M&A Lab

FAQs on Competition Law

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About Nishith Desai Associates

Nishith Desai Associates ("**NDA**") is a research oriented international law firm with offices in Mumbai, Bangalore, Singapore and USA. NDA specializes in providing strategic legal and business solutions coupled with industry expertise. Core practice areas of the firm include mergers and acquisitions, competition law, structuring and advising on outbound & inbound investments, private equity investments and fund formation, international tax, globalization, intellectual property and dispute resolution. From an industry perspective, the firm has practice groups which have developed significant expertise relating to various industries including but not limited to banking and financial services, insurance, IT, BPO and telecom, pharma and life sciences, media and entertainment, real estate, infrastructure and education sectors.

NDA has been included in the Asian Legal Business Watchlist as one of the 'Top 10 firms to watch in 2009' in the Asia Pacific region. It has also been named as one of the top law firms in India for IT, Media & Telecommunications, Taxation and Venture Capital & Private Equity by the India Business Law Journal. NDA was honored with the Indian Law Firm of the Year 2000 and Asian Law Firm of the Year (Pro Bono) 2001 awards by the International Financial Law Review, a Euromoney publication. In an Asia survey conducted by International Tax Review (September 2003), the firm was voted as a top-ranking law firm and recognized for its cross-border structuring work. For further details, please refer to our website at www.nishithdesai.com and for any queries on Competition Law, please contact Mr. Nishchal Joshipura, Head of the M&A practice at nishchal@nishithdesai.com or Mr. Kartik Ganapthy, Partner, Corporate and Securities, at kartik@nishithdesai.com.

PRELUDE

Competition, in a market, has been defined to mean a situation in which *firms or sellers independently strive for the buyers' patronage in order to achieve a particular business objective for example, profit, sales or market share*[1]. The economic analysis of competition shows that the ideal scenario of perfect competition can maximize the benefit to the consumers as demand equals supply and hence the consumers get the best goods / services at the market price. The fundamental reason that competition is favored over a situation of monopoly is that competition drives markets to a more efficient use of scarce resources.

The premise on which Indian competition laws have been drafted is to protect the interest of consumers. Competition law protects competitive markets and prohibits certain types of anti competitive conduct. It can be argued that consumers need no special protection, and that their behavior can be governed by the market forces. However, a perfectly competitive market is a utopian concept and consumer sovereignty is a much-denounced myth.

In pursuit of globalization, India has responded well by opening up its economy, removing controls and resorting to liberalization. The globalized and liberalized industry is facing cut - throat competition. As a natural corollary to this, India has enacted the new competition law called the Competition Act,

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[1] World Bank, *A Framework for the Design and Implementation of Competition Law and Policy,* 1999.

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2002 (“**Competition Act**”) which is meant to replace the extant Monopolies and Restrictive Trade Practices Act, 1969 (“**MRTP Act**”) and provide institutional support to healthy and fair competition.

Since there are reports that the substantive provisions of the Competition Act shall soon be notified by the Government of India, it is worthwhile to have a quick glance at the mechanics of the Competition Act. The Competition Act is a shift from curbing monopolies to encouraging competition and is designed to repeal the extant MRTP Act.

Outline of the paper

This paper provides an elementary guide for both foreign and domestic deal makers with respect to competition law in India. The paper is divided into four parts:

- **Part I:** Introduction
- **Part II:** Anti competitive agreements
- **Part III**: Abuse of dominance
- **Part IV**: Combinations

Part I: INTRODUCTION

Q. WHEN WAS COMPETITION LAW ENACTED IN INDIA?

A. In India, MRTP Act was the first enactment that came into effect on June 1, 1970, to deal with competition issues. It underwent a number of amendments, most notably in 1984 and 1991.

Thereafter, Government of India appointed a committee in October, 1999 to examine the existing MRTP Act for shifting the focus of the law from curbing monopolies to promoting competition and to suggest a modern competition law. Pursuant to the recommendations of the committee, the Competition Act was enacted. However, the jurisprudence of the MRTP regime while interpreting the substantive provisions of MRTP Act may be of persuasive value while interpreting the substantive provisions of the Competition Act.

Further, Competition Act was amended vide the Competition (Amendment) Act, 2007 (“**Amendment Act**”) which received presidential assent towards the end of 2007 brought significant changes to the Competition Law regime in India. Most noteworthy of the changes proposed by the Amendment Act was the introduction of a mandatory notification process for persons undertaking combinations above prescribed threshold limits. The Amendment Act also introduced a lengthy waiting period of 210 days within which the Competition Commission of India (“**CCI**”) is required to pass its order with respect to the notice received, failing which, the proposed combination is deemed to be approved.

