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UNDERSTANDING THE COMBINATION AND ITS THRESHOLD LIMIT: A CONCEPTUAL APPROACH

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ABSTRACT

Combination under the Competition Act, 2002 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, and mergers and amalgamations between or amongst enterprises when the combining parties exceed the thresholds set in the Act. The thresholds are specified in the Act in terms of assets or turnover in India and abroad. The threshold is subject to change by government notification. Entering into a combination which causes or is likely to cause an appreciable adverse effect on competition within relevant market in India is prohibited and such combination shall be void. To ascertain whether the combination has appreciable adverse effect on competition or not, it is necessary to understand the concept of combination and how the threshold is calculated by Competition Commission of India to control the merger and amalgamation. The paper endeavours on these basics and further discusses the exemptions and recently inserted Green Channel Route for entering into combination in India. The paper also mentions the latest proposed amendments in 2022 Bill and with that explores the recent mergers like Etihad Airways-Jet Airways, Sun Pharma-Ranbaxy, and Walmart-Flipkart combinations.

I. INTRODUCTION

Combination refers to merger or amalgamation amongst enterprises, or acquisition of control, shares, voting rights or assets of an enterprise by another person, provided (i) the financial

threshold specified in the Section 5¹ of the Act are satisfied; and (ii) merger, amalgamation and acquisition are not covered under any of exemption notification. Any person or enterprise, which proposes to enter into a combination, is required to give notice to the Commission under Section 6(2)² of the Act any time prior to consummation of the same. However, categories of combinations mentioned in Schedule I of Combination Regulation are ordinarily not likely to cause an appreciable adverse effect on competition in India, therefore notice under sub-section (2) of section 6 of the Act need not normally be filed, in respect thereof.³ If a combination causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India, it can be modified/prohibited by the Commission.⁴

In exercise of its power to frame delegated legislation under the Competition Act, 2002, the commission enacted a set of regulations known as the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 which became operational on June 1, 2011 along with certain other substantive provisions of the Act relating to combinations.⁵ The Combination Regulations mandate parties to a 'combination' for the purposes of the Act. A combination can be of three types as per the Act: (a) acquisitions of control, voting rights, shares and assets, (b) acquisition of control over an enterprise that is engaged in similar or identical services as that of the acquirer and (c) mergers and amalgamations.⁶ These regulations were introduced in an effort to fine-tune the process of regulating combinations in India, a process that began in 2002 underwent changes in 2008⁷ and 2009⁸ and took final shape only in 2011. The Commission has been mindful of the concerns raised by various stakeholders⁹, both national and international, and incorporated suggestions

¹ Competition Act, 2002, s 5 - Combinations

² Competition Act, 2002, s.6(2) – Regulation of Combinations

³ CCI (Procedure in regard to the transaction of Business relating to Combinations) Regulations, 2011, reg 4 - Categories of transactions not likely to have appreciable adverse effect on competition in India

⁴ Competition Act, 2002, s 31 - Orders of Commission on certain combinations

⁵ Ministry of Corporate Affairs, Notification S.O. 479(E), 4 March, 2011 (sections 5, 6, 20, 29, 30 & 31 of the Act came into force through this notification)

⁶ Competition Act, 2002, s 5 - Combinations

⁷The Competition (Amendment) Bill, 2007 <<http://164.100.24.219/billtexts/lsbilltexts/AsIntroduced/competition%202007.pdf>> accessed 21 September, 2022

⁸The Competition (Amendment) Bill, 2009, <https://prsindia.org/files/bills_acts/bills_parliament/2009/Competition_Amendment_Bill.pdf> accessed 21 September 2022

⁹ Joint Comments of the American Bar Association Section of Antitrust Law and Section of International Law on the Draft CCI (Procedure in regard to the transaction of business relating to combination) Regulations, (11 March 2011), <<http://meetings.americanbar>.

proposed by them as a response to a draft version of the Combination Regulations¹⁰. Whether it has entirely succeeded in allaying apprehensions about the effectiveness of the Combination Regulations is a debatable issue but the commission is actively engaging in ‘simplifying the process of notification. With this aim, the commission introduced six set of amendments to the Combination Regulations in 2012, 2013, 2014, 2015, 2016¹¹ and recently in 2018¹² which has been notified on 09th October, 2018 is the subject matter of discussion here. The recent amendment has also been done twice in 2019¹³, once in 2020¹⁴, and newly in 2022¹⁵. However, apart from amendment related to increasing fees for filing forms and various other disclosures nothing much is important for the sake of the article.

The framework of combination control guidelines can be mainly divided into three principal segments: general exemptions from notification, triggering of notification requirements based on threshold limits and scrutiny of notice by the commission. The provisions have clearly laid down the time period available for certain categories of institutionalised transactions which can be filed post the acquisition and all other transaction requiring mandatory notification which have to be intimated to the commission prior to the actual combination. The amended regulations further prescribe the manner in which notices of combinations shall be filed and provide three kinds of forms for the same. The difference in the Forms is with respect to the

org/webupload/commupload/IC906787/relatedresources/aba-SAL-SIL-Comments-on-Indiadraft-Combination-Regulations-final-w-apps.pdf-58k-2011-03-24> accessed 21 September 2022

¹⁰ Draft Competition Commission of India (Procedure in regard to the transaction of business relating to combination) Regulations, 2011 <<http://www.cci.gov.in/images/media/Regulations/DraftCombinationRegulation.pdf>> accessed 21 September 2022

¹¹ Bharat Budhia, Aishwarya Gopalakrishnan and Aishwarya Gupta, ‘India: Sixth Set Of Amendments To The Combination Regulations’, (*Mondaq*, 16 November 2018), <<https://www.mondaq.com/india/trade-regulation-practices/755816/sixth-set-of-amendments-to-the-combination-regulations>> accessed 21 September 2022

¹² The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2018 <<https://www.cci.gov.in/combination/legal-framework/regulations/details/7/0>> accessed 21 September 2022

¹³ CCI (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2019, August 13, 2019 <<https://www.cci.gov.in/combination/legal-framework/regulations/details/8/0>> accessed 21 September 2022; CCI (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2019 <<https://www.cci.gov.in/combination/legal-framework/regulations/details/9/0>> accessed 21 September 2022

¹⁴ CCI (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2020, <<https://www.cci.gov.in/combination/legal-framework/regulations/details/10/0>> accessed 21 September 2022

¹⁵ CCI (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2022, <<https://www.cci.gov.in/combination/legal-framework/regulations/details/11/0>> accessed 21 September 2022

nature of information that is to be furnished under each of them. Undoubtedly, the amended regulations have given parties ample scope for flexibility in filing procedures, but have placed the onus on the parties to notify and do so in a responsible manner to avoid necessary delay in getting clearances from the commission.

