



सत्यमेव जयते

Competition Act, 2002



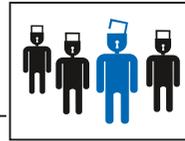
ENGLISH VERSION

FREQUENTLY ASKED QUESTIONS

Filing Information



Leniency



Confidentiality



Combinations



Providing Guidance Through Advocacy



Fair Competition
For Greater Good

भारतीय प्रतिस्पर्धा आयोग
COMPETITION COMMISSION OF INDIA

VISION

To promote and sustain an enabling competition culture through engagement and enforcement that would inspire business to be fair, competitive and innovative; enhance welfare, and support economic growth.

MISSION

Competition Commission of India aims to establish a robust competitive environment through:-

- © proactive engagement with all stakeholders, including consumers, industry, government and international jurisdictions*
- © being a knowledge intensive organization with high competence levels*
- © professionalism, transparency, resolve and wisdom in enforcement*

Disclaimer

These FAQs are published as part of the Competition Advocacy and Awareness Programme of the Competition Commission of India. Their contents should, in no way, be treated as the official views of the Commission. Readers are advised to carefully study the Competition Act 2002, and the rules and regulations made thereunder, and seek legal advice wherever necessary.

PREFACE

The Competition Act, 2002 is a modern economic legislation that provides the legal framework to deal with competition issues in a market driven economy. The Act aims at preventing practices having adverse effect on competition, promoting and sustaining competition in markets, protecting consumer interests and ensuring freedom of trade carried on by other participants in markets in India.

Advocacy is at the core of effective competition regulation. Competition Commission of India (CCI), which has been entrusted with implementation of law, has always believed in complementing robust enforcement with facilitative advocacy.

Earlier this year, while speaking at the 13th Annual Day of CCI, Hon'ble Union Minister of Finance and Corporate Affairs, Smt. Nirmala Sitharaman desired that CCI should prepare FAQs for the benefit of stakeholders and to facilitate better understanding of its functioning. Publication of this FAQs advocacy book is an initiative taken by CCI pursuant to that.

The book is divided into four parts covering anticipated queries of stakeholders in the areas of filing information, confidentiality provisions, leniency provisions and merger regulations. The objective is to handhold stakeholders by proactively making available responses to queries, which have been asked in these areas from time to time, in a simple and easily comprehensible language.

I hope that this initiative would provide clarity, predictability and guidance to stakeholders; and would go a long way in facilitating ease of doing business.

I would also like to assure that it would be a constant endeavour of CCI to update the FAQs on a regular basis to address any further queries that may arise .



Ashok Kumar Gupta
Chairperson,
Competition Commission of India

New Delhi
September, 2022

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Filing Information



Q.1 Who can file Information?

Ans. Any person, consumer or their association or trade association can file Information before the Commission.

Q.2 How has “person” been defined in the Competition Act, 2002?

Ans. The “person” has been defined in the Competition Act as including:

- An individual;
- A Hindu Undivided Family (HUF);
- A company;
- A firm;
- An association of persons or a body of individuals, whether incorporated or not, in India or outside India;
- Any corporation established by or under any Central, State or provincial Act or a Government company;
- Any body corporate incorporated by or under the laws of a country outside India;
- A cooperative society registered under any law relating to cooperative societies;
- A local authority;
- Every artificial juridical person not falling within any of the above.

Q.3 How to file Information before the Commission?

Ans. An Information can be filed before the Commission as per Format No.1, which is available on the website of the Commission at the following link:

<https://www.cci.gov.in/uploads/filemanager/catalog/HowToFileInformation.pdf>

For further details, please refer to Competition Commission of India (General) Regulations, 2009.

Q.4 What should be the content of Information?

Ans. The Information must contain the following:

- Legal name of the person or the enterprise giving the Information;
- Complete postal address in India for delivery of summons or notice by the Commission, with Postal Index Number (PIN) code;
- Telephone number, fax number and electronic mail address,
- Preferred mode of service for notice or documents;

- Legal name and address(es) of the entity alleged to have contravened the provisions of the Act;
- Legal name and address of the counsel or other authorized representative, if any;
- A statement of facts;
- Details of the alleged contraventions of the Act, together with a list enlisting all documents, affidavits and evidence, as the case may be, in support of each of the alleged contraventions;
- A succinct narrative in support of the alleged contraventions;
- Relief sought, if any;
- Details of litigation or dispute pending between the Informant and parties before any court, tribunal, statutory authority or arbitration in respect of the subject matter of Information.

Q.5: What should be the page/ font size for filing Information and subsequent filings?

Ans. All Information(s) or references or responses or other documents which are required to be filed before the Commission should be typed in Arial 12 fonts on one side of A4 size (210 x 297mm or 8.27"x11.69") white bond paper in double space with 2" margin on the left and 1" margin on all other sides. Documents/information filed must also be duly paginated.

Q.6: How to file Information and/ or other filings before the Commission?

Ans. Information or other filings should be addressed to the Secretary and can be filed in person or by registered post or courier service or facsimile transmission.

Q.7: What are the fees to be paid for filing Information?

Ans. As per Regulation 49 of the Competition Commission of India (General) Regulations, 2009, the fee has to be paid as per the following:

- Rs. 5,000 (five thousand) in case of individual or Hindu Undivided Family (HUF), or
- Rs.10,000 (ten thousand) in case of Non-Government Organisation (NGO), or Consumer Association, or a Co-operative Society, or Trust, or
- Rs. 40,000 (forty thousand) in case of firm (including proprietorship, partnership or Limited Liability Partnership) or company (including one-person company) having turnover in the preceding year up to rupees two crore, or
- Rs. 1,00,000 (one lakh) in case of firm (including proprietorship, partnership or Limited Liability Partnership) or company (including one-person company) having turnover in the preceding year exceeding rupees two crore and up to rupees fifty crore.
- Rs. 5,00,000 (five lakhs) in cases not covered under any of the above categories.

Q.8: How to pay the fee?

Ans. The fee can be paid either by tendering demand draft or pay order or banker's cheque, payable in favour of Competition Commission of India (Competition Fund), New Delhi or through Electronic Clearance Service (ECS) by direct remittance to the Competition Commission of India (Competition Fund), Account No. 1988002100187687 with Punjab National Bank, Bhikaji Cama Place, New Delhi- 110066.

Q.9: Whether Information (and subsequent filings) is required to be filed in hard copy or soft copy?

Ans. The Information (and subsequent filings) is to be filed in physical as well as electronic form (soft copy). Soft copy(s) can be filed through CD/pen drive/email.

Q.10: How many hard copies are required to be filed?

Ans. Two sets of hard copies (one original and one photocopy) are required to be filed.

Q.11: What are the documents to be submitted along with Information?

Ans. The following documents need to be filed along with Information:

- Proof of payment of fee;
- Notarized affidavit in support of the Information as per Regulations 10(2)(b) & 42 of the CCI (General) Regulations, 2009;
- Certificate u/s 65-B of the Indian Evidence Act 1872, in support of electronic evidences, if any;
- Board Resolution, if filed by a firm (including proprietorship, partnership or Limited Liability Partnership) or company;
- Vakalatnama, if filed through a legal representative/advocate or authorization letter if filed through Chartered Accountant/Company Secretary/Cost Accountant or authorized officer.

Q.12: Can an individual file Information before the Commission in-person?

Ans. Yes.

Q.13: Whether an individual can engage professionals for representing itself before the Commission?

Ans. Yes. A person or an enterprise can authorize one or more Chartered Accountants or Company Secretaries or Cost Accountants or legal practitioners to present its case before the Commission. Also, a person or an enterprise can authorize its officers to present case before the Commission.

Q.14 Whether mentioning Enrolment No./Registration No. of an advocate/Chartered Accountant/Company Secretary/Cost Accountant in an Information/reply/ subsequent filing before the Commission is necessary?

Ans. Yes.

Q.15: Whether Informant can claim confidentiality over its identity?

Ans. Yes. The Informant can claim confidentiality over its identity by making a request in writing. It is advised to refer to [Regulation 35 of the CCI \(General\) Regulations, 2009](#) as amended, in this regard.

Q.16: Whether parties providing information or documents can claim confidentiality thereon?

Ans. Yes. For detailed procedure to claim confidentiality, parties are advised to refer to [Regulation 35 of the CCI \(General\) Regulations, 2009](#) as amended.

Q.17: Who can sign Information (or reply/subsequent filings)?

Ans. An Information or a reply to a notice or direction issued by the Commission is to be signed by:

- the individual himself or herself, including a sole proprietor of a proprietorship firm;
- the Karta in the case of a Hindu Undivided Family (HUF);
- the Managing Director, and in his or her absence, any Director duly authorized by the board of directors in the case of a company,
- the President or the Secretary in the case of an association or society or similar body or the person so authorized by the legal instrument that created the association or the society or the body;
- a partner in the case of a partnership firm;
- the chief executive officer in the case of a co-operative society or local authority;
- in the case of any other person, by that person or by some person duly authorized to act on his behalf.

Further, the Commission, *vide* [Practice Direction](#) dated 01.07.2021, in order to ease regulatory compliance in exercise of its powers conferred under Section 36 of the Act read with Regulation 54 of the General Regulations, has directed that, in addition to the existing modes of signing of pleadings as provided in Regulation 11 of the General Regulations, the parties shall be at liberty to sign the pleadings through any of their employees who has been authorized by the Board or any other equivalent body to issue such authorizations on behalf of the concerned entity. It was also clarified that this arrangement shall hold for all entities and shall not be confined to companies

alone, i.e., this dispensation shall be available to all entities irrespective of their constitution, i.e., be it company, partnership firm, LLP, etc. It was, however, made clear that the authorized representative must be an employee of the entity concerned and not the specified professionals (including counsel) in terms of Regulation 35 of the General Regulations who are authorized to appear before the Commission. [Practice Direction](#)

Q.18: Whether Central Government or State Government or Statutory Authority can make reference to the Commission?

Ans. Yes. Under Section 19(1)(b) of the Competition Act, 2002, Central Government or State Government or Statutory Authority may make reference to the Commission for seeking inquiry into any alleged contravention of the provisions of Sections 3/4 of the Competition Act, 2002.

Q.19: Who can sign the reference?

Ans. A reference shall be signed and authenticated by an officer not below the rank of a Joint Secretary to the Government of India or equivalent in the State Government or the Chief Executive Officer of the Statutory Authority if the same has been received from the Central Government or State Government or Statutory Authority.

Q.20: What is the time period available to Informant for removing defects?

Ans. If Information filed is found to be defective, Informant is provided thirty (30) days' time from receiving intimation in this regard from the Commission.

Q.21: Whether interim relief can be granted by the Commission?

Ans. Where, during an inquiry, the Commission is satisfied that an act in contravention of Section 3(1) or Section 4(1) or Section 6 has been committed and continues to be committed or that such act is about to be committed, the Commission may, by order, temporarily restrain any party from carrying on such act until the conclusion of such inquiry or until further orders, without giving notice to such party, where it deems it necessary.

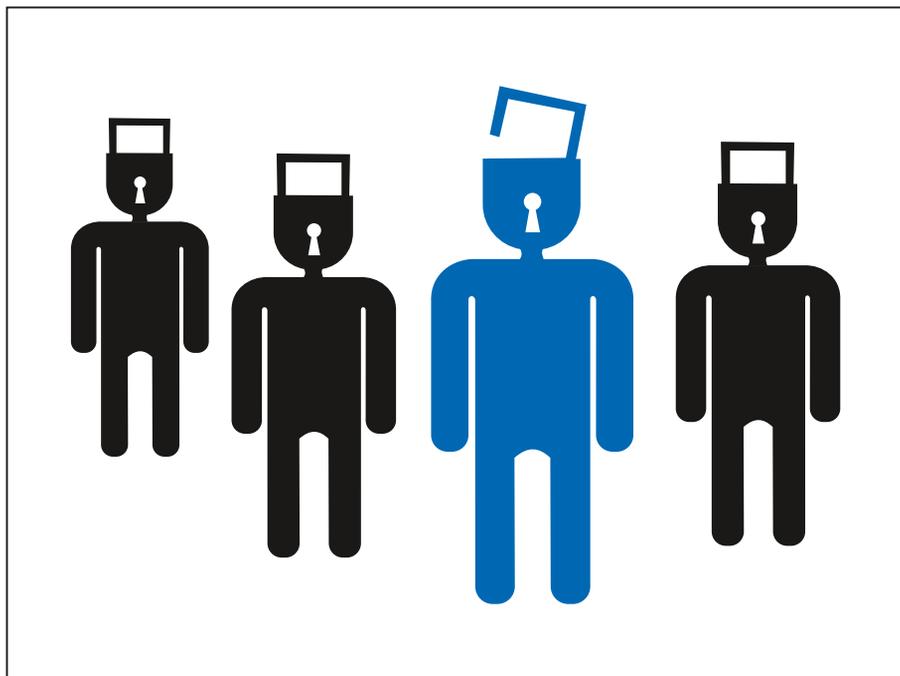
Q.22: Whether Opposite Party can claim confidentiality on documents filed?

Ans. Yes, Opposite Party may claim confidentiality on part or full document filed as per the confidentiality regime by filing a self-certified undertaking. For details, please refer to confidentiality FAQs available on the website.

Q.23: How to apply for inspection of records and obtain certified copies thereof?

Ans. A party to the proceedings, on application, may be allowed inspection of records relating to its case by the Secretary, on such conditions as may be specified, on payment of Rs. 1,000 (rupees one thousand) per day per case. Copying charges for the parties to the proceedings shall be Rs. 20 (rupees twenty) per page.

Leniency



Q.1 What is meant by Lesser Penalty?

Ans. Lesser Penalty means reduction in the amount of penalty imposed upon a person (enterprise or an individual) by the Competition Commission of India (CCI) for contravention of certain provisions of the Competition Act, 2002 (Act). Lesser Penalty is an incentive provided to infringers of law to come forward and disclose information, details and evidences with respect to their cartel conduct, in return for grant of reduction in the penalty which may be levied on them.

Q.2 What are the applicable provisions of the Act and Regulations which govern the Lesser Penalty regime of CCI?

Ans. The Lesser Penalty regime of CCI is provided under Section 46 of the Act and is governed by the Competition Commission of India (Lesser Penalty) Regulations, 2009 (as amended in 2017), more commonly known as the LPR, which are available on the website of CCI and can be accessed at <https://cci.gov.in/legal-framework/regulations>.

Q.3 Do Lesser Penalty and Leniency mean the same thing?

Ans. Yes, in common parlance, programs/regimes similar to the Lesser Penalty regime of CCI available under the Competition/Antitrust Laws of various other jurisdictions are referred to and known as “Leniency Programs”.

Q.4 Who can apply for Lesser Penalty and for what kind of conduct?

Ans. Under the Lesser Penalty regime of CCI, an application for Lesser Penalty may be made by any producer, seller, distributor, trader or service provider included in any cartel, and such applicant may be an (a) enterprise who is or was a member of a cartel or (b) individual who is or was involved in the cartel on behalf of such enterprise.

An application for Lesser Penalty may, however, be made only with respect to cartel conduct, i.e., producers, sellers, distributors, traders or service providers coming together and agreeing amongst themselves to limit, control or attempt to control production, distribution, sale, price or trade in goods or provision of services (including bid-rigging and collusive bidding).

Q.5 Why should one apply for Lesser Penalty?

Ans. For committing contravention of certain provisions of the Act (including cartels), CCI may impose upon a person/entity penalty of upto 10% of the average of the turnover of the infringer for the three preceding financial years.

Further, in cartel cases, such penalty may even go upto three times of the profit or 10% of the turnover of the infringer for each year of the continuance of the cartel, whichever is higher.

By applying for Lesser Penalty and by making full, true and vital disclosures regarding the cartel, the Lesser Penalty applicant may get a reduction in the penalty amount to be imposed upon it, of even upto 100%.

The sooner one files an application for Lesser Penalty, the higher shall be its Priority Status and the higher the benefit of reduction in penalty awarded to it. Accordingly, enterprises, including their individuals, should come forward and apply for Lesser Penalty in a swift manner, as soon as they detect or become aware of their participation in a cartel.

Q.6 What are the benefits of applying for Lesser Penalty?

- Ans. (a) For the first applicant approaching CCI by submitting an application for Lesser Penalty, benefit of reduction in penalty of upto or equal to 100 % may be given;
- (b) For the second applicant approaching CCI by submitting an application for Lesser Penalty, benefit of reduction in penalty of upto or equal to 50 % may be given; and
- (c) For the third and all subsequent applicants approaching CCI by submitting an application for Lesser Penalty, benefit of reduction in penalty of upto or equal to 30 % may be given.

Q.7 What are the conditions to be fulfilled to avail the benefits of Lesser Penalty?

- Ans. To avail the benefits of Lesser Penalty, the Lesser Penalty applicant ought to:
- (a) make full, true and vital disclosures in respect of the cartel conduct before CCI;
- (b) cease further participation in the cartel from the date of filing the Lesser Penalty application, unless otherwise directed by CCI;
- (c) render genuine, full, continuous and expeditious cooperation throughout the investigation as well as before CCI till completion of the proceedings;
- (d) not conceal, destroy, manipulate or remove any relevant document in any manner, that may contribute to the establishment of the contravention; and
- (e) fulfil any other and/or further restriction and/or condition which CCI may deem fit to impose, considering the facts and circumstances of a particular case.

Q.8 How is one protected/ safeguarded under the Lesser Penalty regime?

- Ans. The identity of Lesser Penalty applicant and the information, documents and evidence provided by the applicant as part of its Lesser Penalty application are granted confidentiality by CCI.

After forwarding of the Investigation Report to the parties, non-confidential version of the Lesser

Penalty application is made open for inspection to the other parties involved in the matter, for securing their rights of defence. However, in appropriate cases, even the confidential version of Lesser Penalty application can be granted access to other parties in the matter through setting up of Confidentiality Ring.

With respect to the other submissions made by the Lesser Penalty applicant during the course of investigation before the Investigating Officer or before CCI, confidentiality may be claimed under the relevant provisions of the Competition Commission of India (General) Regulations, 2009 by fulfilling certain conditions (see FAQs on Confidentiality Regime).

The identity of the Lesser Penalty applicant is kept confidential by CCI till the date of passing of the final order in the matter and completion of proceedings before CCI.

Q.9 How does CCI evaluate Lesser Penalty applications?