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Q. WHETHER PROVISIONS OF MRTP ACT ARE PRESENTLY STILL IN FORCE?

A. Yes, the provisions of the MRTP Act are still in force and would be repealed only when all the provisions of the Competition Act have been notified.

Q. WHETHER ALL PROVISIONS OF THE COMPETITION ACT HAVE BEEN NOTIFIED?

A. No, only certain provisions of the Competition Act such as those relating to establishment of the CCI, appointment of chairperson and members, appointment of staff, undertaking of competition advocacy, etc., have been notified, as on date. Further to the above, as per Business Standard news article dated May 21, 2009, the substantive provisions of the Competition Act relating to behavioral pattern of the entities *viz* prohibition of (i) anti competitive agreements and (ii) abuse of dominance have been notified.

Section 66 of the Competition Act expressly repeals the MRTP Act. However, Section 66 and other substantive provisions of the Competition Act (relating to anti competitive agreements, abuse of dominance and regulation of combinations) have not yet been notified.

Q. WHAT IS THE OBJECTIVE OF THE COMPETITION ACT?

A. The Preamble of the Competition Act 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.”* The Competition Act seeks to:

- prohibit anti-competitive agreements including cartels;
- prohibit abuse of dominant position;
- regulate combinations (mergers and amalgamations, and acquisitions).

Q. DOES THE COMPETITION ACT HAVE EXTRA-TERRITORIAL REACH?

A. Section 32 of the Competition Act expressly provides for extra-territorial reach of the statute. Any anticompetitive activity taking place outside India but having an appreciable adverse effect on competition (“**AAE**”) within India shall be subjected to the application of the Competition Act. The Competition Act gives power to the CCI to enquire into any agreement, abuse of dominant position or combination having an AAE in the relevant Indian market, notwithstanding that:

- an anti competitive agreement has been entered into outside India; or
- any party to such agreement is outside India; or
- any enterprise abusing the dominant position is outside India; or
- a combination has taken place outside India; or
- any party to combination is outside India; or
- any other matter or practice or action arises out of such agreement or dominant position or combination outside India, if such agreement or dominant position or combination has, or is likely to have, an AAE in the relevant market in India.

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Part II: ANTI COMPETITIVE AGREEMENTS

Q. WHAT IS AN "AGREEMENT" UNDER THE COMPETITION ACT?

A. Section 2(b) of the Competition Act defines an agreement to include any arrangement, understanding or concerted action entered into between parties. It need not be in writing or formal or intended to be enforceable in law.

Q. WHAT IS AN ANTI COMPETITIVE AGREEMENT?

A. Section 3(1) of the Competition Act provides that no enterprise or a person shall enter into an agreement, which causes or is likely to cause an AAE within India. It is further clear from the provision that if an agreement does not have any AAE then it will remain out of the purview of this provision. The term 'appreciable adverse effect on competition', used in section 3(1) has not been defined in the Competition Act. However, Section 19(3) of the Competition Act states that while determining whether an agreement has an AAE, CCI shall have due regard to all or any of the following factors:

- creation of barriers to new entrants in the market;
- driving existing competitors out of the market;
- foreclosure of competition by hindering entry into the market;
- accrual of benefits to consumers;
- improvements in production or distribution of goods or provision of services;
- promotion of technical, scientific and economic development by means of production or distribution.

