

# Regulation of Combinations

## Lesson 8

### KEY CONCEPTS

- Competition Commission of India
- Combination
- Relevant Geographic Market
- Relevant Product Market

### Learning Objectives

#### To understand:

- Combination under Competition Law
- Competition Commission of India
- Classification of Combination
- Combination Regulations
- Appreciable Adverse Effect on Competition (AAEC)

### Lesson Outline

- Competition aspects of combinations
- Kind of combinations
- Combination thresholds
- Regulation of combinations
- Relevant market
- Filing Process
- Role of CCI
- Inquiry into combination by the Commission
- Orders of Commission
- Lesson Round-Up
- Glossary
- Test Yourself
- List of Further Readings

## REGULATORY FRAMEWORK

- The Competition Act, 2002
- The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011
- The Competition Commission of India (General) Regulations, 2009

## INTRODUCTION

The Sherman Anti-Trust Act of 1890 (Sherman Anti-Trust Act) can be said to be the origin of anti-trust/competition law. This legislation was the result of intense public opposition to the concentration of economic power in large corporations and in combinations of business concerns that had been taking place in the U.S. in the decades following the Civil War.

The Sherman Antitrust Act was the first measure enacted by the U.S. Congress. The Sherman Antitrust Act was based on the constitutional power of Congress to regulate interstate commerce. In 1914, US Congress passed two measures that provided additional support for the Sherman Antitrust Act. One was the Clayton Antitrust Act, which elaborated on the general provisions of the Sherman Act and specified a number of illegal practices that either contributed to or resulted from monopolization. It explicitly outlawed commercial practices such as price discrimination (i.e., charging different prices to different customers), the buying out of competitors and interlocking boards of directors. The other was the establishment of the Federal Trade Commission, an agency with the power to investigate possible violations of antitrust laws and to issue orders forbidding unfair competitive practices. Gradually, competition law came to be recognized as one of the key pillars of a market economy. This recognition led to enactment of competition law in many countries including developing countries.

## Limiting Competition

It would be wrong to conclude that mergers limit or restrict competition from the consumers' point of view. In mergers business enterprises achieve what could be termed as a buy-out of the competitor's market shares or stake. The purpose of such acquisition could be to consolidate or to eliminate the competition posed by the acquired enterprise. It does not mean new competitive forces cannot emerge or survive. Mergers may enable a dynamic functioning of the product / service market resulting in benefit to the customers. It is only natural for business enterprises and the people who drive such enterprises to look at opportunities for acquiring more and more market stake. Mergers therefore are tools in the hands of the entrepreneurial community to keep a watch on the competition and take appropriate action. Mergers are looked at as inorganic mechanisms for diversification and growth.

Following statutory provisions apply to mergers, amalgamations and acquisitions from competition law perspective:

- The Competition Act, 2002
- The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011
- The Competition Commission of India (General) Regulations, 2009
- Notifications issued by Competition Commission of India from time to time.

## COMPETITION ACT, 2002

At the behest of the Directive Principles of State Policy, the first Indian competition law was enacted in 1969 and was named the Monopolies and Restrictive Trade Practices Act, 1969 ("**MRTP Act**").

In the wake of economic reforms since 1991, i.e. the liberalization/privatization/globalization reforms, it was felt that the MRTP Act has become obsolete in the light of international economic developments which relate more particularly to competition laws and thus there was a need to shift the focus from curbing monopolies to promoting competition. Therefore, a 'High Level Committee on Competition Policy and Law' was constituted by the Central Government which submitted its Report on May 23, 2002. In accordance with the recommendations of this Committee, the Competition Act, 2002 was passed by both Houses of Parliament in 2002 and received the assent of President in January 2003. It provided for setting-up of a quasi-judicial body, i.e., the CCI, comprising of a Chairperson and two to ten other Members, to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets in India and for matters connected therewith or incidental thereto.

In exercise of these powers, the sections 3 and 4 were brought into force from 20th May 2009 and section 5 and 6 were brought into force with effect from 1st June 2011.

An Act to provide for, keeping in view of the economic development of the country, the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interest of consumers and to ensure freedom of trade carried on by other participants in market, in India, and for matters connected therewith or incidental thereto.

### Key Provisions

Key provisions of the Act are contained in section 3, 4, 5 and 6. Through these sections, the Act declares anti-competitive agreements as *void*; prohibits abuse of dominant position, and regulates large combinations.

Section 5 and 6 provides for regulation of the combinations beyond the prescribed threshold. A combination includes the acquisition of control, shares, voting rights, assets as well as the cases of merger or amalgamation. Section 6 provides that no person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be *void*.

### Competition Commission of India (CCI / Commission)

Section 7 of the Act provides for the establishment of the Competition Commission of India ("Commission"). The Commission is a statutory body, established under the Act with the legislative mandate inter alia to prevent practices having adverse effect on competition, to promote and sustain competition in the markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in the markets, in India. To perform the above-mentioned functions, under the scheme of the Act, the Commission is vested with inquisitorial, investigative, regulatory, adjudicatory and advisory jurisdiction. As such, the purpose of filing information before the Commission is only to set the ball rolling as per the provisions of the Act. The Commission works as the overarching supervisory and regulatory framework for competition related matters in India.

### National Company Law Appellate Tribunal (NCLAT)

The Act also provided for the establishment of Competition Appellate Tribunal ("COMPAT") which was in operation till 25th May 2017. With effect from 26th May 2017, COMPAT has been merged with the National Company Law Appellate Tribunal ("NCLAT") constituted under the Companies Act, 2013 and the NCLAT has been designated as the Appellate Authority under the Act.

### Combinations and the Competition Act, 2002 (Act)

Section 5 defines the combination as (i) acquisition of control, shares, voting rights or assets; or (ii) acquiring of control by a person over an enterprise when such person has already 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; or (iii) merger or amalgamation.

A combination beyond the prescribed thresholds is regulated under the Act. Section 6 declares a combination as *void* if it causes or is likely to cause an adverse effect on competition within the relevant market in India.

### Kinds of combinations

Based on the economic activities being carried out by the parties, combinations may be classified into three categories:

#### Horizontal combinations

Horizontal combinations involve the joining together of two or more enterprises engaged in producing the same goods, or rendering the same services. They may be termed as competitors to each other. They result in reduction in the number of competing firms in an industry and may create a dominant enterprise.

#### Vertical combinations

Vertical combinations involve the joining together of two or more enterprises where one of them is an actual or potential supplier of goods or services to the other. They involve enterprises operating at different levels of the production chain. The object of these combinations may be to ensure a source of supply or an outlet for products or to enhance the efficiency.

#### Conglomerate combinations

Conglomerate combinations involve the combination of enterprises not having horizontal or vertical connection. These enterprises are engaged in unrelated activities and may be affected with an objective to diversify into new areas by the acquiring enterprise.

Based on the geographical location of the enterprises, the combination may be classified into two categories:

#### Domestic Combinations

Domestic combinations involve the joining together of two or more enterprises located in India only.

#### Cross-border Combinations

Cross-border combinations involve the joining together of two or more enterprises where one or more of them are operating from other countries. In such combinations, the combination needs to be approved by the Commission only if the overseas enterprises satisfy the local nexus test, as stated in section 5 of the Act.

In essence, only if the enterprises exceed the *de minimis* exemption thresholds and the thresholds under Section 5 of the Competition Act, will they be considered to have local nexus. This aligns the position in India more with the international standards.