Ans. While calculating the amount of reduction in penalty which may be awarded to a Lesser Penalty applicant (subject to the maximum limit(s) of 100%, 50% or 30%, as the case may be), CCI gives due regard to:

- (a) the marker status of the applicant;
- (b) the stage at which the Lesser Penalty applicant comes forward with the disclosures;
- (c) the evidence which was by that time already in possession of CCI;
- (d) the quality of the information provided by the applicant; and
- (e) the entire facts and circumstances of the matter.

Q.10 How can one apply for Lesser Penalty?

Ans. One can submit an application for Lesser Penalty in any of the following manners:

- (a) By contacting the designated authority, i.e., Secretary seeking a Priority Status (also known as “first contact”):
 - i. in writing by sending registered post or by filing personally in the Secretary's office;
 - ii. through e-mail to secy@cci.gov.in;
 - iii. through fax at 011-20815022;
 - iv. orally through telephone at 011-20815009 or in person;
- (b) by filing a formal Lesser Penalty application as per the Schedule to the LPR in writing or through e-mail or fax, as stated above.

Q.11 Is there a filing fee to apply for Lesser Penalty?

Ans. No, there is no filing fee for applying for Lesser Penalty.

Q.12 Can one make an anonymous application seeking Lesser Penalty?

Ans. No, one cannot make an anonymous application seeking Lesser Penalty. The identity of the applicant ought to be clearly disclosed in the first contact made with CCI for seeking a Priority Status itself. However, such identity shall be kept confidential by CCI till the date of passing of the final order in the matter and completion of proceedings before CCI.

Q.13 Can more than one person/entity apply jointly for Lesser Penalty?

Ans. Two competitors in the same market cannot jointly approach CCI for filing a Lesser Penalty application.

However, a company/firm and its individuals or group companies not competing with each other in the same market may jointly approach CCI for filing a Lesser Penalty application.

Q.14 What is a Priority Status?

Ans. Priority Status means the position of the applicant marked by CCI for giving the benefit of Lesser Penalty in the queue of applicants. To put it simply, Priority Status simply means the number at which the Lesser Penalty applicant has approached CCI in the queue of applicants in a particular matter. It is also sometimes known as the Marker Status.

For example, the first one to approach CCI by filing an application seeking a Priority Status is granted Priority Status “1”; the second one to approach is granted Priority Status “2”; the third one to approach is granted Priority Status “3”; and so on.

The applicant at number “1” position is entitled to be granted benefit of reduction in penalty upto 100%. The applicant at number “2” position is entitled to be granted the benefit of reduction in penalty upto 50%. Applicants at number “3” and subsequent positions are entitled to be granted the benefit of reduction in penalty upto 30%.

Q.15 What information is required to be provided for seeking a Priority Status?

Ans. In the first contact made for seeking a Priority Status, the following information ought to be disclosed:

- (a) the name, address, e-mail address and contact number of the applicant;
- (b) the product with respect to which existence of a cartel is alleged and Lesser Penalty

- application is proposed to be filed; and
- (c) the fact that the applicant has, or believes that it has, indulged into a cartel.

Q.16 How does one know that one has received a Priority Status?

Ans. Communication in this regard is sent by the Secretary to the applicant on the address or e-mail address provided by the Lesser Penalty applicant.

Q.17 Does one get to know the Priority Status awarded to it?

Ans. The actual Priority Status awarded to a Lesser Penalty applicant is not disclosed to it during pendency of proceedings before CCI. The same is only disclosed in the final order passed by CCI in the matter. However, intimation that an appropriate Priority Status has been marked is given by the Secretary to the Lesser Penalty applicant.

Q.18 Does securing a Priority Status guarantee receiving the benefit under the Lesser Penalty regime?

Ans. No, merely securing a Priority Status does not guarantee receiving the benefit of reduction in penalty under the Lesser Penalty regime.

Actual grant of benefit under the Lesser Penalty regime is determined by CCI at the time of passing of final order and the same is subject to the Lesser Penalty applicant fulfilling all the necessary conditions to avail the benefits of the Lesser Penalty regime.

Q.19 What is a leniency applicant expected to do after receiving a Priority Status?

Ans. Once one has received intimation regarding marking of its Priority Status from the Secretary, it has to, within a period of 15 days from the date of receipt of the communication, file a Lesser Penalty application before CCI, containing all the information as specified in the Schedule to the LPR, along with an affidavit verifying that the application being filed under Section 46 of the Act read with the LPR provides full and true disclosure of all the information and evidence in power and possession of the applicant as on the date of filing of the application and that nothing is being concealed therein.

Q.20 How much time does one have to give an application for Lesser Penalty?

Ans. Once Priority Status is awarded to a Lesser Penalty applicant, it is given 15 days' time from the date of receipt of communication in this regard to file a Lesser Penalty application before CCI, containing all the information as specified in the Schedule to the LPR, along with the requisite affidavit.

Q.21 Once Priority Status is marked, can one seek an extension of time for filing the Lesser Penalty application?

Ans. Yes, one may make an application seeking a brief extension of time for filing the Lesser Penalty application once its Priority Status is marked. However, such extension is granted by CCI only in exceptional cases where it is convinced with the reasons provided for seeking such extension.

Q.22 What consequences does one face if one doesn't provide requisite information by filing the application for Lesser Penalty within the stipulated time?

Ans. The Priority Status granted to the applicant, if it fails to provide the requisite information as per the Schedule to the LPR within the stipulated time, i.e., 15 days or further period as extended by CCI, stands forfeited. No intimation in this regard is made by CCI to the applicant. CCI is also free to use the information provided by the applicant during the first contact for the purposes of its proceedings.

Q.23 What information is required to be submitted in an application for Lesser Penalty?

Ans. In the application for Lesser Penalty, information as specified in the Schedule to the LPR is required to be submitted. The same consists of the following:

- (a) Name, address, e-mail address and contact number of the applicant;
- (b) Name, address, e-mail address and contact number of the authorized representative of the applicant, if any (specifically where the applicant is based or situated outside India);
- (c) Names and preferably addresses of all other persons/entities who are parties to the alleged anti-competitive agreement being reported;
- (d) Detailed description of the alleged anti-competitive agreement (clearly specifying therein the role played by the applicant);
- (e) Evidences in support of the alleged anti-competitive agreement, along with a descriptive list of the same;
- (f) Goods or services involved;
- (g) Geographic market covered;
- (h) Date of commencement of the anti-competitive agreement;
- (i) Duration of the anti-competitive agreement;
- (j) Is the anti-competitive agreement still continuing?
- (k) Estimated volume of business affected in India by the alleged anti-competitive agreement;
- (l) Names and preferably details (roles, designations, addresses, e-mail addresses, contact numbers) of all individuals who were, to the best of the knowledge of the applicant, associated with the alleged anti-competitive agreement, either on their own or on behalf of

- any company/firm that was party to the alleged anti-competitive agreement (including the applicant's own individuals);
- (m) Details of other competition/antitrust authorities, forums or courts, if any, approached or intended to be approached by the applicant in relation to the alleged anti-competitive agreement;
 - (n) Any other material information which the applicant finds pertinent to share or is directed by CCI to provide.

Q.24 When should one apply for Lesser Penalty?

Ans. One should apply for Lesser Penalty as soon as one detects or becomes aware of its participation in a cartel.

However, no Lesser Penalty application can be entertained after receipt of Investigation Report by CCI from the Director General.

Q.25 What is the process after filing of Lesser Penalty application by the leniency applicant?

Ans. If the Lesser Penalty application is found by CCI to be duly complete in all respects, the same is forwarded to the Director General for investigation, and the applicant will be contacted by the Investigation Officer in due course.

If any further clarifications are required by CCI, the applicant shall be communicated the same by Secretary CCI. The applicant is required to provide the requisite clarifications within the time stipulated or appear for an oral hearing on the date and time communicated to it, if directed.

If the application is rejected, communication in this regard is made by Secretary CCI to the applicant.

Q.26 Can one withdraw its application for Lesser Penalty?

Ans. No, an application for Lesser Penalty, once filed with CCI, cannot be withdrawn by the applicant.

Q.27 What happens if one does not pursue its Lesser Penalty application after making first contact for Priority Status?

Ans. If one does not pursue its Lesser Penalty application after making first contact or fails to provide further co-operation during the course of investigation and proceedings before CCI, the applicant may lose the benefits under the Lesser Penalty regime. Besides, in appropriate cases, the Priority

Status awarded to the applicant may also be forfeited. CCI, however, is free to use the information provided by the applicant for the purposes of its proceedings.

Q.28 Does one lose the right to appeal against the final order passed by the Competition Commission of India if one had filed an application for Lesser Penalty?

Ans. No, one does not lose the right to appeal against the final order passed by CCI merely because it had filed an application for Lesser Penalty. The applicant still has the right to file an appeal before the National Company Law Appellate Tribunal under Section 53B read with Section 53A of the Act, against the final order passed by CCI, challenging the contravention found by CCI as well as challenging the amount of reduction in penalty awarded to it.

Confidentiality



Q.1 Can I file an Information before the Commission keeping my identity confidential?

Ans. Yes. The identity of Informant is maintained confidential on a request made in writing.

However, where it is necessary or expedient to disclose the identity of Informant for the purposes of the Act, the Commission may do so after providing a reasonable opportunity to the Informant to present its case against proposed disclosure.

Q.2 Can Informants/Opposite Parties/Third Parties claim confidentiality over the information furnished to the Commission or the Director General? What is the procedure for claiming confidentiality over such information?

Ans. Yes. A party seeking confidentiality over the information or the documents furnished by it has to set out cogent reasons for such treatment. It has to self-certify that making the document or documents or information or a part or parts thereof public will result in disclosure of trade secrets or destruction or appreciable diminution of the commercial value of any information or can be reasonably expected to cause serious injury.

Further, the party has to confirm the following, along with the date on which such confidential treatment shall expire, on a self-certification basis: (a) that the information is not available in the public domain; (b) that the information is known only to limited employees, suppliers, distributors and others involved in the party's business; (c) that adequate measures have been taken by the party to guard the secrecy of the information; and (d) that the information cannot be acquired or duplicated by others.

The party claiming confidentiality is also obligated to provide an undertaking certifying the claims in terms of the requirements as above.

Q.3 What is the form and manner for filing confidential information?

Ans. The party claiming confidentiality has to file a complete version of confidential document(s) with the words "*restriction of publication claimed*" in red ink on top of the first page and the word "*confidential*" clearly and legibly marked in red ink near the top on each page, together with a non-confidential version thereof, which shall redact/ not contain such information(s) or document(s) or

part(s) thereof upon which confidentiality has been claimed.

The non-confidential version of such document(s) shall be an exact copy of the confidential version, with the omissions of the confidential information indicated in a conspicuous manner.

Q.4 What is the consequence of providing false undertaking with respect to self-certification?

Ans. Party furnishing false undertaking for claiming confidentiality is liable to be proceeded against as per the provisions of the Act.

Filing of false undertaking before the Commission may result in initiation of proceedings under Section 45 of the Act by the Commission and such person is liable to be punished with fine which may extend to rupees one crore and/or prosecution under the provisions of the Act. Besides, the Commission may also pass such other order as it may deem fit, including revoking confidential treatment over the information or the documents, which were claimed to be confidential on self-certification basis by filing such false undertaking.

Q.5 What is the consequence if a party claims confidentiality unjustifiably without meeting the parameters?

Ans. If the party seeking confidentiality wrongly, unjustifiably or in an overarching manner claims that making the document or documents or information or a part or parts thereof public will result in disclosure of trade secrets or destruction or appreciable diminution of the commercial value of any information or can be reasonably expected to cause serious injury, the Commission may revoke confidential treatment over the information or the documents, which were claimed to be confidential on such averments and assertions. Further, the Commission may also direct such party to file information and claim confidentiality strictly in accordance with the parameters provided under the General Regulations. Failure to adhere to parameters while claiming confidentiality on self-certification basis may result in the adjudication of such confidentiality claims by the Commission itself, besides being viewed as delaying tactics with attendant consequences.

Q.6 Can the confidential information provided by Informant/Opposite Party/Third Party be disclosed and shared with other parties?

Ans. Confidentiality is always maintained on confidential information provided by the parties on a self-certification basis. However, during the proceedings, such information can be shared with the parties to the proceedings (Informant/Opposite Party) in a controlled manner after obtaining necessary undertakings through setting up of Confidentiality Ring, if sharing of such information is deemed necessary or expedient.

Q.7 What happens if an information/document/material on which confidentiality has been claimed by an entity is also provided by another entity but without claiming confidentiality?

Ans. Such information will not be treated as confidential, as the prerequisite for claiming confidentiality on self-certification basis would not be satisfied in such a scenario.

Q.8 What is Confidentiality Ring?

Ans. Confidentiality Ring is a mechanism introduced under the newly notified Confidentiality Regime under Regulation 35 of the CCI (General) Regulations, 2009 (as amended), whereby controlled access of confidential information gathered during investigation/ inquiry is provided to the parties to the proceedings for effective presentation of their defence/case.

The new Confidentiality Regime was notified on 08.04.2022 and the same is available at the following link on the website of the Commission:

<https://www.cci.gov.in/legal-framework/regulations/12/0>

Q.9 When and by whom can the Confidentiality Ring be set up?

Ans. The Commission may, if considered *necessary* or *expedient*, set up Confidentiality Ring(s) at any time during the proceedings. Such ring comprises authorized representatives of the parties who would only be able to access the confidential information in an unredacted form.

The Commission, while setting up a Confidentiality Ring, may decide the extent of information to be made accessible as well as the parties and their members to be included in the Confidentiality Ring, as deemed appropriate for the purpose.

Q.10 Can there be more than one Confidentiality Ring in a case?

Ans. Yes. Depending on the exigency and expediency of the case, the Commission may set up Confidentiality Rings at different stages for specified purposes.

Q.11 Can a Confidentiality Ring be set up during investigation before/by the Director General?

Ans. No.

Q.12 Who can be a member of the Confidentiality Ring?

Ans. Any authorized representative of the party to the proceedings (Informant/Opposite Party), be it any

professional authorized representative (counsel, chartered accountant, company secretary or cost accountant) or any employee or official of the party or any other person duly authorized by the party. Such authorized representative should not be barred by any other law (including the Advocates Act, 1961) to act, plead or appear before the Commission.

Q.13 Can experts (e.g., economist, data scientist, forensic expert, etc.) be included in the Confidentiality Ring?

Ans. Yes.

Q.14 Can an Informant be included in the Confidentiality Ring?

Ans. Informant is ordinarily not part of the Confidentiality Ring and can only access non-confidential records.

However, the Commission may include the Informant in the Confidentiality Ring in appropriate cases, if inclusion of Informant in the ring is considered necessary or expedient.

Q.15 Can a third party be included in the Confidentiality Ring?

Ans. No. Only Informant or Opposite Party can be part of the Confidentiality Ring, either by themselves or through their authorized representatives.

Q.16 How many representatives of a party can be included in the Confidentiality Ring as members?

Ans. The number of members to be included in the Confidentiality Ring depends upon the complexity and nature of the case. Ordinarily, the Commission allows each party to propose six members to be included in the Confidentiality Ring.

Q.17: What type of information can be shared through the Confidentiality Ring?

Ans. Entire confidential case records or part thereof as decided by the Commission while setting up the Confidentiality Ring can be made accessible through the Confidentiality Ring. However, the following category of documents (except and to the extent that the same have been relied upon by the Director General in the Investigation Report) cannot be made accessible to the members of the Confidentiality Ring:

- (a) documents/material obtained through search and seizure operations;
- (b) e-mail dumps;
- (c) call detail records; or
- (d) any other document/material in the nature of personal information.

Q.18 Can the identity of an Informant who has claimed confidentiality over its identity, be disclosed under the Confidentiality Ring?

Ans. Yes, depending upon the exigency of a case, the identity of the Informant who has claimed confidentiality over its identity, can be disclosed under the Confidentiality Ring if directed by the Commission while setting up Confidentiality Ring.

Q.19 Can members of the Confidentiality Ring access Lesser Penalty/Leniency application and information/documents submitted by Leniency applicant thereunder?

Ans. Lesser Penalty/Leniency application and information/documents submitted by Leniency applicant thereunder can be made accessible through Confidentiality Ring if directed by the Commission.

Q.20 Who has to provide undertaking for accessing confidential information through Confidentiality Ring?

Ans. The undertakings have to be filed by the parties to the proceedings (Informant/Opposite Party) to the Commission. Further, undertakings have to be provided by each party included in the Confidentiality Ring to the other parties in the matter (i.e., Informant/ Opposite Party).

However, no individual undertakings are required to be filed by the members whose names are proposed by the concerned party for inclusion in the Confidentiality Ring.

The parties (i.e., Informant/Opposite Party) have to communicate to the Commission a list of their respective members proposed for inclusion in the Confidentiality Ring. No confidential information shall be shared with any other person/counsel by members of the Confidentiality Ring unless that other person/counsel is also allowed by the Commission as part of the Ring, subject to the restrictions of numbers, as aforementioned.

Q.21 Are the parties (Informant/Opposite Party) also required to furnish undertaking to third parties whose confidential information is allowed to be accessed through the Confidentiality Ring?

Ans. No. The undertaking given to the Commission is to ensure the interest of third parties. In case of breach of undertaking by the parties accessing confidential information, third parties may approach the Commission to obtain a copy of undertaking besides seeking action under Section 45 of the Act for breach of undertaking against defaulting parties and taking out on their own

appropriate actions against the defaulting parties before civil courts.

Q.22 What is the format of the undertaking to be filed by the parties who are part of the Confidentiality Ring?

Ans. The party filing undertaking must categorically state that the information accessed by its members pursuant to the Ring shall not be shared and/or disclosed by them to any other person, including to any official and/or other employee of enterprise concerned or to any official and/or employee of any joint-venture, subsidiary, group entity of the concerned enterprise, or to any other person whatsoever, and that they shall use such information and documents only for the purposes of the proceedings under the Act, and shall keep such information and documents within their sole custody, and shall destroy the same at the culmination of the present proceedings.

The undertaking may be given in the following illustrative format:

CONFIDENTIALITY UNDERTAKING

[As per Regulation 35(2) of the Competition Commission of India (General) Regulations, 2009]

1. I, -----, aged about----- years, duly authorized representative of XYZ, hereby undertake on behalf of XYZ:
 - (a) that the information is not available in the public domain;
 - (b) that the information is known only to limited employees, suppliers, distributors and others involved in the party's business;
 - (c) that adequate measures have been taken by the party to guard the secrecy of the information;
 - (d) that the information cannot be acquired or duplicated by others;
 - (e) The confidentiality is claimed upto -----.

