ 500/1500 (in India>Rs. 1500 cr)
6. Merger or amalgamation (group) 5(c) (ii) (A)&(B):	4000/12,000	U.S.\$ 2000/6000 (in India>1500 Cr)

**The limits to change every two years (S 20 (3))**



## Section 6







## Section 6

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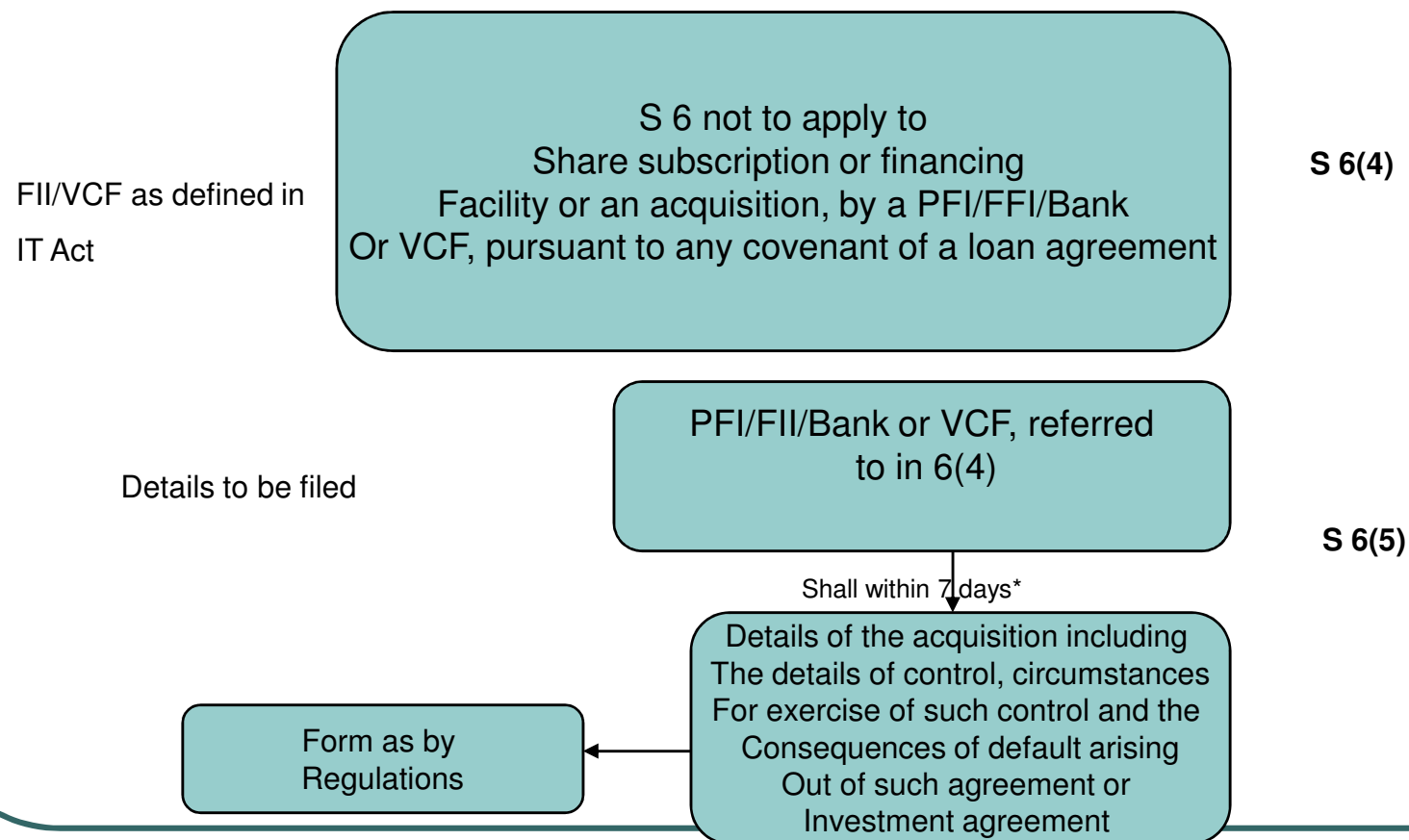


After receipt of notice u/s 6(2), the commission shall deal with such notice u/s 29,30 and 31

**S 6 (3)**



# Exceptions S 6 (4)/(5)



\*should it not be 30?



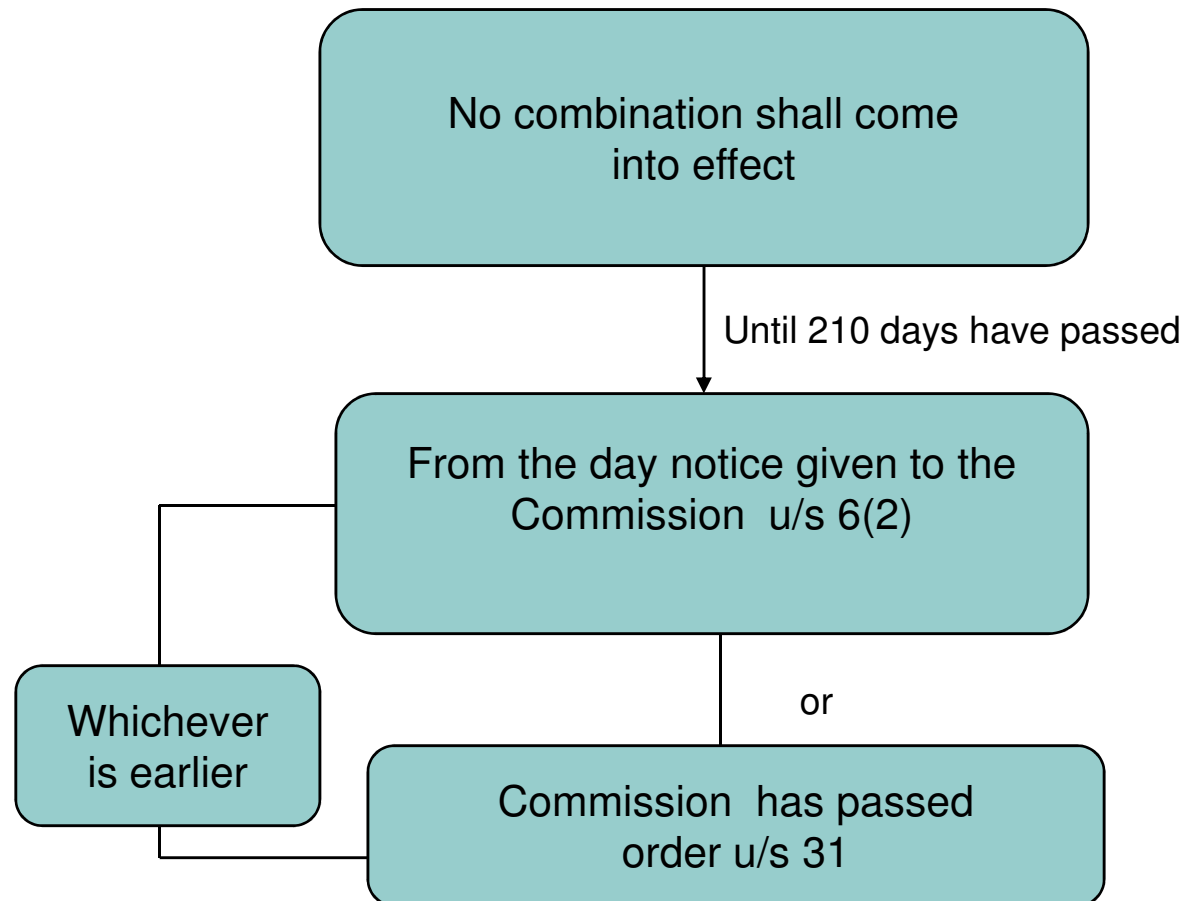
## Section 43 A : Penalty

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- Consequences of not filing Notice u/s 6(2)
  - Penalty – which may extend to one percent of the total turnover or the assets, whichever is higher, of such a combination



# Compulsory wait Section 6 (2A)



## 'Factors' Section 20 (4) 'all or any'

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- (a) actual and potential level of competition through imports in the market;
- (b) extent of barriers to entry into the market;
- (c) level of combination in the market;
- (d) degree of countervailing power in the market;
- (e) likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
- (f) extent of effective competition likely to sustain in a market;
- (g) extent to which substitutes are available or are likely to be available in the market;

# 'Factors'

Section 20 (4)

(contd.)



