



Competition Commission of India

**Training for Central Government Officers
(US & Others)**

on

REGULATION OF COMBINATIONS

K.K. Sharma
Advisor (Law)

IIC, 26-11-2008



Early Stages

- ❑ Planned economic development since early 1950s.
- ❑ Commanding heights in public sector
- ❑ Industrial (development & regulation) Act, 1951 and
- ❑ Monopolies and Restrictive Trade Practices Act, 1969
 - Comprehensive control over direction, pattern and quantum of investment
 - Extensive reservations and concessions in favour of small – scale industry
- ❑ Despite industrial growth/diversification – complex network of controls/regulations fettered freedom of enterprises



Transition

- ❑ Industrial policy statement of 1980
 - focused attention on need for promoting competition in domestic market, technological up gradation and modernization

- ❑ Reforms since 1991- on a much broader scale and scope

- ❑ Industrial policy statement of 1991
 - emphasized attainment of technological dynamism and international competitiveness

 - Indian industry could scarcely be competitive with the rest of the world if it had to operate within an over regulated environment



Wave of Liberalization

- ❑ Starting from 1991 – further liberalization of industrial licensing, dispensing with the requirement of prior governmental approval before effecting expansion of undertakings registered under MRTP Act, 1969
- ❑ Progressively diluting the monopoly of public sector except for security and statutory concerns
- ❑ Abolition of levy and non-levy price system
- ❑ Reducing purchase preference for PSUs



Strengthening of Reforms

- ❑ Further reforms of trade policy substantially reduced the barrier to domestic industries
- ❑ Common thread running through the economic reforms-since 1991 – has been to free the economy from governmental controls and allow market forces to determine economy activity.



Expert Group

- ❑ Singapore ministerial declaration in 1996 – followed by setting up of an expert group by Union Ministry of Commerce in Oct. 1997
- ❑ To study issues relating to interaction between trade and competition policy, including anti-competitive practices and the effect of mergers and amalgamations on competition in order to identify areas that may merit consideration in the WTO framework
- ❑ Expert group, in Jan. 1999 report, suggested enactment of new Competition Law



Raghavan Committee

- ❑ FM on 27-2-1999 declared in budget speech that MRTPC has become obsolete in the light of international economic developments relating to competition laws
- ❑ High level committee on competition policy and law constituted in Oct. 99
- ❑ Inter-alia, the committee noted
 - in conditions of effective competition, rivals have equal opportunities to compete for business on the basis and quality of their outputs, and resource deployment follows market success in meeting consumers' demand at the lowest possible cost



Need for Overhaul

- ❑ The Department Related Parliamentary Standing Committee on Home Affairs, to which the Competition Bill 2001 was referred for examination concluded that the rigidly structured MRTP Act also necessitate its repeal in view of government policy being a facilitator rather than a regulator



Law Enacted

- ❑ In mid term appraisal of 9th five year plan, Planning Commission recognized the need of a National Competition Policy

- ❑ Enactment of Competition Act 2002, pursuant to Raghavan Committee's Report

- ❑ National Common Minimum Programme 2004 (UPA) desired to strengthen all regulatory institutions to ensure that competition is free and fair



Present Status

- ❑ Competition Act, 2002 enacted in January 2003
- ❑ Competition Commission of India established in October, 2003 with one Member
- ❑ Full constitution of Commission and enforcement could not be taken up due to legal challenge leading to process of amendments
- ❑ Competition (Amendment) Act, 2007 passed in September 2007
- ❑ Process for full constitution of the Commission set in motion



Duties of the CCI

- ❑ Prevent practices having adverse effect on competition
- ❑ Promote and sustain competition in markets
- ❑ Protect the interests of consumers
- ❑ Ensure freedom of trade carried on by other participants in markets, in India

[Preamble and Section 18]



Reach of the CCI

- ❑ All enterprises, whether public or private [S 2(h)/
Expln. cl. (I)]
- ❑ Departments of government except activities
relatable to sovereign functions including Atomic
energy, Currency, Defence and Space (S 2(h))
- ❑ Extra-territoriality (S 32)
- ❑ Provision to enter into MOUs or arrangements with
foreign competition authorities (S 18)



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)



“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))



“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)



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)



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)



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)



Where does India stand?

