

likely to significantly affect the factors for the determination of AAEC or CCI's assessment of the combination, CCI may treat the notice filed as not valid after recording reasons.

Please note that no additional fee shall be payable if a notice is filed again by the parties within a period of 45 days from the date of communication of the decision of the Commission [See Regulation 15 of the Combinations Regulations 2024].

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

Ans. Yes, Regulation 16 of Combinations Regulations 2024 allows withdrawal and re-filing of notices with the Commission at any time prior to the issuance of notice under sub-section (1) of Section 29 of the Act. On the request of the parties to the combination, the Commission may allow withdrawal and re-filing of the notice.

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

[See Regulation 16-of the Combinations Regulations 2024].

121. How would a notice get invalidated? What are the grounds for invalidation of notice?

Ans. A notice filed shall not be valid unless it is complete and in conformity with the Combinations Regulations, 2024 [See Combinations Regulation 14(1)]. The Commission may, after recording reasons, invalidate a notice filed under Regulation 5 or Regulation 8 of Combination Regulations 2024 when it comes to the knowledge of the Commission that such notice is not valid as per Regulation 14(1).

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

In case the parties fail to remove the defects or fail to furnish the required information, including documents(s), within the time specified, the notice filed shall not be treated as a valid notice. However, CCI may provide parties with an opportunity of being heard before it decides to invalidate a notice [See Regulation 14(7) of the Combinations Regulations 2024] [See Regulation 14 of Combinations Regulations 2024].

In Amazon.com NV Investment Holdings LLC [C-2019/09/688, available at <https://www.cci.gov.in/combination/order/details/order/1138/0>], it was observed "...If a party conceals/suppresses and/or misrepresents to the Commission the scope and purpose of the Combination and obtains approval, the same would effectively amount to approval/consent having been obtained by way of fraud. Such breach of trust of the

Commission, established under the Act for the benevolent purpose of promoting and sustaining competition in markets in India, manifests a deliberate disregard to the trust based regulatory mechanism provided under the Act...”

122. When does CCI terminate the combination investigation procedure?

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

(a) receiving an intimation from the person(s) or enterprise(s) who filed the notice to the effect that the proposed combination will not take effect;

(b) passing of an order by the Commission under Section 31 of the Act.

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

[See Regulation 17 of Combinations Regulations 2024]

G. Review of Combinations

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

Ans. In terms of sub-section (6) of Section 31 of the Act, the Commission is required to pass an order or issue direction in accordance with the provisions of Section 31 of the Act within 150 days from the date of the notice given to the Commission under sub-section (2) of Section 6 of the Act. Further, in accordance with sub-section (1B) of Section 29 of the Act, the Commission shall form its *prima facie* opinion as to whether a combination is likely to cause or has caused an appreciable adverse effect on competition within the relevant market in India within 30 days of the receipt of such notice.

124. What is procedure for review of combinations?

Ans. Under sub-section (1) of Section 29 of the Act, CCI is required to form its *prima facie* opinion as to whether a combination is likely to cause or has caused an AAEC within the relevant market in India within 30 days of receipt of complete and valid notice. If the Commission is of the opinion that a combination is not likely to cause AAEC within the relevant market in India, it approves the same under Section 31 (1) of the Act.

If CCI is of the *prima facie* opinion that a combination is likely to cause an AAEC or has caused an AAEC within the relevant market in India, CCI issues a show cause notice under Section 29(1) of the Act to the parties to combination, calling upon them to respond within 15 days of the receipt of the notice as to why investigation in respect of such combination should not be conducted. If the response of the parties is found to be satisfactory and CCI decides that there is no AAEC, CCI approves the combination under Section 31(1) of the Act.

If the response of the parties to the Show Cause Notice issued under Section 29 (1) of the Act is not found to be satisfactory and CCI is of the *prima facie* opinion that combination is likely to cause an AAEC or has caused an AAEC within the relevant market in India, CCI shall direct the parties to the said combination to publish details of the combination for bringing the combination to the knowledge or information of the public and persons affected or likely to be affected by such combination. Thereafter, the procedure laid down under Sections 29 (3) to 29 (6), 29A, and that under Section 31 of the Act is to be followed.