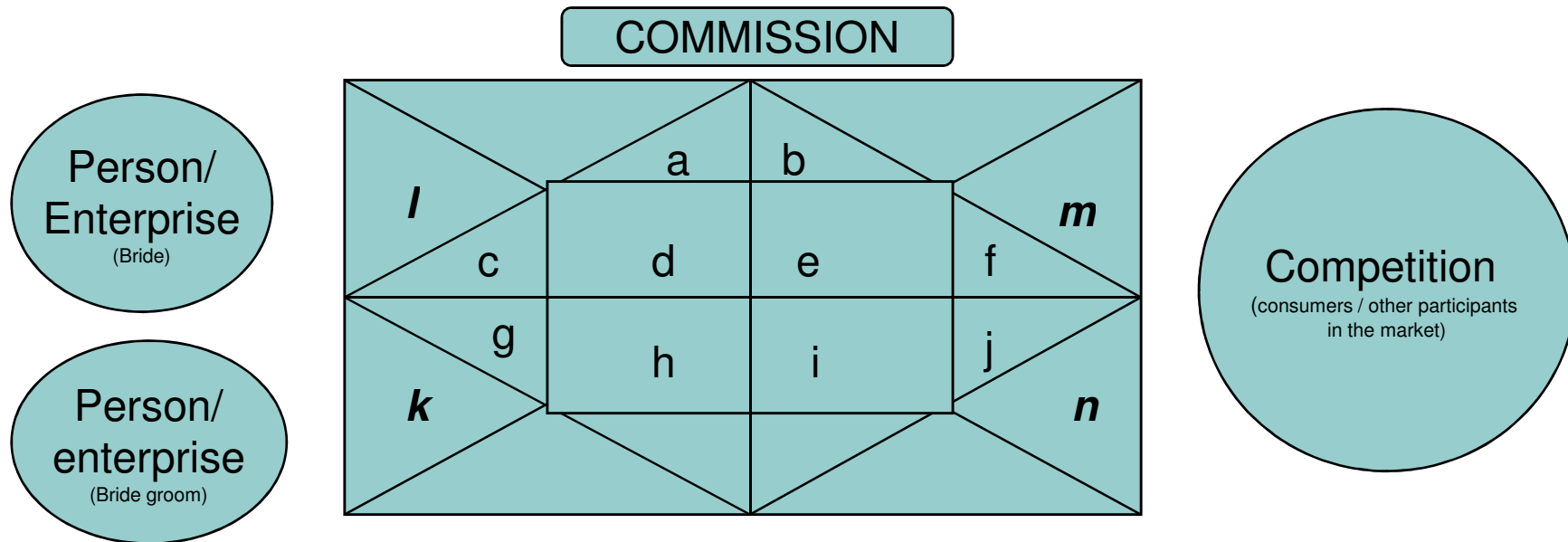
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- (h) market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;
  - (j) likelihood that the combination would result in the removal of a vigorous and effective competitors or competitors in the market;
  - (j) nature and extent of vertical integration in the market;
  - (k) possibility of a failing business;
  - (l) nature and extent of innovation;
  - (m) relative advantage, by way of the contribution to the economic development or by any combination having appreciable adverse effect on competition;
  - (n) Whether the benefits of the combination outweigh the adverse impact of the combination, if any.



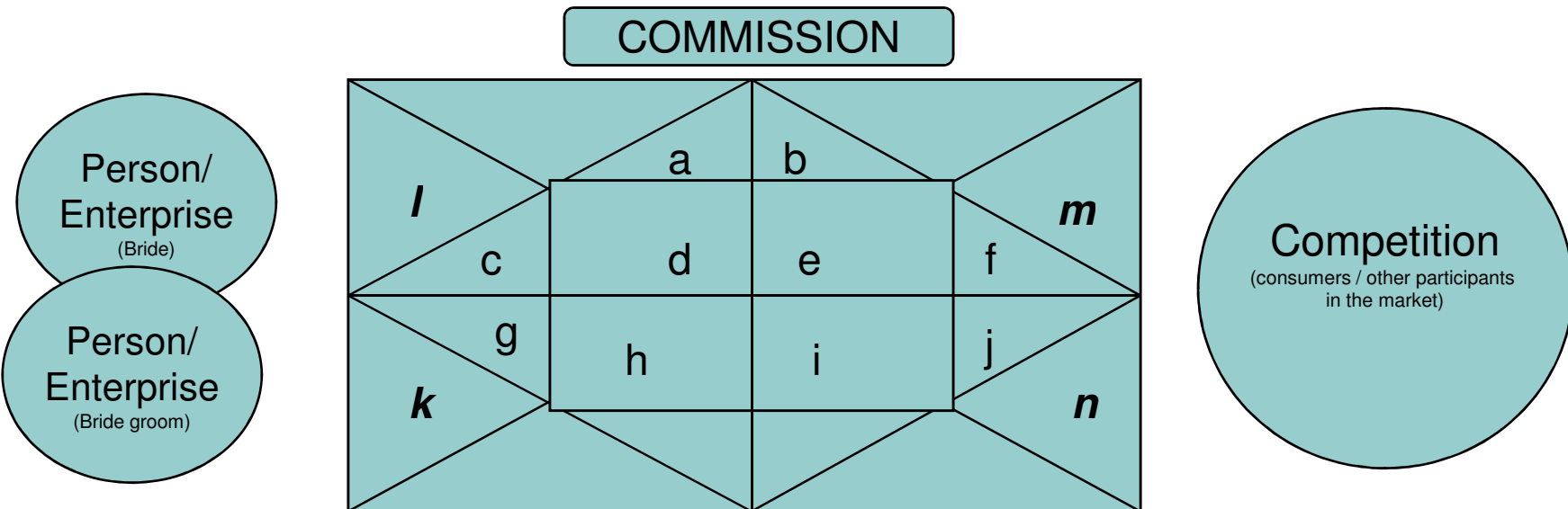
# Job of the Commission

(to permit or not to permit)

(contd.)



(Two spinsters)



Married unit





# FEES

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- Legal sanction under Section 6 (2)

“...give notice to the Commission, in the form as may be specified, **and the fee which may be determined**, by regulations...”



- 
- **Uniform Fee**
  - **Cyprus** – No fees
  - **Norway** – No fees
  - **Japan** – No fees
  - **Sweden**- No filing fees
  - **Netherlands** – No fees
  - **Canada** - (\$ 50000)
  - **Austria and Mexico** - (\$ 10000)



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- **Fees for service**

- **Germany** - a standard procedure to calculate fee which ranges (0 to € 50000 based on personnel and material expenses. Average filing fee was aprox. € 24,000 in 2002-04
- **OFT**-Sends invoice of payment after decision



- 
- **Tiered fees-** Based on complexity
  - **Zambia, Austria** - ( initial flat fee with an additional fee if the review proceeds to second phase)



- 
- **Barbados** (initial fixed and a full investigation fee to cover the cost of investigating more complex transactions. Tiered fees based on size transactions / size of revenues.
  - **U.S.** - \$ 45000, 125000 or 280000 depending on the value of the voting securities or asserts held as a result of a transactions.