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*



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



Notification Forms

- ❑ 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



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



Relevant Market-I

- ❑ Relevant Geographic Market (S 19(6))
 - 1) Regulatory trade barriers
 - 2) Local specification requirements
 - 3) National procurement policies
 - 4) Adequate distribution facilities
 - 5) Transport costs
 - 6) Language
 - 7) Consumer preferences
 - 8) Need for secure or regular supplies or rapid after-sales services



Relevant Market-II

- ❑ Relevant Product Market (S 19(7))
 - 1) Physical characteristics or end-use of goods
 - 2) Price of goods or service
 - 3) Consumer preference
 - 4) Exclusion of in-house production
 - 5) Existence of specialized producers
 - 6) Classification of industrial products



Listed 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



Listed 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

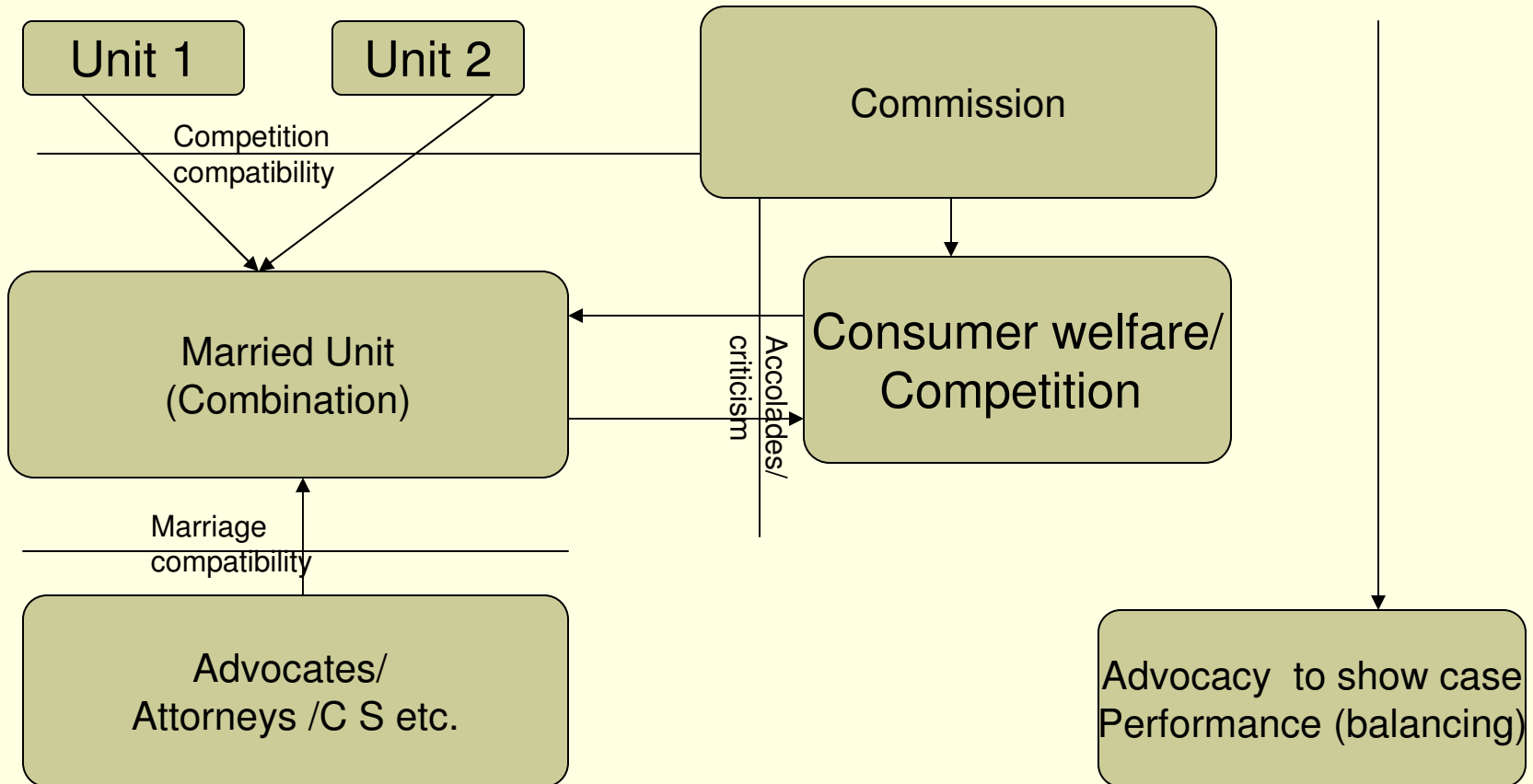


Difficulties

- 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



The Tough Choice





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 Mc Donnell Douglas, approved by FTC/DOJ¹
 - Eleventh hour clearance by EC- speculated to have been given to maintain good relation with US