2. That if any information given in this undertaking is found to be false, XYZ shall be liable to be proceeded against, as per the provisions of the Competition Act, 2002.

Date: -----

Signature: -----

Q.23 What is the remedy to an aggrieved party (Informant/Opposite Party/Third Party) in case of unauthorized disclosure/leakage/sharing of its confidential information that has been accessed through the Confidentiality Ring?

Ans. In case of unauthorized disclosure/leakage/sharing confidential information that has been

accessed through the Confidentiality Ring, an aggrieved party (Informant/Opposite Party/Third Party) may inform the Commission about such disclosure/leakage/sharing at the earliest possible opportunity, along with details thereof. The Commission may initiate appropriate proceedings against the concerned party for breach of undertaking, including action in terms of the provisions of Section 45 of the Act. Such person is liable to be punished with a fine, which may extend to rupees one crore and/or prosecution under the provisions of the Act, as deemed fit. Besides, the Commission may also pass such other order as it may deem fit.

Moreover, the aggrieved party may take recourse before civil courts for breach of undertaking.

Q.24 Can the Commission use confidential information in its orders?

Ans. Yes. If the Commission includes in any order or decision or opinion, information that has been claimed confidential under this regulation, the Commission shall make two versions of the order or decision or opinion, as the case may be. The non-confidential version which omits/redacts the confidential information that appears in the complete version shall be served upon the parties and shall be included in the non-confidential records. The complete version shall be placed in the confidential records as provided in sub-regulation (4) of Regulation 35, and the same shall be shared with the members of the Confidentiality Ring.

Further, if a party has claimed confidentiality in an overarching and unjustifiable manner on a self-certification basis without meeting the parameters, the Commission may use such information which is necessary to be included in the orders for making the same comprehensible for the stakeholders, to provide regulatory guidance on compliance to potential infringers and in larger public interest. Such usage is for the purposes of the Act and the Commission is authorized to disclose such information in terms of the provisions of Section 57 of the Act.

Q.25 Does the new Confidentiality Ring cover cases which are already pending before the Commission or the Director General?

Ans. Yes, provided confidentiality orders have not been already passed by the DG or the Commission on the confidentiality claims previously made as per the past regime.

Where confidentiality claims previously made are pending and no orders thereon have been passed, parties may approach the Commission or the DG, as the case may be, to allow submission of information/documents/submissions as per the new regime on a self-certification basis.

Q.26 Can the confidential information accessed through confidentiality ring be used by the parties in any appellate forum/any other forum?

Ans. As pointed out previously, the party included in the Confidentiality Ring has to file an undertaking categorically stating that the information accessed by its members pursuant to the ring shall not be shared and/or disclosed by them to any other person, including to any official and/or other employee of enterprise concerned or to any official and/or employee of any joint venture, subsidiary, group entity of the concerned enterprise or to any other person whatsoever, and that they shall use such information and documents only for the purposes of the proceedings under the Act, and shall keep such information and documents within their sole custody, and shall destroy the same at the culmination of the present proceedings. Thus, the parties can use information accessed through the Confidentiality Ring for the purposes of the Act which would include, *inter alia*, filing of appeals before the Hon'ble Appellate Tribunal, etc. However, due care needs to be observed and followed by the parties while using such information, subject to the procedure of the concerned forum/authority.

Combinations



Combination and Jurisdictional Thresholds

Q.1 Are all M&As required to be notified to the Commission?

Ans. Not every M&A activity requires notification to the Commission. As per Section 6(2) of the Act, only *combinations* require notification to and approval of the Commission prior to their consummation.

Q.2 What is meant by a combination?

Ans. M&As that meet the asset and turnover thresholds prescribed under Section 5 of the Act are termed as combinations. Thus, only M&As that meet assets and turnover thresholds prescribed under Section 5 of the Act require notification to and approval of the Commission prior to their consummation.

Q.3 What is the scope of Section 5 of the Act?

Ans. As per Section 5 of the Act, acquisition of one or more enterprises by one or more person or merger or amalgamation of enterprises, which exceeds the threshold prescribed therein shall be a combination for the purposes of the Act. The thresholds relate to the assets and turnover of the parties to the combination, i.e., target enterprise and acquirer (or acquirer group)/merging parties (or the group to which merged entity would belong).

Under the Act, acquisition means directly or indirectly acquiring or agreeing to acquire: (i) control, shares, voting rights or assets of any enterprise; or (ii) control over management or control over assets of any enterprise.

The thresholds have been fixed taking into account the value of assets and turnover of the parties to a particular combination or the value of assets and turnover of the group to which the parties belong, as the case may be. The threshold also further takes into account the geographical limits as to the operation of the businesses.

Q.4 What are the threshold values prescribed under Section 5 of the Act?

Ans. The thresholds are based on the value of assets and turnover of the parties to the combination, i.e., enterprise-level threshold, and the group to which the target would belong after the M&A, i.e., group-level threshold. The threshold also takes into account the geographical limits as to the operation of the business. When the Act was enacted, it provided for certain value of assets and turnover as threshold. Section 20(3) of the Act provides for bi-annual review of these thresholds by the Central Government. The thresholds at present are as under:

Table 1

Threshold under Section 5 of the Act				
Level	Geography	Combined Turnover		Combined Assets
Enterprise-Level	In India	> INR 2000 Crore	OR	> INR 6000 Crore
	Worldwide (with India component)	> USD 1 bn with at least INR 1000 Crore in India		> USD 3 bn with at least INR 3000 Crore in India
Group-Level	In India	> INR 8000 Crore	OR	> INR 24000 Crore
	Worldwide (with India component)	> USD 4 bn with at least INR 1000 Crore in India		> USD 12 bn with at least INR 3000 Crore in India

[For reference, please see Notification No. S.O. 675(E) dated 4th March 2016 issued by the Ministry of Corporate Affairs, Government of India]

Q.5 For terming an M&A as Combination, should all the thresholds mentioned in Table 1 be satisfied?

Ans. No. Upon satisfaction of even one threshold prescribed under the Section 5 of the Act, an M&A is called a combination for the purpose of the Act.

Q.6 Under the enterprise-level thresholds, which are the enterprises whose assets and turnover are considered for testing of thresholds prescribed under the Section 5 of the Act?

Ans. For the purpose of testing enterprise-level thresholds:

Table 2

In case of an acquisition	Assets and turnover, as the case may be, of the parties to the acquisition, viz., the acquirer and the target are considered.
In case of merger or amalgamation	Assets and turnover, as the case may be, of the enterprise remaining after merger or the enterprise created as a result of the amalgamation are considered. Thus, the combined value of assets and turnover of the merged or amalgamated entities are considered.
In case of acquiring of control by a person over an enterprise when such person already has direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service	Assets and turnover, as the case may be, of the enterprise over which control has been acquired along with the enterprise over which the acquirer already has direct or indirect control are considered.

Q.7 Under the group-level thresholds, what are the enterprises whose assets and turnover are considered for testing of threshold prescribed under the Section 5 of the Act?

Table 3

In case of an acquisition	Assets and turnover of the group to which the target would belong after the acquisition and the group starting from the acquired enterprise are considered.
In case of merger or amalgamation	Assets and turnover of the group to which the enterprise remaining after the merger or the enterprise created as a result of the amalgamation would belong after the merger or the amalgamation, as the case may be.
In case of acquiring of control by a person over an enterprise when such person already has direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service	Assets and turnover of the group, to which enterprise whose control has been acquired or is being acquired, would belong after the acquisition and the group starting from the acquired enterprise are considered.

Q.8 What is meant by an acquisition?

Ans. Section 2(a) of the Act defines acquisition to mean, directly or indirectly, acquiring or agreeing to acquire shares, voting rights or assets, control over management or control over assets of any enterprise.

Q.9 What is meant by a merger or amalgamation?

Ans. The Act does not specifically define merger or amalgamation. Merger is largely understood to mean where assets and liabilities of an entity are transferred to another entity and the first entity loses its existence. Amalgamation is largely understood to mean where two or more existing entities merge to form a new entity and existing entities lose their existence.

Q.10 What is meant by shares?

Ans. Section 2(v) of the Act defines shares to mean shares in the share capital of a company carrying voting rights and includes: (i) any security which entitles the holder to receive shares with voting rights; (ii) stock except where a distinction between stock and share is expressed or implied.

Q.11 What is meant by group?

Ans. Explanation (b) to Section 5 of the Act provides that a group means two (or more) enterprises where one enterprise directly or indirectly is in a position to: (i) exercise 26% or more of the voting rights in the other enterprise; or (ii) appoint more than 50% of the members of the board of directors in the other enterprise; or (iii) control the management or affairs of the other enterprise.

Q.12 What is meant by control?

Ans. As per Explanation (a) to Section 5 of the Act, *“control” includes controlling the affairs or management by (i) one or more enterprises, either jointly or singly, over another enterprise or group; (ii) one or more groups, either jointly or singly, over another group or enterprise”*.

The ability to control the management and affairs of an enterprise may be inferred from the extent of shareholding and/or statutory rights associated with the shareholding and/or contractual rights such as veto rights, consultation rights, participation in management and affairs. However, special rights/veto rights are not the only basis for inferring the ability to manage/control the affairs of an enterprise and there can be other sources of control as well, viz., status and expertise of an enterprise or person, board representation, structural/financial arrangements, etc. In competition law practice, control is considered a matter of degree. However, all degrees and forms of control nonetheless constitute control. International jurisprudence considers “material influence” as the lowest form of

control, alongside other higher forms such as *de facto* control and controlling interest (*de jure* control), in that order.

Material influence—the lowest level of control—implies the presence of factors that give an enterprise/person the ability to influence the affairs and management of the other enterprise, including factors such as shareholding, special rights, status and expertise of an enterprise or person, board representation, structural/financial arrangements, etc. *De facto* control implies a situation where an enterprise holds less than majority of the voting rights but, in practice, controls over half of the votes actually cast at a meeting. Further, the factors relevant for material influence are relevant for ascertaining *de facto* control as well. It may be noted that the concepts of material influence and *de facto* control are very significant in competition law as there can be situations where commercial realities can be more telling than formal agreements and structures. Controlling interest, or *de jure* control, means a shareholding conferring more than fifty per cent (50%) of the voting rights of an enterprise. It may be noted that only one enterprise can have a controlling interest in the other enterprise, but more than one enterprise can control the other enterprise (situation of joint control). Likewise, there are other terms which are used to express control, such as negative control (by virtue of ability to block special resolutions) or operational control (by virtue of commercial cooperation agreements with or without involving equity).

The control may be classified as negative control, positive control, sole control or joint control.

For further details, please refer to order dated 12th March 2018 issued by the Commission under Section 44 of the Act against M/s Ultratech Cement Limited in C-2015/02/246 available at https://cci.gov.in/combination/orders-section43a_44

Q.13 For the purpose of determining whether an M&A transaction meets the thresholds prescribed under Section 5 of the Act, financials statements of which year are to be considered?

Ans. Explanation (c) to Section 5 of the Act provides that 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 the proposed merger falls. The value of turnover is also determined by applying the same principle.

Q.14 Which year is considered the financial year in which the date of the proposed merger falls?

Ans. For the purpose of explanation (c) to Section 5 of the Act and De-Minimis Exemption Notification, the *financial year in which the date of proposed merger falls* is understood as the financial year in which: (i) the proposal relating to merger or amalgamation was approved by the board of directors of

the enterprises concerned; or (ii) any other document for acquisition was executed.

In this context, Regulation 5(8) of the Combination Regulations provides that the reference to the “other document” shall mean any binding document, by whatever name, conveying an agreement or decision to acquire control, shares, voting rights or assets. It further provides that if the acquisition is without the consent of the enterprise being acquired, any document executed by the acquiring enterprise, by whatever name, conveying a decision to acquire control, shares or voting rights shall be the “other document”.

Q.15 When a portion, a division or a business of an enterprise is being acquired, should the value of total assets and turnover of the seller enterprise or the value of assets and turnover of the portion/division or business be considered for the purpose of determining if the acquisition is a Combination?

Ans. The De-Minimis Exemption Notification provides that, where a portion of an enterprise or division or business is being acquired and/or taken control of, the value of assets and turnover of the said portion or division or business attributable to it and the value of assets and turnover of the acquirer is to be taken into account for the purpose of calculating jurisdictional thresholds. Further, the Hon'ble National Company Law Appellate Tribunal, in its judgement dated 12th March 2020 (Eli Lilly Case), has clarified that, for the purpose of calculation of assets and turnover, what is being acquired is relevant, as the assets/turnover of what is left over with the sellers after the acquisition will have no role to play in the context of the business conducted by the purchaser post acquisition. For reference, please see <https://nclat.nic.in/Useradmin/upload/15914176955e6a2dace9e22.pdf>.

Thus, when a portion, division or business of an enterprise is being acquired, the value of assets and turnover of the said portion or division or business attributable to it is to be considered for the purpose of Section 5 and De-Minimis Exemption Notification.

The value of the said portion or division or business shall be determined by taking the book value of the assets as shown in the audited books of accounts of the enterprise, or as per the statutory auditor's report, where the financial statement has not yet become due to be filed in the financial year immediately preceding the financial year in which the date of the proposed combination falls, as reduced by any depreciation, and the value of assets shall include the brand value, value of goodwill or value of copyright, patent, permitted use, collective mark, registered proprietor, registered trade mark, registered user, homonymous geographical indication, geographical indications, design or layout design or similar other commercial rights, if any, referred to in sub-section (5) of Section 3.

Q.16 What may be done when the target's financial statements have not been audited?

Ans. The onus of determining whether an M&A is a combination rests upon the parties. In cases where the audited financial statements of the previous financial year are not available, unaudited financial statements or best available estimates may be considered for assessing whether the M&A is a combination and/or eligible for benefit of De-Minimis Exemption Notification. However, failure to notify a transaction which satisfies jurisdictional thresholds based on the audited financial statements of the previous financial year would attract penalty under the provisions of Section 43A of the Act. Further, the acquirer may be asked to notify the transaction if the Commission has reasons to believe that the said M&A qualifies to be combination.

Q.17 Should Intra Group Turnover be considered part of the turnover for the purpose of Section 5 of the Act?

Ans. Intra-group sales are excluded from the total turnover while computing threshold limit under Section 5 of the Act. The purpose of exclusion of intra-group turnover is to avoid double counting. However, when an overseas group entity makes further supply (supplied to it under intra-group export) outside India, the turnover relating to such subsequent sale is not counted as turnover in India. If one were to also exclude Intra Group Export Turnover, the economic value addition generated from India goes unaccounted for. Therefore, both the location of the parties to the intra-group sales and the scope of acquisition need to be appropriately factored in the determination of turnover for the purpose of Section 5 as well as De-Minimis exemption.

The aforementioned concept can be clarified through the following example:

Parties Test:

- a) In a transaction where X is acquiring the ultimate parent entity of a group A, the same would lead to indirect acquisition of all group entities of A. In this case, the value of all intra-group sales can be excluded for the purpose of Section 5 as well as De-Minimis exemption to avoid double counting. For instance, A holds 100% stake in B. If A is acquired by X (leading to indirect acquisition of B), the value of intra-group sales between A and B shall be excluded to avoid double counting.
- b) No intra-group sales should be excluded if only one of the group entities of A, for instance, M, is acquired by X (without any direct or indirect acquisition of other group entities of A). This is because the issue of double counting does not arise and the standalone financials of the target

(i.e., M) alone are to be considered.

- c) If two or more companies within a group are acquired, only the value of sales between them alone can be excluded for the purpose of Section 5 and De-Minimis exemption. For instance, if P and Q of group A are acquired, only the value of sales between P and Q shall be excluded, and the turnover of P and/or Q with A or any of its other group entities are not to be excluded.

Location Test:

- d) For computation of worldwide turnover, a location test may not be relevant. However, for determination of turnover in India, the relationship between the revenue and India is a relevant factor in the exclusion of intra-group sales. The exclusions mentioned in (a) and (c) above may be warranted when the intra-group sales are of: (i) domestic nature (i.e., sales originating and terminating in India); and/or (ii) the supply is from or to India and further sales (by the buyer in the intra-group sale) is within India. In simple terms, if the revenue of further sales outside the group is relatable to India, thereby being already accounted for, exclusion of all earlier intra-group sales is warranted to avoid double counting.

(For reference, please see order dated 25th October 2021 issued under Section 31(1) of the Act in C-2021/08/863 at <https://www.cci.gov.in/combination/order/details/order/29/0>)

Fund Management Activities

Q.18 What is the typical structure of a fund management activity?

Ans. Fund management business envisages demutualization of beneficial interest and management or control over the operations. Investors contribute to the funds for investment. Subscribers to the fund transfer authority to the investment managers to conduct the operations of the fund and do not possess authority to take decisions relating to the operations of the fund. Generally, the fund manager conducts the day-to-day affairs of the funds and takes decisions in relation to investments, including the time; target; value, scope and quantum of investment; and exit. Though the beneficial interest of these categories of funds lies with subscribers, the control over the operations and management of the fund is entrusted to the investment manager. Fund structure may also envisage a trustee. The trustee is generally vested with the power of monitoring the activities of the fund manager and compliance of the relevant governing agreements and does not interfere with the

decision-making authority of the fund manager. Fund structure may also envisage a custodian that holds the securities of various funds in its custody. Governing agreements and/or law may provide for the removal of trustee, fund manager and custodian with the decision of a certain majority of the subscribers.

Q.19 Has the Commission issued any order in respect of the acquisition of fund management businesses?

Ans. Yes, the Commission issued an order dated 17th December 2021 issued under Section 43A of the Act in relation to the acquisition of real estate fund management and private equity fund management businesses of IDFC Alternatives Limited by Investcorp India Asset Managers Private Limited.

(For reference, please see order dated 17th December 2021 issued under Section 43A of the Act against Invest Corp India available at https://www.cci.gov.in/combination/orders-section43a_44)

Q.20 In cases of Real Estate Investment Trusts (REIT) or similar structures, should the supplies of these structures be attributed to their manager?

Ans. The relevant regulations governing these types of structures, *inter alia*, provides that the manager shall undertake the management of assets, including their supplies of these structures. Primarily, the manager is responsible for the operation and management of these structures. Thus, the fund manager of these structures is likely to have the ability to significantly influence policies and practices relating to the goods and services supplied by these structures. Therefore, for the purposes of a combination involving the manager of these structures or person(s) controlling such manager, the supplies of these structures should be attributed to the manager or such controlling persons.