The paper has two objectives: first to breakdown the concept of combination and second the applicability of threshold limit to enterprises. The aim of the article is to clear the doubts regarding the ambiguities in threshold application which most research articles fail to describe. The article fulfils its objective with the depiction of pictorial diagrams and theoretical explanation to make it simpler to understand for students, academicians, researchers and professionals.

II. HISTORICAL BACKGROUND

Competition laws in India are aimed to imbibe the social and economic philosophy enshrined in the Directive Principles of State Policy contained in the Constitution.¹⁶ The mandate to draw up a policy that prevents the concentration of wealth and means of production to the common detriment can not only be located in the Constitution but also in the Act which aims to prevent anti-competitive practices.¹⁷ Amongst the principal kinds of anti-competitive behaviour¹⁸ the Act prohibits combinations resulting in an appreciable adverse effect on competition ('AAEC') within the relevant market in India.

In order to fully comprehend the rationale behind the incorporation of the combination control guidelines and the subsequent changes in the amended regulations, I shall look at two main elements: the background events prompting the legislative efforts to regulate combinations in India and the key changes brought about by the amendments as a response to these background events.

¹⁶ The Constitution of India, 1950, Art. 38

¹⁷ The Competition Act, 2002, Statement of Objects & Reasons, <http://www.cci.gov.in/images/media/competition_act/act2002.pdf?phpMyAdmin=QuqXb-8V2yTtoq617iR6-k2VA8d> accessed 21 September 2022

¹⁸ The Competition Act, 2002, s 3 – Anti-Competitive Agreements

A. MRTP ACT

The Monopolies and Restrictive Trade Practices Act, 1969 ('MRTP Act') was India's first antitrust legislation which established a quasi-judicial body for investigating cases of unfair and restrictive trade practices named the Monopolies and Restrictive Trade Practices Commission ('MRTP Commission') which was also the precursor to the Commission.

The concept of combination control was not explicitly recognized in the MRTP Act, nor was it expanded upon. This can be contrasted with the inclusion of section 5 and 6 in the Competition Act, 2002, which is solely dedicated to combination control. This is a remarkable transition in the competition regulatory framework of India. While the lawmakers in 1969 did not feel the need to even include the term 'combination' in the MRTP Act, the lawmakers in the new decade not only incorporated combination control in the Act but buttressed it with additional provisions. Even though the MRTP Act did not explicitly include the term 'combination' in the body of the code, it contained provisions which implicitly dealt with combinations at an elementary level. In Part A of Chapter III of the MRTP Act, 1969, section 20 to 26 dealt with Mergers and Acquisitions.¹⁹ But these sections were subsequently deleted by the MRTP (Amendment) Act, 1991.

Prior to the Amendment, section 23 of the Act was the most significant provision with respect to mergers, amalgamations and takeovers.²⁰ It laid down a rudimentary form of combination control by imposing stringent conditions on the formation of combinations. It also mandated that no such combination can take place without the sanction and express approval of the Central Government.²¹ These sections gave the central government significant power to prevent combinations which would lead to concentration of economic power. Section 24 of the erstwhile MRTP Act provided that if the Central Government felt, upon examination of the facts, that there has been a violation of Section 23, then it may consult with the MRTP Commission and direct the owner of the company to not contravene the provisions by carrying on with the merger or amalgamation.²² The jurisdiction of the Central Government over

¹⁹ Kartik Bajpai, 'History and Dynamics of the MRTP Act and Competition Act in the Realms of Mergers and Acquisitions' (*Juris Online*) <<http://jurisonline.in/?p=2075>> accessed 22 September 2022

²⁰ *ibid*

²¹ *ibid*

²² *ibid*

combinations was overriding on the jurisdiction of the MRTP Commission. These provisions were in force till liberalization in the early nineties, after which the MRTP Act was amended and the sections 20 to 26 were deleted.²³

Eventually, the Ministry of Corporate Affairs vide its Notification dated August 28, 2009 repealed the MRTP Act during the enforcement of The Competition Act, 2002²⁴. There were primarily two reasons behind the repeal of the MRTP Act and its subsequent replacement by the Act. Firstly, with the growing complexity of industrial structure, it was felt that the interference of the Government through the MRTP Act in the investment decisions of large companies had a deleterious effect on Indian industrial growth.²⁵ Secondly, antitrust policy was evolving from an anti-monopoly to pro-competition approach worldwide and Indian competition policy needed to mirror this changed dynamic. But the introduction of a new legislation regulating competition law witnessed some preliminary hurdles. Since the Act was brought into force in a phased manner, an oddity in implementation occurred. There was a period of time between 2002 and 2009 when both the MRTP Act, 1969 and the Act of 2002 had concurrent jurisdiction over competition law matters.²⁶ This ambiguity, especially relating to combination review, was resolved in 2011 with the enforcement of Sections 5 and 6 and certain other provisions of the Act.²⁷ What is relevant for the present discussion is to understand that the mandate of the present Act is to do away with the rigid structural control of the MRTP Act. The Act in conjunction with the Combination Regulations divests the power to review the combinations to the commission as opposed to the central government, thereby introducing more flexibility and autonomy in combination control.

