



TREATMENT OF
COMBINATIONS
(UNDER COMPETITION ACT, 2002)
STATE LEVEL SEMINAR
ON
‘COMPETITION POLICY AND LAW’
KARNATAKA, BANGALORE
30-01-2009

By

AUGUSTINE PETER
ECONOMIC ADVISER

Competition Commission of India

Tel: 011 26701681: Fax: 011 26107131:

email paugustine@nic.in



COMBINATIONS ***(Mergers +)***

(Sec 5, 6)

COMPETITION ACT, 2002

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) 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? - 3

II. 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 (a 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

III. 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
 - Fore-closure
 - Financial leverage and predation (in imperfect financial markets)
- Market extension/ product extension mergers



WHY REGULATE MERGERS? - 5

IV. 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

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 consumers**
- **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)**



DEFINITION

“COMBINATION”

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

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



DEFINITION

“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))



DEFINITION "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)

DEFINITION "GROUP"



'Group' means two or more enterprises which, directly or indirectly, are in a 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)



DEFINITION

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)



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 vigorous 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



SALIENT FEATURES

- **Compulsory Notification (s 6 (2))**
 - **Form of Notification**
 - **Timings of Notification**
- **Suspense 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 recommended practices (RPs) of ICN**



WHY MANDATORY NOTIFICATION ?

- Easier to deal with proposed merger than to *post facto* control market power or collusion
- De-merger could have high social and economic costs. 'Unscrambling of egg'
- Colluding 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
- Around 10 out of 106 jurisdictions provides for voluntary notification



TRIGGERING EVENT FOR NOTIFYING

- Any document indicating *bona fide* intention can trigger filing at the option of the person filing notice
- Penalty for non- notification: which may extend to one percent of the total turnover or assets, whichever is higher, of such a combination (s 43A)



ISSUES IN COMBINATION REGULATION

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.



REVIEW PERIODS IN OTHER JURISDICTIONS

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

ISSUES IN COMBINATION REGULATION

OTHER ISSUES



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



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*



THANK YOU



www.cci.gov.in