



# Competition Commission of India

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**National Workshop on Competition Law**

## **REGULATION OF COMBINATIONS**

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# Regulation of Combinations

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- ❑ Combination may be through acquisition of shares/ voting rights or assets, acquiring of control and mergers & amalgamation (S 5)
- ❑ Combination must be above thresholds and meet domestic nexus criterion (S 5)
- ❑ Thresholds defined in terms of total assets or turnover and domestic nexus (S 5)



# Regulation of Combinations (cont.)

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- Mandatory pre-notification (S 6 (2))
- Suspensive regime (S 6 (2A))
- Assessment of anti-competitive effect based on listed factors (S 20(4))



# Difficulties in Enforcement

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- ❑ Economy is dynamic- even during review being done
- ❑ The viability of proposed combination may change in the review period
- ❑ Challenge to ensure that combination remains viable after review
- ❑ The review periods should gradually be brought down



# Features

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- Compulsory Notification
- Form of Notification
- Timings of Notification
- Consequences of not filing notification
- Detailed procedure for inquiry
- Compares well with Recommended Practices of ICN



# Combination Defined

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- ❑ 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))



# Control Defined

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- ❑ 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)



# Group Defined

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- ❑ '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)





# Value of Assets

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- ❑ **By taking book value of the assets shown in audited BOA in immediately preceding FY w.r.t. FY of date of merger**
  - reduced by depreciation
  
- ❑ **Value of assets to include**
  - brand value, goodwill, copyright, patent, collective mark, registered trade mark or similar other commercial rights

(Expln (c) to S 5)



# Indian Thresholds

		<b>Assets Total (In India)</b>	<b>Turn over Total (In India)</b>
<b>Only in India</b>	<b>No Group</b>	<b>Rs. 1000 cr</b>	<b>Rs. 3000 cr</b>
	<b>Group</b>	<b>Rs. 4000 cr</b>	<b>Rs. 12000 cr</b>
<b>In and outside India</b>	<b>No Group</b>	<b>US \$ 500 m (Rs. 500 cr) (Rs. 2000 cr)</b>	<b>US \$ 1500 m (Rs. 1500 cr) (Rs. 6000 cr)</b>
	<b>Group</b>	<b>US \$ 2000 m (Rs. 500 cr) (Rs. 8000 cr)</b>	<b>US\$ 6000 m (Rs. 1500 cr) (Rs. 24000 cr)</b>



# Thresholds – a Comparison

Except where indicated otherwise, figures, rounded to full numbers, are in US dollars 1\$ = Rs 40/-

Country	Domestic Turnover	World Wide Turnover	Group
Belgium	145 m (DN 58 m)	---	---
Canada	---	---	400 m*
E.U.		7236 m (DN 362 m – Community)	---
France	---	218 m (DN 73 m)	---
Germany	---	724 m (DN 36 m)	---
U.S.A.	200 m	---	---
U.K.	141 m	---	---
India	750 m	1500 m	6000 m (World Wide)

- *m = million*
- *DN = Domestic Nexus*
- *\*= Canadian dollar*



# Compulsory Wait

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- Combining parties to wait for 210 days (S 6 (2A))
  
- Combination coming into effect, before 210 days, without order of Commission – Void
  
- If Commission approves combination before 210 days – Combine
  
- If no order up to 210 days – deemed approval of combination (S 31(11))



# Comparison of Review Periods

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)

Indian time caps not very different from major jurisdictions



# Consequences of not notifying

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- Penalty – which may extend to one percent of the total turnover or the assets, whichever is higher, of such a combination (S 43A)



# Inquiry

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- Mandate for inquiry S 20/ S 30
- Detailed procedure of investigation S 29
- Orders of the Commission S 31
- Determining factors S 20(4)



# Procedure

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- Notice filed (S 6(2))
- Opinion by the Commission
- Prima facie (1<sup>st</sup>) no AAEC
- Order of approval (S 31(1))
- If, prima facie (1<sup>st</sup>) AAEC
- Show cause notice (S 29(1))





## Procedure (cont.)

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- Response to show cause received (S 29(1A))
- Commission may call for DG's report
- Prima facie opinion (2<sup>nd</sup>) of no AAEC
  - Approval order (S 31(1))
  
- If prima facie opinion (2<sup>nd</sup>) of AAEC
  - Direction to publish details of combination (S 29(2))