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- **U.K** – £ 15,000, 30,000, 45,000 depending of the size of transaction
  - **Spain** – filing fees € 3000, € 6000, € 12000 or € 24000- € 60000 depending on the parties revenue in Spain



- 
- **South Africa** – Fee for filing a merger notice (small mergers – no fee)(a) R 5000 if R 100 million  $\geq$  combined value  $\geq$  R 50 million (b) R 125000 if R 1 billion  $\geq$  combined value  $\geq$  R 500 million(c) R 250000 if R 3.5 billion  $\geq$  combined value  $\geq$  R 1 billion(d) R 500000 if combined value  $\geq$  R 3.5 billion



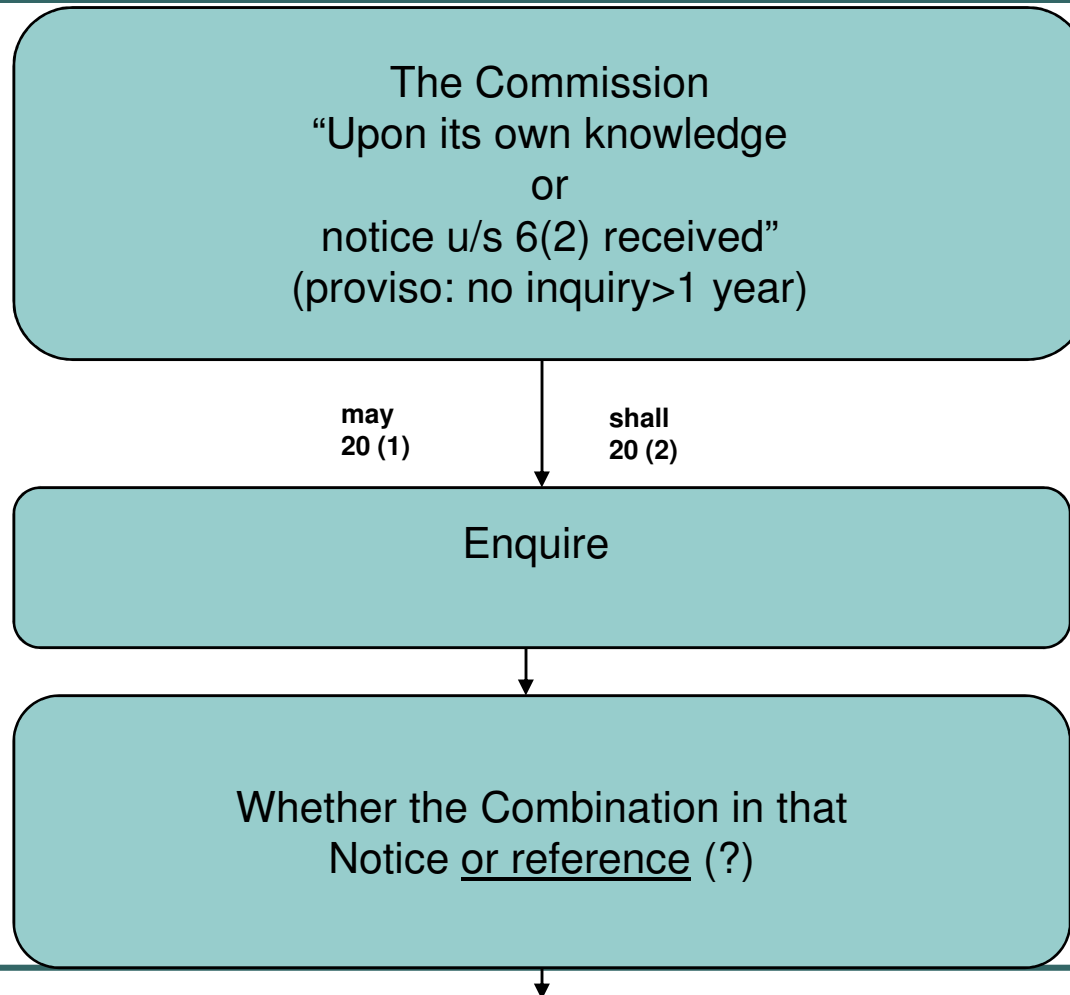
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- **Brazil** – (Aprox. \$15000 )
  - **Kenya** - 3 tiers –complex intermediate and simple (proposal yet to be finalized)





# Procedure for Investigation

## Section 20



# Procedure for Investigation



## Section 20

(contd.)



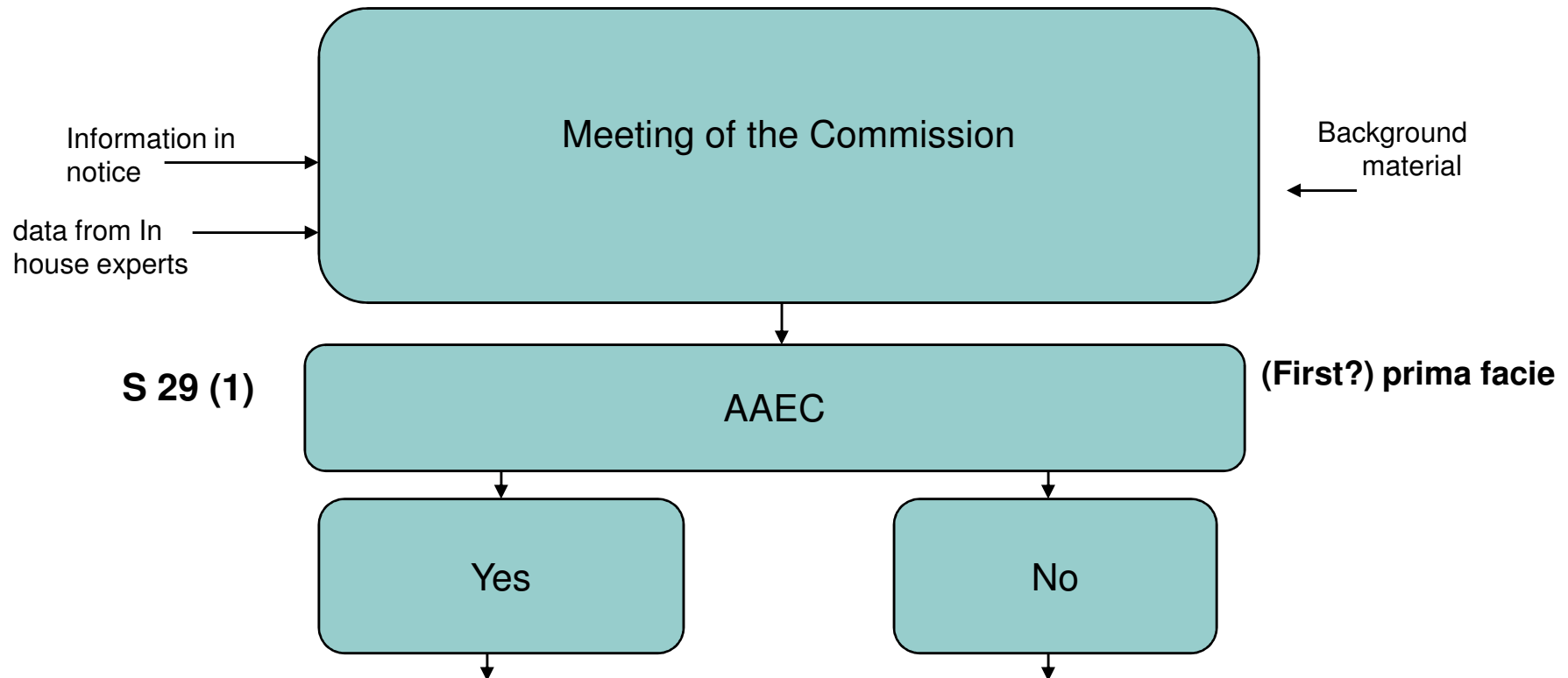
Has caused  
Or  
Is likely to cause AAEC  
in India ?



# Procedure for Investigation

## Section 20

(contd.)