Section 5 of the Competition Act, 2002 provides that the acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises, if—

- a. any acquisition where—
  - i. the parties to the acquisition, being the acquirer and the enterprise, whose control, shares, voting rights or assets have been acquired or are being acquired jointly have,—
    - A. either, in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or
    - B. in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more

- than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or
- ii. the group, to which the enterprise whose control, shares, assets or voting rights have been acquired or are being acquired, would belong after the acquisition, jointly have or would jointly have,—
    - A. either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or
    - B. in India or outside India, in aggregate, the assets of the value of more than two billion US dollars or turnover more than six billion US dollars; or
- b.** acquiring of control by a person over an enterprise when such person has already 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, if—
- i. the enterprise over which control has been acquired along with the enterprise over which the acquirer already has direct or indirect control jointly have, —
    - A. either in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or
    - B. in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or
  - ii. the group, to which enterprise whose control has been acquired, or is being acquired, would belong after the acquisition, jointly have or would jointly have, —
    - A. either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or
    - B. in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India, or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India; or
- c.** any merger or amalgamation in which—
- i. the enterprise remaining after merger or the enterprise created as a result of the amalgamation, as the case may be, have, —
    - A. either in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or
    - B. in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or
  - ii. 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, have or would have, —
    - A. either in India, the assets of the value of more than rupees four-thousand crores or turnover more than rupees twelve thousand crores; or
    - B. in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India, or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India.

- d. value of any transaction, in connection with acquisition of any control, shares, voting rights or assets of an enterprise, merger or amalgamation exceeds rupees two thousand crore:

Provided that the enterprise which is being acquired, taken control of, merged or amalgamated has such substantial business operations in India as may be specified by regulations.

notwithstanding anything contained in clause (a) or clause (b) or clause (c), where either the value of assets or turnover of the enterprise being acquired, taken control of, merged or amalgamated in India is not more than such value as may be prescribed, such acquisition, control, merger or amalgamation, shall not constitute a combination under section 5.

### Value of transaction and substantial business operations in India.

*Section 5 (e) provides that:*

The value of transaction shall include every valuable consideration, whether direct or indirect, immediate or deferred, cash or otherwise, including but not limited to the consideration:

- (a) for any covenant, undertaking, obligations or restrictions imposed on seller or any other person, if such consideration is agreed separately;
- (b) for all inter-connected steps and transactions, as provided in sub-regulation (4) and (5) of regulation 9 of these regulations;
- (c) payable during two years from the date on which the transaction would come into effect for arrangement(s) entered into as a part of the transaction or incidental thereto including but not limited to technology assistance, licensing of intellectual property rights, usage rights of any product, service or facility, supply of raw materials or finished goods, branding and marketing;
- (d) for call option and shares to be acquired thereof assuming full exercise of such option;
- (e) payable, as per best estimates, based on the future outcome specified under the transaction documents.

*It may be noted that:*

- (a) The value of future payments shall not be discounted to present value;
- (b) the rate of conversion of foreign currency into Indian Rupees shall be average spot rate for last six months quoted by the Reserve Bank of India from the relevant date;
- (c) value of transaction shall include consideration for any acquisition by one of the parties or its group entity in the enterprise being acquired or merged or amalgamated in the transaction, anytime during the period of two years before the relevant date;
- (d) in case of implementation of an open offer under the regulations issued by Securities and Exchange Board of India or any other law for the time being in force, the person required to give notice shall assume full subscription to the offer for the purpose of computation of value of transaction;
- (e) the value of transaction does not include transaction costs such as fees payable for legal advice, to investment banks, to regulators, to statutory authorities, etc.;
- (f) In case of merger or amalgamation or where true and complete value of the transaction is not recorded in transaction documents, the value of that transaction or component thereof shall be the same as considered by the board of directors or any other approving authority of the person obligated to file notice under these regulations;
- (g) if value of transaction cannot be established with reasonable certainty, by the board of directors or any other approving authority of the person obligated to file notice under these regulations, the value of the transaction may be considered as exceeding the amount specified in clause (d) of section 5 of the Act;

- (h) the best estimate shall be the estimate of the board of directors or any other approving authority of the person obligated to file notice under these regulations recorded by it in its approval. If the estimate is not recorded by the board of directors or any other approving authority of the person obligated to file notice in its approval, the maximum payable amount shall be considered as the best estimate.

*The enterprise shall be deemed to have substantial business operations in India, if:*

- (a) for digital services provided, the number of its business users or end users in India is 10% or more of its total global number of such users; or
- (b) its gross merchandise value for the period of twelve months preceding the relevant date in India is:
- (i) 10% or more of its total global gross merchandise value, and
  - (ii) more than rupees five hundred crores {not apply to digital services}; or
- (c) its turnover during the preceding financial year in India is:
- (i) 10% or more of its total global turnover derived from all the products and services, and
  - (ii) more than rupees five hundred crores {not apply to digital services}.

*It may be noted that:*

- (i) “gross merchandise value” means cash, receivables, or other consideration either for or facilitating, sale of goods and/ or provision of services, by an enterprise, on its own or as an agent or otherwise;
- (ii) where a portion of an enterprise or division or business is being acquired, taken control of, merged or amalgamated, the number of its business users or end users, gross merchandise value or turnover, as may be applicable, of the said portion or division or business attributable to it, shall be relevant business users or end users, gross merchandise value or turnover;
- (iii) proportion of business users or end users, shall be computed on the basis of average number of such users, for three hundred and sixty-five days preceding the relevant date;
- (iv) Digital service means the provision of a service or one or more pieces of digital content, or any other activity by means of an internet whether for consideration or otherwise to the end user or business user, as the case may be;
- (v) Business user means any natural or legal person supplying or providing goods or services, including through the use of digital services;
- (vi) End user means any natural or legal person using digital services other than as a business user, for informational or transactional purpose.

*Explanation.* —For the purposes of section 5 —

- a. **“Control”** means the ability to exercise material influence, in any manner whatsoever, over the management or affairs or strategic commercial decisions by—
- i. one or more enterprises, either jointly or singly, over another enterprise or group; or
  - ii. one or more groups, either jointly or singly, over another group or enterprise;
- b. **“Group”** means two or more enterprises where one enterprise is directly or indirectly, in a position to—
- i. exercise twenty-six per cent. or such other higher percentage as may be prescribed, of the voting rights in the other enterprise; or
  - ii. appoint more than fifty per cent. of the members of the board of directors in the other enterprise;

or

- iii. control the management or affairs of the other enterprise;
- c. **“Turnover”** means the turnover certified by the statutory auditor on the basis of the last available audited accounts of the company in the financial year immediately preceding the financial year in which the notice is filed under sub-section (2) or sub-section (4) of section 6 and such turnover in India shall be determined by excluding intra-group sales, indirect taxes, trade discounts and all amounts generated through assets or business from customers outside India, as certified by the statutory auditor on the basis of the last available audited accounts of the company in the financial year immediately preceding the financial year in which the notice is filed under sub-section (2) or sub-section (4) of section 6;
- d. **“Value of Transaction”** includes every valuable consideration, whether direct or indirect, or deferred for any acquisition, merger or amalgamation;
- e. **the Value of Assets** shall be determined by taking the book value of the assets as shown, in the audited books of account of the enterprise, in the financial year immediately preceding the financial year in which the date of proposed combination falls and if such financial statement has not yet become due to be filed with the Registrar under the Companies Act, 2013 then as per the statutory auditor’s report made on the basis of the last available audited accounts of the company in the financial year immediately preceding the financial year in which the notice is filed under sub-section (2) or sub-section (4) of section 6, 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 under the laws provided in sub-section (5) of section 3;
- f. where a portion of an enterprise or division or business is being acquired, taken control of, merged or amalgamated with another enterprise, the value of assets or turnover or value of transaction as may be applicable, of the said portion or division or business or attributable to it, shall be the relevant assets or turnover or relevant value of transaction for the purpose of applicability of the thresholds under section 5.