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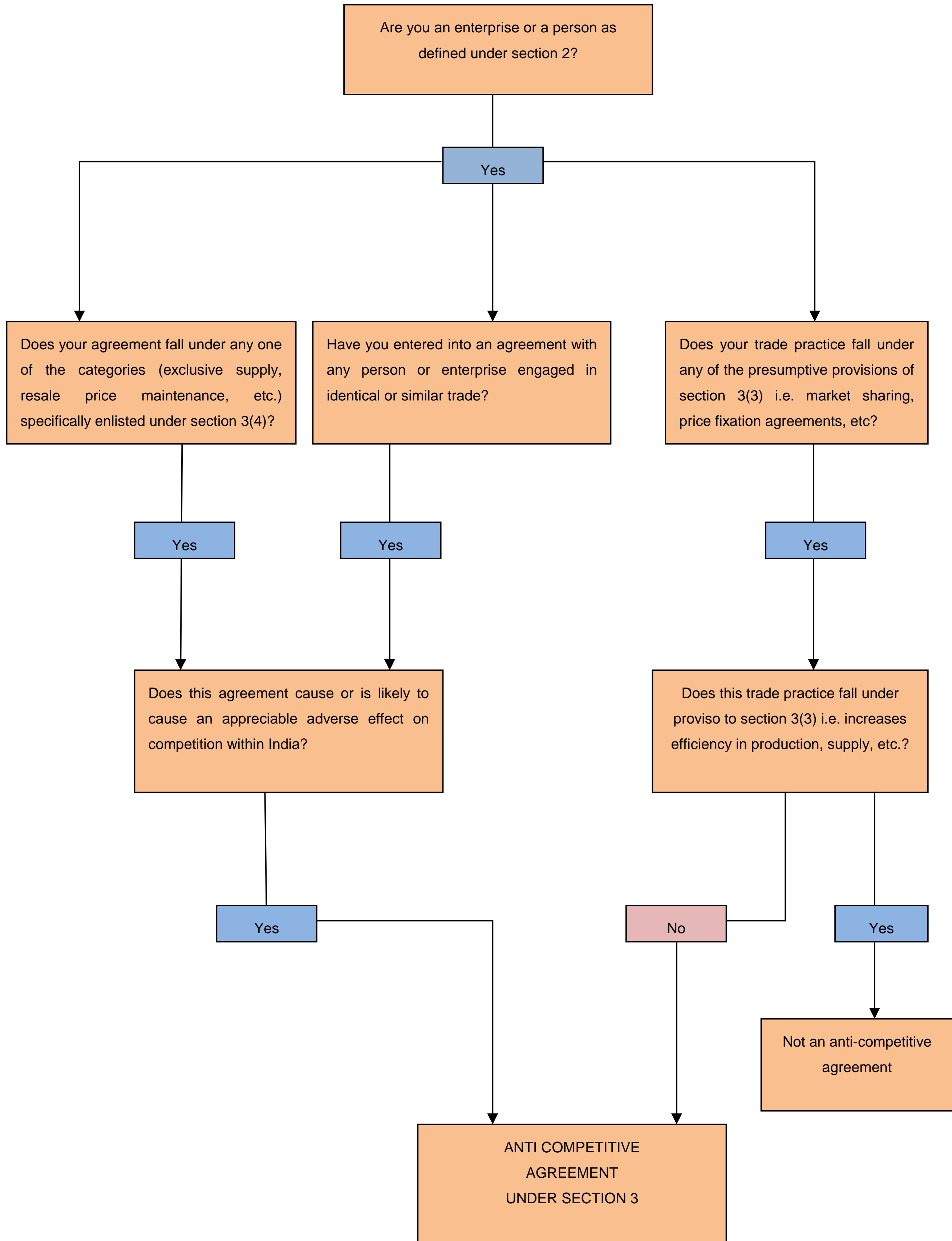
On an analysis of the provisions of the Competition Act, the modus operandi of proving that an agreement is anti-competitive is as follows:



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There are certain categories of agreements, which have been mentioned under Section 3(3) of the Competition Act, which are presumed to be *per se* illegal as it causes an AAE in India. However, there is a carve out provided to such agreements under proviso to Section 3(3) of the Competition Act which provides that such agreements shall not be considered as *per se* illegal if such agreements increase efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services

Horizontal Agreements, which are considered *per se* illegal, are:

- agreement to fix prices;
- agreement to limit production and/or supply of goods or provision of services;
- agreement to allocate markets;
- bid rigging or collusive bidding.

Vertical Agreements, which are considered to be *per se* illegal, which have no carve outs of efficiency, as mentioned above, are:

- <u>conditional purchase/ sale (tie-in arrangement)</u> which includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;
- <u>exclusive supply arrangement</u> which includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person;
- <u>exclusive distribution arrangement</u> which includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods;
- <u>refusal to deal</u> which includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought; and
- <u>resale price maintenance</u> which includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

The other kinds of horizontal agreements and vertical agreements are tested on the principle of *rule of reason* where the CCI shall judge whether such agreements cause an AAE within India.