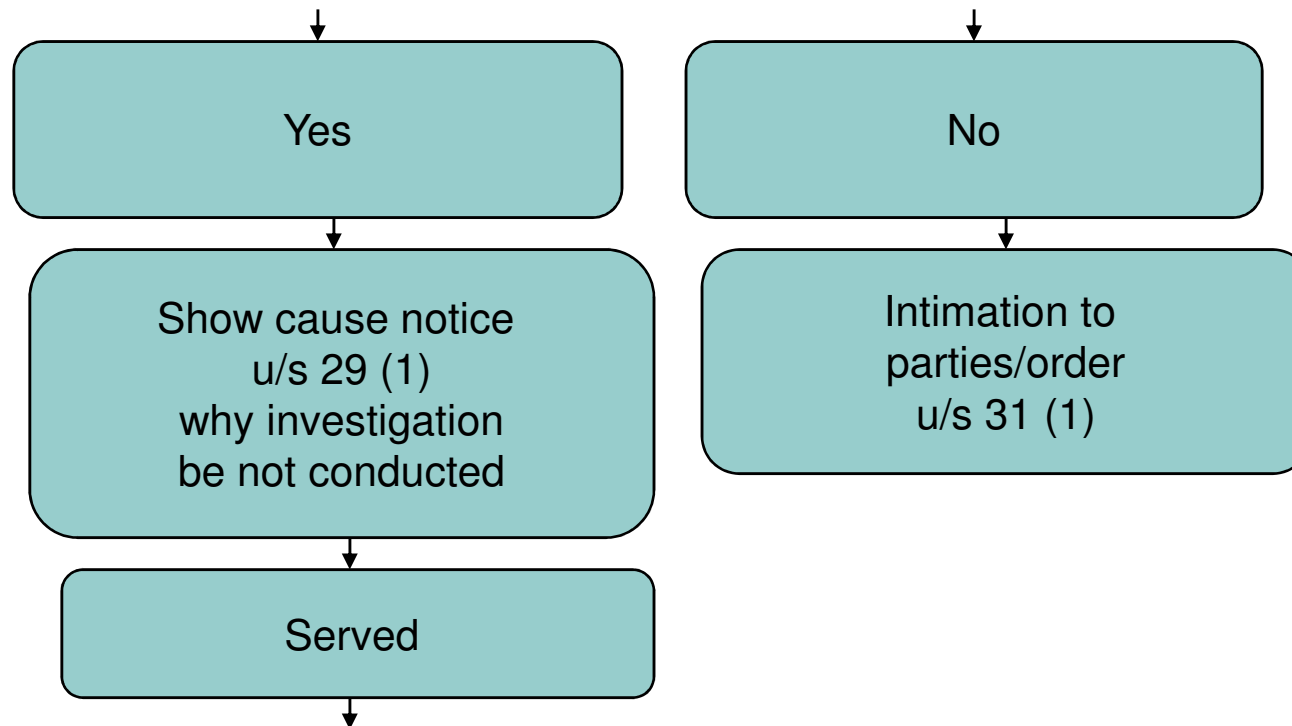




# Procedure for Investigation

## Section 29

(contd.)

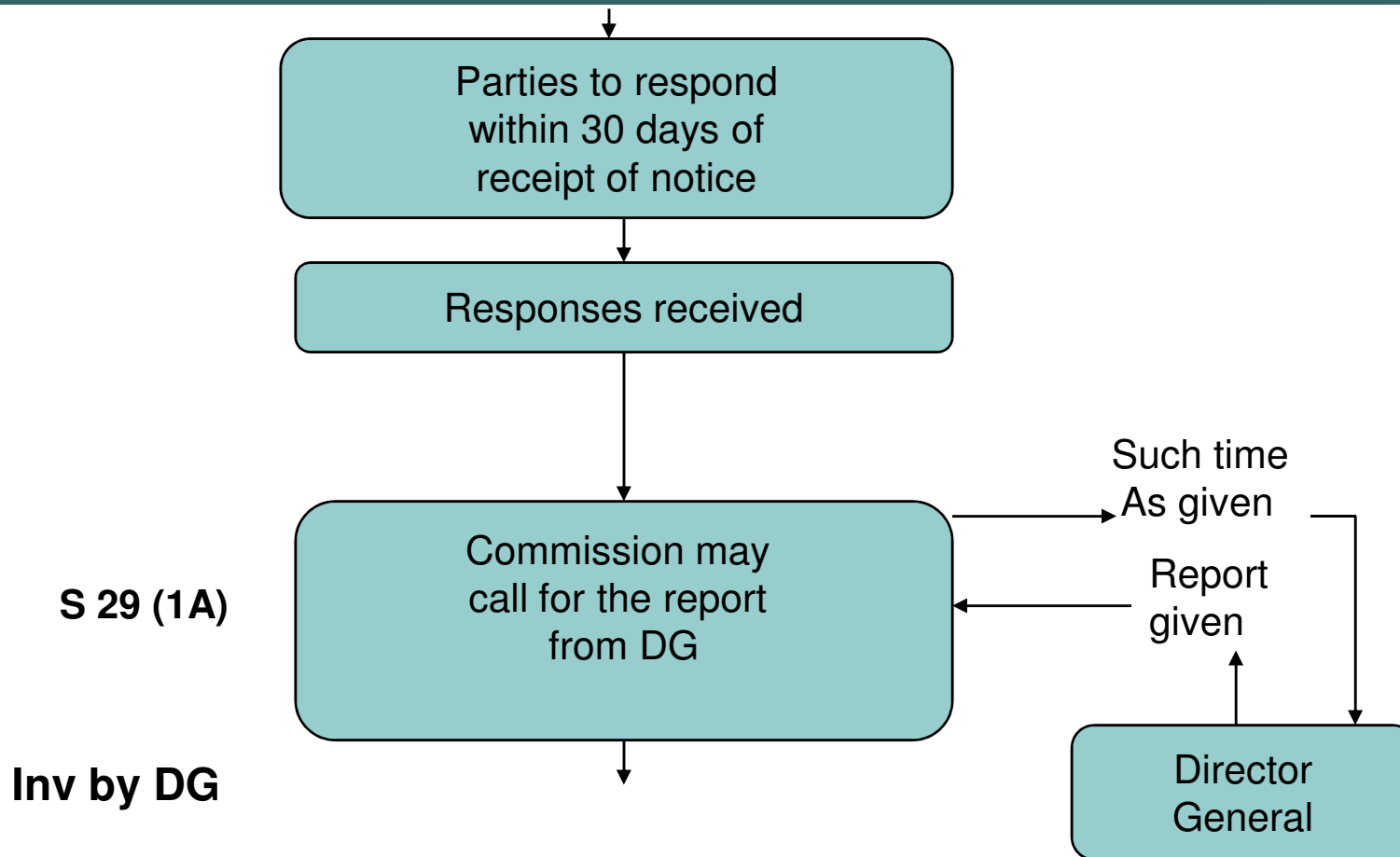




# Procedure for Investigation

## Section 29

(contd.)



