# COMBINATIONS

**J. Sagar Associates**
advocates & solicitors

Bengaluru I Chennai I Gurgaon I Hyderabad I Mumbai I New Delhi

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# Indian Competition Act, 2002

- Section 5 of the Competition Act, 2002 defines combination
- The following transactions exceeding threshold are combinations:
  - acquisition of control, shares, voting rights or assets;
  - acquisition of control by a person over an enterprise where such person has control over another enterprise engaged in competing businesses;
  - mergers and amalgamations.
- Combination provisions came into effect from 01 June, 2011

# Implications

- Combining parties have to notify the Competition Commission of India:
  - within the stipulated time; and
  - seek approval before it can take effect
- Indian regime is suspensory; filing is mandatory and pre-approval is necessary:
  - A combination which is disapproved is void and no authority under any other law can take cognizance of the combination.

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# Important concepts

- "group" – if an enterprise is in a position to:
  - exercises at least 50% of voting rights
  - appoints at least 50% of the directors
  - control the management or affairs of the other, they belong to a 'group"
- "control" – inclusive definition – controlling the affairs or management
  - Includes negative control on Strategic Commercial Decisions

# Thresholds

| Aggregate for the parties to a combination | Value of asset | Turnover |
|---|---|---|
| In India | Rs 1500 crores/ US $ 300 mn approx. | Rs 4500 crores/ US $ 900 mn approx. |
| Worldwide | US$ 750 million including at least Rs 750 crores/ US $ 150 mn approx. in India | US $ 2250 million including at least Rs 2250 crores/ US $ 450 mn approx. in India |

US$ 1=Rs 50

# Thresholds for group

| Aggregate for the parties to a combination belonging to a "group" | Value of asset | Turnover |
|---|---|---|
| In India | Rs 6000 crores/US $ 1200 mn approx. | Rs 18000 crores/ US $ 3600 mn approx. |
| Worldwide | US$ 3 billion including at least Rs 750 crores/ US $ 150 mn approx. in India | US $ 9 billion including at least Rs 2250 crores/ US $ 450 mn approx. in India |

US$ 1=Rs 50

# Value of Assets

- Assets include value of intangibles
- Calculation - book value as per audited accounts for the immediately preceding financial year

  **MINUS** depreciation

  **PLUS** value of intangibles (brand value, goodwill, copyright, patent, permitted use, collective mark, registered proprietor, registered trademark, registered user, etc.)

  **Or**

  **We can consider only balance sheet**
- Value of the assets of the entity to be considered even if only certain assets/ division of the entity is being acquired.

# Value of Turnover

- "Turnover" includes value of sale of goods or services
- Turnover to be calculated on the basis of audited accounts of the immediately preceding financial year

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# Exemptions

- Acquisition of shares/voting rights < 25% but not leading to control
- If the acquirer already owns 50% of shares/voting rights: further acquisition of shares/voting rights unless leading to sole control
- Acquisition of assets in the ordinary course of business or as an investment
  - Conditions applicable
  - Strategic investment

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# Exemptions...2

- Acquisition of raw materials, stores and spares, current assets in ordinary course of business
- Bonus shares, stock splits, subscription to rights, etc.
- Acquisition of shares/voting rights within the same group
- Acquisition of shares/voting rights by securities underwriter/registered stock broker in ordinary course of business

# Exemptions…3

- Merger or amalgamation involving a holding company and its wholly owned subsidiary
- In case of acquisition:
  - If Either the Target enterprise's:
    - Assets < INR 250 Crore in India

      **OR**

    - Turnover < INR 750 Crore in India

# Forms

- Form I to be filed ordinarily
- Form II to be filed preferably when:
  - Horizontal overlap with combined market share of more than fifteen percent (15%) in the relevant market.
  - Vertical overlap with individual or combined market share of parties being more than 25% in the relevant market.
- Form III to be filed for acquisition of public financial institutions, foreign institutional investors, banks or venture capital funds:
  - contract note issued by a stock broker confirming the trade cannot be construed to be an investment agreement for the purposes of section 6(4) of the Competition Act, 2002.

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# Who to file?

- Acquisition - Acquirer to notify
- Mergers and Amalgamation - Parties to the combination to jointly file

# Fee

| Value of Acquisition | Fee (INR) |
|---|---|
| Form I | 10,00,000 |
| Form II | 40,00,000 |
| Form III | Exempted : No fee required |

# Time Period for filing

- Appropriate Form to be filed within 30 days of:
  - Approval of the proposal relating to merger or amalgamation by the boards of directors of the enterprises concerned;
  - Execution of any agreement or any other binding document purporting to convey the intention for acquisition or acquiring of shares/voting rights/ control.

# Consequences of failure to file notice

- Penalty up to 1% of the total turnover or asset, whichever is higher, can be imposed on the parties.
- Commission may suo motu investigate into the combination and direct parties to file notice in Form II with the requisite fee.

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# Prior Consultation

- Enterprises may request for an informal verbal consultation seeking clarification about the filing of notice.
- Consultation shall be kept confidential.
- Opinions or views expressed during consultation will not be binding on the Commission.

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# Time taken for decision

- Within 30 (thirty) days of receiving defect free notice(s), the Commission shall take a decision whether to investigate further.
- There is a time out for furnishing additional information asked by the Commission.
- If the Commission decides to investigate further, it will try to pass an order within 180 days although the law provides for 210 days.