### Combination Regulations

Competition Act, 2002 requires mandatory notification of combination. Assets and turnover thresholds for such mandate are prescribed by the Act, and are modifiable by the Government as prescribed under section 20(3) of the Act. The basic concern is with the existence or likelihood of the proposed combination causing appreciable adverse effect on competition (“AAEC”) in the relevant market in India.

The process of combination analysis undertaken by the Commission is therefore broken down into:

- (a) delineation of the relevant market (product and geographic);
- (b) identification of overlap in the relevant market; and finally,
- (c) subjecting the combination to competition analysis under section 20(4) of the Act to ensure that there is no appreciable adverse effect on competition in the relevant market. The test under section 20(4) of the Act involves balancing of the benefits and the adverse effects on competition, due to the proposed combination.

To aid and assist the parties to the combination in relation to certain procedural and substantive provisions, the CCI has provided for informal non-binding pre-merger consultative process and has also provided for couple of guidance notes i.e., Introductory Note<sup>1</sup> and Notes to Form I in order to assist the notifying parties in drafting the merger notification form(s) to be submitted to the Commission.

The Section 5 and 6 of the Competition Act are the operative and substantive provisions dealing with the combinations and Section 29 to 31 along with the CCI (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2011 (**Combination Regulations**) set-up the procedural provisions in relation to the combinations. In addition to Combination Regulations, the applicable provisions in relation to confidentiality under Section 57 of the Competition Act and CCI (General) Regulation 2009 are applicable. Further, a transaction will be construed as a combination for the purposes of Competition Act, if the transaction crosses certain minimum thresholds in terms of the assets and/ or turnover of the enterprises affected by the transaction.

### What is a Combination?

Section 5 provides the financial thresholds and all combinations exceeding these financial thresholds are required to be mandatorily approved by the Commission.

#### Combination

Combinations as envisaged under section 5(a), 5(b) and 5(c) were explained by the Supreme Court in **Competition Commission of India v. Thomas Cook (India) Ltd. & Anr. (Civil Appeal No.13578 of 2015)** in the following manner:

Under section 5(a), a combination is formed if the acquisition by one person or enterprise of control, shares, voting rights or assets of another person or enterprise subject to certain threshold requirement that is minimum asset valuation or turn over within or outside India.

Under Section 5(b) of the Act the combination is formed if the acquisition of control by a person over enterprise when such person has already acquired direct or indirect control over another enterprise engaged in the production, distribution or payment of a similar or identical or substitutable good provided that the exigencies provided in section 5(b) in terms of asset or turnover are met.

Under section 5(c) merger and amalgamation are also within the ambit of combination. The enterprise remaining after merger or amalgamation subject to a minimum threshold requirement in terms of assets or turnover is covered within the purview of section 5(c).

### Thresholds

In exercise of the powers conferred by sub-section (3) of Section 20 of the Competition Act, 2002, the Central Government vide its Notification dated March 07, 2024 and in consultation with the Competition Commission of India, enhanced, on the basis of the wholesale price index and exchange rate of rupee, the value of assets and the value of turnover, by One hundred and fifty percent for the purposes of section 5 of the Competition Act. The value of assets and turnover after revision is as under:

THRESHOLDS FOR FILING NOTICE				
Enterprise level		Assets	Or	Turnover
	India	> 2500 INR Crore		> 7500 INR Crore
	In India or Outside India	> USD 1.25 bn with at least > 1250 INR Crore in India		> USD 3.75 bn with at least > 3750 INR Crore in India
OR				

Group Level		Assets	Or	Turnover
	India	> 10000 INR Crore		> 30000 INR Crore
	In India or Outside India	> USD 5 bn with at least > 1250 INR Crore in India		> USD 15 bn with at least > 3750 INR Crore in India

**De-Minimis Thresholds:** In exercise of the powers conferred by clause (a) of section 54 of the Competition Act, 2002 it has also been decided with regards to de-minimis thresholds that the value of assets and turnover be enhanced from INR 350 crore (rupees three hundred fifty crore) to INR 450 crore (rupees four hundred fifty crore) for assets and from INR 1000 crore (rupees one thousand crore) to INR 1250 crore (rupees one thousand two hundred fifty crore) for turnover.

THRESHOLDS FOR AVALING OF DE-MINIMIS EXEMPTION				
		Assets	Or	Turnover
Target Enterprise	In India	< Rs.450 Crore		

In exercise of the powers conferred by clause (a) of section 54 of the Competition Act, 2002, the Central Government vide Notification S.O. 1131(E) dated March 07, 2024 and in public interest exempted the enterprises being parties to --

- (a) any acquisition referred to in clause (a) of section 5 of the Competition Act;
- (b) acquiring of control by a person over an enterprise when such person has already 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, referred to in clause (b) of section 5 of the Competition Act; and
- (c) any merger or amalgamation, referred to in clause (c) of section 5 of the Competition Act,

where the value of assets being acquired, taken control of, merged or amalgamated is not more than rupees Four hundred and fifty crore in India or turnover of not more than rupees One thousand two hundred and fifty crore in India, from the provisions of section 5 of the said Act for a period of two years from the date of publication of this notification in the Official Gazette.

Where a portion of an enterprise or division or business is being acquired, taken control of, merged or amalgamated with another enterprise, the value of assets of the said portion or division or business and or attributable to it, shall be the relevant assets and turnover to be taken into account for the purpose of calculating the thresholds under section 5 of the Act. 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 statutory auditor's report where the financial statement have 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 indications, geographical indications, design or layout- design or similar other commercial rights, if any, referred to in sub-section (5) of section 3. The turnover of the said portion or division or business shall be as certified by the statutory auditor on the basis of the last available audited accounts of the company.

### Anti-Competitive Agreements

Section 3 of the Competition Act provides for the prohibition of certain anti-competitive agreements. Under the Act, anti-competitive agreements include any agreement related to the production, supply, storage, or control of goods or services, that can cause an appreciable adverse effect on competition in India. Any agreement between enterprises or persons engaged in identical or similar businesses will have such adverse effect on competition if it meets certain criteria. These include: (a) directly or indirectly determining purchase or sale prices, (b) controlling production, supply, markets, or provision of services, or (c) directly or indirectly leading to collusive bidding.

As per Competition (Amendment) Act, 2023, if an enterprise or association of enterprises or a person or association of persons though not engaged in identical or similar trade shall also be presumed to be part of the agreement under this sub-section if it participates or intends to participate in the furtherance of such agreement. The amendment introduces an additional provision stating that an enterprise or association of enterprises or a person or association of persons though not engaged in identical or similar trade shall also be presumed to be part of such anti-competitive agreements if they participate or intends to participate in the furtherance of such agreements.