Q. ARE THERE ANY EXCEPTIONS TO THE PROVISIONS OF ANTI COMPETITIVE AGREEMENTS?

A. The provisions relating to anti competitive agreements will not restrict the right of any person to restrain any infringement of intellectual property rights or to impose such reasonable conditions as may be necessary for the purposes of protecting any of its rights which have been or may be conferred upon it under the following intellectual property right statutes;

- the Copyright Act, 1957;

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- the Patents Act, 1970;
- the Trade and Merchandise Marks Act, 1958 or the Trade Marks Act, 1999;
- the Geographical Indications of Goods (Registration and Protection) Act, 1999;
- the Designs Act, 2000;
- the Semi-conductor Integrated Circuits Layout-Design Act, 2000.

Another exception to the applicability of the provisions relating to anti competitive agreements is the right of any person to export goods from India, to the extent to which, an agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

Q. WHAT IS A CARTEL?

A. Cartel has been defined under the Competition Act to "*include an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services*".

A cartel is regarded as the most pernicious form of violation of competition law and is subject to the most severe penalties under the law. Under general legal parlance, cartels are agreements which are formed in secrecy, which may or may not be in writing, between firms in direct competition with one another in the relevant market, which result in profits due to unreasonable increase of prices by the cartel at the cost of exploitation of the customers. Under the extant MRTP Act, the MRTP Commission can only pass cease and desist orders to stop the operation of any cartels. However, under the Competition Act, the CCI, apart from passing cease and desist orders, can also impose heavy fines.

Q. ARE THERE ANY SAFE HARBOR PROVISIONS UNDER THE COMPETITION ACT?

A. The Competition Act provides for imposition of a lesser penalty, if any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated the provisions of the Competition Act, with respect to anti competitive agreements,

- has made a full and true disclosure in respect of the alleged violation;
- such disclosure is vital;
- such party continues to co-operate with the CCI till the completion of the proceedings before the CCI.

A further condition is that the disclosure should be made before the report of the investigation by the Director General, as directed by the CCI, has been received. The leniency provision has proved to be a powerful tool in the hands of competition authorities in detecting and investigating cartels and proving their existence. The provision has also served to seriously destabilize cartels and provide an incentive to parties to disclose their existence to the competition authorities.

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Part III: ABUSE OF DOMINANCE

Q. WHAT CONSTITUTES A POSTION OF DOMINANCE?

A. Dominance refers to a position of strength that enables an enterprise to operate independently of competitive forces or to affect its competitors or consumers or the market in its favor.

There are various criteria laid down under the Competition Act, based on which the CCI shall conclude whether an enterprise enjoys dominant position which *inter alia* includes:

- market share of the enterprise;
- size and resources of the enterprise;
- size and importance of the competitors;
- economic power of the enterprise including commercial advantages over competitors;
- vertical integration of the enterprises or sale or service network of such enterprises;
- dependence of consumers on the enterprise; entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale;
- high cost of substitutable goods or service for consumers;
- countervailing buying power;
- market structure and size of market;
- any other factor which the CCI may consider relevant for the inquiry.

Q. WHAT CONSTITUTES ABUSE OF DOMINANCE?

A. Abuse of dominant position is a situation where an enterprise that enjoys dominant position directly or indirectly, imposes unfair or discriminatory conditions in the purchase or sale of goods or service; or imposes unfair or discriminatory prices in purchase or sale (including predatory price) of goods or services.

An abuse of dominant position includes situations of imposing unfair conditions or price, predatory pricing which is defined as the situation where a firm with market power prices below cost so as to drive the competitors out of the market and acquire or maintain a position of dominance, limiting production/market or technical development, creating barriers to entry, applying dissimilar conditions to similar transactions, denying market access, and using dominant position in one market to gain advantages in another market.

Q. WHAT ORDERS CAN THE CCI PASS IN CASE OF ANTI COMPETITIVE AGREEMENTS AND ABUSE OF DOMINANT POSITION?

A. The following can be passed by CCI in case of anti competitive agreement and abuse of dominant position:

- during the course of inquiry, the CCI can pass interim order restraining a party from continuing with anti competitive agreement or abuse of dominant position.

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- impose a penalty up to 10% of the average turnover for the last three preceding financial years of the enterprise. In case of a cartel, the CCI can impose on each member of the cartel, a penalty of up to three times its profit for each year of the continuance of such agreement or up to ten percent of its turnover for each year of continuance of such agreement, whichever is higher.
- may direct after the inquiry a delinquent enterprise to discontinue and not to re-enter anti-competitive agreement or abuse its dominant position (cease and desist order). The CCI may also direct modification of such agreement.
- may direct division of enterprise in case it enjoys dominant position.