125. Does CCI seek information from parties to the combination or third parties before forming a *prima facie* view under Section 29 (1) of the Act??

Ans. Yes. CCI can seek additional information from the parties where the information or document(s) contained in the notice are incomplete in any respect. The parties to the combination may be asked to remove such defect(s) or furnish the required information, including document(s) under Regulation 14(2) of the Combinations Regulations 2024 or to provide any additional information under Regulation 14 (4) of Combinations Regulations 2024.

Under regulation 14(8) of the Combinations Regulations, 2024, CCI can also seek information from third parties before forming a *prima facie* view under Section 29 (1) of the Act.

126. What is the procedure for review of combination under Section 29 (3) to 29 (6) and 29A of the Act?

Ans. If the response of the parties to the show cause notice issued under Section 29(1) of the Act is not found to be satisfactory and CCI is of the opinion that the combination has or is likely to *prima facie* have an AAEC, it shall, within seven days from the date of receipt of the response of the parties to the combination, direct the parties to the said combination under Section 29(2) of the Act to publish details of the combination within seven days of such direction for bringing the combination to the knowledge or information of the public and persons affected or likely to be affected by such combination. The details of the combination shall be published by the parties in Form III, as specified in Schedule I to the Combination Regulations 2024.

Under Section 29(3) of the Act, CCI may also invite any person or member of the public, who is affected or is likely to be affected by the combination to file written objections within 10 days from the date on which details of the combination were published.

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

The additional or other information called for by the Commission shall be furnished by the parties referred to in Section 29(4) within 10 days from the expiry of the period specified in Section 29(4) of the Act [Section 29(5)].

After receipt of all information, the Commission shall proceed to deal with the case in accordance with the provisions contained in Section 29A or Section 31 of the Act, as the case may be. [Section 29(6)].

Upon completion of the process under Section 29 of the Act, where the Commission is of the opinion that the combination has or is likely to have an appreciable adverse effect on competition, it shall issue a statement of objections to the parties under sub-section (1) of Section 29A of the Act. The statement of objections is to be communicated to the parties. The parties have to explain within 25 days of receipt of the statement of objections why such combination should be allowed to take effect.

Where the parties to the combination consider that such appreciable adverse effect on competition can be eliminated by suitable modification to such combination, they may submit an offer of appropriate modification to the combination along with their explanation to the statement of objections. [Section 29A (2)]

If the Commission does not accept the modification submitted by the parties under sub-section (2) it shall, within seven days from the date of receipt of the proposed modifications under that sub-section, communicate to the parties as to why the modification is not sufficient to eliminate the appreciable adverse effect on competition and call upon the parties to furnish, within twelve days of the receipt of the said communication, revised modification, if any, to eliminate the appreciable adverse effects on competition. [Section 29A(3)]

The Commission has to evaluate such proposal for modification within twelve days from receipt of such proposal. [First proviso to Section 29A(3)]

The Commission may also *suo motu* propose appropriate modifications to the combination, which may be considered by the parties to the combination. [Second proviso to Section 29A(3)]

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

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

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

Ans. As provided under Section 20(4) of the Act, for the assessment of AAEC in case of a combination, CCI considers all or any of the following factors: (a) actual and potential level of competition through imports in the market; (b) extent of barriers to entry into the market; (c) level of 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 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.

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

Ans. The Commission employs a wide spectrum of economic tools and techniques, including both quantitative and qualitative analysis. Quantitative analysis most often applied in the

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

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

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

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

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

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

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

CCI, while determining the “relevant geographic market”, will have due regard to all or any of the following factors: (a) regulatory trade barriers; (b) local specification requirements; (c) national procurement policies; (d) adequate distribution facilities; (e) transport costs; (f)

language; (g) consumer preferences; (h) need for secure or regular supplies or rapid after-sales services; (i) characteristics of goods or nature of services; (j) costs associated with switching supply or demand to other areas. [Section 19(6)]

Further, CCI shall, while determining the “relevant product market”, have due regard to all or any of the following factors, namely: (a) physical characteristics or end-use of goods or the nature of services; (b) price of goods or service; (c) consumer preferences; (d) exclusion of in-house production; (e) existence of specialized producers; (f) classification of industrial products; (g) costs associated with switching demand or supply to other goods or services; (h) categories of customers. [Section 19(7)]

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

Ans. Upon assessment of a combination based on the factors stated above, CCI may: (a) approve the combination; (b) block the combination; or (c) approve the combination subject to certain conditions, which are generally referred to as modifications. The modifications are remedies that are intended to address the potential anti-competitive outcome of the proposed combination.