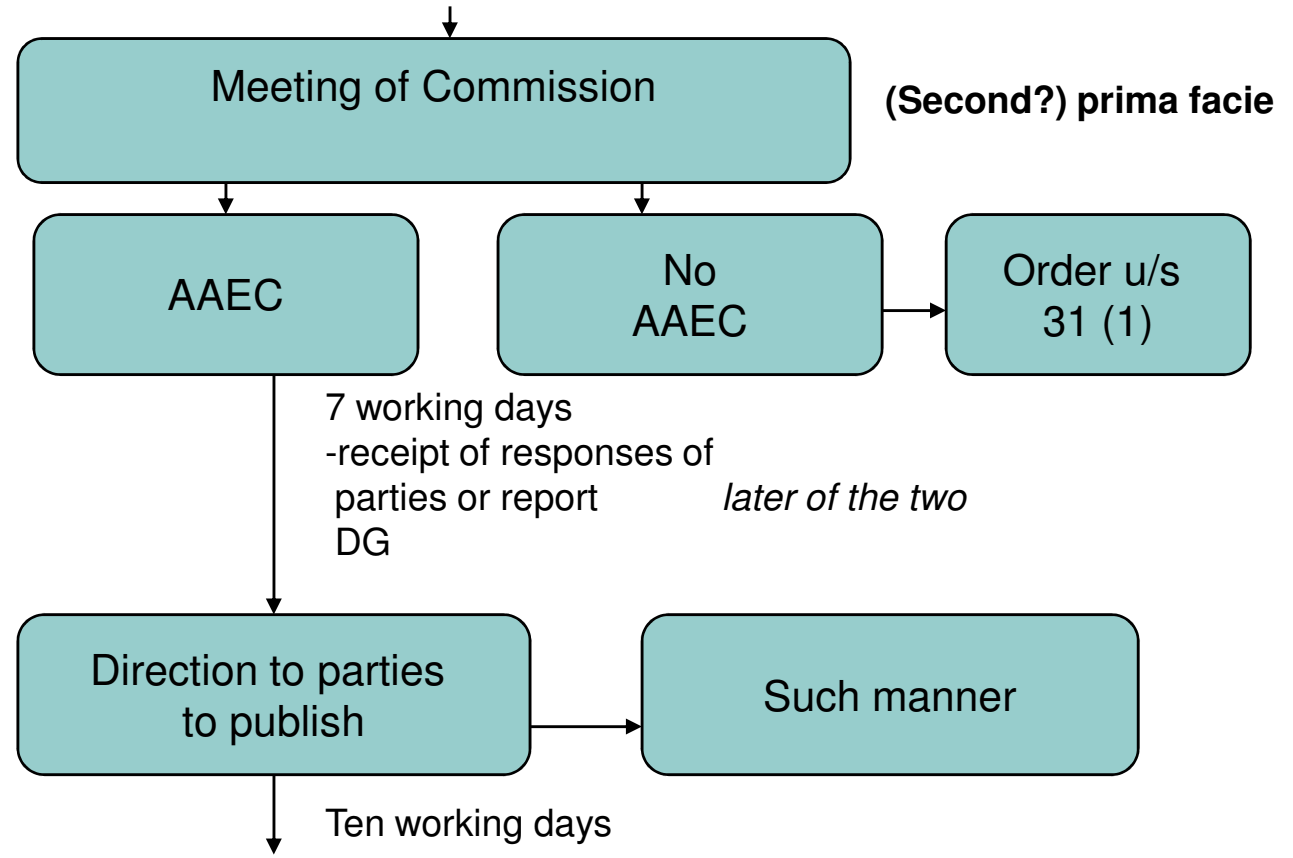


# Procedure for Investigation

## Section 29

(contd.)

S 29 (2)



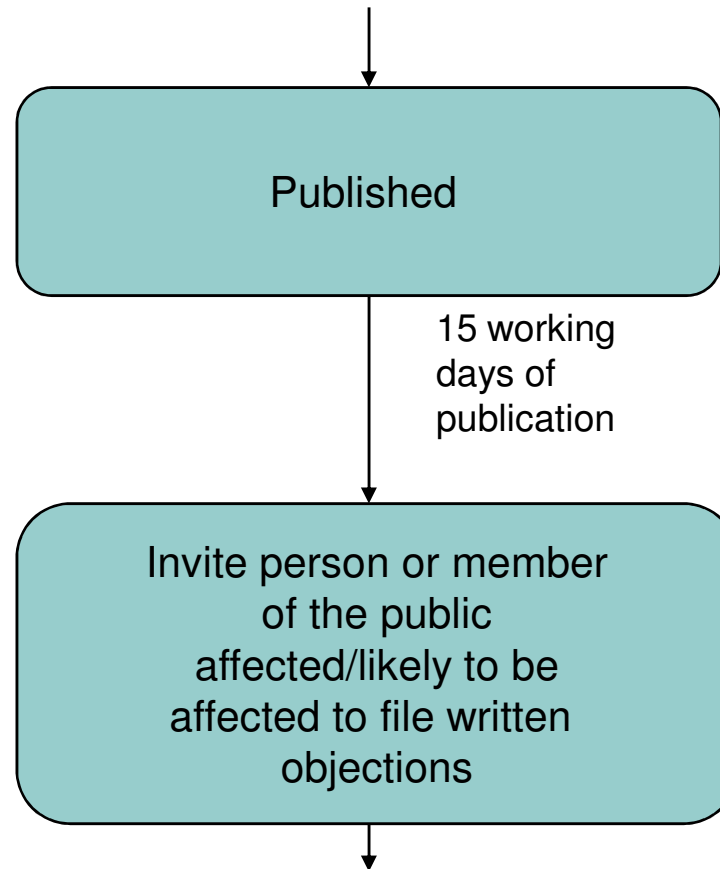
# Procedure for Investigation



## Section 29

(contd.)

**S 29 (3)**

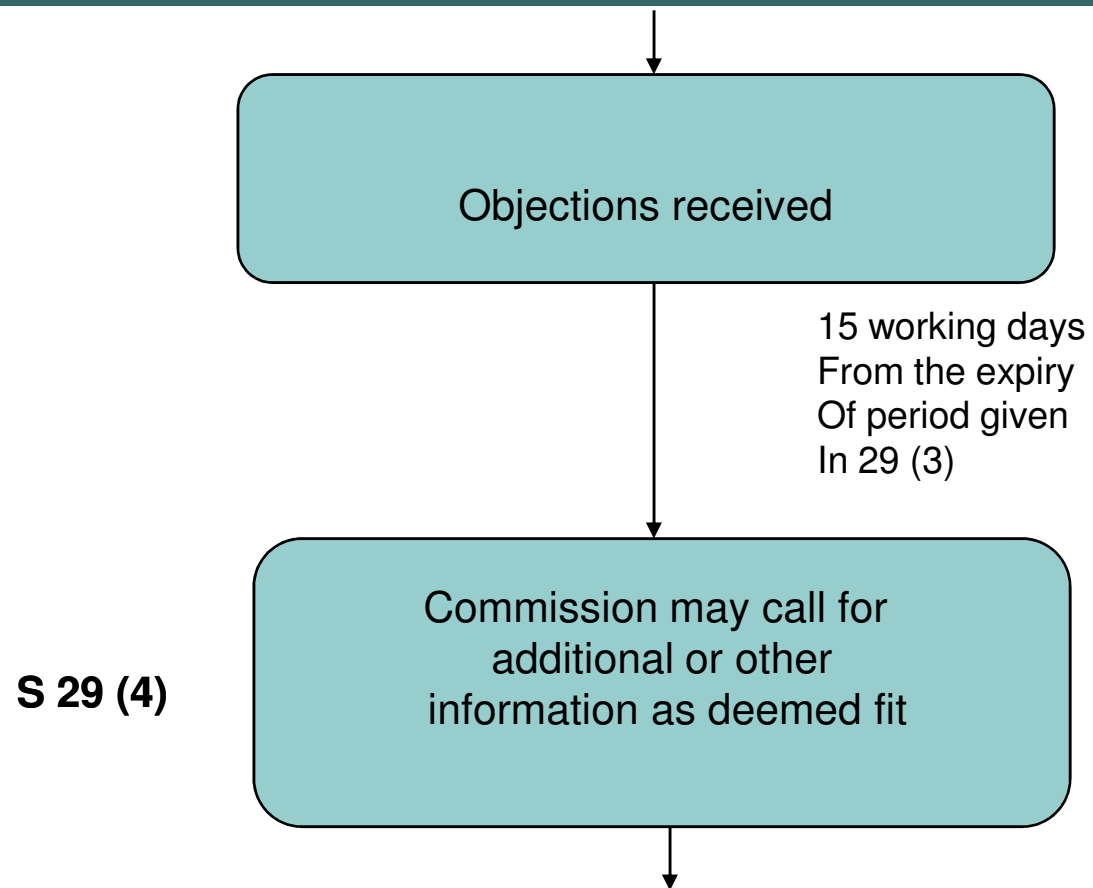




# Procedure for Investigation

## Section 29

(contd.)







# Procedure for Investigation

## Section 29

(contd.)