(For reference, please see order dated 24th February 2021 issued under Section 31(1) of the Act in C-2020/12/794 at <https://www.cci.gov.in/combination/order/details/order/178/0>)

Q.21. In cases of acquisition of any investment management businesses, would the value of assets and turnover of the controlled portfolio enterprise [i.e., controlled investee entities of the fund] also be relevant for the purpose of computing threshold under Section 5 of the Act as well as the De-Minimis exemption threshold?

Ans. Yes, in cases of acquisition of any investment management businesses, the value of assets and turnover of the controlled portfolio entities would also be relevant for the purpose of computing

threshold under Section 5 of the Act as well as the De-Minimis exemption.

(For reference, please see order dated 17th December 2021 issued under Section 43A of the Act against Invest Corp India available at https://www.cci.gov.in/combination/orders-section43a_44)

Q.22 Would an acquisition of control over management or assets of any enterprise that meet financial thresholds prescribed under Section 5 of the Act not be considered a combination if the acquirer does not acquire beneficial interest/ownership over the enterprise?

Ans. In terms of Section 2(a) of the Act, acquisition of control over management or assets of any enterprise is also included in the definition of an acquisition. Acquisition of control is one of the forms of combination under Section 5 of the Act, even if the acquirer of control does not acquire beneficial interest/ownership over the acquired enterprise. Accordingly, the acquirers need to give notice in terms of Section 6(2) of the Act read with the relevant provisions of the Combination Regulations. The said requirement of law is not dispensed with merely on account of the beneficial interest/ownership being vested in person(s) other than the acquirer. This position is not limited to acquisition by funds but applies to any acquisition, merger and amalgamation.

(For reference, please see order dated 17th December 2021 issued under Section 43A of the Act against Invest Corp India available at https://www.cci.gov.in/combination/orders-section43a_44)

Q.23 For assessing that any financial thresholds prescribed under Section 5 of the Act are met by any acquisition, merger or amalgamation, would it be relevant whether the value of assets and turnover of the existing controlled portfolio enterprises are beneficially owned or not, for the purpose of computing threshold under Section 5 of the Act?

Ans. Yes, the value of assets and turnover of the controlled enterprises, beneficially owned or not, would be relevant for the purpose of computing threshold under Section 5 of the Act.

(For reference, please see order dated 17th December 2021 issued under Section 43A of the Act against Invest Corp India available at https://www.cci.gov.in/combination/orders-section43a_44)

Q.24 Should the assets and turnover of the controlled portfolio enterprise of a fund be attributed to the investment manager only if both the fund manager and trustee are acquired or subjected to common control?

Ans. No, as long as the investment manager is responsible for decision making relating to the operational management of the fund, it would enjoy control over the fund. This factual aspect would be the

same, whether or not the trustee is being acquired or subjected to common control. Accordingly, assets and turnover of the controlled portfolio entities of a fund should be attributed to the investment manager whether or not the trustee is being acquired or subjected to common control.

(For reference, please see order dated 17th December 2021 issued under Section 43A of the Act against Invest Corp India available at https://www.cci.gov.in/combination/orders-section43a_44)

Q.25 In cases of fund management structures, should supplies of goods and services of these structures or their portfolio enterprises be attributed to their manager or the person controlling such manager?

Ans. The relevant regulations and/or agreements governing these types of structures, *inter alia*, provide that the manager shall undertake management of assets/funds. Primarily, the manager is responsible for the operation and management of these structures. Thus, the fund manager of these structures is likely to possess the ability to significantly influence policies and practices relating to goods and services supplied by these structures and exercise rights/abilities possessed by these funds in their portfolio entities. Therefore, for the purposes of a combination involving the manager of these structures or person(s) controlling such manager, supplies of these structures or their portfolio enterprises should be attributed to their manager or person controlling such manager.

(For reference, please see order dated 24th February 2021 issued under Section 31(1) of the Act in C-2020/12/794 available at <https://www.cci.gov.in/combination/orders-section31>)

Q.26 In cases where the services of the investment manager can be terminated by the trustee, whether it will change the position regarding existence of control of fund manager over management and affair of the fund?

Ans. Where the investment manager enjoys operational control over the fund, the overall supervision of certain aspects may lie with the trustee. Mere ability and/or possibility of the trustee to terminate the investment manager, that too only after obtaining specified approval from unit holders, does not negate the fact of operational control of the acquirer over the operations of the target business.

(For reference, please see order dated 17th December 2021 issued under Section 43A of the Act against Invest Corp India available at https://www.cci.gov.in/combination/orders-section43a_44)

Q.27 In the case of fund management structure, is the existence of joint control of the trustee or the unit holder a factor to conclude that the investment manager does not have control over the fund?

Ans. A fund may be subject to joint control, *de facto* or *de jure*, of the investment manager, trustee and/or the unit holder. However, mere existence of joint control of the trustee or the unit holder is not a factor to conclude that the investment manager does not have control over the fund.

(For reference, please see order dated 17th December 2021 issued under Section 43A of the Act against Invest Corp India available at https://www.cci.gov.in/combination/orders-section43a_44)

Q.28 In case of fund management structure, for the purpose of Section 5 of the Act, should De-Minimis exemption, assets and turnover of controlled portfolio entities, and for the purpose of identification of horizontal overlaps, vertical interfaces and complementary activities, supplies of goods and services by the fund or their portfolio entities, always be attributed to the manager of the fund and person controlling such manager?

Ans. Generally, in case of fund management structures, the manager is responsible for the operation and management of these structures. The fund manager has the authority to conduct the day-to-day affairs of the funds and take decisions in relation to investments, including the time; target; value, scope and quantum of investment; and exit. The fund manager also exercises rights/abilities possessed by these funds in their portfolio entities.

However, by agreement or otherwise, if trustee, unit holders or any other person acquires from, or share with, the rights or abilities possessed by the fund manager, then:

Such acquisition or sharing of rights or abilities possessed by the fund manager shall amount to an acquisition in terms of Section 2(a) of the Act;

For the purpose of Section 5 of the Act and De-Minimis exemption, assets and turnover of controlled portfolio entities of the fund shall also be attributed to such trustee, unit holders or any such other person;

For the purpose of identification of horizontal overlaps, vertical interfaces and complementary activities, supplies of goods and services by the fund or their portfolio entities shall also be attributed to such trustee, unit holders or any such other person.

Q.29 Do the financials of an enterprise need not be considered for the purpose of Section 5 of the Act, De-Minimis exemption, etc., merely because applicable accounting standards do not require the consolidation of financials of such entity?

Ans. The testing of the thresholds prescribed under Section 5 of the Act is not dependent upon the consolidation of financial statements under the accounting standards. This position is not limited to acquisition by funds, but applies to any acquisition, merger and amalgamation.

(For reference, please see order dated 17th December 2021 issued under Section 43A of the Act against Invest Corp India available at https://www.cci.gov.in/combination/orders-section43a_44)

Q.30 Where an acquirer holds partial ownership/control in an enterprise and enters or proposes to enter another acquisition, merger or amalgamation, should only a proportionate share in the financials of such partially owned/controlled be considered for assessing the financial thresholds prescribed under Section 5 of the Act for the envisaged acquisition, merger or amalgamation?

Ans. Section 5 of the Act does not operate on the basis of proportionality. Even if an enterprise acquires/has material influence (which is the starting threshold of control) over another entity, the whole of the financials of the target enterprise would be taken into consideration for the purpose of Section 5 of the Act. Thus, if control is established, the complete financials of the fund/target would be attributed to the control holder.

(For reference, please see order dated 17th December 2021 issued under Section 43A of the Act against Invest Corp India available at https://www.cci.gov.in/combination/orders-section43a_44)

Exemptions and Schedule I of the Combination Regulations

Q.31 Is there any provision in the Act for granting exemption from its applicability?

Ans. Yes, Section 54 of the Act enables the Central Government to provide exemption from the application of the Act or any provision thereof. This power can be exercised by the Central Government to provide exemption to any enterprise which performs a sovereign function on behalf of the Central Government or a State Government; or any class of enterprises if such exemption is necessary in the interest of security of the State or public interest; or any practice or agreement arising out of and in accordance with any obligation assumed by India under any treaty, agreement or convention with any other country or countries.

Where exemption is provided to any enterprise which performs a sovereign function on behalf of the Central Government or a State Government and enterprise is engaged in any activity including the

activity relatable to the sovereign functions of the Government, the Central Government may grant exemption only in respect of activity relatable to the sovereign functions.

The power to grant exemption can be exercised by the Central Government by issuing a notification in official gazette. The exemption notification may also specify the period for which the exemption has been granted.

Q.32 Are any of the exemptions granted by the Central Government in exercise of power conferred under Section 54 of the Act in relation combinations in vogue?

Ans. Yes, the following exemptions are in vogue in relation to the provision regarding combinations:

- *Exemption from giving notice to the Commission within 30 days:*

The Central Government, *vide* notification no. S.O. 2039(E) published on 29th June 2017 in public interest has exempted every person or enterprise who is a party to a combination from giving notice within 30 days mentioned in Section 6(2) of the Act, subject to the provisions of Section 6(2A) and Section 43A of the Act.

This exemption was provided for a period of five years from the date of publication of the notification in the Official Gazette. However, the Central Government, *vide* notification no. S.O. 1193(E) published on 16th March 2022 has extended the exemption up to ten years.

- *De-Minimis exemption:*

The Central Government, *vide* notification no. S.O. 988(E) published on 29th March 2017 in public interest has provided exemption from the provisions of Section 5 of the Act, where the value of assets in India or turnover in India of the Target does not exceed the amount prescribed in the notification.

This exemption was provided for a period of five years from the date of publication of the notification in the Official Gazette. However, the Central Government, *vide* notification no. S.O. 1192(E) published on 16th March 2022 has extended the exemption up to ten years.

- *Exemption to banking companies:*

The Central Government, *vide* notification no. S.O. 1034(E) published on 11th March 2022 in public interest has exempted a banking company in respect of which the Central Government has issued a notification under Section 45 of the Banking Regulation Act, 1949, from

application of the provisions of Sections 5 and 6 of the Act for a period of five years from the date of publication of the notification in the Official Gazette.

- *Exemption to regional rural banks:*

The Central Government, *vide* notification no. S.O. 2561(E) published on 10th August 2017 in public interest has exempted regional rural banks in respect of which the Central Government has issued a notification under Section 23A(1) of the Regional Rural Banks Act, 1976, from the application of provisions of Sections 5 and 6 of the Act for a period of five years from the date of publication of the notification in the Official Gazette.

- *Exemption to nationalised bank:*

The Central Government, *vide* notification no. S.O. 2828(E) published on 30th August 2017 in public interest has exempted all cases of reconstitution, transfer of the whole or any part thereof and amalgamation of nationalised banks under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 and the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980, from the application of provisions of Sections 5 and 6 of the Act for a period of ten years from the date of publication of the notification in the Official Gazette.

- *Exemption to central public sector enterprises operating in the oil and gas sectors:*

The Central Government, *vide* notification no. S.O. 3714(E) published on 22nd November 2017 in public interest has exempted all cases of combinations under Section 5 of the Act involving central public sector enterprises operating in the oil and gas sectors under the Petroleum Act, 1934 and the rules made thereunder or under the Oilfields (Regulation and Development) Act, 1948 and the rules made thereunder, along with their wholly or partly owned subsidiaries operating in the oil and gas sectors, from the application of the provisions of Sections 5 and 6 of the Act for a period of five years from the date of publication of the notification in the Official Gazette.

Copy of the notification is available at <https://cci.gov.in/combination/legal-framework/notifications>

Q.33 Notification no. S.O. 2039(E) published on 29th June 2017 provides exemption to every person or enterprise who is a party to a combination from giving notice within 30 days as mentioned in Section 6(2) of the Act. Does this mean that, during the exemption period, there is no obligation to give a notice to the Commission under Section 6(2) of the Act?

Ans. Section 6(2) of the Act provides that any person or enterprise that proposes to enter into a combination shall give notice to the Commission within 30 days of approval of the proposal relating to merger or amalgamation or execution of any agreement or other document for an acquisition, as the case may be. Thus, Section 6(2), *inter alia*, provides for the two obligations, viz., (i) notice is required to be given in relation to a proposed combination; and (ii) such notice is required to be given within 30 days. Notification no. S.O. 2039(E) published on 29th June 2017 provides exemption only in relation to the second obligation. Thus, the notification does not do away with the requirement of giving notice to the Commission, but rather, only does away with the timeline of 30 days for giving notice to the Commission. In effect, a combination has to be notified to the Commission and approval obtained before the same is given effect to.

Q.34 Pursuant to notification no. S.O. 2039(E) published on 29th June 2017, the timeline of 30 days for giving notice to the Commission has been exempted. Does this mean that, before giving notice to the Commission or before issue of the order by the Commission by Section 31 of the Act, the combination can be consummated in part or full?

Ans. The exemption provided by notification no. S.O. 2039(E) published on 29th June 2017 is, *inter alia*, subject to the provisions of Section 43A of the said Act.

Section 43A of the Act provides that, if any person or enterprise who fails to give notice to the Commission under Section 6(2), the Commission shall impose on such person or enterprise a penalty which may extend to one per cent (1%) of the total turnover or assets, whichever is higher, of such a combination. Section 6(2) of the Act, *inter alia*, provides that any person or enterprise who or which *proposes to enter into a combination* shall give notice to the Commission. Thus, Section 6(2) imposes an obligation to give notice to the Commission when the combination has not been consummated. Thus, if any combination is consummated, in part or full, before giving notice to the Commission, provisions of Section 43A would get attracted.

Q.35 What are the conditions to be satisfied for availing the benefit of De-Minimis exemption?

Ans. As of now, the benefit of De-Minimis exemption is available where the value of assets being acquired, taken control of, merged or amalgamated [i.e., target] is not more than INR 350 crores in India or turnover is not more than INR 1,000 crores in India.

Q.36 If an M&A qualifying as a combination in terms of provisions of Section 5 of the Act also requires approval of other authority(ies) in India under provision of any other law for the time being in force, would the requirement of obtaining approval of other authority(ies) mean that the requirement of giving notice to the Commission in terms of Section 6(2) of the Act does not apply?

Ans. Section 60 of the Act provides that the provisions of the Act shall have an effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Further, Section 62 of the Act provides that the provisions of the Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force. Thus, the obligation to give notice to the Commission under Section 6(2) in relation to a combination does not get discharged merely on the grounds that the M&A also requires approval of any other authority(ies) in India.

In the matters relating to acquisition of 51% of equity share capital in each of Western Electricity Supply Company of Orissa Limited (WESCO), Southern Electricity Supply Utility of Odisha Limited (SOUTHCO) and Central Electricity Supply Utility of Orissa Limited (CESU) from the Grid Corporation of Odisha Limited (GRIDCO) by the Tata Power Company Limited (TPCL), notice to the Commission was given after consummation of the combinations. TPCL, *inter alia*, submitted that the concerned transactions were different from a typical commercial transaction, as these were end-to-end regulated by the Odisha Electricity Regulatory Commission (OERC). The OERC had the exclusive jurisdiction to regulate combinations in the electricity sector in view of Section 60 of the Electricity Act, 2003, which empowers OERC to issue appropriate directions if, in its opinion, such acquisition/combination will cause an adverse effect on competition in the electricity market in India. Further, Sections 173, 174 and 175 of the Electricity Act, 2003, *inter alia*, state that the provisions of the Electricity Act, 2003 shall have an overriding effect.

The Commission, in its orders dated 17th March 2022 issued under Section 43A of the Act, *inter alia*, observed that, keeping in view the object and purpose underlying both the enactments, viz., the Electricity Act, 2003 and the Competition Act, 2002, the sectoral regulator cannot be said to have exclusive jurisdiction in relation to combinations in the electricity sector and that the notice ought to have been filed with the Commission under Section 6(2) of the Act.

The details of these cases are available at <https://www.cci.gov.in/combination/orders-section-43a-44>

Q.37 Are there any categories of combinations in relation to notice under Section 6(2) of the Act that need not normally be filed?

Ans. Regulation 4 of the Combination Regulations provides that categories of combinations mentioned in Schedule I of the Combination Regulations are ordinarily not likely to cause an appreciable adverse effect on competition in India and notice under Section 6(2) of the Act need not normally be filed in relation thereto.

Q.38 What are the categories of the combinations contained in Schedule I of Combination Regulations?

Ans. The categories of the combinations contained in Schedule I of the Combination Regulations are as under:

- (1) An acquisition of shares or voting rights, referred to in sub-clause (i) or sub-clause (ii) of clause (a) of Section 5 of the Act, solely as an investment or in the ordinary course of business insofar as the total shares or voting rights held by the acquirer directly or indirectly does not entitle the acquirer to hold twenty-five per cent (25%) or more of the total shares or voting rights of the company of which shares or voting rights are being acquired directly or indirectly or in accordance with the execution of any document, including a shareholders' agreement or articles of association, not leading to acquisition of control of the enterprise whose shares or voting rights are being acquired.

Explanation: The acquisition of less than ten per cent (10%) of the total shares or voting rights of an enterprise shall be treated solely as an investment:

Provided that, in relation to the said acquisition:

- (A) the acquirer has the ability to exercise only such rights that are exercisable by the ordinary shareholders of the enterprise whose shares or voting rights are being acquired to the extent of their respective shareholding; and
 - (B) the acquirer is not a member of the board of directors of the enterprise whose shares or voting rights are being acquired and does not have a right or intention to nominate a director on the board of directors of the enterprise whose shares or voting rights are being acquired and does not intend to participate in the affairs or management of the enterprise whose shares or voting rights are being acquired.
- (1A) An acquisition of additional shares or voting rights of an enterprise by the acquirer or its group, where the acquirer or its group, prior to acquisition, already holds twenty-five per cent (25%) or

more shares or voting rights of the enterprise but does not hold fifty per cent (50%) or more of the shares or voting rights of the enterprise, either prior to or after such acquisition:

Provided that such acquisition does not result in acquisition of sole or joint control of such enterprise by the acquirer or its group.