133. Whether the parties can offer modification before the Commission forms *prima facie* opinion under Section 29 (1) of the Act?

Ans. Yes. The parties to the combination can offer modification to the proposed combination before the Commission forms an opinion under Section 29(1) of the Act and the Commission may approve the proposed combination under Section 31(1) of the Act on that basis. [Section 29(7)]

134. At what stage(s) the parties can offer modification after the Commission forms *prima facie* opinion under Section 29 (1) of the Act?

Ans. In terms of the Regulation 25(4) of the Combinations Regulations 2024, the parties to the combination can offer modification to the proposed combination along with the response to the show cause notice issued under Section 29(1) of the Act. The parties can also submit an offer of appropriate modification to the combination along with their explanation to the statement of objections issued under Section 29A (2) of the Act. The CCI may or may not accept such modifications proposed by the Parties. If CCI accepts the offer of modification, it approves the combination. However, if it does not accept the modification, the parties are given time of 12 days to revise the modifications proposed by the Parties. [Section 29A (3)] The Commission may also *suo motu* propose appropriate modifications to the combination which may be considered by the parties to the combination. [Proviso to Section 29A (3)]

135. When does the Commission appoint a monitoring agency?

Ans. Where the Commission is of the opinion that the implementation of the modifications to the proposed combination needs supervision, it may appoint a monitoring agency to oversee such implementation on such terms and conditions as may be determined by the Commission. The agencies appointed as monitoring agency are independent of the parties to the combination having no conflicts of interest. Such independent agencies may include an accounting firm, management consultancy, any other professional organisation or chartered accountants/ company secretaries/ cost accountants. The monitoring agency generally has to submit periodic reports to CCI stating whether the parties to a merger or an acquisition have complied with the modifications directed by CCI. The appointed agency must report to CCI either annually or at periods as specified by CCI. The payment to the appointed monitoring agency shall be made by the parties to the combination as per the directions of the Commission.

[For reference, please see Regulation 27 (Appointment of independent agencies to oversee modification) of the Combinations Regulations 2024 and Regulation 54 of Competition Commission of India (General) Regulations, 2024].

H. Insolvency and Bankruptcy Code (IBC)

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

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

137. Can an IBC transaction be filed through the Green Channel route [Section 6(4)] of the Act? If yes, what is the process of filing IBC transactions through the Green Channel?

Ans. Yes, an IBC transaction can be filed under Green Channel provided it meets the criteria for notifiability of transaction under Green Channel, *i.e.*, there are no overlaps between the activities of the parties to the combination.

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

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

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

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

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

As per the above provision, approval of CCI is required prior to approval of Committee of Creditors (CoC) under the IBC process, in case the IBC transaction is a combination under the Act.

140. What is the procedure followed by CCI in reviewing various M&As which were notified pursuant to IBC proceedings.

Ans. IBC-related proceedings are time bound, and therefore, CCI is conscious of clearing these transactions in a timely manner. For determining whether a combination would have an effect or is likely to have an appreciable adverse effect on competition in the relevant market, the Commission gives due regard to factors under Section 20(4) of the Competition Act. One such factor that the Commission may consider is 20(4)(k), possibility of a failing business. This factor, among others, may be given due consideration while assessing a combination under the Act

I. Standstill Obligations

141. What are standstill obligations?

Ans. The Combinations Regulations regime in India is mandatory and suspensory. Section 6(2A) of the Act imposes a standstill obligation on parties, *i.e.*, parties must not give effect to the combination or any part thereof, before an order under Section 31 of the Act has been passed by CCI or until expiry of 150 days from the date of giving notice to CCI or *prima facie* opinion is not formed by the Commission within 30 days of receipt of notice in terms of Section 29(1B) of the Act, whichever is earlier.