B. COMBINATION REGULATIONS, 2011

The combination regulations were considered to be a marked improvement on the earlier Draft Regulations primarily due to the public debate it generated. The inclusive pre-legislation

²³ *ibid*

²⁴ Competition Act, 2002, s 66 – Repeal and Saving

²⁵ S. M. Dugar, *‘Guide To Competition Law’*, (6th edn, Lexis Nexis, 2010)

²⁶ Tanaya Sanyal and Sohini Chatterjee, ‘Combination Control: Strengthening the Regulatory Framework of Competition Law in India?’ (2012) 5 NUJS L. REV. <<http://docs.manupatra.in/newsline/articles/Upload/931502F5-8DDB-4C22-AAE9-01890981BBF4.pdf>> accessed 22 September 2022

²⁷ Ministry of Corporate Affairs, Notification S.O. 496(E), March 4, 2011

consultation exposed the Draft Regulations to their share of criticism, mostly because of some instances of faulty drafting and structural inadequacies. The Commission was also fairly responsive in incorporating the views of various stakeholders on the Draft Regulations, however, continued to be, by and large, a blueprint for the Combination Regulations. Thus, the Commission notified the Combination Regulations on a positive note. But as is the case with most new legislation, the Combination Regulations were also ridden with flaws. What is pertinent for us is that with this notification, India joined a club of 100 other countries that have a merger control regime.²⁸

III. MAJOR CHANGES BROUGHT ABOUT BY THE REGULATIONS

A. THE COMBINATION REGULATIONS, 2011

a. The regulations expressly included what are commonly referred to as ‘transitional provisions’. These provisions state that aforesaid regulations will only apply to combinations where binding documents are executed on or after June 1, 2011.²⁹ Therefore, all the pending transactions and unsigned transactions prior to the stipulated date are not notifiable, reducing ‘uncertainty’ and ‘compliance burden’ of the parties and stalling the flow of notifications before the commission.

b. The impact of the enactment of the combination regulations was immense. Section 32 of the Act confers extra-territorial jurisdiction on the commission to accomplish its task of terminating practices having an AAEC and the combination regulations are a mode of exercising these powers.

c. Another notable change is with regard to the time frame for completing the process of review. The Act mandates the Commission to pass a final order within 210 days from the date of filing.

³⁰If an order is not passed by the commission within the stipulated time frame, the combination

²⁸‘CCI has today notified the final merger control regulations’, (*Bar and Bench News Network*, 11 May 2011), <<http://barandbench.com/brief/2/1466/cci-has-today-notified-thefinal-merger-control-regulations>> accessed 22 September 2022

²⁹ The Combination Regulations, 2011, reg 31 - Filing of notice under sub-section (2) of section 6 of the Act

³⁰Competition Act, 2002, s 31(11) - If the Commission does not, on the expiry of a period of two hundred and ten

would be deemed to have been approved. According to the provisions of the Combination Regulations, however, the stipulated time period for review has been modified. The Combination Regulations impose a mandatory duty on the Commission to 'endeavour' to pass a final order within 180 days from the date of filing.³¹ Given that the language used in the Combination Regulations is not strictly binding and that a subsidiary regulation cannot override the provisions of the parent Act, the statutory time limit still continues to remain 210 days.

B. THE SEBI (SUBSTANTIAL ACQUISITION OF SHARES AND TAKEOVERS) REGULATIONS, 2011 ('TAKEOVER CODE')

The Securities and Exchange Board of India was in the process of reviewing the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997³² for quite some time. In 2009, a Takeover Regulations Advisory Committee was constituted for the purpose. The Takeover Code finally became effective in October, 2011. In one of the major changes introduced by the Takeover Code, the threshold for triggering open offer was substantially increased from the initial limit of 15% shareholding of the company³³. Presently, a public offer under the Takeover Code is necessary when 25% voting rights or shares of the target company is acquired.³⁴

Similarly, the Combination Regulations generally exempted those acquisitions from notification which do not result in exceeding 10% voting rights or interests in the company

days from the date of notice given to the Commission under sub-section (2) of section 6, pass an order or issue direction in accordance with the provisions of sub-section (1) or subsection (2) or sub-section (7), the combination shall be deemed to have been approved by the Commission.

³¹ Combination Regulations, 2011, reg. 28(6) - Having due regard to the provisions contained in sub-section (11) of section 31 of the Act, the Commission shall endeavour to pass an order or issue direction in accordance with sub-section (1) or sub-section (2) or sub-section (7) of section 31 of the Act within one hundred and eighty days of filing of the notice under sub-section (2) of section 6 of the Act.

³² Souvik Bhadra, 'SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011- some key features', (*pxvlaw*, 8 October 2011), <<http://pxvlaw.wordpress.com/2011/10/08/sebi-substantial-acquisition-of-shares-and-takeovers-regulations-2011-%E2%80%93-somekey-features/>>accessed 22 September 2022

³³ SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, reg. 10

³⁴ SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, reg. 3(1)

being acquired.³⁵ Since an acquisition of interests in a target company can lead to multiple obligations, as under the securities and competition legislation, a need for harmonization between assumes relevance. In light of such concerns, the Commission stepped in to make the Combination Regulations consistent with the Takeover Code and exempted combinations resulting in direct or indirect acquisition of less than 25% of voting rights or shares in the target company not leading to acquisition of control of the enterprise whose shares or voting rights are being acquired³⁶

IV. FILING OF COMBINATION NOTICE

This sub-topic is the soul of the article where we will learn step up step about the applicability of threshold limit in India and outside India, the *de minimis* exemption and the exemptions which need not be notified.

A. COMBINATION

As per Section 5 of the Competition Act, acquisition of one or more enterprises or merger or amalgamation of enterprises, which exceeds the threshold prescribed therein shall be a 'Combination' for the purposes of the Act.