- (2) An acquisition of shares or voting rights, referred to in sub-clause (i) or sub-clause (ii) of clause (a) of Section 5 of the Act, where the acquirer, prior to acquisition, has fifty percent (50%) or more shares or voting rights in the enterprise whose shares or voting rights are being acquired, except in cases where the transaction results in transfer from joint control to sole control.
- (3) An acquisition of assets, referred to in sub-clause (i) or sub-clause (ii) of clause (a) of Section 5 of the Act, not directly related to the business activity of the party acquiring the asset or made solely as an investment or in the ordinary course of business, not leading to control of the enterprise whose assets are being acquired, except where the assets being acquired represent substantial business operations in a particular location or for a particular product or service of the enterprise, of which assets are being acquired, irrespective of whether such assets are organized as a separate legal entity or not.
- (4) An amended or renewed tender offer where a notice to the Commission has been filed by the party making the offer prior to such amendment or renewal of the offer:

Provided that the compliance with Regulation 16 relating to intimation of any change is duly made.
- (5) An acquisition of stock-in-trade, raw materials, stores and spares, trade receivables and other similar current assets in the ordinary course of business.
- (6) An acquisition of shares or voting rights pursuant to a bonus issue or stock splits or consolidation of face value of shares or buyback of shares or subscription to rights issue of shares, not leading to acquisition of control.
- (7) Any acquisition of shares or voting rights by a person acting as a securities underwriter or a registered stockbroker of a stock exchange on behalf of its clients in the ordinary course of its business and in the process of underwriting or stock broking, as the case may be.
- (8) An acquisition of shares or voting rights or assets by one person or enterprise of another person or enterprise within the same group, except in cases where the acquired enterprise is jointly controlled by enterprises that are not part of the same group.
- (9) A merger or amalgamation of two enterprises, where one of the enterprises has more than fifty per

cent (50%) shares or voting rights of the other enterprise, and/or merger or amalgamation of enterprises in which more than fifty per cent (50%) shares or voting rights in each of such enterprises are held by enterprise(s) within the same group:

Provided that the transaction does not result in transfer from joint control to sole control.

- (10) Acquisition of shares, control, voting rights or assets by a purchaser approved by the Commission pursuant to and in accordance with its order under Section 31 of the Act.

Q.39 Explanation to Item 1 of Schedule I of the Combination Regulations provides that acquisition of less than ten per cent (10%) of the total shares or voting rights of an enterprise shall be treated solely as an investment if certain conditions are satisfied. Does this mean that the acquisition of shares above 10% of the share capital of the target cannot qualify solely as an investment?

Ans. Explanation to Item I provides that the acquisition of less than 10% of the total shares or voting rights of an enterprise shall be treated solely as an investment if certain conditions are satisfied. However, it does not presume the opposite, i.e., the explanation does not presume that acquisition in excess of 10% of share capital of any target cannot qualify solely as an investment. Whether or not an acquisition of shares in excess of 10% of share capital is solely as an investment would, *inter alia*, depend on the facts of the case, status and *inter-se* relation of the parties and shareholders.

Q.40 One of the conditions for availing the benefit of Item 1 of Schedule I of the Combination Regulations is that the acquisition should be solely an investment. Which type of acquisitions can be considered solely as investments?

Ans. One of the conditions for availing the benefit of Item 1 of Schedule I of the Combination Regulations is that the acquisition should be solely an investment. The benefit of Item 1 is normally available to the acquisition that is for ordinary shareholding. The provision distinguishes this from the acquisition of strategic shareholding. The provision is clearly not applicable to instances of acquisition of control.

Proviso (A) to the explanation of Item 1 provides that, to get the benefit of Item 1 read with its explanation, the acquirer should only have the ability to exercise rights that are exercisable by the ordinary shareholder of the enterprise whose shares or voting rights are being acquired to the extent of their respective shareholding. The Item 1 provision does not differentiate between various rights, viz., investor protection rights, informational rights, etc.

Proviso (B) to the explanation of Item 1 provides that there should be no representation of the

acquirer on the board of directors of the enterprise whose shares or voting rights are being acquired. This is meant to ensure that an acquirer with minority shareholding does not become privy to competitively sensitive information, access or awareness of which may be sufficient to lead to coordinated outcomes.

Proviso (B) to the explanation of Item 1 further provides that there should not be a right or intention to nominate a director on the board of directors of the enterprise whose shares or voting rights are being acquired, and there should not be any intention on the part of the acquirer to participate in the affairs or management of the enterprise whose shares or voting rights are being acquired.

In a matter relating to the acquisition of shareholding in Clariant AG (Target), SABIC International Holdings B.V. (SABIC), consummated the acquisition and executed an agreement on the same date. Notice under Section 6(2) of the Act was not given to the Commission prior to consummation of the acquisition. The agreement granted certain rights to it, including the right to nominate members on the board of the target. Such rights are not available to ordinary shareholders. Considering the facts of the case, it was clear that SABIC intended to participate in the affairs and management of the target without ruling out the possibility that there may have been an understanding with the target in that regard. However, even if SABIC's contentions were to be believed, that there was no such intention or understanding, it was held that it was incumbent on SABIC to approach the Commission before the implementation of the agreement which allowed SABIC to participate in the management or affairs of the target. Based on the analysis of the response of the acquirer, the Commission was of the opinion that, in consummating the acquisition without the approval of the same by the Commission, the acquirer failed to file a notice for the acquisition in accordance with Section 6(2) of the Act.

For further details, please refer to the order dated 15th July 2012, issued by the Commission under Section 43A of the Act against SABIC International Holdings B.V., available at https://cci.gov.in/combination/orders-section43a_44

Q.41 One of the conditions for availing the benefit of Item 1 of the Schedule I of the Combination Regulations is that the transaction should be in the ordinary course of business. In respect of the acquisition of shares, which type of transactions can be considered transactions in the ordinary course of business?

Ans. Transactions in the ordinary course of sale and purchase of securities are done solely with the intent to benefit from the price movement of securities. Further, acquisition in the ordinary course of

business of sale and purchase of securities neither entails the right nor the ability of any of the parties to the acquisition (including their affiliates) to participate in the decision-making process of another party(ies) to the acquisition (including its affiliates) nor result in access to commercially sensitive information nor envisages any other agreement or understanding having commercial significance such as agreements or understanding related to strategic course of business, or any domains of operation, e.g., procurement, production, marketing, distribution, technology, research and development, sales, etc.

(Refer order dated 23rd March 2022 issued under Section 31(1) of the Act in Combination Registration No. C-2022/02/905 at <https://www.cci.gov.in/combination/order/details/order/274/0>)

Q.42 Benefit of Item 2 of Schedule I of the Combination Regulations is available to the acquirer if, prior to the acquisition, it has 50% or more shares or voting rights in the enterprise whose shares or voting rights are being acquired, except in cases where the transaction results in transfer from joint control to sole control. What is understood by transfer of joint control to sole control?

Ans. Ability to exert material influence over management or affairs or strategic commercial decisions (MASC) of an enterprise may be inferred from statutory rights attached to the shareholding and/or understanding between shareholders and/or the subject enterprise such as representation on board, veto rights, and consultation right. In competition law, control is considered a matter of degree.

In this regard, voting rights in excess of 25%, confers joint control on the holder in relation to matters requiring special resolutions. However, as soon as the voting rights of a person move to 75% or more, such person acquires sole control over the matters requiring special resolution. Therefore, benefit of Item 2 of Schedule I of the Combination Regulations would not be available in such cases, irrespective of the fact that other shareholder(s) continue(s) to have certain contractual right conferring ability to materially influence the MASC of the company.

Further, in cases where, pursuant to understanding between shareholders and/or the subject enterprise, prior to the transaction, certain MASC of an enterprise is subject to joint control, but one of the shareholders exerting joint control loses its ability to materially influence, the other joint controller gains sole control over the MASC of the company. In such cases, benefit of Item 2 of Schedule I of the Combination Regulations would not be available. This would hold good irrespective of the fact that the person that gained sole control through understanding already held more than 75% shareholding and thus, sole control over special resolutions.

- i. *Some of the various real-world scenario where prior and post transaction shareholding remains more than 50% but up to 75% are as follows:*
 - a) Person A holds more than 50% but not more than 75% shareholding in Company X and Person B holds remaining shareholding. Person B does not hold any rights not available to an ordinary shareholder of a company (Special Rights). Person B sells part of its shareholding in Company X to Person A, such that, post the transaction, Person A continues to hold more than 50% but not more than 75% shareholding in Company X, and Person B holds the remaining shareholding. Post transaction, Person B continues without any Special Rights.
 - b) Person A holds more than 50% but not more than 75% shareholding in Company X and Person B holds the remaining shareholding. In addition to its ability to block special resolution, Person B also holds Special Rights that are enough to exert material influence over the MASC of Company X. Person B sells part of its shareholding in Company X to Person A, such that post the transaction, Person A still holds more than 50% but not more than 75% shareholding in Company X and Person B continues to hold the remaining shareholding. Post transaction, the ability of Person B to materially influence the MASC of the Company X remains unchanged.
- ii. *Some of the various real-world scenario where pre-transaction shareholding is more than 50% but upto 75% and post - transaction shareholding exceeds 75% are as follows:*
 - c) Person A holds more than 50% but not more than 75% shareholding in Company X and Person B holds the remaining shareholding. Person B does not hold any Special Rights. Person B sells part of its shareholding in Company X to Person A, such that, post the transaction, Person A holds more than 75% shareholding in Company X and Person B holds the remaining shareholding. Post transaction, Person B does not hold any Special Rights.
 - d) Person A holds more than 50% but not more than 75% shareholding in Company X and Person B holds the remaining shareholding. Person B does not hold any Special Rights. Person B sells the whole of its shareholding in Company X to Person A.
 - e) Person A holds more than 50% but not more than 75% shareholding in Company X and Person B holds the remaining shareholding. In addition to its ability to block special resolution, Person B also holds Special Rights that are enough to exert material influence over the MASC of Company X. Person B sells part of its shareholding in Company X to

Person A, such that, post the transaction, Person A holds more than 75% shareholding in Company X and Person B continues to hold the remaining shareholding. Post transaction, the ability of Person B to materially influence the MASC of the Company X either remains unchanged, with an exception that it can now it not block special resolutions, or gets diluted.

f) Person A holds more than 50% but not more than 75% shareholding in Company X and Person B holds the remaining shareholding. In addition to its ability to block special resolutions, Person B also holds Special Rights that are enough to exert material influence over the MASC of Company X. Person B sells the whole of its shareholding in Company X to Person A;

iii. *Some of the various real-world scenario where pre- and post- transaction shareholding exceeds 75%:*

g) Person A holds more than 75% shareholding in the Company X and Person B holds the remaining shareholding. Person B holds Special Rights that are enough to exert material influence over the MASC of Company X. Person B sells part of its shareholding in Company X to Person A, such that post the transaction, Person A holds more than 75% but not 100% shareholding in Company X and Person B continues to hold the remaining shareholding. Post transaction, ability of Person B to materially influence the MASC of the Company X, through the Special Rights, remains unchanged.

h) Person A holds more than 75% shareholding in Company X and Person B hold the remaining shareholding. Person B holds Special Rights that are enough to exert material influence over the MASC of Company X. Person B sells part of its shareholding in Company X to Person A, such that, post the transaction, Person A holds more than 75% but not 100% shareholding and Person B holds the remaining shareholding. Post transaction, Person B does not hold any Special Rights.

i) Person A holds more than 75% shareholding in Company X and Person B holds the remaining shareholding. Person B holds Special Rights that are enough to exert material influence over the MASC of Company X. Person B sells the whole of its shareholding in Company X to Person A.

For the cases referred to in (c), (d), (e), and (f) above the benefit of Item 2 of Schedule I of the Combination Regulations would not be available to Person A as it gains sole control over matters requiring special resolutions.

for cases referred to in (h) and (i) above the benefit of Item 2 of the Schedule I of the Combination Regulations would not be available to Person A as it gains sole control pursuant to cessation of contractual arrangement.

For cases referred to in (a), (b) and (g), above Person A does not gain sole control either on matters requiring special resolutions or otherwise. Thus, benefit of Item 2 of Schedule I of the Combination Regulations can be availed for these cases.

Above are a few examples of the transaction scenario. Other scenarios may also result in joint to sole control and accordingly, may not qualify for the benefit of Item 2 of Schedule I of the Combination Regulations.

Q.43 Benefit of Item 2 of Schedule I of the Combination Regulations is available to the acquirer if, prior to acquisition, it has 50% or more shares or voting rights in the enterprise whose shares or voting rights are being acquired, except in cases where the transaction results in transfer from joint control to sole control. Is the benefit of Item 2 available where a person does not acquire share or voting right but otherwise gains control?

Ans. In terms of Section 6(2) of the Act read with Section 5 and 2(a) of the Act, *inter alia*, acquisition of shares, voting rights, or control is notifiable to the Commission if any of the financial thresholds prescribed under Section 5 of the Act are met and the transaction is not eligible for benefit of any of the exemption notifications issued under Section 54 of the Act. Further, Regulation 4 read with Schedule I of the Combination Regulations provides that, in relation to certain transactions notice under Section 6(2) of the Act need not normally be filed.

The benefit of Item 2 of Schedule I of the Combination Regulations, subject to conditions specified therein, is available only in relation to the acquisition of shares and voting rights but not in relation to acquisition of control.

Some of the real-world scenarios, where, prior to the transaction, a company is under joint control of two shareholder and pursuant to the transaction, one of the shareholders loses its/their ability to exert material influence, through contractual rights, over Company X, are as follows:

- i. Person A holds more than 50% shareholding in Company X and Person B holds the remaining shareholding. Person B also holds rights not available to an ordinary shareholder of a company (Special Rights) that are enough to exert material influence over the MASC of Company X. Person B sells whole of its shareholding in Company X to persons other than Person A in a manner that such acquirer(s) does not hold any Special Rights.

- ii. Person A holds more than 50% but not more than 75% shareholding in Company X and Person B holds the remaining shareholding. In addition to its ability to block special resolution, Person B also holds Special Rights that are enough to exert material influence over the MASC of Company X. Person A and Person B by mutual agreement agrees to terminate the Special Rights of Person B.
- iii. Person A holds more than 75% shareholding in Company X and Person B holds the remaining shareholding. Person B holds the Special Rights that are enough to exert material influence over the MASC of Company X. Person A and Person B by mutual agreement agree to terminate the rights of Person B that are not available to an ordinary shareholder of a company.

In relation to Person A, the transaction is concerned with the acquisition of control by it. As mentioned above, the benefit of Item 2 is not available in respect of acquisition of control, and the question of applicability of Item 2 to the transaction, in relation to acquisition of control by Person A does not arise. If any of the financial thresholds prescribed under Section 5 of the Act are met and the requirement of notification is not otherwise dispensed with, transaction of acquisition of control by Person A would require notice to the Commission in terms of Section 6(2) of the Act.

Q.44 One of the conditions for availing the benefit of Item 3 and Item 5 of Schedule I is that acquisition of assets, stock-in-trade, raw materials, stores and spares, trade receivables and other similar current assets, as the case may be, should be in the ordinary course of business. In this context, what is meant by ordinary course of business?

Ans. The phrase “ordinary course of business” refers to frequent, routine and usual transactions, and therefore, the phrase corresponds to revenue transactions for competition law purposes.

Please refer to order dated 11th May 2018 issued under Section 43A of the Act in relation to Combination Registration No. C-2017/05/509

Q.45 The condition for availing benefit of Item 6 of the Schedule I is that acquisition of shares or voting rights pursuant to a bonus issue or stock splits or consolidation of face value of shares or buyback of shares or subscription to rights issue of shares (say Corporate Action) should not lead to acquisition of control. Would the benefit of this Item be available in the following circumstances?

- Pre-corporate action shares or voting rights percentage is less than 25% and post-corporate action is likely to exceed 25%;
- Pre-corporate action shares or voting rights percentage is less than 50% and post-corporate action is likely to exceed 50%; or

- **Pre-corporate action shares or voting rights percentage is less than 75% and post-corporate action is likely to exceed 75%.**

Ans. One of the conditions for availing the benefit of the Item 6 of Schedule I of the Combination Regulations is that the corporate action should not lead to acquisition of control. Whether any of the corporate actions lead to acquisition of control or not, *inter alia*, depends on the facts of the case, status and *inter-se* relation of the parties and shareholders.

Shareholding/voting rights in excess of 25% confer joint control on the holder in relation to matters requiring special resolutions. Similarly, shareholding/voting rights in excess of 50% confer sole control on the holder in relation to matters requiring ordinary resolutions.

Thus, irrespective of the other facts of the case, when shareholding/voting rights move from less than 25% to more than 25%, the share/voting right holder acquires joint control over the matters requiring special resolution. Similarly, when shareholding/voting rights move from less than 75% to more than 75%, share/voting right holder acquires sole control over the matters requiring special resolution. Further, when shareholding/voting rights move from less than 50% to more than 50%, share/voting right holder acquires sole control over the matters requiring ordinary resolution.

Thus, in the circumstances illustrated in the query, the benefit of Item 6 would not be available. These are the illustrations and, in any circumstance, if a corporate action leads to acquisition of control, benefit of Item 6 of Schedule I of the Combination Regulations would not be available.

Q.46 A condition for availing the benefit of Item 6 of Schedule I of the Combination Regulations is that acquisition of shares or voting rights should be pursuant to a bonus issue or stock splits or consolidation of face value of shares or buyback of shares or subscription to rights issue of shares (say corporate action) and it should not lead to acquisition of control. Would the benefit of this Item be available in the following circumstances?

- **A person gaining control (Gainer of Control) because it is not participating in buyback;**
- **Gainer of Control is gaining control because it is not participating in buyback to the full extent of his entitlement;**
- **Gainer of Control is gaining control because it is subscribing to the rights issue in excess of its entitlement;**
- **Gainer of Control is gaining control because it got the right entitlement renounced in its favour;**

- **Gainer of Control is gaining control because other right entitlement holders are not subscribing to the right issue.**

Ans. One of the conditions for availing the benefit of Item 6 of Schedule I of the Combination Regulations is that the corporate action does not lead to acquisition of control. For the purpose of Item 6 of Schedule I of the Combination Regulations, the essential test is whether or not the corporate action is leading to acquisition of control. It is immaterial whose action or inaction in the corporate action would lead to acquisition of control. Thus, in the circumstances illustrated in the query, the benefit of Item 6 would not be available. These are the illustrations and, in any circumstance, if a corporate action leads to acquisition of control, the benefit of Item 6 of Schedule I of the Combination Regulations would not be available.

Pre-Filing Consultations

Q.47 Who can approach CCI for pre-filing consultation prior to making a filing?

Ans. Parties intending to file a notice with CCI can approach it for an informal pre-filing consultation in case of any doubts/queries. However, the advice given during a pre-filing consultation is non-binding and may not necessarily reflect the views of CCI.

Q.48 How can parties seek certain clarifications on the filing procedures interpretation of the Act and Combination Regulations? What is the procedure for requesting a pre-filing consultation?

Ans. A request for pre-filing consultation on substantive issues should be made by the parties intending to file a notice at the earliest and at least 10 days before the intended date of filing to allow time for allocating a case team for the pre-filing consultation.