### Regulation of Combinations

Section 6 of the Competition Act, 2002 prohibits any person or enterprise from entering into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and if such a combination is formed, it shall be *void*. Section 6 read as under:

#### *Regulation of combinations*

- (1) No person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.
- (2.) Subject to the provisions contained in sub-section (1), any person or enterprise, who or which proposes to enter into a combination, shall give notice to the Commission, in the form as may be specified, and the fee which may be determined, by regulations, disclosing the details of the proposed combination, after any of the following, but before consummation of the combination—
  - (a) approval of the proposal relating to merger or amalgamation, referred to in clause (d) of section 5, by the board of directors of the enterprises concerned with such merger or amalgamation, as the case may be;
  - (b) execution of any agreement or other document for acquisition referred to in clause (d) of section 5 or acquiring of control referred to in clause (b) of that section.

It may be noted that “other document” means any document, by whatever name called, conveying an agreement or decision to acquire control, shares, voting rights or assets or if the acquisition is without the consent of the enterprise being acquired, any document executed by the acquiring enterprise, by whatever name called, conveying a decision to acquire control, shares or voting rights or where a public announcement has been made in accordance with the provisions of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 made under the Securities and Exchange Board of India Act, 1992 for acquisition of shares, voting rights or control such public document.

- (2A) No combination shall come into effect until one hundred and fifty days have passed from the day on which the notice has been given to the Commission under sub-section (2) or the Commission has passed orders under section 31, whichever is earlier.
- (3) The Commission shall, after receipt of notice under sub-section (2), deal with such notice in accordance with the provisions contained in sections 29, 29A, 30 and 31.

- (4) Notwithstanding anything contained in sub-sections (2A) and (3) and section 43A, if a combination fulfils such criteria as may be prescribed and is not otherwise exempted under this Act from the requirement to give notice to the Commission under sub-section (2), then notice for such combination may be given to the Commission in such form and on payment of such fee as may be specified by regulations, disclosing the details of the proposed combination and thereupon a separate notice under sub-section (2) shall not be required to be given for such combination.
- (5) Upon filing of a notice under sub-section (4) and acknowledgement thereof by the Commission, the proposed combination shall be deemed to have been approved by the Commission under sub-section (1) of section 31 and no other approval shall be required under sub-section (2) or sub-section (2A).
- (6) If within the period referred to in sub-section (1) of section 20, the Commission finds that the combination notified under sub-section (4) does not fulfil the requirements specified under that sub-section or the information or declarations provided are materially incorrect or incomplete, the approval under sub-section (5) shall be void *ab initio* and the Commission may pass such order as it may deem fit:

Provided that no such order shall be passed unless the parties to the combination have been given an opportunity of being heard.

- (7) Notwithstanding anything contained in this section and section 43A, upon fulfilment of such criteria as may be prescribed, certain categories of combinations shall be exempted from the requirement to comply with sub-sections (2), (2A) and (4).
- (8) Notwithstanding anything contained in sub-sections (4), (5), (6) and (7)—
- (i) the rules and regulations made under this Act on the matters referred to in these sub-sections as they stood immediately before the commencement of the Competition (Amendment) Act, 2023 and in force at such commencement, shall continue to be in force, till such time as the rules or regulations, as the case may be, made under this Act; and
  - (ii) any order passed or any fee imposed or combination consummated or resolution passed or direction given or instrument executed or issued or thing done under or in pursuance of any rules and regulations made under this Act shall, if in force at the commencement of the Competition (Amendment) Act, 2023, continue to be in force, and shall have effect as if such order passed or such fee imposed or such combination consummated or such resolution passed or such direction given or such instrument executed or issued or done under or in pursuance of this Act.
- (9) The provisions of this section shall not apply to share subscription or financing facility or any acquisition, by a public financial institution, foreign portfolio investor, bank or Category I alternative investment fund, pursuant to any covenant of a loan agreement or investment agreement.

*Explanation.*—For the purposes of this section, the expression—

- (a) “Category I alternative investment fund” has the same meaning as assigned to it under the Securities and Exchange Board of India (Alternative Investment Funds) Regulations, 2012 made under the Securities and Exchange Board of India Act, 1992;
- (b) “foreign portfolio investor” has the same meaning as assigned to it under the Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2019 made under the Securities and Exchange Board of India Act, 1992.

## Open Offers

Section 6A of the Act provides that nothing contained in sub-section (2A) of section 6 and section 43A shall prevent the implementation of an open offer or an acquisition of shares or securities convertible into other securities from various sellers, through a series of transactions on a regulated stock exchange from coming into

effect, if—

- (a) the notice of the acquisition is filed with the Commission within such time and in such manner as may be specified by regulations; and
- (b) the acquirer does not exercise any ownership or beneficial rights or interest in such shares or convertible securities including voting rights and receipt of dividends or any other distributions, except as may be specified by regulations, till the Commission approves such acquisition in accordance with the provisions of sub-section (2A) of section 6 of the Act.

*Explanation.* —For the purposes of this section, “open offer” means an open offer made in accordance with the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulation, 2011 made under the Securities and Exchange Board of India Act, 1992.

### Exemptions to Banking Sector and Oil and Gas Sector

Section 54(a) of the Act empowers the Central Government to grant exemption to any class of enterprises from all or any provisions of the Act if such exemption is necessary in the interest of security of the State or public interest. To exercise the said power, the Central Government has to issue a notification giving details about the extent of exemption and the duration of such exemption. With regard to the combinations relating to banking sector and oil and gas sectors, the Central Government has issued the following notifications.

- (i) *Regional Rural Banks:* Regional Rural Banks in respect of which the Central Government has issued a notification under sub-section (1) of section 23A of the Regional Rural Banks Act, 1976 are exempted from complying with the provisions of the application sections 5 and 6 of the Competition Act, 2002 for a period of five years. - S.O. 2561(E). 10th August 2017 issued by the Ministry of Corporate Affairs.
- (ii) *Nationalized banks:* All cases of reconstitution, transfer of the whole or any part thereof and amalgamation of nationalized banks, under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 and the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980, are exempted from complying with the provisions of the application of sections 5 and 6 of the Competition Act, 2002 for a period of five years. - S.O. 2828(E). 30th August 2017 issued by the Ministry of Corporate Affairs.
- (iii) *Oil and Gas Sectors:* All cases of combinations under section 5 of the Act involving the Central Public Sector Enterprises (CPSEs) 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, are exempted from complying with the provisions of the application of sections 5 and 6 of the Competition Act, 2002 for a period of five years. - S.O. 3714(E). 22nd November 2017 issued by the Ministry of Corporate Affairs.

### Ordinarily exempt transactions under Combination Regulations

The Combinations Regulations, 2024 provide for the procedural framework on regulation of the combinations. Schedule I to the Regulations provides a list of transactions which are ordinarily not likely to raise competition concerns and hence normally exempt from approval requirements. They are known as ‘ordinarily exempt’ transactions. However, such ordinarily exempt transactions also need prior approval of the Commission if the same is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination. In other words, the parties will have to approach the Commission, before giving effect to the proposed combination.