B. FILING RESPONSIBILITY

Regulation 9 of the Combination Regulations states that it is the responsibility of the acquirer to notify an acquisition or a hostile takeover. In case of a merger or an amalgamation, a joint notice is to be filed by the merging or amalgamating parties.³⁷ In case of a joint venture, the responsibility to file a notice would lie with all the parties forming the joint venture.³⁸

C. THRESHOLDS FOR COMBINATIONS

Section 5 of the Competition Act sets out thresholds for enterprises and groups, in terms of

³⁵ Combination Regulations, 2011, Schedule 1 Clause 1 Explanation, Inserted by the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2016, w.e.f. 7-1-2016

³⁶ Combination Regulations, 2011, Schedule 1 Clause 1

³⁷ Combination Regulations, 2011, reg 9(2)

³⁸ Combination Regulations, 2011, reg 9(3)

assets and turnover, which if exceeded triggers a requirement to notify to the CCI. The current thresholds are as follows³⁹:

THRESHOLDS FOR FILING NOTICE				
		Assets		Turnover
Enterprise Level	India	> 2000 INR crore	OR	>6000 INR crore
	Worldwide with India leg	>USD 1 bn with at least >1000 INR crore in India		>USD 3 bn with at least >3000 INR crore in India
OR				
Group Level	India	>8000 INR crore	OR	>24000 INR crore
	Worldwide with India leg	> USD 4 bn with at least >1000 INR crore in India		> USD 12 bn with at least >3000 INR crore in India

Threshold Limit Figure 1.1

Let us understand the threshold diagram in the simplest theoretical expression. Section 5(a) of the Competition Act, 2002 deals with Acquisition and Section 5(c) deals with Merger or Amalgamation. Any acquisition or merger or amalgamation by or between Acquirer Company and Target Company or Amalgamated Company or the group to which the acquirer company or amalgamated company would belong after the acquisition or amalgamation. This combination is further classified into two categories (1) Enterprise Level and (2) Group Level. In other references, also referred to as individual or group level. The threshold limit is calculated based on assets and turnover an enterprise and group level have in India and Outside India.

At enterprise level, the notice of the proposed combination is mandatory if the parties to the combination jointly hold more than the following limits⁴⁰: (1) Have in India assets of more than Rs. 2,000 crore or turnover of more than Rs. 6,000 crore or (2) Have in India and/or Outside India assets of more than 1 billion dollars out of which assets of minimum Rs. 1,000 crore is in India or turnover of more than 3 billion dollars out of which the turnover of minimum Rs. 3,000 crore is in India.

³⁹ Ministry of Corporate Affairs, Notification No. S.O. 675(E), 4 March, 2016

⁴⁰ ibid

At Group Level, the notice of the proposed combination is mandatory if the group to which the acquirer company or amalgamated company would belong after the merger/acquisition jointly hold more than the following limits⁴¹: (1) Have in India assets of more than Rs. 8,000 crore or Turnover of more than Rs. 24,000 crore or (2) Have in India and/or outside India assets of more than 4 billion dollars out of which assets of minimum Rs. 1,000 crore is in India or Turnover of more than Rs. 12 billion dollars out of which the turnover of minimum Rs. 3,000 crore is in India. Let us further understand with a set of calculations for deriving in which threshold of combinations approval is required and in threshold of which combinations approval is not required.

Enterprise Combination figure 1.1

Enterprise	Assets	Turnover
A Ltd.	1000 cr.	3000 cr.
B Ltd.	800 cr.	2,000 cr.
Combined Value	1800 cr.	500 cr.
	(-)	(-)
CCI Threshold u/s 5	2000 cr.	6000 cr.

In this Combination approval is not required as the transaction is not breaching the minimum threshold limit given in Threshold Limit figure 1.1 above.

Enterprise Combination figure 1.2

Enterprise	Assets	Turnover
ABC Ltd.	1000 cr.	3000 cr.
XYZ Ltd.	1800 cr.	4,000 cr.
Combined Value	2800 cr.	7000 cr.
	(+)	(+)
CCI Threshold u/s 5	2000 cr.	6000 cr.

In this Combination approval is required as the transaction has breached the minimum

⁴¹ Ministry of Corporate Affairs (n 39)

threshold limit figure given in Threshold Limit figure 1.1.

Enterprise & Group Combination figure 1.1

Enterprise	Assets	Turnover
ABC group of enterprises	4000 cr.	16,000 cr.
X Ltd.	1000 cr.	3,000 cr.
Combined Value	5000 cr.	19000 cr.
	(-)	(-)
CCI Threshold u/s 5	8000 cr.	24,000 cr.

It is to be noted that when there is a combination between a group and an enterprise, the threshold limit of group is applicable. In this case, approval is not required as the transaction amount is not crossing the threshold limit given in Threshold Limit figure 1.1.

Enterprise & Group Combination figure 1.2

Enterprise	Assets	Turnover
ABC group of enterprises	9000 cr.	25,000 cr.
X Ltd.	300 cr.	1,200 cr.
Combined Value	9300 cr.	26200 cr.
	(-)	(-)
CCI Threshold u/s 5	8000 cr.	24,000 cr.

Now, we will discuss a new concept which is known as *de minimis* exemption. Before delving into the answer as to whether the proposed transaction in above figure will require approval or not, let us first understand the conceptual background of the exemption.

a. De Minimis Exemption

On 27th March, 2017, the Central Government issued a notification ⁴²exempting any acquisition, merger or amalgamation, if the enterprise being acquired, taken control of, merged or amalgamated has (i) assets less than INR 350 crore, or (ii) turnover less than INR 1000 crore. This exemption is valid for a period of 5 years from the date of publication of its notification

⁴² Ministry of Corporate Affairs, vide S.O. 988(E), (27 March, 2017) <<https://egazette.nic.in/WriteReadData/2022/234300.pdf>>accessed 22 September 2022

in the official gazette. The de minimis has been extended by Central Government for a further 5-year period vide notification dated 16th March 2022⁴³. Through its notification, the MCA has substituted the period of “five years” in the De Minimis Exemption, with “ten years”, thereby extending the exemption benefit for a further period of 5 years, i.e., till 28 March 2027. The validity of the target-based exemption was due to expire on 28th March, 2022.⁴⁴

THRESHOLDS FOR AVAILING OF DE MINIMIS EXEMPTION FOR ACQUISITIONS			
		Assets	Turnover
Target Enterprise	In India	≤350 INR crore	OR ≤1000 INR crore

De Minimis Exemption Figure 1.2

Now coming to the answer of whether the transaction in Enterprise & Group Combination figure 1.2 will require approval or not, it is stated that no the transaction does not require the approval as the same is covered under De minimis exemption for not crossing the given threshold limit.