A pre-filing consultation is also provided on interpretational issues relating to Sections 5 and 6 of the Act and the Combination Regulations. In such cases, a request for pre-filing consultations must be sent at least 5–7 days before the meeting is requested to be scheduled.

The email seeking pre-filing consultation may be sent to the following email id: cci-consult@nic.in.

Q.49 What details/documents need to be provided for seeking pre-filing consultation on interpretational issues?

Ans. The parties may request a pre-filing consultation on interpretational issues. They are required to provide complete and sufficient details regarding facts of the case, including the sector, relevant

market, legal provisions, decisional practices of CCI and of other jurisdictions (if available and material to the facts of the case).

Q.50 Can the parties also discuss a draft Form I/Form II with CCI before making a filing?

Ans. A copy of the draft application comprising Form I/II, as the case may be, and supporting documents can be forwarded for discussion with the request for scheduling a pre-filing consultation. However, a request for such pre-filing consultation should be made by the parties at least 10 days before the intended date of filing to allow time for allocating a case team and enabling the case team to go through the draft form.

Q.51 I require certain clarifications on the filing procedures/interpretation of the Act and Combination Regulations. Can I contact CCI before making a filing? Can I also discuss a draft Form I with CCI before making a filing?

Ans. Parties intending to file a notice with the CCI are encouraged to approach CCI for an informal pre-filing consultation in case of any doubts/queries. However, the advice given during pre-filing consultation is non-binding and may not necessarily reflect the views of CCI.

A request for pre-filing consultation on substantive issues should be made by the parties intending to file a notice at the earliest and at least 10 days before the intended date of filing to allow time for allocating a case team for the pre-filing consultation. A copy of the draft application comprising Form I/II/III, as the case may be, and supporting documents should be forwarded along with the request for scheduling a pre-filing consultation. For further details, please refer to the information on pre-filing consultation on the CCI website.

In addition to the above, CCI also provides pre-filing consultations on interpretational issues relating to Sections 5 and 6 of the Act and the Combination Regulations. In such cases, a request for pre-filing consultations must be sent at least 5–7 days before the meeting is requested to be scheduled. Complete and sufficient details regarding facts of the case, including the sector/relevant market, legal provisions, decisional practices of the CCI and of other jurisdictions (if available and material to the facts of the case) should be provided in the request for pre-filing consultations on interpretational issues.

The email seeking pre-filing consultation may be sent to the following email id: cci-consult@nic.in with the subject “Request for pre-filing consultation on interpretational issues”.

Filing Notices of Combinations

Q.52 How do parties to the combination decide which form needs to be filed for notifying to CCI?

Ans. Notifying parties have the discretion to file a notice either using Form I or Form II, as set out in Schedule II of the Combination Regulations. However, in the following cases, a notice should preferably be given in Form II:

- (a) the parties to the combination are engaged in production, supply, distribution, storage, sale or trade of similar or identical or substitutable goods or provision of similar or identical or substitutable services, and the combined market share of the parties to the combination after such combination is more than fifteen per cent (15%) in the relevant market;
- (b) the parties to the combination are engaged at different stages or levels of the production chain in different markets in respect of production, supply, distribution, storage, sale or trade in goods or provision of services, and their individual or combined market share is more than twenty-five per cent (25%) in the relevant market.

Note: The parties to the combination shall give notice in Form I or Form II, as the case may be, in accordance with the notes to Form I/Form II issued by the Commission and published on its official website from time to time.

In cases where the parties to the combination have filed a notice in Form I and the Commission requires information in Form II to form its *prima facie* opinion as to whether the combination is likely to cause or has caused an AAEC within the relevant market, the Commission shall direct the parties to the combination to file a notice in Form II.

Q.53 What documents should be filed along with the notice in Form I?

Ans. Generally, the following documents need to be filed along with the notice (in Form I):

- (a) Certified copy of the authorization in favour of a person signing the notice in the prescribed format.
- (b) Copy of proof of payment of filing fee.
- (c) Copies of approval of the proposal relating to merger/amalgamation and/or agreement/other document executed in relation to the acquisition or acquiring of control.
- (d) An authorization letter in favour of a person located in India who is authorised to receive communication(s) on behalf of the notifying party(ies) from CCI.
- (e) Copies of the most recent annual report and accounts of the parties to the combination.

Where, the previous year's annual report is not available, copies of the most recent annual reports and accounts of the parties to the combination shall be submitted.

- (f) In accordance with sub-regulation (1A) of Regulation 13 of the Combination Regulations, the summary to be filed with the Commission must not contain any confidential information and must not be less than 1000 words. The said summary will be published on the website of the Commission.
- (g) An affidavit in support of the request for confidentiality as specified in Regulation 42 of the Competition Commission of India (General) Regulations, 2009.

However, it may be noted that this is not an exhaustive list of documents to be filed with the notice and, depending on the nature of the combination, other documents may also be required to be filed.

In Amazon.com NV Investment Holdings LLC [C-2019/09/688 available at <https://www.cci.gov.in/combination/order/details/order/1138/0>], it was observed “... *Item 8.8 of Form I, which requires a notifying party to furnish documents, material (including reports, studies, plan, latest version of other documents), etc. considered by and/or presented to the board of directors and/or key managerial person of the parties to the combination and/or their relevant group entities, in relation to the proposed combination. The purpose of this requirement is to understand the commercial and economic contours of the given combination in addition to the legal contracts submitted as trigger documents against Item 8.7 of Form I. True and complete disclosure against Item 8.8 enables the Commission to determine the appropriate framework for competition assessment of the Combination*”...

For reference, please visit the link for “Form and Notes to Form”:<https://cci.gov.in/combination/combination/filing-of-combination-notice/form>

Q.54 Is there any fee to be paid for filing the notice?

Ans. As of now, the parties who wish to file Form I shall pay Rs. 20,00,000 and parties who wish to file a notice in Form II shall pay Rs. 65,00,000. This may be revised by a notification.

In cases where the parties have filed the notice in Form I and the Commission directs the parties to file notice in Form II, a residual fee is chargeable [For further reference, please see Regulation 5(5) of the CCI (Procedure in regard to the transaction of Business relating to Combinations) Regulations, 2011].

Q.55 How does a Party notify a combination to CCI?

Ans. The notice in respect of a combination is required to be filed in original, along with one (1) copy, and

an electronic copy thereof, with the registry of CCI. The notice should be complete in all respects (must be filed in required format) and accompanied by filing fees. (See Regulation 13 of the Combination Regulations).

In the event that the parties are claiming confidentiality on certain information provided by them in the notice, a public version of the notice, and an electronic version thereof, is also required to be filed (See proviso to Regulation 13(1) of the Combination Regulations).

The notice must also be accompanied by a summary of the combination, as required in terms of Regulations 13(1A) of the Combination Regulations, along with separate electronic copies thereof.

Detailed instructions on how to file a notice are set out in Notes to Form I and Regulations 5, 9, 10, 11, 12, 13 and 30 of the Combination Regulations.

Q.56 Does CCI provide the facility of e-filing?

Ans. The e-filing facility is currently under process. However, to facilitate the notifying parties, filing through email is permitted, and parties are required to provide the soft copy of Notice and Annexures as an attachment or a link in the email. Further details may be obtained from the Combination Registry, CCI.

Q.57 If a combination involves a series of steps, can I file a single notice?

Ans. Where the ultimate intended effect of a business transaction is achieved by way of a series of steps or smaller individual transactions which are inter-connected, one or more of which may amount to a combination, a single notice covering all these transactions shall be filed by the parties to the combination.

Please note that the requirement of filing a notice shall be determined with respect to the substance of the transaction, and any structure of the transaction(s) comprising a combination that has the effect of avoiding notice in respect of the whole or a part of the combination shall be disregarded.

Some of the decisions in which CCI has treated multiple transactions as inter-connected steps of a single combination are: Sapphire Food/Yum! India, Case No.C-2015/07/290, Koneru Holdings Limited; Case No.C-2015/10/329, Baramati Speciality Steels/Kalyani Investment/KSL Holdings; and Case No.C-2015/10/334, Blue Star Limited/Blue Star Infotech Limited/Blue Star Infotech Business Intelligence and Analytics Private Limited.

The Hon'ble Supreme Court in CCI v. Thomas Cook (India) Ltd. & Anr. [Civil Appeal No. 13578 of 2015, dated April 17th, 2018] reiterated the Commission's findings that the scheme, market

purchases and other transaction were inter-connected transactions or steps with the same ultimate effect, therefore being a part of the single composite combination. Further, the Hon'ble Court held that the combination comprised an entire series of transactions/steps and not a single transaction on a standalone basis. The landmark judgment also stated that market purchases were not independent and could not be used in isolation for the purpose of any exemption.

In Amazon.com NV Investment Holdings LLC [C-2019/09/688, available at <https://www.cci.gov.in/combination/order/details/order/1138/0>], it was observed “... Regulation 9(4) of the Combination Regulations states that “Where the ultimate intended effect of a business transaction is achieved by way of a series of steps or smaller individual transactions which are inter-connected, one or more of which may amount to a combination, a single notice, covering all these transactions, shall be filed by the parties to the combination”. This provision makes it mandatory for parties to the combination to give one notice covering all inter-connected steps of their proposed combination. Further, Regulation 9(5) of the Combination Regulations stipulates that “The requirement of filing notice under regulation 5 of these regulations shall be determined with respect to the substance of the transaction and any structure of the transaction(s), comprising a combination, that has the effect of avoiding notice in respect of the whole or a part of the combination shall be disregarded...”

Q.58 Which parties are required to file the notice?

Ans. In case of acquisitions, the acquirer is required to file the notice. In case of M&As, all the parties to the combination are required to jointly file the notice.

(See Regulations 9(1), 9(2) and 9(3) of the Combination Regulations as well as Regulation 11 of CCI General Regulations, 2009)

Q.59 Does CCI grant confidentiality over information that has been submitted in a notice? How is a confidentiality request made over documents filed with CCI?

Ans. In line with best practices, CCI treats all documents as confidential in terms of and subject to the provisions of Section 57 of the Act. In this regard, the notifying parties are required to submit a request for confidential treatment to the information filed by them. Such request can only be made if making public of such information or parts thereof will result in disclosure of trade secrets or destruction or appreciable diminution of the commercial value of any information or can be reasonably expected to cause serious injury.

[See Regulations 13(1) and 30 of the Combination Regulations; Regulations 35 and 42 of the General Regulations and Section 57 of the Act].

Q.60 After we have filed a notice with CCI, can we inform CCI of any changes in the information provided in the notice?

Ans. Yes, the parties are required to inform CCI of any change in the information provided in the notice to CCI at the earliest during the CCI's assessment of the combination. If the change in the information provided in the notice is likely to significantly affect the factors for the determination of AAEC or CCI's assessment of the combination, CCI may treat the notice filed as not valid. CCI may do so after providing the parties with an opportunity of being heard.

Please note that no additional fee shall be payable if a notice is filed again by the parties within a period of 30 days [See Regulation 16 of the Combination Regulations].

Q.61 Is there any provision which allows parties to withdraw the notice filed with the Commission and refile the same? Will the filing fees be adjusted in case of re-filing?

Ans. Yes, Combination Regulation 16A allows withdrawal and re-filing of notices with the Commission at any time prior to the issuance of notice under sub-section (1) of Section 29. On the request of the parties to the combination, the Commission may allow withdrawal and re-filing of the notice.

Further, in case of withdrawal of notice, the fee already paid in respect of such notice shall be adjusted against the fee payable in respect of new notice given by the parties, provided the new notice is given within three months from the date of withdrawal.

[See Regulation 16A of the Combination Regulations].

Q.62 How would my notice get invalidated? What are the grounds for invalidation of notice?

Ans. A notice filed shall not be valid unless it is complete and in conformity with the Combination Regulations, 2011 [See Combination Regulation 14(1)]. The Commission may, after recording reasons, invalidate a notice filed under Regulation 5 or Regulation 8 of Combination Regulations when it comes to the knowledge of the Commission that such notice is not valid as per Regulation 14(1).

Further, where the information or document(s) contained in the notice or any response filed is incomplete in any respect, the parties to the combination may be asked to remove such defect(s) or

furnish the required information including document(s).

Please note that the time taken by the parties in removing such defects or furnishing the required information including document(s) shall be excluded from the period provided in sub-section (11) of Section 31 of the Act and sub-regulation (1) of Regulation 19 of these regulations.

Also, in case the parties fail to remove the defects or fail to furnish the required information, including documents(s), within the time specified, the notice filed shall not be treated as a valid notice. However, CCI may provide parties with an opportunity of being heard before it decides to invalidate a notice [See Regulation 14(2A) of the Combination Regulations] [See Regulation 14 of Combination Regulations, 2011].

In Amazon.com NV Investment Holdings LLC [C-2019/09/688, available at <https://www.cci.gov.in/combination/order/details/order/1138/0>], it was observed “...If a party conceals/suppresses and/or misrepresents to the Commission the scope and purpose of the Combination and obtains approval, the same would effectively amount to approval/consent having been obtained by way of fraud. Such breach of trust of the Commission, established under the Act for the benevolent purpose of promoting and sustaining competition in markets in India, manifests a deliberate disregard to the trust based regulatory mechanism provided under the Act...”

Q.63 When does CCI terminate the combination investigation procedure?

Ans. The proceedings under the Competition Act, 2002 relating to the combinations shall be terminated upon:

- (a) receiving an intimation from the person(s) or enterprise(s) who filed the notice to the effect that the proposed combination will not take effect;
- (b) passing of an order by the Commission under Section 31 of the Act.

Please note that, if the approval of the Commission is conditional upon the parties to the combination carrying out modifications to the combination, the proceedings shall terminate upon acceptance of the compliance report by the Commission.

[See Regulation 17 of Combination Regulations, 2011]

Review of Combinations

Q.64 What are the timelines for review of combinations by CCI?

Ans. In terms of sub-section (11) of Section 31 of the Act, the Commission is required to pass an order or

issue direction in accordance with the provisions of Section 31 of the Act within 210 days from the date of the notice given to the Commission under sub-section (2) of Section 6 of the Act. Further, in accordance with sub-regulation (1) of Regulation 19 of the Combination Regulations, the Commission shall form its *prima facie* opinion as to whether a combination is likely to cause or has caused an appreciable adverse effect on competition within the relevant market in India within 30 working days of the receipt of such notice.

Q.65 What is the procedure for review of combinations by CCI?

Ans. The review of combinations by CCI can broadly be divided into two phases: Phase I investigation and Phase II investigation.

Q.66 What is Phase I investigation?

Ans. Under Regulation 19(1) of the Combination Regulations, CCI is required to form its *prima facie* opinion as to whether a combination is likely to cause or has caused an AAEC within the relevant market in India within 30 working days of receipt of complete and valid notice. This is Phase I investigation.

Q.67 Does CCI seek information from parties to the combination or third parties during Phase I investigation?

Ans. Yes. During the Phase I investigation, CCI can seek additional information from the parties. Where the information or document(s) contained in the notice is incomplete in any respect, the parties to the combination may be asked to remove such defect(s) or furnish the required information, including document(s) under Regulation 14(3) of the Combination Regulations.

Under Regulation 19(3) of the Combination Regulations, CCI can also seek information from third parties during a Phase I investigation for which it has an additional 15 working days' time limit. Phase I investigation terminates either with CCI approving a combination (with or without modifications) or with the CCI forming a *prima facie* view that a combination is likely to have AAEC in a relevant market.

The time taken by the parties to remove defect(s)/furnish the required information and also time taken by the third parties to provide information shall be excluded from the time limit of 30 working days provided in Regulation 19(1) of the Combination regulations to form *prima facie* opinion.

Q.68 When does Phase II investigation begin?

Ans. If the *prima facie* opinion of CCI is that a combination is likely to cause an AAEC or has caused an AAEC within the relevant market in India, CCI issues a show cause notice under Section 29(1) of the Act to the parties to combination, calling upon them to respond within 30 days of the receipt of the notice as to why investigation in respect of such combination should not be conducted.

If the response of the parties is found to be satisfactory and CCI decides that there is no AAEC, CCI shall, by an order under Section 31(1) of the Act, approve the combination.

If the response of the parties is not found to be satisfactory, CCI can initiate an in-depth investigation into the combination, i.e., a Phase II investigation.

Q.69 What are the steps of the Phase II investigation or what is the procedure for investigation of combination under Section 29(1) of the Competition Act, 2002?

Ans. If the response of the parties to the show cause notice issued under Section 29(1) of the Act is not found to be satisfactory and CCI is of the *prima facie* opinion that the combination has or is likely to have an AAEC, it shall, within seven working days from the date of receipt of the response of the parties to the combination, direct the parties to the said combination under Section 29(3) of the Act to publish details of the combination within ten working days of such direction for bringing the combination to the knowledge or information of the public and persons affected or likely to be affected by such combination. The details of combination shall be published by the parties in Form IV, as specified in Schedule II to Combination Regulations.

Under Section 29(3) of the Act, CCI may also invite any person who is affected or is likely to be affected by the combination to file written objections within 15 working days from the date on which details of the combination were published. CCI may, within 15 working days of receiving written objections from affected parties, seek further information from parties to the combination.

The Commission may, within 15 working days from the expiry of the period specified in Section 29(3), call for such additional or other information as it may deem fit from the parties to the said combination under Section 29(4) of the Act.

The additional or other information called for by the Commission shall be furnished by the parties referred to in Section 29(4) within 15 days from the expiry of the period specified in Section 29(4) of the Act [Section 29(5)].

After receipt of all information and within a period of 45 working days from the expiry of the period specified in Section 29(5), the Commission shall proceed to deal with the case in accordance with the provisions contained in Section 31 [Section 29(6)].

Q.70 Can CCI call for a report of the Director General (DG) in combination cases?

Ans. Yes, CCI can call for a report from the DG in combination cases. After receipt of the response to the show cause notice from the parties to the combination under Section 29(1) of the Act, CCI may decide to call for a report from the DG under Section 29 (1A) of the Act within the time specified by CCI.

However, CCI has not called for a report of the DG in any combination case till date.

Q.71 What is the procedure for publication where the Commission directs the parties to the combination to publish details of the combination?

Ans. Where the Commission under sub-section (2) of Section 29 of the Act directs the parties to the combination to publish the details of the combination, the parties shall publish the details of combination in Form IV, as specified in Schedule II to these regulations within ten working days of the date of such direction. However, before such publication, the parties shall submit the details of combination to be published to CCI and CCI may host the same on its official website. The details of the combination shall also be hosted by the parties on the websites of their respective enterprises not later than the specified time. Further, the parties shall publish the details of the combination in all-India editions of four leading daily newspapers, including at least two business newspapers within the specified time. The parties to the combination shall submit copies of publication to the Secretary not later than the fifteenth day of the direction of the Commission for publication of the details of the combination.