Part IV: COMBINATIONS

Q. WHAT IS A COMBINATION UNDER THE COMPETITION ACT?

A. Combination includes acquisition of control, shares, voting rights or assets, acquisition of control by a person over an enterprise where such person has control over another enterprise engaged in competing businesses, and mergers and amalgamations between or amongst enterprises where these exceed the thresholds specified in the Competition Act in terms of assets or turnover. If a combination causes or is likely to cause an AAE within the relevant market in India, it is prohibited and can be scrutinized by the CCI.

However, the Competition Act clearly provides that the provisions with respect to combinations are not applicable to share subscription or financing facility of any acquisition by a public financial institution, foreign institutional investors, banks or venture capital fund pursuant to any covenant of a loan agreement or investment agreement. However, such provisions shall not apply only when within 7 days from the date of such acquisition, the parties to such share subscription or financing facility file Form 3 as prescribed with the CCI providing for:

- the details of acquisition including the details of control;
- the circumstances for exercise of such control;
- consequences of default arising out of such loan agreement of investment agreement, as the case may be.

Q. WHAT ARE THE TYPES OF MERGERS?

A. Mergers are broadly classified into three categories:

- Horizontal mergers, which take place between competitors which produce or supply similar or identical products;
- Vertical mergers, which take place between enterprises at different levels in the chain of production, distributors etc. like manufacturers and distributors;
- Conglomerate mergers, which take place between enterprises engaged in unrelated business activities.

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Q. WHAT ARE THE THRESHOLDS IN CASE OF COMBINATIONS?

A. The thresholds for the joint assets/turnover are presented in the form of a table below:

Type of combination	For the Parties		For the Group	
	In India	**World-wide**	**In India**	**World-wide**
Acquisitions, Mergers, Amalgamations, Abuse of dominance	Assets – INR 10 billion (~USD 200 million) or Turnover - INR 30 billion (~USD 600 million)	Assets - USD 500 million or Turnover - USD 1500 million; and In India Assets – INR 5 billion (~USD 100 million) or Turnover – INR 15 billion (~USD 300 million)	Assets - INR 40 billion (~USD 800 million) or Turnover – INR 120 billion (~USD 2400 million)	Assets - USD 2 billion or Turnover - USD 6 billion; and In India Assets – INR 5 billion (~USD 100 million) or Turnover - INR 15 billion (~USD 300 million)

(For reference: 1 crore = 10 million; 1 USD = Rs.50 (approx.)

For the purposes of calculating the threshold limits, a "**group**" means two or more enterprises, which directly or indirectly have:

- The ability to exercise 26% or more of the voting rights in the other enterprise; or
- The ability to appoint more than half the members of the board of directors in the other enterprise; or
- The ability to Control the affairs of the other enterprise.

Control (which expression occurs in the third bullet defining 'group' above), has also been defined in the Competition Act. Control includes controlling the affairs or management by:

- one or more enterprises, either jointly or singly, over another enterprise or group;
- one or more groups, either jointly or singly, over another group or enterprise.

Q. DOES A FIRM PROPOSING TO COMBINE HAVE TO NOTIFY THE CCI?

A. A firm proposing to enter into a combination, shall notify the CCI in the specified form disclosing the details of the proposed combination within 30 days of the approval of the merger or amalgamation by the board of directors of the enterprises concerned with such merger or

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amalgamation or execution of any agreement or other document evidencing acquisition of control.

