

THE COMPETITION ACT AND BUSINESS COMBINATIONS

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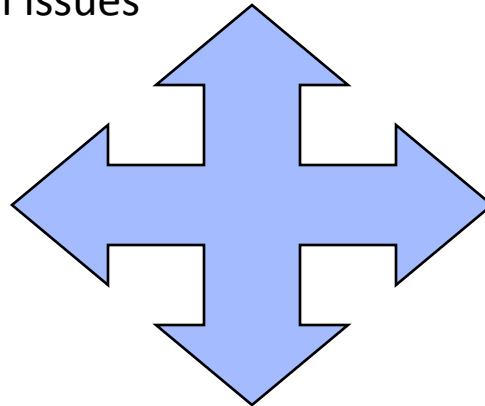
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COMPETITION ACT 2002

The Competition Act 2002 [as amended by Competition (Amendment) Act, 2007] overrides the erstwhile MRTP Act and codifies a present-day competition law. Provides for mainly 4 areas:

It gives the Commission the responsibility of undertaking competition advocacy, awareness and training about Competition issues

It prohibits anti-competitive agreements



It prohibits abuse of dominant position

It regulates combinations that cause or are likely to cause an appreciable adverse effect on competition.

GIST OF PROVISIONS

- ⊙ Voids two agreements:
 - Anti-competitive agreements
 - Abuse of dominant position
- ⊙ Regulates
 - Combinations
 - The provisions pertaining to combinations were notified effective 4th March 2011

RECENTLY ENFORCED PROVISIONS ON COMBINATION IN THE ACT

Section 5 – Combination

Section 6- Regulations of Combinations

Section 20 – Enquiry into combination by CCI

Section 29 – Procedure for investigation of combination

Section 30 - procedure in case of notice u/s 6

Section 31 (as amended by Amendment Act, 2007) -Orders of CCI on certain combination

Also provision laying down penalty for non-furnishing of information on combinations – sec. 43A, recently enforced.

Vide notification dated 4th March, 2011- these sections have been brought into effect., from 1st June 2011

RECENT NOTIFICATION RE. COMBINATIONS

Value of assets and turnover enhanced by 50% for the purpose of sec 5

'Group' exercising less than 50% voting rights in other enterprise has been exempted for the purpose of sec 5

Enterprise having assets of less than Rs. 250 crs or turnover of less than Rs 750 crs in India has been exempted for the purpose of sec 5

Amendments vide notification dated 4th March, 2011

REGULATION OF COMBINATIONS

- ◉ Regulatory provisions:
 - sec 5, 6, 20, 29, 20, 31
- ◉ “Combination” –meaning assigned under sec 5 and which includes mergers, amalgamations, acquisition of shares, voting rights and control
 - Exceptions in case of acquisition of shares by
 - Financing or subscription agreement of
 - A PFI
 - FII
 - Bank
 - VCF
- ◉ Comprehensive definitions of ‘group’ and ‘control’ under section 5
 - ‘Group’ meaning two or more enterprises
 - Exercising more than 50% voting rights in other enterprise, or
 - Appointing more than 50% of directors, or
 - Controlling the management of other enterprise
 - ‘Control’ meaning exercising control over another enterprise by
 - One or more enterprise singly or jointly
 - One or more groups singly or jointly

EXEMPTIONS

- ⦿ Notification dated 4th March 2011 exempts acquisition of entities with
 - Assets of Rs 250 crores or less
 - Turnover of Rs 750 crores or less
- ⦿ As exempted for 5 years from notification, we are of the view that if either of these 2 conditions are satisfied, the exemption will be available

TRIGGERING LIMITS FOR NOTIFICATION REQUIREMENT

- ◉ Combinations (limits increased Vide Notification S.O.480(E) dated 4th March, 2011) sec 5:
- ◉ Require approval in 4 situations – 2 each relating to the Parties and the Group
 - Acquirer+ enterprise have assets of Rs 1500 crores; turnover of Rs 4500 crores:
 - This applies where the combination creates a group with the limits as above
 - Combination to result into group with assets of Rs 6000; turnover of Rs 18000 crores
 - Acquisition of control over an enterprise in similar or substitute goods, where acquirer has assets of Rs 1500 crores; turnover of Rs 4500 crores
 - Merger to result into an entity with assets of Rs 1500 crores; turnover of Rs 4500 crores
 - This clause is restricted to mergers