Q.72 What are the factors of assessment considered by CCI in combination cases?

Ans. As provided under Section 20(4) of the Act, for the assessment of AAEC in case of a combination, CCI considers all or any of the following factors:

- (a) actual and potential level of competition through imports in the market;
- (b) extent of barriers to entry into the market;
- (c) level of combination 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.

Q.73 What economic tools are used for the assessment of combinations and for defining relevant markets?

Ans. The Commission employs a wide spectrum of economic tools and techniques, including both quantitative and qualitative analysis. Quantitative analysis most often applied in the assessment of combinations are concentration ratios and price analysis in order to check the likely effects on competition in the markets. The commonly used economic tools are:

- (a) Concentration Ratio (CR): The ratio of the combined market shares of a given number of firms to the whole market size. The most commonly used Concentration Ratio are CR3 and CR4, i.e., the concentration ratio of the top 3–4 firms, respectively.
- (b) Herfindahl-Hirschman Index (HHI): Calculated by squaring the market share of each firm competing in the market, then summing the resulting numbers. For example, in a market consisting of three firms with a market share of 60%, 30% and 10%, HHI will be 4600 (3600+900+100). HHI approaches zero when there are a large number of firms in the market. HHI reaches its maximum of 10,000 (square of 100% market share) when there is a single firm in the market.

Apart from market share, HHI and concentration ratio, the Commission uses various tools and techniques such as diversion ratios, churn rates, etc., wherever warranted. Data and information are collected from the parties and, in some cases, the Commission also seeks information from customers, competitors and other third parties. Data is also sometimes collected by conducting surveys.

In some cases, techniques such as the Elzinga–Hogarty test have been used for delineating the relevant geographic market. Such tests have been applied by CCI in a manner that ensures that the market definition thus arrived at reflects the most relevant constraints on the behaviour of the parties.

In combination case C-2020/03/734, CCI used the Elzinga–Hogarty (LIFO-LOFI) test involving analyses of consumption and production data of cement in different states starting with states where the combining parties are present, then extending to other neighbouring states, in order to delineate relevant geographic markets.

Q.74 Are the parties to the combination required to provide relevant market definition for the purposes of assessment of combination?

Ans. In order to assist the Commission in its assessment of combinations, the parties to the combination are required to identify all plausible alternative definition(s) of relevant product and geographic market, including the narrowest possible definition, with appropriate reasoning/justification in the notice. Both acceptance and rejection of a particular plausible alternative definition shall be substantiated with appropriate material. The parties may be guided by the earlier decisions of the Commission or of other jurisdictions. However, these decisions need not limit the delineation of any plausible alternative market definition.

Q.75 What are the factors to be considered by the parties to the combination for determining relevant market?

Ans. As per Section 19(5) of the Act, for determining whether a market constitutes a “relevant market” for the purposes of this Act, CCI shall have due regard to the “relevant geographic market” and “relevant product market”.

CCI, while determining the “relevant geographic market”, will have due regard to all or any of the following factors:

- (a) regulatory trade barriers;
- (b) local specification requirements;
- (c) national procurement policies;
- (d) adequate distribution facilities;
- (e) transport costs;
- (f) language;
- (g) consumer preferences;

- (h) need for secure or regular supplies or rapid after-sales services [Section 19(6)].

Further, CCI shall, while determining the “relevant product market”, have due regard to all or any of the following factors, namely:

- (a) physical characteristics or end-use of goods;
- (b) price of goods or service;
- (c) consumer preferences;
- (d) exclusion of in-house production;
- (e) existence of specialized producers;
- (f) classification of industrial products [Section 19(7)].

Q.76 What order(s) can the Commission pass upon assessment of a combination?

Ans. Upon assessment of a combination based on the factors stated above, CCI may:

- (a) approve the combination;
- (b) block the combination; or
- (c) approve the combination subject to certain conditions, which are generally referred to as modifications. The modifications are merger remedies that are intended to remedy the potential anti-competitive outcome of the proposed merger.

Q.77 Where can CCI approve a combination with modifications?

Ans. Where the Commission is of the opinion that a combination has or is likely to have AAEC but such adverse effect can be eliminated by suitable modifications to such combination, it may propose appropriate modifications to the combination to the parties to such combination. The different types of modifications or remedies suggested by the Commission are discussed ahead.

Q.78 What is the procedure for approval of combinations with modification?

Ans. Where the parties to the combination offer modification to address the *prima facie* concerns in the notice before the Commission forms an opinion under Section 29(1) of the Act or along with their response to the notice issued under Section 29(1) of the Act in the Phase I investigation itself, the Commission may approve the proposed combination under Section 31(1) of the Act on that basis.

However, once CCI has initiated its Phase II review, the parties can suggest amendments to the modification, which can only be proposed by CCI. If CCI accepts the counter-proposal, it approves the combination. However, if it does not accept the counter-proposal, the parties are given time to accept the modifications proposed by CCI.

If the parties then fail to accept the modifications proposed by CCI, the combination is deemed to have an AAEC and is treated as being blocked by the Commission. However, there have been no such cases to date.

Q.79 When does the Commission appoint a monitoring agency?

Ans. Where the Commission is of the opinion that the implementation of the modifications to the proposed combination needs supervision, it may appoint a monitoring agency to oversee such implementation on such terms and conditions as may be determined by the Commission. The agencies appointed as monitoring agency are independent of the parties to the combination having no conflicts of interest. Such independent agencies may include an accounting firm, management consultancy, law firm, any other professional organisation, or part thereof, or independent practitioners of repute. The monitoring agency generally has to submit periodic reports to CCI stating whether the parties to a merger or an acquisition have complied with the modifications directed by CCI. The appointed agent must report to CCI either annually or at regular periods specified by CCI. The payment to the appointed monitoring agency shall be made by the parties to the combination by depositing it with the Commission or as may be directed by the Commission. The compliance with modifications made during Phase II is usually monitored by a monitoring agency [For reference, please see Regulation 27 (Appointment of independent agencies to oversee modification) of the Combination Regulations].

Q.80 Does CCI accept voluntary modification before forming a *prima facie* opinion under Section 29(1) of the Act?

Ans. Yes, the parties can voluntarily propose modifications under Regulation 19(2) of the Combination Regulations. The said regulation provides that: “*Before the Commission forming an opinion under sub-section (1) of section 29 of the Act, the parties to the combination may offer modification to the combination and on that basis, the Commission may approve the proposed combination under sub-section (1) of section 31 of the Act*”.

Some of the cases in which the Commission has accepted voluntary modification and approved the combination on that basis are:

- (a) Hyundai Motor Company and Kia Motor Company (C-2019/09/682): The parties offered the voluntary commitment in terms of Regulation 19(2) of the Combination Regulations that the strategic collaboration between the acquirers and OLA would be on a non-exclusive basis. Further, the algorithm/programme of the marketplace of OLA would not: (i) give preference to the driver

solely based on the brand of the passenger vehicles manufactured by the acquirers; or (ii) discriminate against any driver based solely on the brand of the passenger vehicles manufactured by any other automobile manufacturer. Since the compliance of the modification was to be ensured by OLA, the Commission directed the acquirers to procure an affidavit from OLA to the effect that it would ensure compliance of the modifications. Based on this, the Commission approved the Proposed Combination under sub-section (1) of Section 31 of the Act.

- (b) Canary Investments Limited, Link Investment Trust II and Intas Pharmaceuticals Limited (C-2020/04/741): In order to address any concerns that may arise out of the Proposed Combination, the acquirers offered voluntary modification, whereby they undertook to (i) remove their director on the board of Mankind; (ii) restrict use of information relating to Intas, Curatio and Mankind; and (iii) not exercise veto rights in Mankind in relation to change in capital structure, M&As amendment to memorandum and articles of association and commencement of new business, with certain limited exemption to protect the extent of shareholding/investment of the acquirers. Considering the voluntary modification offered by the acquirers to be sufficient, the Commission approved the combinations under sub-section (1) of Section 31 of the Act.
- (c) TRIL Urban Transport Private Limited, Valkyrie Investment Pte. Ltd., Solis Capital (Singapore) Pte. Ltd. And GMR Airports Limited (C-2019/07/676): The acquirers gave voluntary modification under Regulation 19(2) of the Combination Regulations (“Voluntary Modification”) to alleviate any potential conflict of interest arising out of Tata Sons group acquiring stake in the target. The Commission noted that the Voluntary Modification would address any apprehensions that vertical integration between Tata Sons group and GMR group may foreclose downstream competitors, *inter alia*, airline companies. It also ensured that no airline gets preferential treatment in the allotment of slot(s). Further, the Voluntary Modification that “*Airport Concession Entities follow the principles of competition law including competition neutrality, level playing and field and fairness*” ensured that, based on the principle of competition neutrality, no preferential treatment shall be meted out to any airline company and/or other service providers required for the functioning of airlines. Based on the modification, the Commission approved the proposed combination under sub-section (1) of Section 31 of the Act.
- (d) Northern TK Venture Pte. Ltd. (C-2018/09/601): In this case, the acquirer (along with its group entities), JV partner, i.e., Apollo and the target were competitors in the overall field of healthcare, present throughout India and in many of the overlapping cities. To alleviate any potential concern that the said JV may provide a common platform for coordinated behaviour, the Acquirer submitted certain voluntary commitments, based on which the Commission approved the proposed combination.

The details of these and other cases on voluntary modification are available at the following link:
<https://www.cci.gov.in/combination/cases-approved-with-modification>

Q.81 Can the parties propose voluntary modification after the issue of show cause notice by the Commission under Section 29(1) of the Act?

Ans. Yes, the parties can voluntarily propose modifications under Regulation 25(1A) of the Combination Regulations. The said regulation provides that along with their response to the notice issued under sub-section (1) of Section 29 of the Act, the parties to the combination may offer modification to address the *prima facie* concerns in the said notice and, on that basis, the Commission may approve the proposed combination under sub-section (1) of Section 31 of the Act.

Some of the cases in which the Commission has accepted the voluntary modification and approved the combination on that basis are:

- (a) Outotec Oyj and Metso Oyj (C-2020/03/735): In order to address the competition concerns arising as a result of the proposed combination, the parties proposed voluntary remedies/modifications (VRP) under Regulation 25(1A) of the Combination Regulations. The modification essentially allowed the emergence of a new competitor. CCI noted that the VRP given by parties eliminates the overlap between the parties in the IOP segment in India and would effectively transfer Metso Minerals' Indian Straight Grate (SG) IOP capital equipment business to a suitable buyer, thereby preserving competition.
- (b) ZF Friedrichshafen AG and WABCO Holdings Inc. (C-2019/11/703): In this case, ZF had offered behavioural remedies of the nature of firewall at the board of Brakes India and boards of WABCO for a period of five years so that they work independently. However, the Commission felt that the nature and extent of such behavioural remedies offered by ZF were not sufficient to address the competition concerns. Accordingly, a show cause notice (SCN) was issued in terms of Section 29(1) of the Act asking why a detailed investigation should not be conducted. In response to the SCN, the acquirer submitted voluntary modifications under Regulation 25(1A) of the Combination Regulations, wherein it proposed to divest its 49% shareholding, and all rights and arrangements thereof, in Brakes India. The Commission accepted the voluntary modifications proposed by the parties and approved the proposed combination.

The details of these and other cases of voluntary modification are available at the following link:
<https://www.cci.gov.in/combination/cases-approved-with-modification>

Insolvency and Bankruptcy Code (IBC)

Q.82 Are IBC transactions notifiable to the Commission? How can it be ascertained whether an IBC transaction is notifiable?

Ans. There are no separate requirements to assess the notifiability of IBC cases. The criteria for defining combinations under the Competition Act, 2002 is the same, i.e., meeting of thresholds, etc., for all types of transactions, be they IBC or non-IBC.

Q.83 Can an IBC transaction be filed through the Green Channel route? If yes, what is the process of filing IBC transactions through the Green Channel?

Ans. Yes, an IBC transaction can be filed under Green Channel provided it meets the criteria for notifiability of transaction under Green Channel, i.e., there are no overlaps between the activities of the parties to the combination. For further details on how to assess the notifiability of transaction under Green Channel, please see the FAQs in Chapter XII.

Q.84 If, there is more than one applicant in the IBC process of a company, do all applicants need to apply for approval under the Competition Act, 2002?

Ans. The notifiability under the Competition Act of any transaction depends on the nature of the transaction. It may happen that, in one IBC transaction, there may be more than one applicant. However, whether each of them needs to notify their transaction to the Commission will depend on the facts of the particular transaction undertaken by the applicant and whether each applicant has to assess notifiability separately for their respective transaction.

If, on assessment by the applicant, the notification requirements are triggered for an IBC transaction, each of the applicants/acquirers may be required to file the notice for the same target.

Q.85 When does a party need to approach the Commission for filing notice under the CIRP process of IBC?

Ans. As per the existing legal framework, Section 31(4) of the IBC provides that *“Provided that where the resolution plan contains a provision for combination, as referred to in section 5 of the Competition Act, 2002, the resolution applicant shall obtain the approval of the Competition Commission of India under that Act prior to the approval of such resolution plan by the committee of creditors”*.

As per the above provision, approval of CCI is required prior to approval of COC under the IBC process, in case the IBC transaction is a combination under the Competition Act, 2002.

Q.86 CCI has reviewed various M&As which were notified pursuant to IBC proceedings.

Ans. We understand that IBC-related proceedings are time bound, and therefore, CCI is conscious of clearing these transactions in a timely manner. Moreover, CCI's limited mandate in IBC-related transactions involves only opinion regarding whether or not the notified transaction results in an appreciable AAEC. Further, for determining whether a combination would have an effect or is likely to have an appreciable effect on competition in the relevant market, the Commission gives due regard to factors under Section 20(4) of the Competition Act. One such factor that the Commission may consider is 20(4)(k), possibility of a failing business. This factor, among others, may be given due consideration while assessing a combination under the Competition Act, 2002.

Q.87 How many IBC cases have been filed so far and in which sectors? What are some of the cases associated with IBC?

Ans. As on 18th July 2022, 34 IBC cases were received in sectors ranging from cement, steel, textiles, telecom, etc. A brief summary of some cases are given below:

- (a) In C-2019/03/648 [available at <https://www.cci.gov.in/search-filter-details/1985>], the Commission received a notice jointly filed by Reliance Industries Limited and JM Financial Asset Reconstruction Company for the acquisition of up to 75% of the total issued and paid-up equity share capital of Alok Industries Limited, which was undergoing insolvency resolution proceedings initiated under the Insolvency and Bankruptcy Code, 2016. The parties had submitted that Alok Industries is a failing firm and that the acquisition will allow for a failing firm to remain operational. It was noted that the products of the parties exhibited overlap in the manufacture and sale of following products: (i) polyesters, (ii) fabrics, (iii) ready-made garments and (iv) home textiles. In the overall market for polyester in India, the combined market share of the parties was less than 30% in terms of installed capacity and in terms of sale, with an increment of less than 5%. In the sub-segments, either the combined market shares of the parties was less than 40% or the increment was less than 10%. On an overall basis and in all the narrow overlapping segments for other overlapping products (fabric for men's shirting, suiting and trouser and RMG for men's shirts, trousers and t-shirts and home textiles for towels and bed linens), the individual as well as combined share of the parties was insignificant and there were a number of other players present. The Commission observed that the proposed combination was not likely to cause AAEC in any of the possible alternative relevant markets. Accordingly, the Commission approved the proposed combination.
- (b) In C-2019/10/693 [available at <https://www.cci.gov.in/search-filter-details/1419>], the Commission received a notice jointly filed by Haldiram Snacks Private Limited (Haldiram) and Pioneer Securities Private Limited (Pioneer) in relation to acquisition of 100% of the total issued and paid-

up equity share capital of Kwality Limited (Kwality), which was undergoing insolvency resolution proceedings initiated under the Insolvency and Bankruptcy Code, 2016. Haldiram is a private limited company and the flagship company of Haldiram Group. It is engaged in the business of manufacturing and marketing a variety of snack products as well as exporting its products to various countries. Pioneer, a private limited company incorporated in India, renders services pertaining to stock and non-banking financial services. Kwality, a listed company incorporated in India, processes and sells milk and related dairy products. During the course of competition assessment, it was observed that parties to the combination are not engaged in any business activities relating to similar or identical or substitutable products or services. As far as vertical relationship was concerned, Haldiram procured ghee (a dairy product) from Kwality, and the vertical relationship was not likely to cause any change in the competition dynamics. Accordingly, the Commission concluded that the proposed combination is not likely to have an appreciable adverse effect on competition in India.

- (c) In C-2021/02/815 [available at <https://www.cci.gov.in/search-filter-details/648>], a notice was given by Piramal Capital & Housing Finance Limited. The Commission approved the proposed acquisition of (i) Dewan Housing Finance Corporation Limited (DHFL/'Target') and (ii) Pramerica Life Insurance Limited (PLIL) by the Piramal Capital & Housing Finance Limited (PCHFL/'Acquirer') under the Corporate Insolvency Resolution Process (CIRP) initiated under the IBC against DHFL. PCHFL was a wholly owned subsidiary of Piramal Enterprises Limited (PEL/'Acquirer Group'). PEL, a public company listed on the National Stock Exchange of India Limited and BSE Limited, belongs to Piramal Group and has presence in financial services and pharmaceutical sectors. Its financial services business provides both wholesale and retail funding opportunities across sectors. DHFL, a public limited company, is a deposit-taking non-banking financial company (NBFC) and an HFC registered with NHB. The parties exhibited horizontal overlaps in the broad markets for (i) loans and lending services in India and (ii) provision of life insurance services in India. Within the broad market for loans and lending services, the parties exhibited overlaps in the segments of retail loans and wholesale loans. In the segment of retail loans, parties exhibited overlaps in (i) housing loans, (ii) LAP and (iii) SMEs loans. In the segment of wholesale loans, parties exhibited overlaps in (i) project finance/commercial real estate financing and (ii) corporate loans. There were no existing vertical overlaps; however, two potential vertical relationships between the activities of parties were identified: (i) Acquirer's presence (through IRARC) in the provision of asset reconstruction services (upstream market) and Target's presence in the provision of loans/lending services (downstream market) and (ii) Acquirer's presence (through its investment in Shriram Group's entities) in the provision of insurance services (upstream market) and Target's presence in the distribution and solicitation of life and general

insurance products (downstream market). It was observed that the combined market share of the Acquirer/Acquirer Group and DHFL in all the segments/sub-segments (except project finance) was in the range of [0–5]% and the incremental market share was insignificant. In the sub-segment of project finance, the combined market share was in the range of [–10]% and the incremental market share was in the range of [0–5]%. Further, the combined and incremental market share of the parties in the market for the provision of life insurance services in India was insignificant. Since the proposed combination was not likely to have an appreciable adverse effect on competition in India, the Commission approved the same under sub-section (1) of Section 31 of the Act.

