
DISCLAIMER

This quick guide is published as part of the advocacy programme of the Competition Commission of India (the Commission). Its contents should, in no way, be treated as official views of the Commission. Readers are advised to carefully study the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007, and seek legal advice, wherever necessary.

COMBINATIONS

INTRODUCTION

The Competition Act, 2002 as amended by the Competition (Amendment) Act, 2007, (the Act) follows the philosophy of modern competition laws and aims at fostering competition and at protecting Indian markets against anti-competitive practices by enterprises. The Act prohibits anti-competitive agreements, abuse of dominant position by enterprises, and regulates entering into combinations (consisting of mergers, amalgamations and acquisitions) with a view to ensure that there is no adverse effect on competition in India.

Though combination is a wider term compared to merger, for convenience, the term merger will be used frequently in place of combination in this booklet.

WHAT IS COMBINATION?

Broadly, combination under the Act means acquisition of control, shares, voting rights or assets, acquisition of control by a person over an enterprise where such person has control over another enterprise engaged in competing businesses, and mergers and amalgamations between or amongst enterprises when the combining parties exceed the thresholds set in the Act. The thresholds are unambiguously specified in the Act in terms of assets or turnover in India and abroad.

Entering into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India is prohibited and such combination would be void.

THRESHOLDS FOR COMBINATIONS UNDER THE ACT

India is one of the fastest growing economies in the world. The

process is driven both by organic and inorganic (through the merger, amalgamation, acquisition route) growth of enterprises. It is neither feasible nor advisable to review all the mergers, acquisitions and amalgamations. It is natural to presume that in the case of small size combinations there is less likelihood of appreciable adverse effect on competition in markets in India. Therefore, the Act provides for sufficiently high thresholds in terms of assets/turnover, for mandatory notification to the Commission.

The thresholds for the combined assets/turnover of the combining parties are:

- Combined assets of the enterprises value more than Rs. 1,000 crores or combined turnover is more than Rs. 3,000 crores. In case either or both of the enterprises have assets/turnover outside India also, then the combined assets of the enterprises value more than US\$ 500 millions, including at least Rs. 500 crores in India, or turnover is more than US\$1500 millions, including at least Rs. 1,500 crores in India .
- Combined assets of the group to which the acquired enterprise would belong being more than Rs. 4,000 crores or such group having a joint turnover more than Rs. 12,000 crores after acquisition or merger. In case such group has assets/turnover outside India, then the combined assets of the group value more than US\$ 2 billion, including at least Rs. 500 crores in India or turnover is more than US\$6 billion including at least Rs. 1,500 crores in India.
- Group is defined in the Act. Two enterprises belong to a “group” if one is in position to exercises at least 26% voting rights or appoint at least 50% of the directors or controls the management or affairs in the other.

The above thresholds are presented in the form of a table below:

In India	APPLICABLE TO	ASSETS		TURNOVER	
	Individual parties	Rs. 1000 cr.		Rs. 3000 cr.	
Group	Rs. 4,000 cr.		Rs. 12,000 cr.		

In India and outside	APPLICABLE TO	ASSETS		TURNOVER	
		Total	India	Total	India
Individual parties	\$ 500 m	Rs. 500 cr.	\$ 1500 m	Rs.1500 cr.	
Group	\$ 2,000 m	Rs. 500 cr.	\$ 6000 m	Rs.1500 cr.	

1 Crore = 10 Million

The Act provides for revision of the threshold limits every two years by the government, in consultation with the Commission, through notification, based on the movement in Wholesale Price Index (WPI) or fluctuations in exchange rates of rupee or foreign currencies.

The turnover shall be determined by taking into account the values of sales of goods or services. The value of assets shall be determined by taking the book value of the assets as shown in the audited books of account of the enterprise, in the financial year immediately preceding the financial year in which the date of proposed merger falls, as reduced by any depreciation. The value of assets shall include the brand value, value of goodwill, or Intellectual Property Rights etc. referred to in explanation (c) to section 5 of the Act.