142. What is the purpose and objective of standstill obligations?

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

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

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

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

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

144. Please provide clarity, as to what constitutes a 'fully consummated' transaction.

Ans. In the context of Regulation 34 of the Combinations Regulations 2024, fully consummated transaction would mean and imply 'closing' of a transaction as defined in respective transaction documents.

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

Ans. (a) In Ultratech/Jaypee (C-2015/02/246), the Commission observed: "the sequence of events and terms and conditions of the MOU and notes that the Board had approved

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

After observing that the extension of corporate guarantee was not in ordinary course of business and in fact was pursuant to the Combination, the Commission notes the terms and conditions agreed by the Parties in the MOU as per which, [...]. This agreement brings out clearly that the corporate guarantee was, in substance, pre-payment of consideration. In this regard, the mere fact that UltraTech had not granted any advance or loan to JAL and arranged corporate guarantee also becomes inconsequential considering the minutes of the First Meeting. [...]. Accordingly, the decision to use the instrument of corporate guarantee was a tactical decision made by management of UltraTech”. For reference, please see <https://www.cci.gov.in/combination/order/details/order/1101/0>.

- (b) In Hindustan Colas Private Limited (C-2015/08/299), the Commission observed: “...that pre-payment of price (whether refundable/non-refundable) may have a number of competition distorting effects viz., (i) it may lead to a strategic advantage for the Acquirer; (ii) it may reduce the incentive and will of 'target' to compete; and (iii) it may become a reason/basis to access the confidential information of the 'target'. On an overall basis, it may be said that pre-payment of consideration may have the impact of creating a tacit collusion which may cause an adverse effect on competition even before consummation of the combination. Thus, the Commission is of the opinion that what is important is pre-payment of consideration and solely the fact of the same being refundable or otherwise is not relevant...” For reference, please see <https://www.cci.gov.in/combination/order/details/order/1135/0>.
- (c) In Bharti Airtel/Tata (C-2017/10/53), the Commission observed: “that as per Clause [...] of the Implementation Agreement, the Parties have agreed that [...]. This arrangement provides for a potential mechanism to exercise operational control on Tata CMB from the Agreed Date itself considering that cash is a flow variable which needs to be managed prospectively and cannot be managed retrospectively and any leakages etc. thereof during the interim period cannot be managed after consummation of the Combination... The ER Clause is clearly in the nature of an anteriority clause as it envisages [...] from a date prior to the approval of the said Transaction by the Commission. Further, as detailed in Clause [...] of the Implementation Agreement, Airtel is allowed to [...] which implies Airtel's direct interference in ordinary course activities of Tata CMB”. For reference, please see <https://www.cci.gov.in/combination/order/details/order/439/0>.
- (d) In Adani Green Energy Limited(C-2021/05/837), the Commission observed: “Having noted the inherence of the exchange of information, in broader terms, in the process of

businesses combining from a business perspective, it is also important to note that the exchange of information between the parties at any stage before the transaction has been assessed and approved can also have the effect of leading a combination to “come into effect.” This may be true if, for any reason (legitimate business rationale or otherwise), the parties to a combination get involved in an exchange of commercially sensitive information... Considering all the relevant aspects of the case, the Commission is of the opinion that the contractual arrangements similar to the impugned Clause should be discouraged, and parties to a combination, in general, would also be well advised to ensure adherence to inherence/proportionality principle in the contractual terms and resulting actions/conduct. Wherever it is felt that certain restrictions are required to be imposed or certain information is required to be exchanged/discussed to ensure preservation of economic value of assets or any other such legitimate objective, the parties ought to strive to make the arrangement as objective and precise as possible to avoid any likelihood of inference on interference with ordinary course activities of the target or causing any competition distortions in contravention of standstill obligations. Likewise, wherever applicable, the safeguards should be commensurate with the scope and effect of the conduct/arrangement in letter and applied similarly in spirit” For reference, please see https://cci.gov.in/combination/orders-section43a_44.