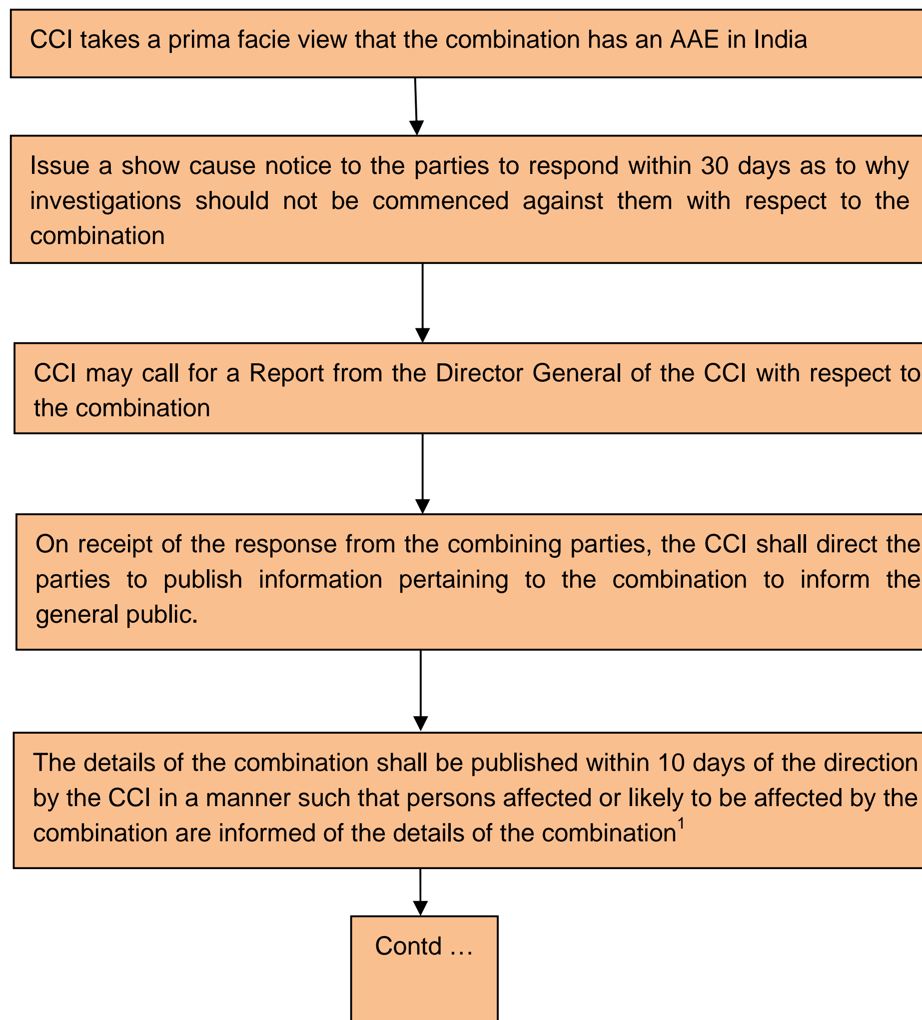
Q. IS THERE COMPULSORY WAITING PERIOD FOR A COMBINATION TO TAKE EFFECT?

A. Yes. The proposed combination cannot take effect for a period of 210 days from the date it notifies the CCI or till the CCI passes an order, whichever is earlier.

If the CCI does not pass an order during the said period of 210 days the combination shall be deemed to have been approved.

Q. WHAT IS THE PROCEDURE FOR INVESTIGATION OF COMBINATIONS?

The schematic delineation for the procedure for investigation into combination is provided below:



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…contd.

Written objection to the combination if invited by the CCI shall have to be provided within 15 days from the date of publication of details of the combination by the combining parties

The CCI may direct the parties to furnish such additional information regarding the combination as it may deem fit, which is required to be furnished by the enterprises within 15 days from the date of such direction

On receipt of the response from the combining parties, the CCI shall direct the parties to publish information pertaining to the combination so as to inform the general public of the details of the combination

On receipt of such additional information sought, the CCI will have to make its determination as to whether the combination is to be allowed, disallowed or modified within a period of 45 days

If the CCI suggests modifications to the scheme of combination and the parties to the combination accept the same, the modifications shall have to be carried out by the parties within the time period as suggested by the CCI. In the event the parties do not agree with the modifications suggested by the CCI, the parties shall submit their suggested modifications to the CCI within 30 days from the date of receipt of suggestions from the CCI.

If the CCI agrees with the amendments proposed by the parties, the combination is deemed to have been approved and if the CCI disagrees with the suggested modifications, the parties are allowed another 30 days to accept the suggestions of the CCI, the acceptance of which will deem the combination approved and the disapproval of which will deem the combination to have an AAE in the relevant market in India and hence shall be declared as void.

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Q. WHAT ARE THE CRITERIA THAT CCI SHALL LOOK AT TO CONCLUDE THAT A COMBINATION HAS AN AAE?

A. The mergers or acquisitions shall be refused by the competition authorities if the merger creates a situation wherein the effect may be to substantially lessen competition or which tends to create a monopoly. The Competition Act has listed the following factors to be taken into account for the purpose of determining whether the combination would have the effect of or be likely to have an AAE:

- The actual and potential level of competition through imports in the market;
- The extent of barriers to entry to the market;
- The level of combination in the market;
- The degree of countervailing power in the market;
- The likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
- The extent of effective competition likely to sustain in a market;
- The extent to which substitutes are available or are likely to be available in the market;
- The market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;
- The likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;
- The nature and extent of vertical integration in the market;
- The possibility of a failing business;
- The nature and extent of innovation;
- Relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;
- Whether the benefits of the combination outweigh the adverse impact of the combination, if any.