TYPES OF MERGERS

Mergers are broadly classified into three categories:

- (i) **Horizontal mergers**, which take place between competitors which produce or supply similar or identical products
- (ii) **Vertical mergers**, which take place between enterprises at different levels in the chain of production, distributors etc. like manufacturers and distributors

- (iii) **Conglomerate mergers**, which take place between enterprises engaged in unrelated business activities

BOX 1

ASSESSING APPRECIABLE ADVERSE EFFECTS ON COMPETITION

Mergers are subjected to review because of their potential adverse effect on competition in the relevant market. Such adverse effect could be the result of a unilateral conduct (exercise of dominance) or of coordinated conduct between two or more enterprises facilitated by the merger. Control of either type of conduct is prospective and aimed at preventing such conduct post-merger.

Effect of mergers on competition is thus classified into two broad categories: unilateral effects and coordinated effects.

Unilateral Effects

When a merged enterprise gains sufficient market power to enable it to behave independently of market forces, such conduct results in 'unilateral' effect on competition. This happens when the rivals in the market are not able to increase output in response to a unilateral increase in price by the merged enterprise. It can also occur when the products are differentiated and are not close substitutes of each other.

Coordinated Effects

The anti-competitive effect of a merger is termed 'coordinated' when it facilitates collusive behaviour, either due to express agreement among competitors, as in cartels, or due to tacit coordination by competitors that have similar effects, irrespective of whether the coordination is legal or not. Markets that are highly concentrated make such coordination easy. Product markets that are homogenous are prone to such coordination.

Horizontal mergers are the main focus of merger control because they typically tend to limit the number of players in the relevant market and eliminate a potential competitor from the relevant market. Competition issues are the least likely in the case of conglomerate mergers.

MERGER NOTIFICATION

The review process for combination under the Act involves mandatory pre-merger notification to the Commission of combinations that exceed the prescribed threshold. In case a notifiable merger is not notified, the Commission has the option to inquire into it within one year of the taking into effect of the merger. In case such an inquiry finds appreciable adverse effect on competition, the Commission may have to order de-merger which would involve social and economic costs. This would involve 'unscrambling of the egg'.

The Commission is authorized to impose a fine which may extend to one per cent of the total turnover or the assets of the combination, whichever is higher, for failure to notify the Commission of the merger.

Any combination which causes or is likely to cause appreciable adverse effect on competition is void.

EXEMPTIONS FROM MANDATORY NOTIFICATION

The share subscription or financing facility or any acquisition, *inter alia*, by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant of a loan agreement or investment agreement are exempt from notification as per sub section (4) of section 6. The concerned institution is, however, required to make disclosure to the Commission within 7 days by way of filing details of such transactions

TIME LIMIT FOR NOTIFICATION

Any person or enterprise proposing to enter into a combination shall notify the Commission in the specified form disclosing the details of the proposed combination within 30 days of the approval of such proposal by the board of directors or of the execution of any agreement or other document. The regulations propose to permit parties to notify the Commission anytime after they can demonstrate a bonafide intention to combine.

The proposed combination cannot take effect for a period of 210 days from the date it notifies the Commission or till the Commission passes an order, ***whichever is earlier***. If the Commission does not pass an order during the said period of 210 days the combination shall be deemed to have been approved. The draft regulations propose to dispose of notifications within 30 days in respect of mergers, which, in the opinion of the Commission, has little or no potential for appreciable adverse effect on competition in Indian markets.

PROCEDURE FOR INVESTIGATION OF COMBINATIONS

If the Commission is *prima facie* of the opinion that a combination has caused or is likely to cause adverse effect on competition in Indian markets, it shall issue a notice to show cause to the parties as to why investigation in respect of such combination should not be conducted. On receipt of the response, if Commission is of the *prima facie* opinion that the combination has or is likely to have appreciable adverse effect on competition, it may direct publication of details of combination, inviting objections from the public, affected or likely to be affected by the proposed combination, and call for additional or other information from parties to the combination, if considered appropriate.

INQUIRY INTO COMBINATIONS

Merger evaluation involves the following process:

- (a) Identification of the relevant market, consisting of relevant product market and relevant geographic market
- (b) Consideration whether the merger has appreciable adverse effect on competition in the relevant market in India
- (c) Approval, rejection, or approval with modification of the merger

(I) Identification of the relevant market

The Act envisages appreciable adverse effect on competition in the relevant market in India as the touchstone. The concept of relevant market is clearly defined in the Act. It consists of the relevant product (including goods and services) market and the relevant geographic market.