Group Combination 1.1

Enterprise	Assets	Turnover
Foreign Group of Companies	5 billion Indian Asset 200 cr.	35 billion Indian Turnover 800 cr.
Indian Enterprise	600 cr.	2,200cr
Global Value	5 billion	35 billion
Indian Value	800 cr.	3000 cr.
CCI Threshold u/s 5 (Have in outside India)	4 billion	12 billion
Out of which in India the group must have	1000 cr.	3000 cr.
	(-ve)	(+ve)

⁴³Abhay Joshi and others, ‘The Central Government has extended the validity of certain exemptions available to enterprises keeping with its policy of ease of doing business in India’ (ELP, 21 March, 2022), <<https://elplaw.in/the-central-government-has-extended/#:~:text=Mar%2021%2C%202022&text=Now%20through%20its%20notification%20dated,.%2C%20till%2028%20March%202027>> accessed 22 September 2022

⁴⁴ibid

Here is a situation, in which the assets of the proposed combination are not crossing the threshold but the turnover is crossing the threshold. This is a proposed merger involving group of companies situated outside India. In such cases we shall remind ourselves the word “or”. When either assets or turnover cross the threshold limit, approval shall be sought by the enterprises.

V. COMBINATIONS ORDINARILY NOT NOTIFIABLE (SCHEDULE I)

Regulation 4 of the Competition Commission of India (Procedure in regard to the transaction of Business relating to Combinations) Regulations, 2011 (“Combination Regulations”) states that certain transactions, listed in Schedule I of the Combination Regulations are unlikely to have any AAEC and therefore, are not ordinarily notifiable. These transactions, listed below, do not enjoy absolute exemption and have to be assessed on a case-to-case basis.

1. An acquisition of less than 25% of shares or voting rights of an enterprise solely as an investment or in the ordinary course of business, not amounting to control
 - a. In 2016, an amendment to the Combination Regulations clarified ‘solely as an investment’ to mean any acquisition of less than 10% of the total shares or voting rights of an enterprise⁴⁵, provided the acquirer has (i) rights as that of ordinary shareholders, and (ii) neither has representation on the board of directors nor any intention to participate in the affairs or management of the enterprise being acquired. Clause (1A)- An acquisition of additional shares or voting rights by an enterprise having at least 25% and less than 50% of shares and voting rights in another enterprise, provided such an acquisition does not result in change of control.⁴⁶
2. An acquisition of shares or voting rights of an enterprise by an acquirer which already holds at least 50% shares or voting rights, unless the acquisition results in any change of control.
3. An acquisition of assets (i) not directly related to the business activity of the acquirer, (ii)

⁴⁵ The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2016

⁴⁶ The Competition Commission of India (Procedure in Regard to the Transaction of Business Relating to Combinations) Amendment Regulations, 2013

undertaken solely as an investment or in ordinary course of business, and (iii) does not result in acquisition of control, except where the assets being acquired represent substantial business operations in a particular location or for a particular product or service of the enterprise being acquired, irrespective of whether such assets are organized as a separate legal entity or not.

4. An amended or renewed tender offer made in a combination where a notice has already been filed with the CCI by the party making the offer, prior to making the amended or renewed offer.

5. An acquisition of stock in trade, raw materials, stores and spares, and other similar current assets in ordinary course of business.

6. An acquisition of shares or voting rights pursuant to a bonus issue or stock split or consolidation of face value of shares or buy back of shares or subscription to rights issue of shares, not leading to acquisition of control.

7. An acquisition of shares or voting rights by a person acting as a securities underwriter or a registered broker of a stock exchange, on behalf of clients, in the ordinary course of business.

8. An acquisition of shares or voting rights or assets by a person/enterprise of another person/enterprise within the same group (intra-group acquisition), except where the acquired enterprise is jointly controlled by enterprises that are not part of the same group.

9. A merger or an amalgamation of two enterprises where (i) one enterprise has more than 50% shares or voting rights in the other, and/or (ii) 50% or more shares or voting rights in both the enterprises are held by enterprise(s) belonging to the same group, provided there is no change from joint control to sole control.

10. An acquisition of shares, control, voting rights or assets by purchaser approved by the CCI in accordance with Section 31⁴⁷ of the Competition Act.

⁴⁷ The Competition Act, 2002, s. 31 – Orders of Commission on Certain Combinations

VI. GOVERNMENT NOTIFICATIONS: (SECTOR SPECIFIC EXEMPTIONS)

A. AMALGAMATION OF REGIONAL RURAL BANKS

On 10 August 2017, the Central Government granted exemption to amalgamation of 'Regional Rural Banks' as per section 23A(1)⁴⁸ of the Regional Rural Banks Act, 1976⁴⁹, from the application of section 5 and 6 of the Competition Act, for a period of 5 years from the date of notification in official gazette.

B. RECONSTITUTION, TRANSFER AND AMALGAMATION OF NATIONALISED BANKS:

On 30 August 2017, the Central Government granted exemption to all cases of reconstitution, transfer 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, from the application of section 5 and 6 of the Competition Act, for a period of 10 years from the date of notification in the official gazette.⁵⁰

C. BANKING COMPANY IN RESPECT OF WHICH THE CENTRAL GOVERNMENT HAS ISSUED A NOTIFICATION UNDER SECTION 45 OF THE BANKING REGULATION ACT, 1949

A notification dated 11 March 2020⁵¹ issued by the Central Government exempts a 'banking company' whose business has been suspended under section 45 of the Banking Regulation Act, 1949,⁵² from the application of sections 5 and 6 of the Competition Act, for a period of 5 years from the date of notification in official gazette.