Q. ARE THERE ANY EXEMPT TRANSACTIONS WHICH DO NOT REQUIRE APPROVAL FROM CCI?

A. CCI has also promulgated a draft of the Competition Commission (Combinations) Regulations ("**Regulations**") which seeks to govern combinations. The Regulations provide for certain kinds of combination that are excluded from the ambit of combinations that are likely to have an AAE. Some of the key transactions, that have been exempted, include:

- an acquisition of shares or voting rights as investment or in the ordinary course of business, of not more than 26% of the total shares or voting rights of the company, of which shares or voting rights are being acquired, directly or indirectly or in accordance with the execution of any document including a shareholders' agreement or articles of association; or
- an acquisition of assets, not directly related to the business activity of the party acquiring the asset or made solely as an investment or in the ordinary course of business, not leading to control of the enterprise whose assets are being acquired except where the assets being acquired represent the entire business operations in a particular location or

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for a particular product or service of the enterprise, of which assets are being acquired, irrespective of whether such assets are organized as a separate legal entity or not; or

- an acquisition of or acquiring of control or merger or amalgamation where the minimum assets or turnover, in India, of INR 5 billion (~USD 100 million)or INR INR 15 billion (~USD 300 million) respectively, but does not include assets of INR 2 billion (~USD 40 million) millions or turnover of INR 6 billion (~ USD 120 million)2, respectively, of each of at least two of the parties to the combination; or
- an acquisition of shares or voting rights where, prior to such acquisition, the acquirer holds more than 50% of the shares or voting rights in the enterprise of which further shares or voting rights are being acquired; or
- an acquisition of control or shares or voting rights or assets resulting from gift or intestate or testamentary succession or transfer by a settler to an irrevocable trust; or
- an acquisition of current assets in the ordinary course of business; or
- an acquisition where the acquiring party is a foreign state; or
- an acquisition of shares or voting rights by a person acting as a securities underwriter, in the ordinary course of business and in the process of underwriting; or
- an acquisition of shares or voting rights pursuant to a bonus or rights' issue or sub – division of shares; or
- an acquisition pursuant to an order of CCI; or
- an acquisition by the Central Government or a State Government; or
- any acquisition, acquiring of control, merger or amalgamation, which is specifically exempt under any other statute made by the Parliament.

Q. WHAT ORDERS CAN THE CCI PASS IN CASE OF A COMBINATION?

A. The CCI can pass the following orders either:

- approve the combination in the event that the CCI is of the opinion that there is no AAE.
- disapprove of combination in the event that the CCI is of the opinion that there is an AAE.
- In the event that the CCI is of the opinion that there is an AAE but the AAE can be eliminated by suitable modifications, CCI shall propose such suitable modifications to the scheme which shall be carried out by the parties to such combination within a specified time frame. The parties to the combination who accept the modification proposed by the CCI shall carry out such modification within the period specified by the CCI. In the event that the parties to the combination, who have accepted the modification fail to carry out the modification within such prescribed time period, such combination shall be deemed to have an AAE.

  If the parties to the combination do not accept the modification proposed by the CCI such parties may, within 30 working days of the modification proposed by the CCI, submit amendment to the modification proposed by the CCI. In the event the CCI agrees with the amendment submitted by the parties, it shall approve the combination. If the Commission does not accept the amendment, then, the parties shall be allowed a further period of 30 working days within which such parties shall accept the modification proposed by the CCI. If

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[2] 1 crore = 10 million; 1 USD = Rs.50 (approx.)

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the parties fail to accept the modification proposed by the CCI within 30 working days or within a further period of 30 working days, the combination shall be deemed to have an AAE.

Q. IS THERE ANY POSSIBILITY OF CONFLICT BETWEEN THE PROVISIONS OF THE COMPETITION ACT VIS-À-VIS OTHER INDIAN LAWS AND REGULATIONS?

A. Section 60 of the Competition Act states that the provisions of the Competition Act shall override all other provisions contained in any law. However, Section 62 states that the provisions of the Competition Act are in addition to and not in derogation of any other law. Thus, applying the principle of harmonious construction, where there is a direct conflict between the provisions of the Competition Act and any other law, the former shall prevail, and where there is no repugnancy, provisions of both laws shall apply together. In situations wherein there is a conflict between the Competition Act and any other law which other law also has a "non obstante" clause, either an amendment in the law will be necessary, or a judicial proceeding will be required to resolve the conflict.