The Commission has highlighted this fact in the matter of **SCM Soilfert Limited / Deepak Fertilizers** (order under section 43A relating to Combination Registration No. C-2014/05/175), in the following words:

*“It is observed that the categories of combinations listed in Schedule I to the Combination Regulations must be interpreted in light of the Commission’s objectives (listed in Section 18 of the Act) and the intent of Schedule*

*I (expressed in Regulation 4 of the Combination Regulations). This means that the categories of combinations listed in Schedule I as normally not notifiable ought not to include combinations which envisage or are likely to cause a change in control or are of the nature of strategic combinations including those between competing enterprises or enterprises active in vertical markets.”*

### Control

One of the most important facets of the Indian merger control regime is the element of ‘control’. Control over an enterprise has the ability to change the competitive dynamics of any market, and the CCI, like all other competition regulators, gives due importance to changes in control.

Apart from the ‘positive control’ over an enterprise which comes from owning more than 50% of the voting rights of a company or control over more than 50% of the board of directors of a company, the CCI also considered ‘negative control’, i.e. control exercised contractually by way of Affi Voting Rights (AVRs) / veto rights over the strategic business decisions of the company. This is concurrent with the practice in other advanced jurisdictions such as the EU, which also follow the test of decisive control<sup>4</sup>. The CCI judges each case on its merits and circumstances, and seeks to distinguish between rights that are purely investment protection rights, and those that enable the holder to control the key strategic business decisions of the company.

As per Section 5 of the Competition Act, 2002 as amended in 2023 “Control” means the ability to exercise material influence, in any manner whatsoever, over the management or affairs or strategic commercial decisions 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.

Further, “group” means two or more enterprises where one enterprise is directly or indirectly, in a position to—

- (i) exercise twenty-six per cent. or such other higher percentage as may be prescribed, of the voting rights in the other enterprise; or
- (ii) appoint more than fifty per cent. of the members of the board of directors in the other enterprise; or
- (iii) control the management or affairs of the other enterprise.

From the control perspective, a combination may involve acquisition of control; acquisition of joint control; transfer from joint control to sole control; or continuation of joint control even after acquisition has taken place. Based on the Regulations and the interpretation by the CCI in numerous cases, the term control can have different dimensions such as joint control, indirect control, common control, negative control, strategic control etc.

### Notice to the Commission disclosing details of the proposed combination

As stated earlier, section 6(2) envisages that any person or enterprise, who or which proposes to enter into any combination, shall give a notice to the Commission disclosing details of the proposed combination, in the form prescribed and submit the form together with the fee prescribed by Regulations. Contravention of this provision would attract the result into the imposition of penalty under section 43A of the Act.

### Inquiry into combination by the Commission

The Commission under section 20 of the Competition Act may inquire into the appreciable adverse effect caused or likely to be caused on competition in India as a result of combination in the following circumstances:

- (i) upon its own knowledge or information (*suo moto*); or
- (ii) upon receipt of notice under section 6(2) relating to acquisition referred to in section 5(a); or acquiring of control referred to in section 5(b); or merger or amalgamation referred to in section 5(c) of the Act.

It has also been provided that a *suo moto* enquiry shall be initiated by the Commission within one year from the

date on which such combination has taken effect. Thus, the Act has provided a time limit within which *suo moto* inquiry into combinations can be initiated. This provision dispels the fear of enquiry into combination between merging entities after the expiry of stipulated period.

On receipt of the notice under section 6(2) from the person or an enterprise which proposes to enter into a combination, it is mandatory for the Commission to inquire whether the combination referred to in that notice, has caused or is likely to cause an appreciable adverse effect on competition (AAEC) within the relevant market in India.

### Appreciable Adverse Effect on Combination (AAEC)

The Commission shall have due regard to all or any of the following factors listed under section 20(4) for the purposes of determining whether the combination causes or is likely to cause an AAEC in the relevant market:

- (a) actual and potential level of competition through imports in the market;
- (b) extent of barriers to entry into the market;
- (c) level of concentration in the market;
- (d) degree of countervailing power in the market;
- (e) likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
- (f) extent of effective competition likely to sustain in a market;
- (g) extent to which substitutes are available or 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 competition 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.

The above yardsticks are to be taken into account irrespective of the fact whether an inquiry is instituted, on receipt of notice under section 6(2) or upon its own knowledge. The scope of assessment of adverse effect on competition will be confined to the “relevant market”. Most of the facts enumerated in section 20(4) are external to an enterprise. It is noteworthy that sub clause (n) of Section 20(4) requires to invoke principles of a “balancing”. It requires the Commission to evaluate whether the benefits of the combination outweigh the adverse impact of the combination, if any. In other words if the benefits of the combination outweigh the adverse effect of the combination, the Commission will approve the combination. Conversely, the Commission may declare such a combination as *void*.

### Relevant market

Relevant market is the mix of relevant geographic market and relevant product market. Sub-section (r) of section 2 defines relevant market to mean the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets.

### Relevant geographic market

Sub-section (s) of section 2 defines the relevant geographic market to mean a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas.

### Relevant product market

Sub-section (t) of section 2 defines the relevant product market to mean a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use.

Competition (Amendment) Act, 2023 expands the definition of relevant product market to include the perspective of suppliers. As per revised definition “relevant product market” means a market comprising of all those products or services—

- (i) which are regarded as inter-changeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use; or
- (ii) the production or supply of, which are regarded as interchangeable or substitutable by the supplier, by reason of the ease of switching production between such products and services and marketing them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices.

*The Commission shall, while determining the “relevant geographic market”, have due regard to all or any of the following factors, namely: —*

- 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;
- i) characteristics of goods or nature of services;
- j) costs associated with switching supply or demand to other areas.

*The Commission 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 or the nature of services;
- b) price of goods or service;
- c) consumer preferences;
- d) exclusion of in-house production;
- e) existence of specialised producers;
- f) classification of industrial products;
- g) costs associated with switching demand or supply to other goods or services;
- h) categories of customers.

### Filing of Combination Notice to Competition Commission of India (CCI)

Section 6(4) of the Competition Act states that notwithstanding anything contained in sections 6(2A) and (3) and section 43A, if a combination fulfils such criteria as may be prescribed and is not otherwise exempted under this Act from the requirement to give notice to the Commission under sub-section (2), then notice for such combination may be given to the Commission in such form and on payment of such fee as may be specified by regulations, disclosing the details of the proposed combination and thereupon a separate notice under sub-section (2) shall not be required to be given for such combination.

### Criteria of Combination

For the purposes of sub-section (4) of section 6 of the Act, the parties to a combination, their respective group entities and their affiliates who fulfils the following criteria, may give notice for such combination under that sub-section, namely:

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

It may be noted that:

(a) the parties to the combination and their respective group entities means:

- (i) the ultimate controlling person of the acquirer and other entities forming part of the same group;
  - (ii) the enterprise being acquired and its downstream entities forming part of its group;
  - (iii) enterprises being merged or amalgamated, their controlling persons, and entities forming part of their group.
- (b) an enterprise is considered to be an affiliate of another enterprise if that another enterprise has–
- (i) ten per cent. or more of the shareholding or voting rights of the enterprise; or
  - (ii) right or ability to have a representation on the board of directors of the enterprise either as a director or as an observer; or
  - (iii) right or ability to access commercially sensitive information of the enterprise.