# Competition Assessment -1

- Combination which has or is likely to have appreciable adverse effect on competition in the relevant market in India is void.
- First step -Market definition in terms of section 19(5) – 14 factors to be considered
- Second step – assessment of adverse effect In terms of section 20(4) – 14 factor to be considered

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# Competition Assessment - 2

- Usually merger is of three types:
  - Horizontal
  - Vertical
  - Conglomerate
- Horizontal mergers subjected to most strict scrutiny

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# Relevant Market

- Section 2(r) of CA02:-
  - "relevant market"  to be defined with reference to:
    - the relevant product market; or
    - the relevant geographic market; or
    - with reference to both the markets;
  - Generally it is defined with reference to both the markets
- Relevant Product Market: Section 2(t) - “relevant product market means a market comprising all those **products or services which are regarded as interchangeable or substitutable by the consumer**, by reason of characteristics of the products or services, their prices and intended use”
- Relevant Geographic Market: Section 2(s) – “relevant geographic market means 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 neighbouring areas.”

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# Substitutability

- Demand Side Substitutability – exists when a sufficient number of purchasers of product A regard product B as a credible alternative and would switch from A to B in response to a small change in relative prices.

- Supply Side Substitutability – extent to which alternative suppliers would switch, or begin, production in response to a hypothetical price increase.
  - Pertinent to note that the factor has not been statutory recognition under CA02.

# Relevant Product Market Factors under CA02

- Factor (a) – physical characteristics or end-use of goods
- Factor (b) – price of goods or service
- Factor (c) – consumer preferences
- Factor (d) – exclusion of in-house production
- Factor (e) – existence of specialized producers
- Factor (f) – classification of industrial products

# Relevant Geographic Market under CA02

- Sec 19(7)- Commission is required to consider:-
  - Regulatory trade barriers
    - Licence – Circle/ technology
  - Local specification requirements
  - National procurement policies
  - Adequate distribution facilities
    - Availability of network/ towers
  - Transport costs
  - Language
  - Consumer preferences
  - Need for secure or regular supplies or rapid after-sales services

# Relevant Product Market

- Are these two substitutes?

# RPM – Factors under CA02

- Section19(7)(a) - Physical Characteristics or end-use of goods:-



  - Physical Characteristics are quite different
  - End Use – Entertainment?
  - Unlikely that boxing fans would enjoy a game of chess with the same relish.

# RPM – Factors under CA02

- Section19(7)(b) – Price of goods or services:-


  - Ticket prices or the price of broadcasting rights can vary depending on tournament, players and television exposure.
  - Ringside tickets for a boxing championship are generally around USD 1000.
  - Can’t even find details of ticket prices for the World Chess Championship games.

# RPM – Factors under CA02

- Section19(7)(c) – Consumer Preference :-



  - Difficult to analyze this factor in the absence of definitive survey.
  - Can it be said that both will have common consumers?
  - And who are the consumers? Viewers or Broadcasters who are going to telecast it?

# Economic Tools

- SSNIP test/ Hypothetical Monopolist Test
  - Small but significant non-transitory increase in price
  - 5%-10% increase in price – to assess cross-elasticity
  - Switching cost

# Cellophane Fallacy

- SSNIP test fails in a monopoly market or in case of monopolistic price
- U.S. Supreme Court in U.S. v. E.I. Dupont – Cellophane market
- Customers will have no option but to shift if the prices are raised beyond the monopoly prices
- SSNIP test should use competitive price

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# Adverse Effect - Factors

- Actual and potential competition through imports
  - imports/trade agreements
- Entry barriers
  - sunk cost/technological lead
- Concentration level
  - CR, HHI
- Countervailing power
  - Dominant buyer
- Likelihood of increase in prices or profit margins
- Effective competition after combination
- Substitutes
  - actual or potential

# Factors to be considered…2

- Market share
- Removal of maverick competitor
- Extent of vertical integration
  - Distributor and/or supplier being the subsidiary/ parent company
- Failing business
- Nature and extent of innovation
  - Technology based industry
- Contribution to economic development
- Whether benefits outweigh the adverse impact?

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# Economic Tools

- **Concentration Ratio**
  - Ratio of the combined market shares of a given number of firms to the whole market size.
  - CR3, CR4, CR5
- **Herfindahl-Hirschman Index**
  - The HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers.
  - HHI between 1,500 and 2,500 points to be moderately concentrated, and consider markets in which the HHI is in excess of 2,500 points to be highly concentrated.

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# Countervailing buying power

- *Korsnas/AD Cartonboard*- In a landmark phase one decision, the European Commission unconditionally approved the creation of a near-duopoly in the supply of liquid packaging board (‘‘LPB’’). The acquisition by Korsnas of Assi Doman Cartonboard (‘‘AD Cartonboard’’) combined the second and third largest LPB suppliers in the EEA. The operation did not result in market leadership but it significantly increased concentration on an already heavily concentrated market. In fact, it created a near duopoly with the two largest producers accounting for more than 90 per cent of the total supply in the EEA.

# What happens incase of adverse effect?

- *CCI can refuse permission for the combination*
- *CCI can approve the transaction with modifications*
  - *Structural modifications (preferred)*
  - *Behavioural commitments*
- Caselaws
  - Sun-Ranbaxy
  - Holcim-Lafarge

# THANK YOU

amitabh.kumar@jsalaw.com