S 29 (5)

Called information shall be furnished by the parties within 15 days from expiry of period u/s 29 (4)

All information received

45 working days

S 29 (6)

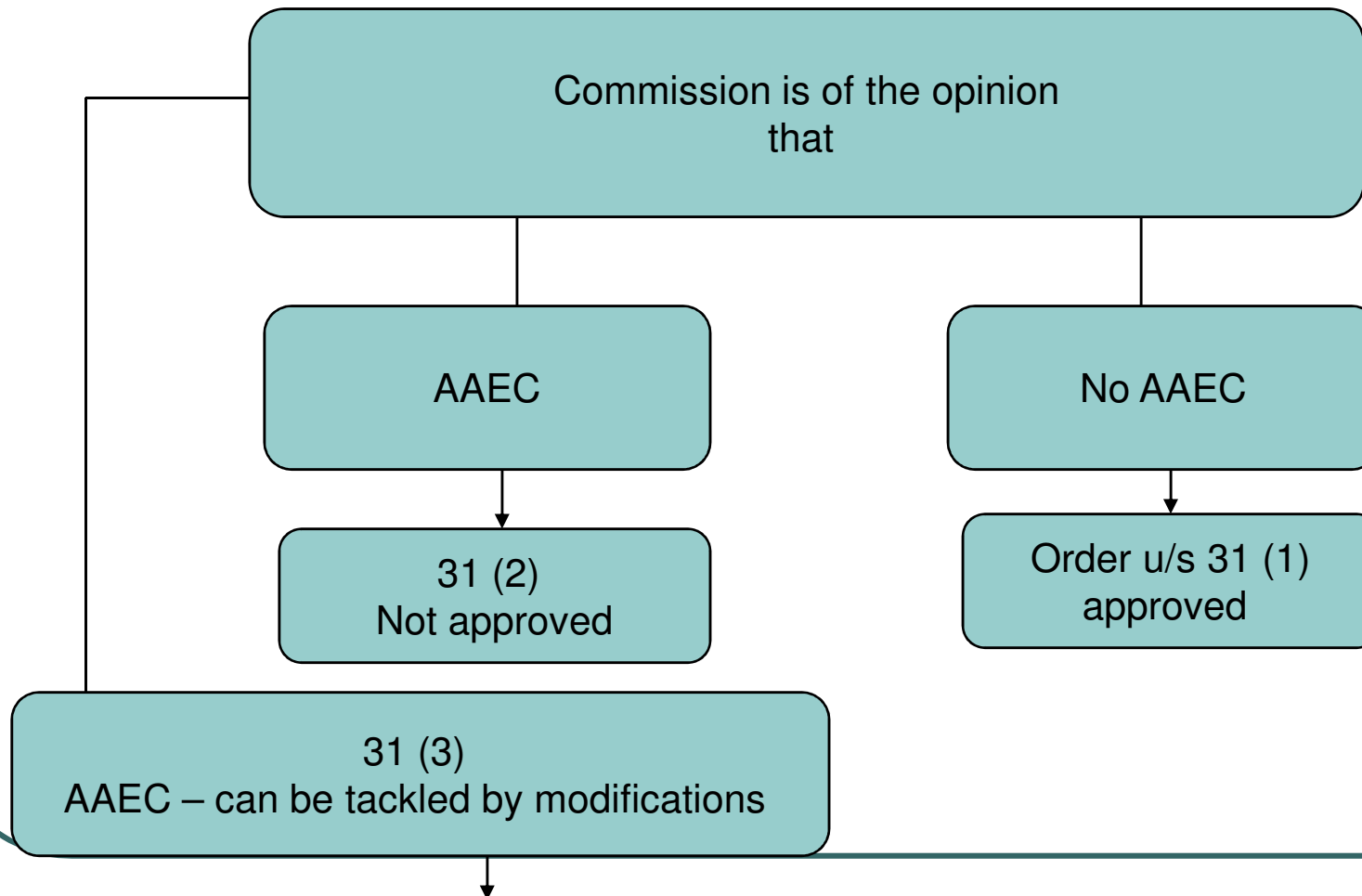
Commission to proceed to deal with the case



# Orders by the Commission

## Section 31

(contd.)

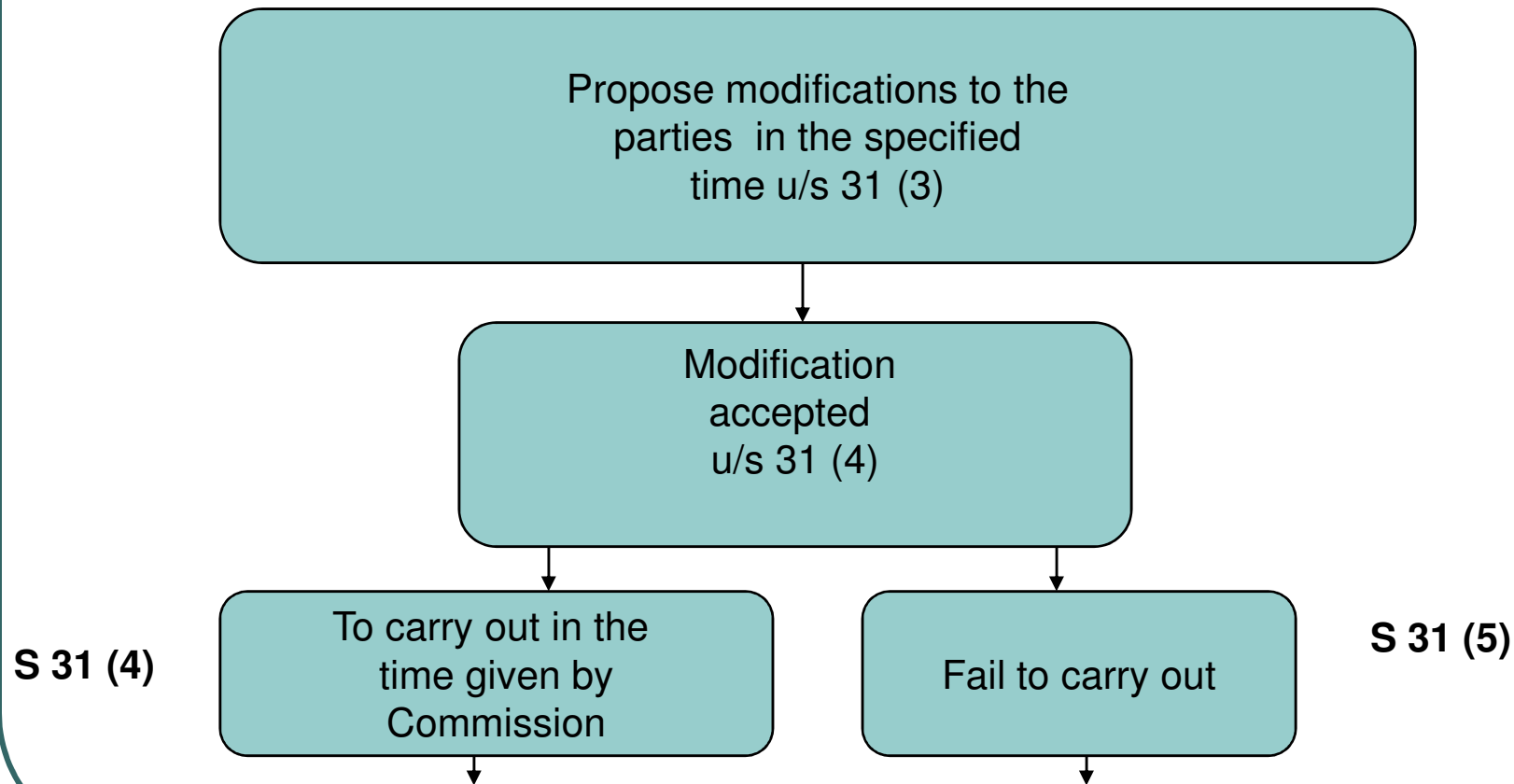




# Orders by the Commission

## Section 31

(contd.)