### Categories of Combinations which are Exempted

The following categories of combinations shall be exempted from the requirement to comply with sub-sections (2), (2A) and (4) of section 6 of the Act:

1. An acquisition of shares of an enterprise in ordinary course of business where the said transaction is –
  - (a) an acquisition of unsubscribed shares upon devolvement as per covenant of an underwriting agreement by any person registered with the Securities and Exchange Board of India established under the Securities and Exchange Board of India Act, 1992 (15 of 1992) or other similar authority established under any law for the time being in force outside India, as an underwriter, in so far as the total shares or voting rights held by the acquirer, directly or indirectly, does not entitle the acquirer to hold more than twenty-five per cent. of the total shares or voting rights of the company, of which shares are being acquired; or
  - (b) an acquisition of shares as a stockbroker registered with the Securities and Exchange Board of India, or other similar authority established under any law for the time being in force outside India, in so far as the total shares or voting rights held by the acquirer, directly or indirectly, does not entitle the acquirer to hold

more than twenty-five per cent. of the total shares or voting rights of the company, of which shares are being acquired; or

(c) an acquisition of shares as a mutual fund registered with the Securities and Exchange Board of India, or other similar authority established under any law for the time being in force outside India, in so far as the total shares or voting rights held by the acquirer, directly or indirectly, does not entitle the acquirer to hold more than ten per cent. of the total shares or voting rights of the company, of which shares are being acquired.

2. An acquisition of shares or voting rights solely as an investment in so far as the total shares or voting rights held by the acquirer, directly or indirectly, does not entitle the acquirer to hold more than twenty-five per cent. of the total shares or voting rights of the company, of which shares or voting rights are being acquired, not leading to acquisition of control of the enterprise whose shares or voting rights are being acquired.

The acquisition of shares or voting rights of an enterprise shall be treated as solely as an investment where:

(a) pursuant to the said acquisition, the acquirer does not gain a right or ability to have a representation on the board of directors of any enterprise either as a director or as an observer;

(b) pursuant to the said acquisition, the acquirer does not gain a right or ability to access commercially sensitive information of any enterprise;

(c) the acquirer or its group entities and their affiliates are not engaged in---

(i) any activity relating to production of similar or identical or substitutable product or service as offered by the target or its downstream group entities and their affiliates;

(ii) any activity relating to production, supply, distribution, storage, sale and service or trade in product or provision of service which are at different stages or level of production chain to the activities of the target or of its downstream group entities and their affiliates; or

(iii) any activity relating to production, supply, distribution, storage, sale and service or trade in product or provision of service which are complementary to the activities of the target or any of its downstream group entities or their affiliates.

Provided, where the acquirer or its group entities or their affiliates are engaged in any of the aforesaid activities mentioned in this clause, the acquisition shall be considered to be solely as an investment if such acquisition does not result in the acquirer holding ten per cent. or more shares or voting rights after the acquisition.

3. An acquisition of additional shares or voting rights of an enterprise by the acquirer or its group entities, where the acquirer or its group entities, prior to acquisition, holds shares or voting rights of the enterprise, but does not hold more than twenty-five per cent. of the shares or voting rights of the enterprise, either prior to or after such acquisition.

*It may be noted that:*

(i) such acquisition does not result in acquisition of control of such enterprise by the acquirer or its group;

(ii) pursuant to the acquisition, the acquirer or its group entities do not gain a right or ability to have a representation on the board of directors of any enterprise either as a director or as an observer for the first time;

(iii) pursuant to the acquisition, the acquirer or its group entities do not gain a right or ability to access commercially sensitive information of any enterprise for the first time except where the acquirer or its group entities already have right or ability to have a representation on the board of directors of any enterprise as a director;

(iv) in case the activities of the acquirer or its group entities and their affiliates exhibit horizontal or vertical or complementary linkages with the activities of target or its downstream group entities and their affiliates, the incremental shareholding or voting rights acquired by a single acquisition or a series of smaller inter-connected acquisitions does not exceed five per cent. and such acquisition does not

result in the shareholding or voting rights of the acquirer or its group entities increasing from less than ten per cent. to ten per cent. or more.

4. An acquisition of additional shares or voting rights of an enterprise by the acquirer or its group entities, where the acquirer or its group entities, prior to acquisition, holds more than twenty-five per cent. shares or voting rights of the enterprise, but does not hold more than fifty per cent. of the shares or voting rights of the enterprise, either prior to or after such acquisition:

Provided that such acquisition does not result in change in control of such enterprise.

5. An acquisition of shares or voting rights, where the acquirer or its group entities, prior to acquisition, has more than fifty per cent. shares or voting rights in the enterprise whose shares or voting rights are being acquired, except in the cases where the transaction results in change in control of such enterprise.

6. An acquisition of assets of an enterprise in ordinary course of business: The acquisition of assets of an enterprise shall be treated as in ordinary course of business provided that said acquisition involves acquisition of stock-in-trade, raw materials, stores and spares, trade receivables or other similar current assets that do not constitute business.

7. An acquisition of assets, not directly related to the business activity of the party acquiring the asset or made solely as an investment, 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 organised as a separate legal entity or not.

8. An acquisition of shares pursuant to a bonus issue or stock splits or consolidation of face value of shares or buy back of shares or subscription to rights issue of shares, not leading to a change in control.

9. An acquisition of assets by one person or enterprise, of another person or enterprise within the same group, except in cases where there is change in control over assets being acquired.

10. A merger or amalgamation of enterprises within the same group provided that the transaction does not result in change in control.

11. Acquisition of shares, control, voting rights or assets by a purchaser approved by the Competition Commission of India pursuant to and in accordance with its order under section 31 of the Act.

12. Demerger of a company and issue of shares by resulting company, in consideration of demerger, either to the demerged company or to the shareholders of the demerged company in the proportion of their shareholding in the demerged company prior to the demerger, except for discharge of consideration for fractional shares.

*It may be noted that:*

(1) The acquirer and its group entities mean the ultimate controlling person of the acquirer and other entities forming part of the same group.

(2) An entity is considered to be an affiliate of another enterprise if that another enterprise has:

(i) ten per cent. or more of the shareholding or voting rights of the enterprise; or

(ii) right or ability to have a representation on the board of directors of the enterprise either as a director or as an observer;

(iii) or right or ability to access commercially sensitive information of the enterprise.

**Notice for the Proposed Combination**

- The notice under Section 6(2) of the Act or Section 6A(a) of the Act, shall ordinarily be filed in **Form I** as, duly filled in and accompanied by evidence of payment of requisite fees.
- The person required to give notice may, at their option, give notice in **Form II**, preferably in the instances where –
  - ◆ 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 percent (15%) in any of the relevant markets;
- 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 percent (25%) in any of the relevant markets.
- The person required to give notice shall give notice in Form I or Form II, as the case may be, in accordance with the notes to Form I and Form II issued by the Commission and published on its official website, from time to time.
- A notice shall be given within thirty days from the date of first acquisition of shares pursuant to the implementation of an open offer or an acquisition of shares or securities convertible into other securities from various sellers, through a series of transactions on a regulated stock exchange, along with the declaration specified in schedule II to Combination Regulations and accompanied by evidence of payment of requisite fee.
- The notice under sub-section of section 6(4) of the Act shall be filed in Form I, duly filled in along with the declaration specified in schedule III to Combination Regulations, and accompanied by evidence of payment of requisite fee by the parties to the combination
- In cases where the notice is given in Form I and the Commission requires information in Form II to form prima facie opinion whether the combination is likely to cause or has caused appreciable adverse effect on competition within the relevant market, it shall direct the person required to give notice to file notice in Form II.
- In case of an acquisition or acquiring of control of enterprise(s), the acquirer shall file the notice in Form I or Form II, as the case may be, which shall be duly signed by the person(s) as specified and Form I or Form II may also be signed by any person duly authorised by the company.
- In case the enterprise is being acquired without its consent, the acquirer shall furnish such information as is available to him, in Form I or Form II, as the case may be, relating to the enterprise being acquired.
- In case of a merger or an amalgamation, parties to the combination shall jointly file the notice in Form I or Form II, as the case may be, duly signed by the person as specified.
- The duly filled in notice along with one copy and an electronic version thereof shall be delivered to the Commission at the address published on its official website.
- A summary of the combination, not containing any confidential information, in not more than 1000 words, comprising details regarding: (a) name of the parties to the combination; (b) the nature and purpose of the combination; (c) the products, services and business(es) of the parties to the combination; and (d) the respective markets in which the parties to the combination operate, shall be filed for the purpose of publishing the same on the website of the Commission.

