



Competition Commission of India

REGULATION OF COMBINATIONS

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Broad Provisions of CA 02

- Prohibits anti-competitive agreements (S 3)
- Prohibits abuse of dominant position (S 4)
- Regulates combinations (S 6)
- Mandates competition advocacy and awareness (S 49)



Need for Regulation of Combinations-I

- Issues in ACA and AOD
- How to prevent possibilities of AOD
- Dominance emanates from size
- Size can come through
 - Organic growth – takes time
 - Inorganic growth - M&A – faster
- Remedies for AOD include division



Need for Regulation of Combinations-II

- Division of an enterprise enjoying dominance and abusing it involves high socio economic costs
- Prevention of such a possibility would be a better option
- Competition assessment prior to M&A
- Better choice in socio economic terms
- Worldwide mandatory notification is preferred as it gives certainty to business



Peculiarities

- Economy is dynamic- even during review
- The viability of proposed combination may change in the review period
- Delay can break/destroy the deal
- Challenge to ensure that combination remains viable after review
- The review periods should gradually be brought down



Broad Procedure-I

- Define relevant market
 - relevant product market
 - relevant geographical market
 - relevant temporal market (?)
- Look at state of competition in relevant market
- Compare two situations
 - as if merger had not taken place
 - as if merger has taken place
- Compare the relative state of competition in the relevant market in two situations



Broad Procedure-II

- Relatively whether, in the hypothetical post-merger situation, the competition in the relevant market is adversely affected ?
- Appreciable ?
- Not defined
- In many jurisdictions 'SLC' test used
- In India, the test is AAEC
- Is AAEC caused or likely to be caused?
- If no, permit the merger



Broad Procedure-III

- If yes, can the AAEC be addressed by some structural/behavioral remedies?
- If yes, suggest the remedies to merging parties
- If the merging parties are ready to carry out the modification, permit the modification
- If the merging parties are not ready to carry out the modification, do not permit the merger
- If the adverse effect cannot be addressed by any remedies, do not permit the merger



Pit falls

- If any efficiency enhancing merger is wrongly blocked, consumers/economy are denied the benefits of merger
- State of competition is not always adversely affected by mergers
- Many mergers are beneficial
- If a merger having anti competitive effect is cleared, consumers/economy suffer
- Tough choice indeed



Un-enviable position of CCI

- Either way blame may come
- Analysis and decision have to be carefully made
- Staffing with due care
- Advocacy
- Continuous capacity building
- Confidentiality
- If properly implemented, can be a boon for the economy



Other Constraints-I

- Relatively, politically most sensitive

- Politically sensitive issues
 - Massive lay-offs
 - Substantial new investments
 - National pride

- Competition policy forms a part of industrial policy¹



Other Constraints-II

- Undoing the connection between the two may be an impossible task

- Strongest advocates of competition may be swayed by political prospects of the creation of a national champion
 - Despite perceived lessening of competition, merger of Boeing and McDonnell Douglas, approved by FTC/DOJ¹
 - Eleventh hour clearance by EC- speculated to have been given to maintain good relation with US



Global Experience

- International experience- less than 10/15 percent of notified combinations seen to have AAEC
- Very few (less than one in hundred) blocked
- Approval with Structural and/or Behavioural remedies



“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))



“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))



“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)



“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)



Thresholds for Notification

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



Value of Assets

- **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)



High Indian Thresholds

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*



Applicability

- Combination 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)



Salient Features

- Compulsory Notification (S 6 (2))
 - Form of Notification
 - Timings of Notification
- Suspensive regime (S 6 (2A))
- Assessment based on listed factors (S 20(4))
- Consequences of not filing (S 43A)
- Detailed procedure for inquiry (S 29)
- Compares well with RPs of ICN



Triggering event for notifying

- 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)
- Conforms with ICN best practices



Forms for Notifying

- Forms (R 6)
 - simple notification forms seeking readily available information
 - Two forms
 - 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)



Filing Fee

- Legal sanction S 6 (2)
- Fee pattern of different jurisdictions studied
- Fee pattern of SEBI/ROC in India studied
- Detailed consultation with stakeholders
- Uniform fee model followed
- Uniform fee of Rs. 40 lakhs (R 12)



Consequences of not notifying

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



Suspensive Regime

- 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))
- First clearance in most cases 30/60 days – CR



Review Periods else where

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



Factors for Assessment-I

Factors (S 20(4)):

1. Actual and potential level of competition through imports
2. Extent of barriers to entry into the market
3. Level of concentration in the market (HHI, CR)
4. Degree or countervailing power in the market
5. Likelihood of post combination price/profit increase
6. Extent of effective competition in the market – post combination
7. Extent to which substitutes are/likely to be available



Factors for Assessment-II

Factors (S 20(4))

8. Market share in the relevant market-individually and combined
9. Removal of vigorous and effective competitor from the market
10. Nature and extent of vertical integration in the market
11. Possibility of failing business
12. Nature and extent of innovation
13. Contribution to economic development
14. Whether the benefit of combination outweigh adverse effect of combination



Inquiry

- Mandate for inquiry (S 20/ S 30)
- Detailed procedure of investigation (S 29)
- Orders of the Commission (S 31)
- Substantive test - AAEC



Procedure in CA 02-I

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



Procedure in CA 02-II

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



Procedure in CA 03-III

- 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/ Approval with modification (S 31(1))/
Non approval (S 31(2))



Procedure in CA 04-IV

- Modification suggested to the parties
- Parties accept modification and carry out in time specified
- Approve
- Parties do not accept the modification/submit amendment to modification proposed by the Commission
- Commission agrees with the amendment to modification
- Approve



Procedure in CA 04-V

- Commission does not agree with the modification. Further time to parties
- Parties either do not accept the modification/ do not carry out after accepting the modification/do not accept the amendment to modification
- Not approve
- Orders of the Commission:
 - Approve
 - Approve with modifications
 - Not approve



Combination Regulations-I

Salient Features

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



Combination Regulations-II

■ 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



Combination Regulations-III

- 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



Combination Regulations-IV

- 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



Combination Regulations-V

- Special provisions for hostile takeover (R 10)
- Permitting additional time when sought by parties (R 18)
- Rectification of mistakes (R 20)
- Intimation of changes, not affecting assessment (R 22)
- Deemed clearance in 30/60 days in most cases (R 26)



Combination Regulations-VI

- Provision for personal appearance of the parties to the combination / opportunity of being heard before final order (R 41)
- Enabling provision for appointing independent trustees, at the cost of the parties, for overseeing orders/directions of the Commission (R 54)
- Pre-notification consultation being considered



Draft Regulations Endorsed

- Advisory Committee, consisting of experts, endorsed the draft regulations with minor changes. Changes suggested by Advisory Committee have been incorporated in draft regulations.



Recommended Practices-I

(non-binding)

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-II

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



Recommended Practices-III

9. Confidentiality

10. Inter agency coordination

11. Remedies

12. Competition agency powers and

13. Review of merger control provisions



Other 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)



THANKS

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