⁴⁸ The Regional Rural Banks, s 23A(1)- Amalgamation of Regional Rural Banks

⁴⁹ 'Filing of Combination Notice' (CCI) <<https://www.cci.gov.in/combination/combination/filing-of-combination-notice/introduction>> accessed 24 September 2022

⁵⁰ Joshi (n 43)

⁵¹ ibid

⁵² The Banking Regulation Act, 1949, s 45 - Power of Reserve Bank to apply to Central Government for suspension of business by a banking company and to prepare scheme of reconstitution of amalgamation

D. COMBINATIONS INVOLVING CENTRAL PUBLIC SECTOR ENTERPRISES IN THE OIL & GAS SECTORS:

On 22 November 2017, the Central Government exempted all cases of combinations involving Central Public Sector Enterprises including their wholly or partly owned subsidiaries, operating in the Oil and Gas sectors, under the Petroleum Act, 1934 or under the Oilfields (Regulation and Development) Act, 1948, and rules made under these two laws, from the application of sections 5 and 6 of the Competition Act for a period of 5 years from the date of notification in the official gazette.⁵³

VII. AMENDMENTS MADE BY COMBINATION REGULATION, 2018

The amendments to the Combination Regulations, notified on 9 October 2018 (Amendment Regulations)⁵⁴, reiterate the CCI's constant endeavour to bring greater clarity and transparency to the merger control process. The notable changes introduced by the Amendment Regulations are set out below⁵⁵:

A. WITHDRAW AND REFILE

In a significant step forward, the Amendment Regulations now provide notifying parties with the option to withdraw and refile a merger notification, before the CCI issues a show cause notice (hereinafter 'SCN). In this regard CCI has also clarified that the filing fee already paid shall be adjusted against the fee payable for the new notification, provided the new notification is given within three months from the date of withdrawal. While there have been instances in the last year where parties have been able to "pull and refile" merger notifications, this amendment formalizes the mechanism.

⁵³ Filing of Combination Notice (n 43)

⁵⁴ The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2018 <<https://www.cci.gov.in/combination/legal-framework/regulations/details/7/0>> accessed 24 September 2022

⁵⁵ Aishwarya Gupta & CAM Competition Team, 'Sixth set of Amendments to the Combination Regulations', (Cyril Amarchand Mangaldas, 25 October, 2018) <<https://competition.cyrilamarchandblogs.com/2018/10/sixth-amendments-combination-regulations-competition-law/>> accessed 24 September 2022

B. MODIFICATIONS TO COMBINATION

In a welcome move to expedite the approval process, the Amendment Regulations also clarify that notifying parties may now offer voluntary modifications, post the issuance of SCN under section 29 of the Competition Act, 2002⁵⁶. Now, notifying parties can offer modifications even while providing their response to the SCN and the CCI can, on the basis of such voluntary modifications, approve the combination. By being provided the opportunity to offer voluntarily modifications at the stage of SCN, notifying parties can allay the CCI's potential concerns, without having to undergo in-depth scrutiny. Similar to the previous amendment, this is also an attempt to explicitly include what the CCI was already following in practice.

C. CLARIFICATION REGARDING TIMELINE

The amendment regulations clarify that certain time periods (such as the time taken by the parties to provide additional information, remove defects from the filing, provide additional details when an incomplete notification has been filed, the time taken by the CCI to consider validity of the merger filing or voluntary modifications offered by parties, etc.) shall be excluded from the 210-day timeline mentioned under Section 6(2A) of the Act, which requires parties to wait until the expiry of 210 days from the date of notification, before giving effect to notifiable transactions/combinations. This amendment is merely clarificatory in nature given that these time periods are already excluded from Section 31(11) of the Act, which stipulates that if the CCI does not approve/block a transaction within 210 days from the date of notification to the CCI, the combination will be deemed as approved.

VIII. THE GREEN CHANNEL ROUTE

The unnecessary delay and piling up of cases are amongst the predicament of the Indian Judicial System. And the existence of this intricacy is not limited to the judiciary, it also stretches to other regulatory aspects and administrative systems across our country. Even specific tribunals and regulatory bodies are lagging behind in keeping pace with the required settlement speed. Observing the exigency for providing a smooth and hassle-free procedure in

⁵⁶ The Competition Act, 2002, s 29 – Procedure for investigation of Combinations

antitrust lawsuits pertaining to combination filings, the Competition Law Review Committee under the chairmanship of Mr. Injeti Srinivas submitted a recommendation dated July 26, 2019⁵⁷ to the Ministry of Corporate Affairs, Government of India seeking necessary amendments in the Competition Act 2002.

Keeping in view the needs of the market and the best practices in other jurisdictions, the Commission vide notification dated August 13, 2019, amended Competition Commission of India (Procedure in regard to the transaction of business relation to combinations) Regulations, 2011⁵⁸, and introduced an automatic system of approval for combinations through a 'Green Channel' route.

A. GREEN CHANNEL ROUTE: THE UNDERLYING CONCEPT

The Green Channel Route is an automated approval scheme which acts as a filter for certain kind of merger transaction or combination filings which do not possess any risk of harm to competition regimes. It is an automated approval system for combinations which will prove to be beneficial for parties falling into a certain category to avail the benefit of this scheme instead of waiting for a 30-day working period⁵⁹. This route provides a bypass from the regular legal proceedings to enable them for speedy settlements and quicker administrative decisions. This also eliminates a mandatory 210 day⁶⁰s period prescribed under the Act which CCI takes for an ex-ante investigation to see whether the transaction is causing any appreciable adverse effect on competition. For the sake of quicker disposal, parties are not required to mention market size, market share, competitor details etc. Thus, they are allowed for fewer disclosure requirements.