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 Brief-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 Brief-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 Brief-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 (S 31(1))/ Non approval (S 31(2))



Options and Global Experience

- ❑ Orders of the Commission:
 - Approve
 - Approve with modifications
 - Not approve
- ❑ 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 Behavioral remedies



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



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

(non-binding)

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



Recommended Practices-III

(non-binding)

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)



Powers of Enforcement

- ❑ CCI has powers of a civil court for gathering evidence
- ❑ After *prima facie* determination CCI shall direct DG to investigate (S 26(1))
- ❑ DG is empowered to investigate into contraventions of the Act when so directed by the commission and has the powers of a civil court for gathering evidence {Section 41(1) & (2)}



Gathering Evidence

- ❑ Powers of a civil court for gathering evidence
 - Summoning and enforcing attendance of any person and examining him on oath;
 - Requiring the discovery and production of documents;
 - Receiving evidence on affidavits;
 - Issuing commissions for the examination of witnesses or documents;
 - Requisitioning any public record or document or copy of such record or document from any office.



Powers of Director General

- ❑ Director General (DG) has powers as are vested in the 'Inspector' in terms of Section 240 & 240 A of the Companies Act, 1956.
- ❑ These powers, inter-alia, include seizure of documents with the approval of the Chief Metropolitan Magistrate, Delhi, when there is reasonable ground to believe that books, papers or documents may be destroyed, mutilated, altered, falsified or secreted. (S 41(3))



Other Principles in the Act

- Competitive neutrality [S 2(h)/expln (l)]
- Effects doctrine (S 32)
- International co-operation (S 18)
- Exclusive jurisdiction in competition matters (S 53B/ 53T /61)
- Confidentiality (S 57/GR 38)



Present Activities of Commission

- ❑ Competition advocacy and awareness
- ❑ Ground-work--professional & legal-including 7 draft regulations and internal guidelines, etc.
- ❑ Institutional capacity building, including staffing and training-IIM B entrusted with organizational study
- ❑ IIM B suggested – economists 40% , lawyers 40% and financial analysts etc. 20%-Training – high priority, on going



Preparatory Work-I

- ❑ Draft Competition Commission (General) Regulations 200_
- ❑ Draft Competition Commission (Combination) Regulations 200_
- ❑ Draft Competition Commission (Lesser Penalty) Regulations 200_
- ❑ Draft Competition Commission (Meeting for Transaction of Business) Regulations 200_
- ❑ Draft Competition Commission (Determination of Cost of Production) Regulation 200_



Preparatory Work-II

- ❑ Draft Competition Commission (Procedure for Engagement of Experts and Professionals) Regulations 200_
- ❑ Draft Competition Commission (Calling upon Experts to Assist in Conduct of Inquiry) Regulations 200_
- ❑ Preparation of Advocacy Booklets on
 - Competition Compliance Programme
 - Bid rigging
 - Intellectual Property Rights
 - Abuse of Dominance
 - Activities
 - Cartel
 - FAQs



Guiding Principles of CCI

- CCI to be in sync with markets
- Minimize compliance costs for enterprises and enforcement costs for Commission
- Fully professional organization with required skills
- Confidentiality for business, transparency for CCI
- Consultative approach



Wide Consultations

- ❑ An international conference on “India’s New Merger Notification Regime (INMNR)” held on 15/16, March, 2008 in New Delhi, by IBA & others
- ❑ Delegates from ICN, EU, FTC, ACCC, IBA, ABA & leading legal firms across the world attended
- ❑ Benefiting from the experience of mature, functioning jurisdictions



Indian Law in Global Context

- ❑ WTO : *“Law is broadly comparable to those of other jurisdictions with effective laws in this area and, for the most part, embodies a modern economics - based approach” (Trade Policy Review of India 2007)*
- ❑ OECD : *“close to state-of-the-art” (Economic Survey India Report 2007)*



The Road Ahead

- Advocacy is already on
- The stage is all set for enforcement
- The fully constituted CCI expected to be in place in about a month's time
- Waiting for the curtain to rise
- In view of the good background work, expected to deliver



Thank you