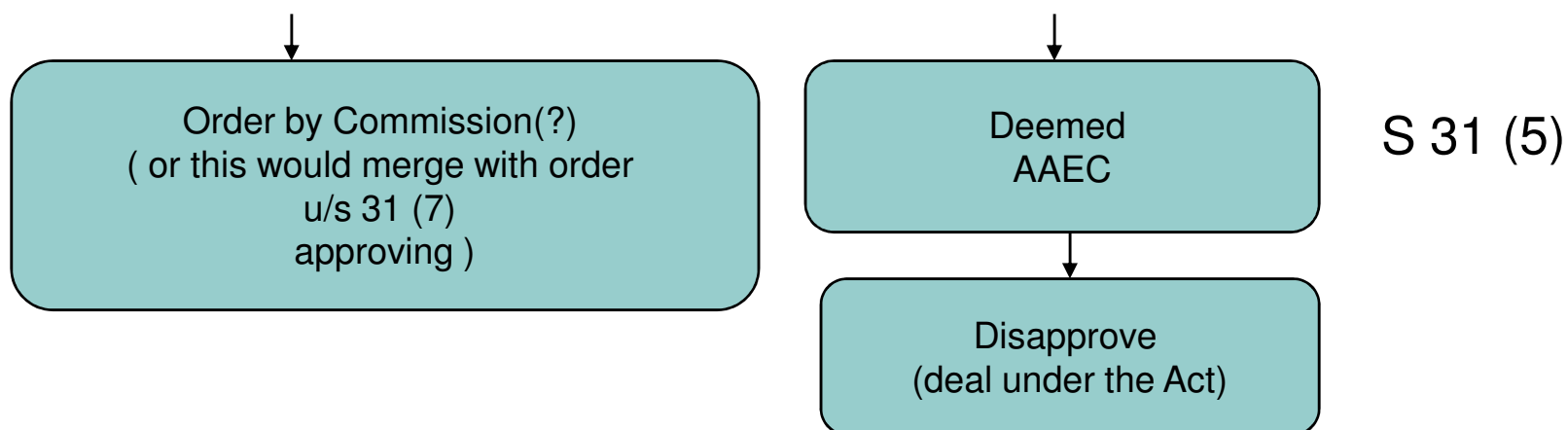




# Orders by the Commission

## Section 31

(contd.)





# Orders by the Commission

## Section 31

(contd.)

**S 31  
(6)**

Parties do not accept modifications asked  
by the Commission

30 Working days

**S 31  
(7)**

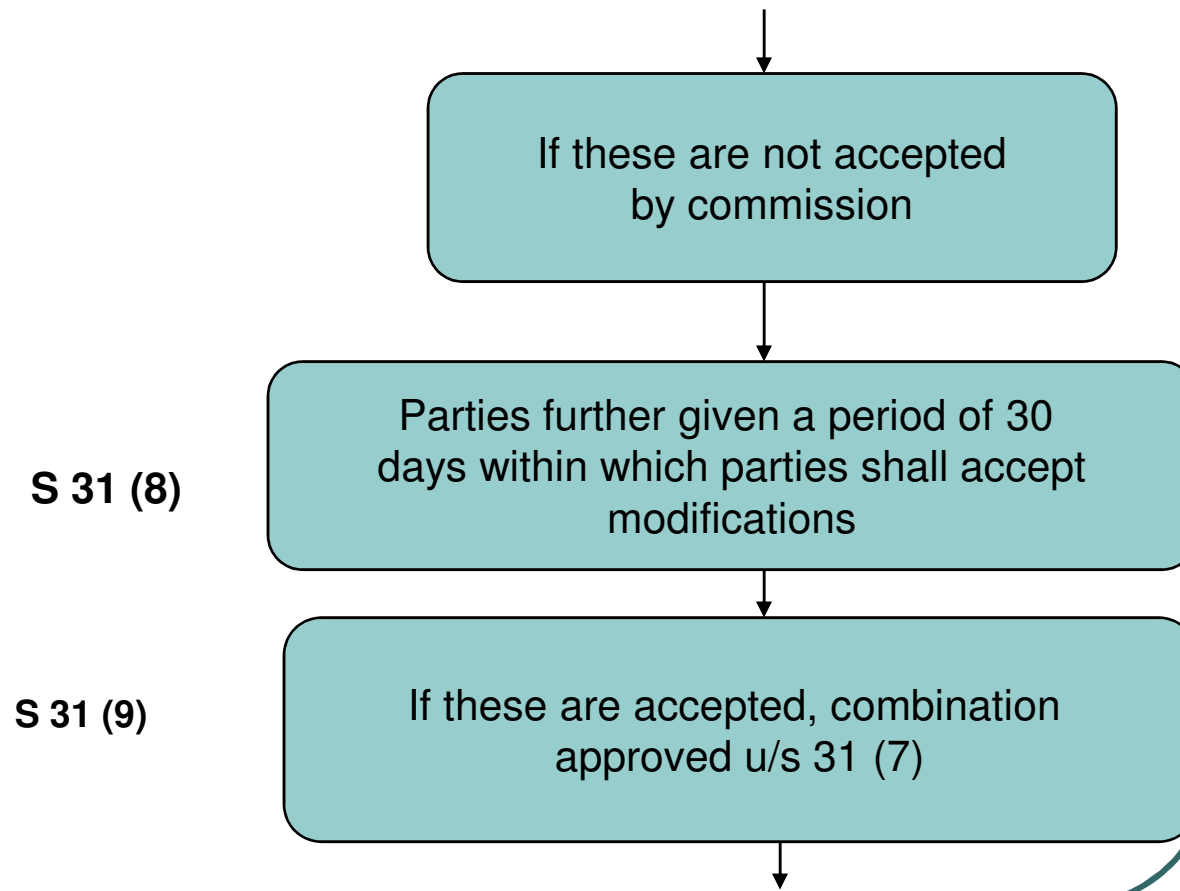
Such parties may submit amendment to the  
Commission's proposed modification



# Orders by the Commission

## Section 31

(contd.)

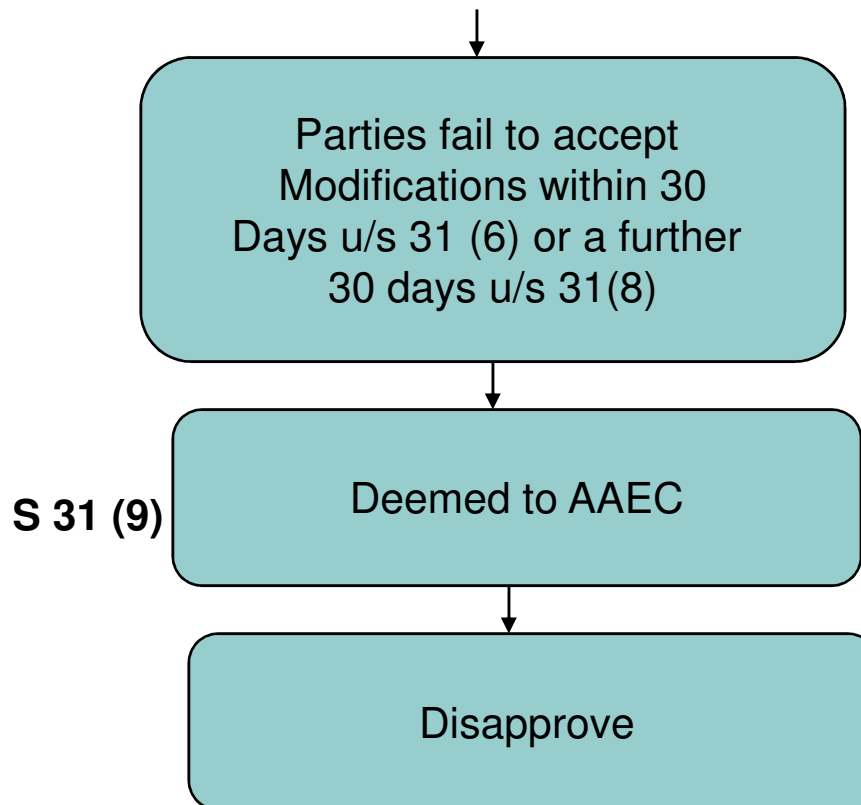




# Orders by the Commission

## Section 31

(contd.)





# Orders by the Commission

## Section 31

(contd.)

**S 31 (10)**

u/s 31 (2)      AAEC or  
u/s 31 (9)      deemed AAEC

Without prejudice to any  
penalty & persecution

Commission may order that the  
combination  
shall not be given effect to  
(no combination in the eyes of law)



# Orders by the Commission

## Section 31



(contd.)

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May frame a scheme to implement its order under this sub section



# Orders by the Commission

## Section 31

(contd.)

**S 31 (11)**

If no order passed > 210 days from 6 (2) notification or no directions u/s 31 (1), 31 (2) or 31 (7) issued, deemed approval



Expln: Time of 30 working days each given u/s 31 (6) & 31 (8) shall be excluded from 210 days



# Orders by the Commission

## Section 31 (12)

(contd.)

### S 31 (12)

Time of 210 (90 – mistake?) days is to be reckoned after deducting the extended time granted at the request of parties\*

\* Nowhere extension mentioned. Harmonious construction indicates that it is an enabling provision for regulations

# Orders by the Commission

## Section 31

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(contd.)