Standstill Obligations

Q.88 What are standstill obligations?

Ans. The combination regulation regime in India is mandatory and suspensory. Section 6(2) of the Act imposes a standstill obligation on parties, i.e., parties must not give effect to the combination or any part thereof, before an order under Section 31 of the Act has been passed by CCI or until expiry of 210 days from the date of giving notice to CCI, whichever is earlier.

Q.89 What is the purpose and objective of standstill obligations?

Ans. Section 6(2A) of the Act, relating to standstill obligations, imposes a restriction upon the parties from consummating the proposed combination (even part-consummation is not allowed).

“The basic objective of standstill obligations contained in Section 6(2A) of the Act is to ensure that the parties to a combination transaction compete as they were competing before the initiation of combination process till the time the transaction is reviewed for any appreciable adverse effect on competition (“AAEC”) and approved by the Commission. In other words, the standstill obligations essentially require that the parties carry on with their ordinary course activities completely independent of each other and to the fact of the combination transaction. The rationale behind such obligations is that if the parties stop competing as they were competing before, the resulting adverse effect on competition in the interim period cannot be restored even if the Commission based on its review decides that the transaction is likely to result in AAEC and therefore does not approve the same or approve with modifications i.e., even if the transaction is not consummated or at least not consummated in the form as originally envisaged by the parties. Accordingly, the basis of examination of a gun jumping contravention is whether the parties have ceased to compete as they were competing earlier or whether they have ceased to act independently as regards their ordinary course activities pursuant to the combination transaction.” [For reference, please see order under

Section 43A in C-2017/10/531(Bharti Airtel Limited), available at <https://www.cci.gov.in/combination/order/details/order/439/0>].

Q.90 Considering that part-consummation of a combination may also contravene standstill obligations, does it imply that the parties cannot initiate any activity/action in relation to the proposed combination?

Ans. The objective of standstill obligations is to ensure that the parties remain independent competitors as they were before the proposed transaction, and accordingly, what constitutes contravention of standstill obligations is the activities, actions and arrangements, etc., which may reduce or have the potential to reduce the degree of independence or the incentives of the parties to compete as they were competing earlier.

The Commission, by way of its decisional practice, has considered the various aspects of a combination transaction that may require parallel activities on the part of the parties to a combination and highlighted specific instances of action and arrangements that may be considered contravention of standstill obligations.

Q.91 What are the specific instances of action and arrangements which have been considered contravention of standstill obligations by the Commission in its decisional practice so far?

Ans. (a) In Ultratech/Jaypee (C-2015/02/246), the Commission observed:

“the sequence of events and terms and conditions of the MOU and notes that the Board had approved [...]. These discussions of the Board make it amply clear that UltraTech would not have granted this corporate guarantee had it not been for the sole purposes of the Combination. Similarly, examination of disbursement pattern of the Short Term Loan makes the fact of this arrangement being pursuant to the Combination more clear [...]. Thus, it is clear that the extension of corporate guarantee by UltraTech and disbursement of “loan” by Axis Bank was connected and inextricably linked to the Combination, and therefore, extension of corporate guarantee by UltraTech does not seem to be an independent transaction but an integral part of the Combination.

After observing that the extension of corporate guarantee was not in ordinary course of business and in fact was pursuant to the Combination, the Commission notes the terms and conditions agreed by the Parties in the MOU as per which, [...]. This agreement brings out clearly that the corporate guarantee was, in substance, pre-payment of consideration. In this regard, the mere fact that UltraTech had not granted any advance or loan to JAL and arranged corporate guarantee also becomes inconsequential considering the minutes of the

First Meeting. [...] Accordingly, the decision to use the instrument of corporate guarantee was a tactical decision made by management of UltraTech”.

For reference, please see <https://www.cci.gov.in/combination/order/details/order/1101/0>.

- (b) In Hindustan Colas Private Limited (C-2015/08/299), the Commission observed:

“...that pre-payment of price (whether refundable/nonrefundable) may have a number of competition distorting effects viz., (i) it may lead to a strategic advantage for the Acquirer; (ii) it may reduce the incentive and will of 'target' to compete; and (iii) it may become a reason/basis to access the confidential information of the 'target'. On an overall basis, it may be said that pre-payment of consideration may have the impact of creating a tacit collusion which may cause an adverse effect on competition even before consummation of the combination. Thus, the Commission is of the opinion that what is important is pre-payment of consideration and solely the fact of the same being refundable or otherwise is not relevant...”

For reference, please see <https://www.cci.gov.in/combination/order/details/order/1135/0>.

- (c) In Bharti Airtel/Tata (C-2017/10/53), the Commission observed:

“that as per Clause [...] of the Implementation Agreement, the Parties have agreed that [...]. This arrangement provides for a potential mechanism to exercise operational control on Tata CMB from the Agreed Date itself considering that cash is a flow variable which needs to be managed prospectively and cannot be managed retrospectively and any leakages etc. thereof during the interim period cannot be managed after consummation of the Combination...”

The ER Clause is clearly in the nature of an anteriority clause as it envisages [...] from a date prior to the approval of the said Transaction by the Commission. Further, as detailed in Clause [...] of the Implementation Agreement, Airtel is allowed to [...] which implies Airtel's direct interference in ordinary course activities of Tata CMB”.

For reference, please see <https://www.cci.gov.in/combination/order/details/order/439/0>.

- (d) In Adani Green Energy Limited (C-2021/05/837), the Commission observed:

“Having noted the inherence of the exchange of information, in broader terms, in the process of businesses combining from a business perspective, it is also important to note that the exchange of information between the parties at any stage before the transaction has been assessed and approved can also have the effect of leading a combination to “come into effect.” This may be true if, for any reason (legitimate business rationale or otherwise), the parties to a combination get involved in an exchange of commercially sensitive information...

Considering all the relevant aspects of the case, the Commission is of the opinion that the

contractual arrangements similar to the impugned Clause should be discouraged, and parties to a combination, in general, would also be well advised to ensure adherence to inherence/proportionality principle in the contractual terms and resulting actions/conduct. Wherever it is felt that certain restrictions are required to be imposed or certain information is required to be exchanged/discussed to ensure preservation of economic value of assets or any other such legitimate objective, the parties ought to strive to make the arrangement as objective and precise as possible to avoid any likelihood of inference on interference with ordinary course activities of the target or causing any competition distortions in contravention of standstill obligations. Likewise, wherever applicable, the safeguards should be commensurate with the scope and effect of the conduct/arrangement in letter and applied similarly in spirit”

For reference, please see https://cci.gov.in/combination/orders-section43a_44.

Q.92 What precautions do the parties need to keep in mind after notifying and before approval to adhere to standstill obligations?

Ans. Since the Indian combination regime is a suspensory one (i.e., the parties to a notifiable combination are not allowed to consummate the transaction in any manner before the Commission grants formal approval), any action in furtherance of the transaction, including sharing of commercially sensitive information before such approval is granted, is likely to be seen as an instance of violating standstill obligations and may attract penalties under the Act.

Given that most transactions, especially mergers/amalgamations, require a pre-transaction due diligence, as well as a certain level of post-signing integration planning, parties need to be extremely cautious that such actions are not seen violating standstill obligations under Section 6(2A).

To mitigate such risks, it is recommended that, while conducting due diligence/integration planning, parties constitute a limited team of individuals, preferably comprising members of the senior management, internal legal team as well as external legal counsel ('Clean Team'). Commercially sensitive information of the other party should only be accessible to such Clean Teams. The Clean Teams should not include personnel involved in pricing, marketing, sales, etc., in order to ensure that such personnel are not (consciously or unconsciously) influenced by any competitively sensitive information in the course of the day-to-day operations of the business (such as determining pricing, pricing strategy, sales quantity, marketing strategy, terms of consumer contracts, etc.)

Gun Jumping and Media Scanning

Q.93 What is gun jumping?

Ans. Gun jumping essentially means acting before the appropriate time and refers to situations where a party or parties to a combination consummate a transaction wholly or partly before CCI approves the transaction, thereby violating standstill obligations. The merger control regime in India is *ex-ante*. All combinations above a certain financial threshold are mandatorily required to be notified to the Commission and the combination cannot be consummated until approved by the Commission. Section 6(2) of the Act places the obligation on the parties to give notice to the Commission disclosing the details of the proposed combination.

Q.94 How does the Commission deal with cases where a party fails to notify the transaction to the Commission?

Ans. After identifying the transaction(s), in cases where incomplete information is available, the parties are directed to provide details under Section 36(4) of the Act in order to assess whether further proceeding is required under Section 20(1) and/or Section 43A of the Act in relation to such transaction(s).

If it *prima facie* appears that the transaction meets the thresholds under Section 5 of the Act and does not avail any exemption under the provisions of the Act or any benefit under Schedule I of the Combination Regulations, the parties are issued a show cause notice (SCN) under Section 43A of the Act read with Regulation 48 of the General Regulations.

Q.95 What is the proceeding under Section 43A of the Act?

Ans. If the Commission forms a *prima facie* opinion that a notifiable transaction was not notified to the Commission prior to consummation, the Commission issues an SCN under Section 43A of the Act read with Regulation 48 of General Regulations. The parties provide their written responses to the SCN and generally seek an opportunity to provide its oral submissions before the Commission. The Commission fixes a date of hearing of the parties for the same. After completion of the hearing, the Commission passes an appropriate order, including the decision on the matter of imposition of penalty, based on the facts and circumstances of the case. As a result of its media scanning exercise, the Commission has initiated inquires and passed various orders. For example, in:

- (i) Allcargo Logistics Limited/GATI Ltd.: The Commission observed that Allcargo Logistics

Limited acquired 46.86% equity in GATI Limited and did not notify the same. On completion of the abovementioned proceedings, the Commission imposed a penalty of INR 20 lakhs on the acquirer.

- (ii) Investcorp India Asset Managers Private Limited/IDFC Alternatives Limited: The Commission observed that Investcorp India Asset Managers Private Limited acquired the private equity and real estate investment management businesses of IDFC Alternatives Limited without notification to the Commission. On completion of the abovementioned proceedings, the Commission imposed a penalty of INR 20 lakhs on the acquirer.

Q.96 What is the minimum penalty and the maximum penalty that can be imposed by the Commission under Section 43A of the Act?

Ans. Under Section 43A of the Act, the penalty may extend to one per cent (1%) of the total turnover or the assets, whichever is higher, of such a combination. The Commission, *inter alia*, considers the mitigating and aggravating factors and decides the quantum of penalty. For reference, please see cases like DiasSys Diagnostics Systems GmbH, Germany –Order under Section 43 in C 2015/09/313, available at <https://www.cci.gov.in/combination/order/details/order/1112/0>, and Amazon.com NV Investment Holdings LLC – Order under Sections 43A, 44 and 45 of the Act in C 2019/09/688, available at <https://www.cci.gov.in/combination/order/details/order/1138/0>.

Section 44 and 45 of the Act, 2002

Q.97 What are the consequences of false statement, omission to state any material fact, etc., under the Act?

Ans. Section 44 of the Act prescribes a penalty of up to INR 1 crore for any party which either makes a false statement or omits to state any material fact. Similarly, Section 45 of the Act prescribes a penalty up to INR 1 crore on any person who makes any false statements or omits to state any material facts, knowing it to material or wilfully alters, suppresses or destroys any document which is required to be furnished. Sub-section (2) of Section 45 also additionally empowers CCI to pass “*such order as it deems fit*”.

The Competition Commission of India in the proceedings in Amazon.com NV Investment Holdings LLC [C-2019/09/688 available at <https://www.cci.gov.in/combination/order/details/order/1138/0>] under Sections 43A, 44 and 45 of the Competition Act, 2002, levied a penalty of INR 1 crore each under the provisions of Section 44 and Section 45 of Act on Amazon.com NV for suppressing the actual scope and purpose of the combination.

What is Green Channel Filing?

Q.98 What is Green Channel Filing?

Ans. Green Channel is an automatic system of approval for certain mergers, amalgamations and acquisitions (combinations) where there are no business overlaps of any kind, be it horizontal, vertical or complementary in nature, between the parties to combination. These combinations are perceived to be not likely to cause appreciable adverse effect on competition (AAEC) in India. The Green Channel was introduced by inserting a new Regulation 5A to the Combination Regulations *vide* an amendment dated 13th August 2019.

Q.99 What is the advantage of Green Channel Filing?

Ans. The provisions of the Competition Act, 2002 impose a standstill obligation on parties, i.e., parties must not give effect to the combination or any part thereof, before an order under Section 31 of the Act has been passed by CCI or until expiry of 210 days from the date of giving notice to CCI, whichever is earlier (See Section 6(2A) of the Act).

If a combination meets the requirements of Green Channel and the parties exercise the option to file the notice under Green Channel, then the notifying parties may give effect to the combination, i.e., consummate the combination, immediately upon filing of the form under Regulation 5A and receipt of the acknowledgement from the Commission, without waiting for the completion of the statutory standstill obligation of 210 days.

Q.100 Which combinations are eligible for Green Channel Filing?

Ans. Schedule III of the Combination Regulations prescribes the categories of combinations that can opt for Green Channel. Schedule III states as below:

“Considering all plausible alternative market definitions, the parties to the combination, their respective group entities and/or any entity in which they, directly or indirectly, hold shares and/or control:

- a. do not produce/provide similar or identical or substitutable product(s) or service(s);*
- b. are not engaged in any activity relating to production, supply, distribution, storage, sale and service or trade in product(s) or provision of service(s) which are at different stage or level of production chain; and*
- c. are not engaged in any activity relating to production, supply, distribution, storage, sale and service or trade in product(s) or provision of service(s) which are complementary to each other.*

Q.101 Is there are separate form for filing a notice under Green Channel?

Ans. There is no separate form for filing a notice under Green Channel. The same Form I that is specified to be filed under a normal filing can be used for Green Channel filing, along with a declaration (as prescribed in Schedule IV of amended regulations) that the resultant combination will not cause any appreciable adverse effect on competition. The declaration must substantiate that:

- (a) the proposed combination will not cause any horizontal, vertical or complementary overlaps;
- (b) there will not be any appreciable adverse effect on competition as a result of the successful execution of this transaction; and
- (c) the details provided in the application are not false or misleading and are true to the best of the parties' knowledge.

Q.102 Is there any additional fee for availing Green Channel Filing?

Ans. No. The filing is the same as that for filing through the normal route. The filing fee of INR 20,00,000 for Form I needs to be paid as prescribed in Regulation 11 of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011.

Q.103 What if the parties are unsure about whether a proposed combination is eligible for Green Channel?

Ans. Green Channel filing is a facilitative option and not a mandatory requirement. Thus, parties always have the option of filing through the normal route if they are unsure about the eligibility.

However, it is encouraged to avail the option of Green Channel filing whenever a proposed combination meets the requirements of the Green Channel. The parties can avail the facility of Pre-Filing Consultation (PFC) provided by the Commission at no additional cost and get a clarification about the eligibility of Green Channel for their respective proposed combination. The advice provided by the officers of the Commission during PFC is non-binding, and hence, the parties still have the option of whether to file the notice through the Green Channel or the normal route.

Q.104 How to avail the facility of PFC in case of Green Channel?

Ans. The parties to a proposed combination can avail the facility of PFC by sending the request for PFC

to the email cci-consult@nic.in, along with brief details of the combination to the email. A copy of the draft application comprising Form I, as the case may be, and supporting documents, may also be forwarded along with the request for scheduling a pre-filing consultation.

Q.105 What happens if a notice is filed under Green Channel and it is later found that it is not eligible for filing under Green Channel?

Ans. If CCI concludes that a transaction notified to it under the Green Channel did not, in fact, meet the Green Channel requirements, the notice and the deemed approval will be *void ab initio* and the combination would be dealt with “*in accordance with the provisions of the Act*”, as if the notice has not been filed. When parties consummate a combination before the statutory standstill period or the approval of CCI or without notifying CCI, such transactions would be subject to investigation for gun jumping with proceedings under Section 43A and Section 44 of the Competition Act, 2002.

Q.106 Is the option of filing under the Green Channel route normally availed by the business stakeholders?

Ans. There are a considerable number of combinations that are filing through the Green Channel route, and there need not be any apprehensions about Green Channel filing where the proposed combination is eligible for filing under Green Channel. As on end of FY 2022–23, almost 25% of combination notices filed with the Commission are filed under the Green Channel route. The apprehensions, if any, can always be clarified by opting for the Pre-Filing Consultation with officers of the Commission.

The summary of notices filed under the Green Channel route are available at the CCI website, at <https://www.cci.gov.in/combination/green-channel>.

Q.107 How many Green Channel cases have been filed so far?

Ans. CCI received the first green Channel combination filed under sub-section (2) of Section 6 of the Competition Act, 2002 (Act) read with regulations 5 and 5A of the Combination Regulations on 3rd October 2019. As on 20th July 2022, the total number of Green Channel notices received were 60, which accounted for about 25%.

List of Abbreviations

M&A	Merger, Amalgamation and Acquisition
Commission/CCI	Competition Commission of India
Act	The Competition Act, 2022
AAEC	Appreciable Adverse Effect on Competition
Target	Enterprise that is merging or amalgamating or whose shares, voting rights, or assets are acquired
INR	Indian Rupees
USD	US Dollar
US	The United States of America
>	More than
De-Minimis Exemption Notification	Notification no. S.O. 988(E) dated 27 th March 2017 issued by the Ministry of Corporate Affairs, Government of India read with notification no. S.O. 1192(E) dated 16 th March 2017 issued by the Ministry of Corporate Affairs, Government of India published on 29 th March 2017
Combination Regulations	CCI (Procedure in regard to the transaction of Business relating to Combinations) Regulations, 2011
General Regulations	The Competition Commission of India (General) Regulations, 2009
Combination	Such M&A that are required to be notified to the CCI, in terms of the Act and Combination Regulation, as amended

Advocacy Material by Competition Commission of India



Above Material is available at
www.cci.gov.in

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