- The notice under sub-sections (2) and (4) of section 6 of the Act, clause (a) of section 6A of the Act, and sub-regulation (2) of regulation 8 of these regulations may be given electronically when the facility for the same is made available by the Commission.
- The Secretary shall issue an acknowledgement of the receipt of notice.

### Details Information required to be filled in by the notifying party(ies)

1. Information about each of the party to the combination: Legal name of parties to the combination:

- Legal status of the parties to the combination (Company/Firm/LLP/Trust, etc.)
- Jurisdiction of incorporation/formation
- Registration number (if applicable)
- Complete registered address / principal business address
- Name of the person signing on behalf of the parties to the combination and his contact details (email address, telephone no, mobile no, including country/city/area code): Complete address and contact details in India
- Website address
- digit National Industrial Classification of the activities of the parties to the combination
- Date of pre-filing consultation, if any

2. Particulars of fee deposited

3. Name, complete address and contact details of individual(s) located in India who is authorized to receive communication(s) on behalf of each of the notifying party(ies).

4. Financial details and Value of Transaction

5. Description of the combination by providing information regarding the following:

- Scope of the combination notified pursuant to sub-section (2) of section 6 or section 6A of the Act (with reference to relevant clause under the agreement(s), as applicable);
- Details of acquisition or merger or amalgamation, as the case may be, with reference to relevant clause of Section 5;
- Any other transaction(s) that is/are inter-connected;
- Right(s) acquired or arising out of or in connection with the transaction(s);
- Step(s) to give effect to the combination, along with timelines for each step(s) of the combination.
- Economic and strategic purpose (including business objective and rationale for each of the parties to the combination and the manner in which they are intended to be achieved) of the combination.
- Value of the proposed combination.
- Foreign investment as a result of the combination (FDI, FPI, etc., if any, in rupees) and country(ies) of origin.
- Filing requirements and its status in jurisdictions other than India Any other relevant information related to the combination.

#### 6. Activities of parties to the combination and sector overview

- Name of the group to which the parties to the combination belong.
- For each of the parties to the combination, provide details regarding the following:
  - Entities in India and the presence in India (for example, sales office, factory, liaison office, branch office, franchise or through any entity from outside India, etc.);
  - Tradename(s), business name(s) and the brand name(s) used in India;
  - Overview of activities worldwide and in India, as applicable.
  - List/details of the products (manufactured, supplied, distributed, and/or sold) and/or services provided by the parties to the combination.
- 7. Whether the notice for the proposed combination is under Green Channel

#### 8. Attachment of the following documents:

- Authorisation for signing the notice
- Acknowledgement for payment of fees to the Commission
- Authorisation for receiving communication
- Annual report of the parties to the combination, for the preceding financial year.
- Summary of the combination
- Chart depicting shareholding/extent of ownership and voting right (if different from ownership pattern) along with details of control, prior to and after the combination, of:
  - (a) the parties to the combination starting from their ultimate parent entity and controlling shareholder(s); and
  - (b) for the enterprises, whose structure, ownership and control will be directly or indirectly affected by the combination
- Copy of approval or agreement/.
- 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.
- Declaration

### Procedure for investigation of combination

The Competition Commission of India (CCI) has been empowered to deal with in accordance with provisions of sections 29A, 30 and 31 of the Act. Section prescribes procedure for investigation of combinations. Section 30 empowers the Commission to determine whether the disclosure made to it under section 6(2) is correct and whether the combination has, or is likely to have, an appreciable adverse effect on the competition. Section 31 provides that the Commission may allow the combination if it will not have any appreciable adverse effect on competition or pass an order that the combination shall not take effect, if in its opinion, such a combination has or is likely to have an appreciable adverse effect on competition.

Section 29 of the Act deals with procedure of investigation of Combinations. It provides that:

- 1) Where the Commission is of the prima facie opinion that a combination is likely to cause, or has caused an appreciable adverse effect on competition within the relevant market in India, it shall issue a notice to show cause to the parties to combination calling upon them to respond within fifteen days of the receipt of the notice, as to why investigation in respect of such combination should not be conducted.
- (1A) After receipt of the response of the parties to the combination under sub-section (1), the Commission may call for a report from the Director General and such report shall be submitted by the Director General within such time as the Commission may direct.
- (1B) The Commission shall, within thirty days of receipt of notice under sub-section (2) of section 6, form its prima facie opinion referred to in sub-section (1).
- 2) The Commission, if it is prima facie of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition, it shall, within seven days from the date of receipt of the response of the parties to the combination, or the receipt of the report from Director General called under sub section (1A), whichever is later, direct the parties to the said combination to publish details of the combination within seven days of such direction, in such manner, as it thinks appropriate, for bringing the combination to the knowledge or information of the public and persons affected or likely to be affected by such combination.
- 3) The Commission may invite any person or member of the public, affected or likely to be affected by the said combination, to file his written objections, if any, before the Commission within ten days from the date on which the details of the combination were published under sub-section (2).
- 4) The Commission may, within seven days from the expiry of the period specified in sub-section (3), call for such additional or other information as it may deem fit from the parties to the said combination.
- 5) The additional or other information called for by the Commission shall be furnished by the parties referred to in sub-section (4) within ten days from the expiry of the period specified in sub-section (4).
- 6) After receipt of all information, the Commission shall proceed to deal with the case in accordance with the provisions contained in section 29A or section 31, as the case may be.
- 7) Notwithstanding anything contained in this section, the Commission may accept appropriate modifications offered by the parties to the combination or suo motu propose modifications, as the case may be, before forming a prima facie opinion under sub-section (1).

#### **Issue of statement of objections by Commission and proposal of modifications**

Section 29A (1) of the Act states that upon completion of the process under section 29, where the Commission is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition, it shall issue a statement of objections to the parties identifying such appreciable adverse effect on competition and direct the parties to explain within twenty-five days of receipt of the statement of objections, why such combination should be allowed to take effect.

As per sub-section (2) where the parties to the combination consider that such appreciable adverse effect on competition can be eliminated by suitable modification to such combination, they may submit an offer of appropriate modification to the combination along with their explanation to the statement of objections issued under sub-section (1) in such manner as may be specified by regulations.