## Procedure (cont.)

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- ❑ Commission may invite any person or member of the public, affected, to file written objections (S29(3))
- ❑ Commission may call for additional or other information from parties (S 29(4))
- ❑ Additional or other information furnished (S 29(5))
- ❑ Commission to proceed with the case (S 29(6))
- ❑ Approval (S 31(1))/ Non approval (S 31(2))



# Factors for Determination

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- Formation of opinion – not arbitrary
- Based on detailed factors (S 20 (4))
- These are
  - (a) actual and potential competition through imports;
  - (b) extent of barriers to entry;
  - (c) level of combination/concentration ;
  - (d) countervailing power;



## Factors for Determination (cont.)

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- (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;
- (h) market share, individually and as a combination;



## Factors for Determination (cont.)

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- (j) likelihood that the combination would result in the removal of a vigorous and effective competitor (s) in the market;
- (j) vertical integration;
- (k) failing business;
- (l) innovation;
- (m) for a combination having AAEC, advantages by way of economic development;
- (n) Whether the benefits outweigh the adverse effects of combination, if any.



# Fee

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- Legal sanction S 6 (2)
- Fee pattern of different jurisdictions studied
- After consultative process, uniform fee model followed
- Uniform fee of Rs. 40 lakhs (R 12)

# Transactions not likely to AAEC

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- ❑ Through R 5 transactions having no significant competition concerns indicated
- ❑ The type of transactions covered under R 5 are

# Transactions not likely to AAEC (cont.)

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## □ Acquisition

- of shares/ voting rights not exceeding 15%, provided not leading to control,
- of assets not directly related to business, solely as investment, or in ordinary course of business, provided not leading to control,
- of shares/ voting rights where the acquirer hold more than 50% of shares/voting rights before acquisition
- by succession, will, etc.
- of current assets in ordinary course of business





# Transactions not likely to AAEC (cont.)

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- in the process of under writing,
- pursuant to a bonus or right issue or sub division of shares
- pursuant to an order of the Commission
- within a group
- of 5% of shares/voting rights per year by an acquirer who has already acquired 15% or more

# Transactions not likely to



## AAEC (cont.)

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- specifically exempt under statute of parliament
  
- Amended or renewed tender offer
  
- Where each of at least two of the combining parties do not have assets / turnover of Rs 200 / 600 crores in India



# Triggering event for notifying

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- ❑ Any document indicating bonafide intention can trigger filing at the option of the person filing notice
- ❑ Flexibility for time of filing notice introduced without liability for not filing notice in time (R 6)
- ❑ This conforms with ICN best practices



# Forms for notifying

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- Forms (R 6)
  - simple notification forms seeking absolutely essential information
  - Two forms stipulated for notice
  - Form 1 – 30 days
  - Form 2 - for combinations not likely to cause AAEC including those between Indian and foreign companies- 60 days
  
- Form 3 for information to be filed by banks/PFIs/FIIs/ VCFs (R 7)



# Time for first clearance

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- ❑ The clock of 210 days begins after notifying and Commission has to decide in that time
- ❑ If, for any reason, a party chooses to use Form 2 although Form 1 only may capture the information needed for competition assessment, Commission will have to make extra efforts
- ❑ Such instances are to be discouraged in view of overall limit of 210 days and self imposed limit of 30 days (R 27)
- ❑ Therefore self imposed limit for 1<sup>st</sup> prima facie for Form 2 kept at 60 days (R 27)



# Draft Regulations Endorsed

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- ❑ Advisory Committee, consisting of experts, endorsed the draft regulations with minor changes



# Recommended Practices

(non-binding)

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1. Sufficient Nexus
2. Clear and objective notification thresholds
3. Flexibility in the timings of merger notification
4. Merger review periods -Six weeks / six months
5. Requirements for initial notification



# Recommended Practices (cont.)

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6. Conduct of merger investigations
7. Procedural fairness
8. Transparency





# Recommended Practices (cont.)

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9. Confidentiality

10. Inter agency coordination

11. Remedies

12. Competition agency powers and

13. Review of merger control provisions



# Imposable Penalties

- Failure to comply with orders/ directions u/s 27, 28, 31, 32, 33, 42A and 43A – **fine upto Rs. one lakh per day** [S 42 & 43 (S 36 (2)/(4)) / 41(2)]
- Non furnishing of information on combinations – **upto 1% of turnover/ assets whichever is higher** (S 43A)
- Making false statement/ omission to furnish material information on combinations – **not less than Rs. 50 lakh extendable to Rs. one crore** (S 44)
- False statement/ omitting information – **fine upto Rs. one crore**
- Lesser penalty (S46)



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*THANKS*

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