⁵⁷ Ministry of Corporate Affairs, *Report of the Competition Law Review Committee*, (2019) <<https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf>> accessed 24 September 2022

⁵⁸ CCI (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2019, < <https://www.cci.gov.in/combination/legal-framework/regulations/details/8/0> > accessed 24 September 2022

⁵⁹ The Competition (Amendment) Act, 2007, s 6(2)

⁶⁰ The Competition (Amendment) Act, 2007, s 6(2A)

B. PROCEDURE AND ELIGIBILITY CRITERIA

The freshly inserted Schedule III⁶¹ of the amended combination regulations prescribes the methodology for parties to self-assess the proposed transaction by considering relevant market definitions in all cogent and reasonable ways and to determine whether the proposed transaction would be considered fit for Green Channel Approval or not. The self-assessing measure is stipulated so as to make entities understand the standpoint of each other and the possible economic and financial effects as a result of this transaction. For parties to be considered fit for Green Channel approval, the below-mentioned points are to be fulfilled for proceeding further-

- a. That they do not manufacture similar or identical or substitutable goods (*horizontal overlaps*)
- b. That they are not involved in any activity relating to production, supply, sale and distribution of goods that belong to different levels of the production chain (*vertical overlaps*).
- c. That they are not involved in any activity relating to production, supply, sale and distribution of goods which acts as complementary to each other (*Complementary overlaps*).

If all the above conditions are satisfied, then the parties are required to fill and submit the amended Form I (Form I which contains the Green Channel section) along with a declaration (as prescribed in Schedule IV of amended regulations) that the resultant combination will not cause any appreciable adverse effect on competition. The declaration must substantiate that (a) the proposed combination will not cause any horizontal, vertical or complementary overlaps. (b) there will not be any appreciable adverse effect on competition as a result of the successful execution of this transaction (c) the details provided in the application are not false or misleading and are true to the best of the parties' knowledge. The filing fee of INR 20,00,000 has to be deposited while submitting an application as prescribed in Regulation 11 of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011. Afterwards, the CCI issues an acknowledgement paper certifying the deemed approval if it considers the transaction to be fit for processing through

⁶¹ CCI (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2019, <<https://www.cci.gov.in/combination/legal-framework/regulations/details/8/0> > accessed 24 September 2022

Green Channel. This approval is construed as an order by CCI under section 31(1) of the Competition Act, 2002.

In case the CCI considers a transaction to be unqualified for Green Channel purpose or if the details provided in the application are proved to be false and misleading, then it may declare the approval *void ab initio* and afterwards, the proposed combination will be dealt with by the regular proceedings mentioned therein. Another scenario is when parties execute the transaction before CCI's approval, such transactions would be held for Gun Jumping⁶² (It refers to unlawful activities by a company awaiting regulatory approval for a transaction) and will come under the ambit of Section 44⁶³ of the Competition Act 2002.

IX. EVALUATION OF 'APPRECIABLE ADVERSE EFFECT ON COMPETITION'

The Act envisages appreciable adverse effect on competition in the relevant market in India as the criterion for regulation of combinations. In order to evaluate appreciable adverse effect on competition, the Act empowers the Commission to evaluate the effect of Combination on the basis of factors mentioned in sub section (4) of section 20.

Factors to be considered by the Commission while evaluating appreciable adverse effect of Combinations on competition 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 are likely to be available in the market; (h) market share, in the relevant market, of the persons or

⁶² Apurv Umredkar, 'Green Channel Route: Resolving the Impediment and Procedural Infirmities', (*Kluwer Competition Law Blog*, 18 June 2021) < <http://competitionlawblog.kluwercompetitionlaw.com/2021/06/28/green-channel-route-resolving-the-impediment-and-procedural-infirmities/#:~:text=Green%20Channel%20Route%3A%20The%20Underlying,of%20harm%20to%20competiti on%20regimes.>> accessed 24 September 2022

⁶³ The Competition Act, 2002, s 44 - Penalty for making false statement or omission to furnish material information

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

X. THE COMPETITION (AMENDMENT) BILL, 2022: MAJOR CHANGES

The Competition (Amendment) Bill, 2022 was introduced in Lok Sabha on August 5, 2022. It seeks to amend the Competition Act, 2002. The Act establishes the Competition Commission of India (CCI) for regulating market competition. Key features of the Bill regarding regulation of combination include⁶⁴:

1. Regulation of combinations based on transaction value: The Act prohibits any person or enterprise from entering into a combination which may cause an appreciable adverse effect on competition. Combinations imply mergers, acquisitions, or amalgamation of enterprises. The prohibition applies to transactions where parties involved have: (i) cumulative assets of more than Rs 1,000 crore, or (ii) cumulative turnover of more than Rs 3,000 crore, subject to certain other conditions. The Bill expands the definition of combinations to include transactions with a value above Rs 2,000 crore.

2. Definition of control for classification of combination: For classification of combinations, the Act defines control as control over the affairs or management by one or more enterprises over another enterprise or group. The Bill modifies the definition of control as the ability to exercise material influence over the management, affairs, or strategic commercial decisions.

⁶⁴The Competition Amendment Bill
<[https://prsindia.org/files/bills_acts/bills_parliament/2022/Competition%20\(Amendment\)%20Bill,%202022.pdf](https://prsindia.org/files/bills_acts/bills_parliament/2022/Competition%20(Amendment)%20Bill,%202022.pdf)> accessed 24 September 2022

3. Time limit for approval of combinations: The Act specifies that any combination shall not come into effect until the CCI has passed an order or 210 days have passed from the day when an application for approval was filed, whichever is earlier. The Bill reduces the time limit in the latter case to 150 days.

XI. RECENT CASE LAWS SUMMARY

A. ETIHAD AIRWAYS AND JET AIRWAYS COMBINATION ORDER⁶⁵

Facts:

In 2013, Etihad a company incorporated in UAE, a national airline, proposed to acquire 24% in Jet Airways, a listed company incorporated in India.

Issue:

Whether the proposed combination of Jet and Etihad has an appreciable adverse effect on Competition in India

Decision:

According to CCI, a relevant market in this case is market of international passenger air transport based on the point of origin and destination constituted a different route and hence each different route, constituted a different relevant market. CCI concluded that the relevant market in the instant case would be pertaining to origin and destination from or ending in 9 cities in India to/from UAE.

CCI observed that when considering the network effects, the assessment must go beyond the origin and destination pairs and consider the potential network effects of the proposed combinations. Complementarity of routes makes the network effects stronger. Hubs, increased access to gates, slot and other infrastructure interfaces that link markets.