Sub-section (3) provides that if the Commission does not accept the modification submitted by the parties under sub-section (2) it shall, within seven days from the date of receipt of the proposed modifications under that sub-section, communicate to the parties as to why the modification is not sufficient to eliminate the appreciable adverse effect on competition and call upon the parties to furnish, within twelve days of the receipt of the said communication, revised modification, if any, to eliminate the appreciable adverse effects on competition:

Provided that the Commission shall evaluate such proposal for modification within twelve days from receipt of such proposal:

Provided further that the Commission may *suo motu* propose appropriate modifications to the combination which may be considered by the parties to the combination.

### Orders of Commission on Combinations

The Commission, after consideration of the relevant facts and circumstances of the case under investigation by it under section 28 or 30 and assessing the effect of any combination on the relevant market in India, may pass any of the written orders indicated herein below:

- (a) *Approve*: Where the Commission comes to a conclusion that any combination does not, or is not likely to, have an appreciable adverse effect on the Competition in relevant market in India, it may, approve that Combination.
- (b) *Reject*: Where the Commission is of the opinion that the combination has, or is likely to have an adverse effect on competition, it shall direct that the combination shall not take effect.
- (c) *Modify*: Where the Commission is of the opinion that adverse effect which has been caused or is likely to be caused on competition can be eliminated by modifying such combination then it shall direct the parties to such combination to carry out necessary modifications to the combination.

### Orders of Commission on certain Combinations

Section 31 of the Act provides that:

- (1) where the Commission is of the opinion that any combination does not, or is not likely to, have an appreciable adverse effect on competition, it shall, by order, approve that combination including the combination in respect of which a notice has been given under sub-section (2) of section 6.
- (2) Where the Commission is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition, it shall direct that the combination shall not take effect.
- (3) Where the Commission is of the opinion that any appreciable adverse effect on competition that the combination has, or is likely to have, can be eliminated by modification proposed by the parties or the Commission, as the case may be, under sub-section (7) of section 29 or sub-section (2) or sub-section (3) of section 29A, it may approve the combination subject to such modifications as it thinks fit.
- (4) Where a combination is approved by the Commission under sub-section (3), the parties to the combination shall carry out such modification within such period as may be specified by the Commission.
- (5) Where (a) the Commission has directed under sub-section (2) that the combination shall not take effect; or (b) the parties to the combination, fail to carry out the modification within such period as may be specified by the Commission under sub-section (4); or (c) the Commission is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition which cannot be eliminated by suitable modification to such combination, then, without prejudice to any penalty which may be imposed or any prosecution which may be initiated under this Act, the Commission may order that such combination shall not be given effect to, or be declared void, or frame a scheme to be implemented by the parties to address the appreciable adverse effect on competition, as the case may be.
- (6) If no order is passed or direction issued by the Commission in accordance with the provisions of sub-section (1) or sub-section (2) or sub-section (3) or sub-section (5), as the case may be, within a period

of one hundred and fifty days from the date of notice given to the Commission under sub-section (2) of section 6, the combination shall be deemed to have been approved by the Commission.

### Extra Territorial Jurisdiction of Commission

Section 32 extends the jurisdiction of Competition Commission of India to inquire and pass orders in accordance with the provisions of the Act into an agreement or dominant position or combination, which is likely to have, an appreciable adverse effect on competition in relevant market in India, notwithstanding that,

- (a) an agreement referred to in section 3 has been entered into outside India; or
- (b) any party to such agreement is outside India; or
- (c) any enterprise abusing the dominant position is outside India; or
- (d) a combination has taken place outside India; or
- (e) any party to combination is outside India; or
- (f) any other matter or practice or action arising out of such agreement or dominant position or combination is outside India. have power to inquire in accordance with the provisions contained in sections 19, 20, 26, 29, 29A and 30 of the Act into such agreement or abuse of dominant position or combination if such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India 1 [and pass such orders as it may deem fit in accordance with the provisions of this Act.

The above clearly demonstrate that acts taking place outside India but having an effect on competition in India will be subject to the jurisdiction of Commission. The Commission will have jurisdiction even if both the parties to an agreement are outside India but only if the agreement, dominant position or combination entered into by them has an appreciable adverse effect on competition in the relevant market of India.

### Power to impose penalty for non-furnishing of information on Combination

Section 43A provides that if any person or enterprise fails to give notice to the Commission under sub-section (2) or sub-section (4) of section 6 or contravenes sub-section (2A) of section 6 or submit information pursuant to an inquiry under sub-section (1) of section 20, the Commission may impose on such person or enterprise, a penalty which may extend to one per cent., of the total turnover or assets or the value of transaction referred to in clause (d) of section 5, whichever is higher, of such a combination:

Provided that in case any person or enterprise has given a notice under sub-section (4) of section 6 and such notice is found to be void *ab initio* under sub-section (6) of section 6, then a notice under sub-section (2) of section 6 may be given by the acquirer or parties to the combination, as may be applicable, within a period of thirty days of the order of the Commission under sub-section (6) of that section and no action under this section shall be taken by the Commission till the expiry of such period of thirty days.

### LESSON ROUND-UP

- The preamble of the Competition Act, 2002 states that this is an Act to establish a Commission to prevent anti-competitive practices, promote and sustain competition, protect the interests of the consumers and ensure freedom of trade in markets in India.
- Section 4 prohibits the abuse of dominance by an enterprise or a group.
- Section 5 and 6 provides for regulation of the combinations beyond the prescribed threshold.
- Section 5 provides the financial thresholds and all combinations exceeding prescribed financial thresholds are required to be mandatorily approved by the Commission.
- Section 6 provides that no person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.

- Combination means acquisition of control, shares, voting rights or assets, acquisition of control by a person over an enterprise where such person has direct or indirect control over another enterprise engaged in competing businesses, mergers and amalgamations between or amongst enterprises.
- Any person or enterprise, who or which proposes to enter into any combination, shall give a notice to the Commission disclosing details of the proposed combination, in the form, prescribed and submit the form together with the fee prescribed by regulations. Such intimation should be submitted before consummation of the proposed combination.
- The Competition Commission of India has been empowered to deal with Form I or Form II in accordance with provisions of sections 29, 30 and 31 of the Act. Section 29 prescribes procedure for investigation of combinations.
- Section 32 of the Competition Act, 2002 extends the extra territorial jurisdiction of the Competition Commission of India to enquiry and pass orders in accordance with the provisions of the Act into an agreement, dominant position and regulates combinations i.e., mergers and acquisitions with a view to ensure that there is no adverse effect on competition in India.

### GLOSSARY

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

**Combination:** An acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises if the thresholds prescribed under Section 5 of the Act are met.

**Group:** Two or more enterprises which, directly or indirectly, are in a position to —

- (i) exercise fifty per cent or more of the voting rights in the other enterprise; or
- (ii) appoint more than fifty per cent of the members of the board of directors in the other enterprise; or
- (iii) control the management or affairs of the other enterprise.

**Control:** It the ability to exercise material influence, in any manner whatsoever, over the management or affairs or strategic commercial decisions by— (i) one or more enterprises, either jointly or singly, over another enterprise or group; or (ii) one or more groups, either jointly or singly, over another group or enterprise.

**Relevant Market:** Relevant market to mean the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets.

**Relevant geographic market:** A market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas.

**Relevant product market:** A market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use. The amendment act 2022 expands the definition of relevant product market to include the perspective of suppliers. The revised definition includes all those products or services that are regarded as interchangeable or substitutable by the consumers as well as those whose production or supply is regarded as interchangeable or substitutable by suppliers.