- **Companies Act, 1956**

Section 391 – 394 of the Companies Act, 1956 ("**Companies Act**") governs reconstructions and amalgamations of companies. The Companies Act requires the High Court of appropriate jurisdiction to approve of the merger and sanction the same[3] which is said to usually take 4-6 months time. However, the maximum time that can be taken by CCI under the Competition Act is 210 days, which can be extended upon further clarifications as explained above. This would mean that the CCI could legally utilize the maximum time period available to it, thereby further extending the time period within which mergers may be sanctioned by the various regulatory authorities.

Thus, an issue that can arise on the concurrent functioning of the Companies Act and the Competition Act is that, the Competition Act/Companies Act empowers the CCI/High Court to make modifications to the scheme of combination and a modification made by either the CCI/High Court would render the review undertaken by the other infructuous.

For instance, if the combination is being reviewed by the High Court and the CCI, and the latter suggests modifications to the scheme which are subsequently carried out, it would render the review process of the High Court futile as the High Court would be reviewing a scheme which has been modified. Thus, the approvals will have to be sought one after the other, which would unreasonably lengthen the process of executing the combinations.

- **Takeover Code**

The approval period of 210 days provided for in the Competition Act would impose additional financial obligations when the combination in question concurrently triggers the threshold limits as prescribed under the Takeover Code. Under the Takeover Code, when the acquirer is unable to pay the shareholders who have accepted the acquirer's offer within 15 days from the date of

[3] Section 394, Companies Act, 1956

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closure of the offer owing to non-receipt of any statutory approval, the extension of time to make such payment is subject to the acquirer agreeing to pay interest to the shareholders for the delayed payment[4].

The Competition Act requires the CCI to prima facie opine on the proposed combination with a maximum turnaround time of 210 days. Thus, legally the CCI is entitled to a time period of 210 days to form its opinion, which will obligate the acquirer to pay interest to the shareholders under most circumstances, if the two enactments are triggered simultaneously.

- **Preferential allotment guidelines**

A practical difficulty arises in cases of preferential allotments that are governed by Chapter XIII of the SEBI (Disclosure and Investor Protection) Guidelines, 2000 (the "**DIP Guidelines**"). Clause 13.4.1 of the DIP guidelines provides that the allotment in case of preferential allotments needs to be completed within 15 days from the date of passing of the resolution in pursuance of Section 81 of the Companies Act. In case the allotment is pending awaiting regulatory approval, the same will have to be completed within 15 days of such approval. But, legally the CCI is entitled to 210 days to approve/disapprove the combination. In such circumstances, the potential investor is protected at a price determined within the first 15 days of the resolution to allot on a preferential basis, which is a much older price for the transaction.

It is important to note that transactions involving securities are highly price sensitive, and hence transactions need to be completed quickly. The inter-play of the Competition Act and the triggering of other legislations governing combinations will slow down the speed of transactions and lengthen the process of completion of the same.

- **Telecom Sector**

One of the primary functions of the Telecom Regulatory Authority of India ("**TRAI**"), India's telecom regulator, is to create conditions for growth of telecommunications in India and provide a fair and transparent policy environment which promotes a level playing field and facilitate fair competition as provided under the TRAI Act, 1997 (the "**TRAI Act**").It is pertinent to note that based on TRAI's recommendations, on April 22, 2008 the Department of Telecommunications ("**DoT**") issued revised guidelines ("**Guidelines**") for intra-service area merger of Cellular Mobile Telephone Service/Unified Access Services ("**CMTS/UAS or Licenses**") superceding the earlier guideline issued in 2004[2]. Thus, there is a possibility of an overlap of the regulatory framework between the DoT and the CCI. The Guidelines issued by the DoT provides that the combined market share of any merged entity shall not be more than 40%. The Guidelines also provide that no merger shall be allowed if the number of service providers reduces to less than four in the relevant market. In light of Section 60 of the Competition Act, the DoT Guidelines will be in addition to the provisions of the Competition Act, and any provision which is repugnant to the provisions of the Competition Act will be redundant in light of Section 62 of the Competition Act,

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[4] Proviso, Regulation 22(12), Regulations

[2] Guideline No. 20-100/2007-AS-1 issued by the DoT, issued on April 22,2008 ("DoT Guideline")

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which provides that the legislation is in addition to other laws and not in derogation of other existing laws.

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