The **relevant market** means “the market that may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets”. The Act lays down the factors, any one or all of which shall be taken into account by the Commission while defining the relevant product/geographic market as the case may be.

Relevant product market is defined in terms of substitutability of products. It means “a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use.” It can be taken as the smallest set of products which are substitutable given a small but significant non-transitory increase in price (SSNIP).

Relevant geographic market is defined in the Act in terms of “the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas”. It can be understood as the geographic region within which substitutable products can be made available at similar price.

(II) Evaluation of ‘appreciable adverse effect on competition’

Mergers are regulated under the Act in view of their potential appreciable adverse effect on competition in the relevant market in India. Evaluation of the adverse effects is not based on any single criterion. The Act empowers the Commission to evaluate the effect of merger on competition in the relevant market in India based on a number of factors (sub section (4) of section 20). These factors are indicated in Box. 2.

The Commission will use the **rule of reason** approach for evaluation of combination. The beneficial and adverse effects of the proposed combination on competition in the relevant market in India would be evaluated by the Commission with reference to the factors indicated in sub section (4) of section 20 of the Act.

BOX 2

**Factors To Be Considered By The Commission While Evaluating Appreciable Adverse Effect Of Combinations On Competition In The Relevant Market
(sub section (4) of section 20 of the Act)**

- (a) actual and potential level of competition through imports in the market;
- (b) extent of barriers to entry into the market;
- (c) level of concentration in the market ;
- (d) degree of countervailing power in the market;
- (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, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;

- (i) likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;
- (j) nature and extent of vertical integration in the market;
- (k) possibility of a failing business;
- (l) nature and extent of innovation;
- (m) relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;
- (n) whether the benefits of the combination outweigh the adverse impact of the combination, if any.

(III) Approval, rejection or approval with modification of the merger

Based on evaluation of the combination as above, the Commission may decide to approve the merger, reject the merger or approve the merger subject to modifications.

International experience shows that less than 10 per cent of mergers evaluated by competition authorities have been found to have adverse effect on competition/have the potential for lessening of competition in the relevant market. A large portion of such cases are eventually approved by competition authorities subject to modifications. It can be reasonably expected that only a small percentage of the total notified mergers may be found to have appreciable adverse effect on competition in India.

REMEDIES UNDER THE ACT

Most of the expected anti-competitive effects of mergers can be remedied without holding back the merger itself.

Merger analysis consists of assessment of the likely anti-competitive effect of the merger under analysis and how such effect could be

minimized or eliminated. Prohibition is considered only when remedies are either not available or not feasible.

Remedies can be either structural or behavioural. Although behavioural remedy is preferable, its implementation is difficult. On the other hand, a structural remedy would entail requiring the merged enterprise to make structural adjustment which could be in the form of sale of assets, divestment of a division or a unit or creation or strengthening of competitors through, for example, licensing of an Intellectual Property Right (IPR).

APPEALS

The Central Government has notified a Competition Appellate Tribunal (CAT) to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under specified sections of the Act, such as orders relating to notification of combination, inquiry by the Commission and penalties.

An appeal has to be filed within 60 days of receipt of the order / direction / decision of the Commission.



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REGULATIONS NOTIFIED BY COMPETITION COMMISSION OF INDIA

- The Competition Commission of India (Procedure for Engagement of Experts and Professionals) Regulations, 2009; (No. 1 of 2009)
- The Competition Commission of India (General) Regulations, 2009 ; (No. 2 of 2009)
- The Competition Commission of India (Meeting for Transaction of Business) Regulations, 2009; (No. 3 of 2009)
- The Competition Commission of India (Lesser Penalty) Regulations, 2009; (No. 4 of 2009)
- The Competition Commission of India (Determination of Cost of Production) Regulations, 2009; (No. 5 of 2009)
- The Competition Commission of India (General) Amendment Regulations, 2009; (No. 6 of 2009)

Above regulations are available on the website of the Commission : www.cci.gov.in