NOTIFICATION REGIME- SEC 6

- ◉ Sec 6 (1) and 6 (2) provide for different things – 6 (1) is a factual finding irrespective of asset values; 6 (2) is a notification requirement based on asset /turnover values
 - Combination having appreciable adverse effect on Indian Economy is void [sec 6(1)]
 - Person proposing combination to notify CCI within 30 days of approval by Board of directors or execution of agreement as the case may be in a prescribed form along with the prescribed fee [sec 6(2)]
- ◉ CCI to decide within 210 days of the notice; else combination deemed to be approved [sec 6(2A)]
 - 210 days time for the merger to become effective
- ◉ Provisions not applicable to banks/ FII/ venture capitalists buying shares in pursuance of lending agreements [sec 6(4)&(5)]:
 - However, such bank/ FII etc will file within 7 days a notice to commission

CCI TO ENQUIRE (SEC 20)

- On its own knowledge or information
- No enquiry to be launched after 1 year of the combination
- Several factors listed in the law to be borne in mind whether combination having adverse impact on competition
- Enquiries into combinations taking place out of the country:
 - Sec 32 provides powers to the Commission

PROCEDURE FOR INVESTIGATION BY CCI (SEC 29)

- ⦿ First *prima facie* opinion on possible AAEC
- ⦿ Show-cause *Notice to acquirer-30 days to respond*
- ⦿ May call for report from DG
- ⦿ Second *prima facie* opinion on possible AAEC –in 7 days
- ⦿ direction to publish details of combination in 10 days
- ⦿ May invite objections from the Public to proposed combination in 15 days from date of publication of details
- ⦿ May call for additional information from parties which is to be given in 15days

PROCEDURE FOR ISSUING ORDERS (SEC 31)

- ⦿ May approve or reject proposed combination or approve with “modifications”
- ⦿ Modifications if not accepted by parties-proposed combination not to take effect; failing which penalties may be imposed

NEW CCI REGULATION FOR COMBINATION

- ◉ Vide notification dated 11th May, 2011, CCI (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 introduced which have overriding effect
- ◉ *Notification further amended vide Notification no 40 dated February 23, 2012*
- ◉ Combinations mentioned in schedule I to the Regulations need not to file any notice to CCI; transactions agreed pursuant to definitive documentation prior to June 1, 2011 have been exempted.
- ◉ New Forms prescribed for filing notices with CCI
 - Form I for transactions mentioned in Schedule II
 - Form II at the option of the parties, preferably for the instances where:
 - The parties to the combination are engaged in sale or supply of similar or identical goods or services and market share after such combination is more than 15%; or
 - The parties to the combination are engaged at different levels of production/distribution/sale chain of same goods or services and the market share is more than 25%
 - Form III where PFI/FII/Venture capital funds or banks etc have acquired in pursuant to a loan or investment agreement
 - ***Acquisition by these entities by any other mode would require approval of CCI (CCI order dated March 20, 2012 in the matter of Max India Limited)***

CCI REGULATION FOR COMBINATION CONTD...

- ◉ Belated notice may be accepted by CCI
- ◉ Suo-moto action by CCI in case of non-receipt of notices
 - May make enquiry and impose penalty and direct prosecution if deemed fit by CCI
- ◉ Obligation to file notice is of the acquirer and of all the parties jointly in case of amalgamation
- ◉ Quantum and mode of payment of fee specified
 - Filing Fee for Form I increased from RS. 50,000 to Rs. 10 lakhs
 - Filing Fee for Form II increased from Rs. 10 lakhs to Rs 40 lakhs
 - No Filing Fee for Form III
 - Fee to be paid by cheque, DD or through ECS
- ◉ Time frame prescribed for disposal of the applications
- ◉ Power to modify the combination
 - ◉ Appointment of independent agency to supervise the modification of combination, if directed by CCI
- ◉ Appeal against the order of CCI can be made to the Tribunal

TRANSACTIONS IN SCHEDULE I INCLUDE

- ⦿ No need to file notice to CCI for these combinations
 - ⦿ Acquisition of control, voting rights etc not exceeding 25% in ordinary course of business or as an investment
 - ⦿ Acquisition of shares etc if acquirer's pre-acquisition holding is 50% or more; provided such acquisition does not result in transfer of joint control to sole control
 - ⦿ Acquisition of current assets (as per Sch VI) in ordinary course of business
 - ⦿ Acquisition pursuant to a bonus or right issue, stock split, consolidation or buy back etc not leading to acquisition of control

TRANSACTIONS IN SCHEDULE I INCLUDE CONTD..