⁶⁵*Etihad Airways and Jet Airways* [2013], Combination Registration No. C-2013/05/122 <www.cci.gov.in/May2011/OrderOfCommission/CombinationOrders/C-2013-05-122%20Order%20121113.pdf> accessed on 24 September 2022

Competition was observed to be increasing, among systems rather than on point-to-point origin and destination pairs. CCI by majority observed that airlines alliance results in improving and expanding services and thereby inducing competition in that sector. Therefore, CCI concluded that the proposed combination is not likely to have appreciable adverse effect on competition in India and consequently approved the proposed combination.

Dissenting Opinion:

In contrast, the dissenting opinion has concluded that it was not possible to independently verify the details submitted by the parties and consequently, the impact of the proposed combination could not be satisfactorily examined. Further, the negative impact of jet airways' existing codeshare agreements on competition could not be discounted. The dissenting opinion also notes that the origin and destination pairs examined might not justify complete substitutability and consequently the conclusion of majority ruling that there would be no impact on competition might not be accurate. In view of the same, the dissenting opinion concludes that possibility of AAEC cannot be ruled out.

B. SUN PHARMA AND RANBAXY COMBINATION ORDER, CCI ⁶⁶

Facts:

There was a proposed merger of Sun Pharma and Ranbaxy which would result the combined entity to be fifth largest specially generics company in the world and the largest pharmaceutical company in India. CCI in terms of Section 29(2) formed a prima facie opinion that the combination is likely to have an appreciable adverse effect on Competition.

Issue:

Whether the proposed combination is likely to have appreciable adverse effect on competition in India?

Decision:

CCI observed that both the parties are engaged in the manufacture, sale and marketing of

⁶⁶ *Sun Pharma and Ranbaxy Combination Order* [2014] <<https://dullbonline.wordpress.com/2017/08/29/sun-pharmaceutical-industries-limited-and-ranbaxy-laboratories-limited-combination/>> accessed 24 September 2022

various pharmaceutical products including medicines and active pharmaceutical ingredients which constituted a separate relevant market. CCI observed that there are horizontal overlaps between the parties in both the markets for formulation as well as active pharmaceutical ingredients.

In order to examine the present position, determine the effect of transaction, the combination (commission) focused its investigation on 49 relevant product market for formulations where the proposed combination was likely to have an AAEC in India based on:

- a. The parties combined market share
- b. The parties incremental market share
- c. The market share of competition, and
- d. The number of significant players in the relevant market.

The commission focused its examined-on SI molecules or relevant product markets for formulation which resulted in a 15% market share and found that in 7 formulations, the combined entity on competition due to high market share post-merger.

CCI proposed the approval of the merger subject to the modifications proposed as follows:

- a. Ranbaxy to divest all products containing 5 formulations and Sun Pharma to divest all products containing two formulations.
- b. CCI has asked the parties to give full information regarding divestment products to potential purchase so as to enable them to undertake reasonable due diligence.

Exceptions:

Section 6(4) and 6(5) provides for exemption from giving notice to the CCI in order case of:

- a. Share Subscription, or
- b. Financial facility, or
- c. Any acquisition by public financial institution, foreign institutional investor, bank, or venture capital fund, pursuant to any covenant of loan agreement or investment agreement.

These institutions are required to file within 7 days from date of acquisition with the details of acquisition. The exemption is provided in the act to facilitate raising of funds by an enterprise in course of its normal business. The procedure to be followed pursuant to section 6 of the

Competition Act, 2002 are subject to regulation issued by CCI.

C. WALMART AND FLIPKART COMBINATION ORDER, CCI⁶⁷

Facts:

CCI received a notice under section 6(2) of the Competition Act, 2002 given by Walmart International Holdings Inc., a subsidiary of Walmart Inc. for acquisition between 51% and 77% of the outstanding shares of Flipkart Pvt Ltd. and matters incidental thereto.

Issue:

Whether proposed combination is likely to have an appreciable adverse effect on competition in India

Decision:

CCI approved the 77% acquisition of outstanding shares of Flipkart Pvt. Ltd. By Walmart International Holdings Inc. and stated that it is not likely to have an appreciable adverse effect on Competition in India. Since both the parties are engaged in Business-to-business sales (hereinafter 'B2B') and the combination would facilitate the same for Walmart, the CCI analysed the combination from both perspectives.

CCI observed that both the parties to the combination have substantial foreign investments and therefore they are governed by Foreign Direct Investment policy of India and extent of Walmart's market share in Business-to-Business sales in India is less than half a percent. Walmart and Flipkart are not close competitor. Therefore, the CCI held that, the proposed combination does not affect the current market structure.

Coming to the question of vertical overlap, the CCI observed that the Foreign Direct Investment

⁶⁷ *Walmart And Flipkart Combination* [2016], Combination Registration No. C-2018/05/571 <https://cuts-ccier.org/pdf/Edition-10-Analysis_of_Competition_Cases_in_India.pdf> accessed 24 September 2022

policy restricts both the parties from engaging in B2B sales. However, there is no restriction on the parties to offer an online market place where they function merely as intermediaries.

CCI observed that the proposed combination would not result in elimination of any major player in the relevant market. The proposed combination would enhance the quality of operations, financial strength and would help them compete effectively in this dynamic e-commerce markets. CCI held that the issues about common customer of Flipkart are not directly or indirectly related to proposed combination and thus the same is not likely to alter the competition dynamics as it exists today.

XII. CONCLUSION

Combination of enterprises is not *per se* prohibited under Competition Act, 2002. The prohibition applies if the combination or merger is having appreciable adverse effect on competition in India. Whether the merger has any AAEC affect or not, the same has to be ascertained through its dominance in the relevant market. Not all combination shall be subject to approval by the commission, it is only those combinations which are crossing the threshold limit as per latest notification of 2016 and not falling under any exemptions, which we have discussed in detail above.

The concept of combination is technical to understand and in my opinion the Act has not done justice to its understanding and only created ambiguity and confusion to its applicability. It is suggested that lawmakers shall amend the Act and infuse clarity in its conceptual framework to make it easier for academicians and layman for the better implementation of the Competition Act, 2002.