**S 31 (13)**

If combination void, shall be dealt with by Authorities as if it has not taken place

# Orders by the Commission

## Section 31

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(contd.)

**S 31 (14)**

Nothing in this chapter shall  
effect any proceedings initiated/  
may be initiated under other law

# Best International Practices



- 
- Merger Notification & Review Procedures (N&P) sub group has developed a set of Recommended Practices for Merger Notification to facilitate convergence towards best practices in merger review. These were adopted by ICN (April 2006) these are:
    1. Sufficient nexus between transaction's effects and the reviewing jurisdiction
      - Clear objective criteria
      - Only transactions having effect in jurisdiction be covered
      - Local nexus



- 
2. Clear and objective notification thresholds
  3. Flexibility in the timings of merger notification
    - Suspensive jurisdiction – no deadlines recommended
    - Non suspensive jurisdictions – sufficient time from triggering events
  4. Merger review periods
    - Six weeks / six months
  5. Requirements for initial notification
    - Less than for full investigation
    - Pre notification guidance/ meeting
    - The agency's staff should be accessible



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## 6. Conduct of merger investigations

- General
  - Effective
  - Efficient
  - Transparent
  - Predictable merger review
  - No unnecessary costs
  - Merger remains viable after review





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- Interactive process
    - Sufficient and timely information of factual and competitive concern behind any adverse decision
    - Meaningful opportunity to respond to those concerns before final decision
    - Reasons behind in-depth review be informed not later than at the beginning of a second stage inquiry
  - No undue delays
    - Even in absence of deadline definitive procedures
    - Indicative time table
    - Response for request of information within specified time



- 
- Confidentiality
    - Due regard for legal privileges and confidentiality doctrine
    - Principles of confidentiality be established
  - Opportunity of expression
    - Merged party and interested third party should be have meaningful opportunity to express views
    - Opportunity without discrimination – foreign/domestic firms
    - Third party be allowed to express views without adverse impact on review time



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## 7. Procedural fairness

## 8. Transparency

- Vis-à-vis jurisdiction
  - Type of transaction
  - Exemptions/exclusions
  - Precise test / thresholds
- Vis-à-vis procedure
  - Identity and contact details of agency/staff
  - Filing deadlines
  - Information about initial filing
  - Any filing fee



- 
- Review periods
  - Waiting period
  - Investigative procedure
  - Any in between deadlines (during review)
  - Deadlines for appealing against adverse decision
  - Procedural rights of merging and third parties
  - Enforcement procedure relating to violations
  - Supporting regulations/case laws etc.
  - Speaking orders
  - Publicly accessible material



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## 9. Confidentiality

## 10. Intra agency coordination

## 11. Remedies

- Addressing competitive harm
  - Careful, factual and economic analysis
  - Goal to prevent competitive harm
  - Goal can be achieved by remedies – most often requiring a divestiture
  - Prevent if parties don't agree



- 
- Issue guides / notice / bulletins
  - Procedures be in public domain
  - Providing a transparent framework for proposal, discussions and adoption of remedies
    - Meager guideline etc.
    - Steps and procedures
  - Procedure in practice to ensure that remedies are effective and easily administrable
    - Clear procedure
    - Precisely written documents
    - Documentation for ability to obtain compliance

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- Divestiture

- Structural or behavioral
- Approving the acquirer
- Time and quick divestiture
- Means to ensure implementation monitoring compliance / enforcement

12. Competition agency powers and

13. Review of merger control provisions

These are only recommended – non-binding

# Comparison of time limits

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- Time Limits for

	W days	Days
1. determining prima-facie opinion u/s 29(1)	'x'	x
2. issuing show cause notice to parties u/s 29(1)	Nil	
3. receipt of reply from parties to show cause notice u/s 29(1)	-	30*
4. issuing directions to parties to publish details of combination u/s 29 (2)	7	9
5. parties to publish details of the combination u/s 29 (2)	10	13

(days and not working days given)\*



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	W. Days	days
6. inviting written objections from any person or member of the public to said combination u/s 29(3)	15	21
7. calling upon additional or other information from parties to combination u/s 29 (4)	15	21
8. parties to the combination to furnish additional or other information u/s 29(5)	-*	15

(days and not working days given)\*

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	W. days	days
9. proceeding to deal with the case in accordance with section 31 u/s 29(6)	45	63
10. rejecting the combination u/s 31 (2)	Nil	Nil
11. proposing modification to the combination u/s 31 (3)	Nil	Nil
12. parties to carry out modification u/s 31 (4)		'Y' (as specified)
13. declaring combination having aaeoc u/s 31 (5)	Nil	Nil

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	W. days	days
14. parties to submit amendment to modification proposed by CCI u/s 31 (6)	30	42
15. CCI to approve amendment u/s 31 (7)	Nil	Nil
16. parties to accept further modification proposed by CCI u/s 31 (8)	30	42
17. declaring combination having AAEC u/s 31(9)	Nil	Nil

# Comparison of Waiting Period

<b>Earlier</b>	<b>Now</b>
<p data-bbox="584 611 779 671"><b>31 (11)</b></p> <ol data-bbox="257 699 1064 1161" style="list-style-type: none"><li data-bbox="257 699 1064 815">1. 90 Working days from date of publication</li><li data-bbox="257 842 1064 1018">2. No time limit between filing and determination of first prima facie under section 29 (1)</li><li data-bbox="257 1045 1064 1161">3. Means 126 (minimum)days+unspecified time</li></ol>	<p data-bbox="1480 611 1675 671"><b>31(11)</b></p> <ol data-bbox="1144 699 1989 1118" style="list-style-type: none"><li data-bbox="1144 699 1989 922">1. 210 days from date of filing notice (absolute – no free cushion)</li><li data-bbox="1144 949 1989 1118">2. This includes Gazetted holidays/ Natural Calamities / Social disturbance includes bandhs, riots, strikes etc.)</li></ol>

# Comparison of Waiting Period

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## Another way

90 Working Days

:

126 Days

210 Days

:

150 Working Days

Ignoring holidays etc. ratio of working day to days is 5 to 7

From the time chart it can be seen that the following is the comparison

## TIME CHART

From Publishing	From Notice
15+15+45 = 75 days	30+9+13+21+21+15+63 = 172 days
Cushion was 15 Working days / 21 Days	Cushion is 27 working days/ 38 days
<b>Difference of 17 days/ 12 Working Days barely enough to account all kinds of holidays / strikes etc. put together - rather now more tough</b>	

## Features planned to be introduced through Regulations

- 3 tier fee based on service

(a)	Rs. 30 lakh	With notice
(b)	Rs. 15 lakh	With the reply to the show cause notice, if any u/s 29(1)
(c)	Rs. 15 lakh	u/s 29(2) alongwith the proof of publication of details, if applicable

**0.01 % of the Turnover value of Rs. 3000 crore is Rs. 30 lakh. Thus, the merger fee is 0.01 % of the basic minimum threshold turnover value for prima facie opinion and 0.02% for a full investigation.**

## **Features planned to be introduced through Regulations**

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- Mechanism to mark date of receipt of a valid notice
- time to remove defects taken out from 210 days time limit
- mechanism for compliance of orders of Commission on modifications suggested.
- first window clearance planned within about six weeks

# Food for thought-I

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- The word reference still remains in section 6(2). Is it a mistake? Or there is a purpose?
- Prima-facie word comes at two stages, once in section 29 () and second time in 29 (2). It is confusing? Should there be two separate words to identify the different stages
- Section 31 (4) expects the parties to carry out the modification in the time given by the Commission. There is no talk of approval order. Does it merged with 31 (7) in which amended modifications are approved by the Commission?



## Food for thought-II

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- Section 31 (12) still carry phrase 90 days and not 210 days
- Section 31 (12) talks of deducting time given to parties to be excluded from the 210 days. No provision for extension.
- Harmonious construction suggests that regulations has take care of the extensions.
- Factors for prima facie and final determination are same. This has resulted in a bulky notification form. Is it possible to have a light form for initial examination ?

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# Thank You

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