- ⦿ Acquisition of shares or voting rights by stock brokers or underwriters during the ordinary course of business
- ⦿ Intra-group acquisition
- ⦿ Acquisition of stock, raw materials, stores and spares in ordinary course of business
- ⦿ Combination taking place entirely outside India having insignificant nexus to Indian Market
- ⦿ **Merger or amalgamation between holding company and WOS of the same group

*****Inserted vide notification dated February 23, 2012***

FACTORS CONSIDERED BY CCI WHILE REGULATING COMBINATION

- Actual and potential competition through imports
- Extent of entry barriers into the market
- Level of combination in the market
- Degree of countervailing power in the market
- Possibility of the combination to significantly and substantially increase prices or profits
- Extent of effective competition likely to sustain in a market
- Availability of substitutes before and after the combination
- Market share of the parties to the combination individually and as a combination
- Possibility of the combination to remove the vigorous and effective competitor or competition in the market
- Nature and extent of vertical integration in the market
- Nature and extent of innovation
- Whether the benefits of the combinations outweigh the adverse impact of the combination.

REMEDIES WITH CCI

- Approve/ block the combination
- Approve modification,
 - Divestment of some assets or business
 - Requiring access to essential inputs/facilities
 - Dismantling exclusive distribution agreements
 - Removing non-compete clauses
 - Imposing price caps or other restraints on prices
 - Refrain from conduct inhibiting entry of others

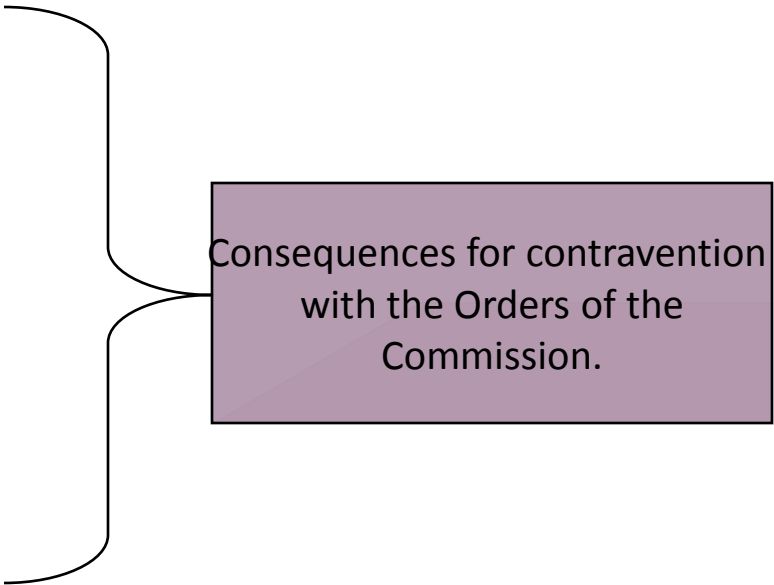
REDRESSAL MACHINERY

- ⦿ Appeals to Competition Appellate Commission
- ⦿ Appeals to Supreme Court

PENALTY FOR NON COMPLIANCE

The Act empowers the CCI to impose
Penalty of 1 lac for each day
maximum up to Rs 10 crores; or

Up to three year
imprisonment; or with a fine
up to Rs 25 crores or with
both



Consequences for contravention
with the Orders of the
Commission.

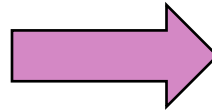
OTHER PENALTIES

Compensation in case of contravention of orders of CCI



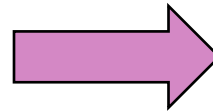
To any person making an application to Appellate Tribunal

Failure to comply with the directions of CCI and Director General



Penalty of Rs. 1 lakh per day upto a maximum of Rs. 1 cr

Non-furnishing of information on combination



1% of total turnover or assets whichever is higher

ADVERSE EFFECTS OF COMBINATION

- Horizontal merger reduces number of players
- Market share post merger goes up;
- Embracing unhealthy reduces the tax liability
- Rivalry in firms is friendly to consumers;
- Mergers often fails to harmonize human relation.
- Unilateral/Coordinated effects

RATIONALE FOR REGULATION OF COMBINATION

- Better to prevent firms from gaining anticompetitive market power than to control such market power after its creation.
- Easier to deal with ex ante merger.
- Structural remedy post merger is as formidable as 'to unscramble an omelette and turn it back to egg',
- combination regulation is forward looking.
- Certainty is preferable than later on hassles.

OTHER LAWS/BODIES REGULATING MERGERS

- Companies Act, 1956
- Sick Industrial Companies (Special Provisions) Act, 1985
- SEBI (Substantial Acquisition of Shares and Takeovers) Regulation, 2011
- Regulatory Authorities also regulate mergers

MERGER CONTROL IN OTHER JURISDICTIONS

Jurisdiction	First Phase	Second Phase (i.e. usually where competition issues are anticipated)
China	30 working days	90-150 working days from filing
EU	25 or 35 working days	90-125 working days from decision to enter a second phase
Japan	30 calendar days	Later of 120 calendar days from filing or 90 calendar days from receipt of additional material
US	15 or 30 calendar days	10 or 30 days from substantial compliance with Second Request (in practice up to 6 months)