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

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

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

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

J. Gun Jumping and Media Scanning

147. What is gun jumping?

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

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

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

If it appears that the transaction meets the thresholds under Section 5 of the Act and does not avail any exemption under the provisions of the Act or rules made thereunder, the parties are issued a show cause notice under Section 43A of the Act read with Regulation 49 of the General Regulations 2024.

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

Ans. If the Commission forms a *prima facie* opinion that a notifiable transaction was not notified to the Commission prior to consummation, the Commission issues a SCN under Section 43A of the Act read with Regulation 49 of General Regulations 2024. The parties provide their written response(s) to the SCN and generally seek an opportunity to provide their oral submissions before the Commission. After receipt of the explanation and completion of the hearing, if granted, the Commission may impose the penalty based on the facts and circumstances of the case. As a result of its media scanning exercise, the Commission has initiated inquiries and passed various orders. For example:

- (i) Allcargo Logistics Limited/GATI Ltd.: The Commission observed that Allcargo Logistics Limited acquired 46.86% equity in GATI Limited and did not notify the same. On completion of the above-mentioned proceedings, the Commission imposed a penalty of INR 20 lakhs on the acquirer.

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

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

Ans. Under Section 43A of the Act, the penalty may extend to one per cent (1%) of the total turnover or the assets or the value of transaction referred to in Section 5(d) of the Act, whichever is higher, of such a combination. The Commission, *inter alia*, considers the mitigating and aggravating factors and decides the quantum of penalty.

Please see Clause 6 of the Competition Commission of India (Determination of Monetary Penalty) Guidelines, 2024.

For reference, please see (i) DiasSys Diagnostics Systems GmbH, Germany –Order under Section 43 in C 2015/09/313, available at <https://cci.gov.in/combination/order/details/order/1015/1/orders-section31>, and (ii) Amazon.com NV Investment Holdings LLC – Order under Sections 43A, 44 and 45 of the Act in C-2019/09/688, available at https://www.cci.gov.in/combination/order/details/order/1138/0/orders-section43a_44.

K. Sections 44 and 45 of the Act

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

Ans. Section 44 of the Act prescribes a penalty of INR 50 lakh to INR 5 crore for any party which either makes a false statement or omits to state any material fact. Similarly, Section 45 of the Act prescribes a penalty of up to INR 1 crore on any person who makes any false statements or omits to state any material facts, knowing it to material or wilfully alters, suppresses or destroys any document which is required to be furnished. Sub-section (2) of Section 45 also additionally empowers CCI to pass “such order as it deems fit”.

Please see Clause 7 of the Competition Commission of India (Determination of Monetary Penalty) Guidelines, 2024.

The Competition Commission of India in the proceedings in Amazon.com NV Investment Holdings LLC [C-2019/09/688 available at https://www.cci.gov.in/combination/order/details/order/1138/0/orders-section43a_44 under Sections 43A, 44 and 45 of the Act, levied a penalty of INR 1 crore each under the provisions of Section 44 and Section 45 of Act on Amazon.com NV for suppressing the actual scope and purpose of the combination.

L. Green Channel

152. What is Green Channel Filing?

Ans. Green Channel is an automatic system of approval for certain mergers, amalgamations and acquisitions (combinations) where there are no business overlaps of any kind, be it horizontal, vertical or complementary in nature, between the parties to combination. These combinations are perceived to be not likely to cause appreciable adverse effect on competition (AAEC) in India. After the provisions of Section 7 of the Competition (Amendment) Act, 2023 coming into effect, provisions relating to the Green Channel are given in Section 6(4) and 6(5) of the Act read with the Competition (Criteria of Combination) Rules, 2024 (**Green Channel Rules**). Earlier these were incorporated in Regulation 5A of the Combination Regulations 2011.

153. What is the advantage of Green Channel Filing?

Ans. The provisions of the Competition Act, 2002 impose a standstill obligation on parties, *i.e.*, parties must not give effect to the combination or any part thereof, before an order under Section 31 of the Act has been passed by CCI or until expiry of 150 days from the date of giving notice to CCI or *prima facie* opinion is not formed by the Commission within 30 days of receipt of notice in terms of Section 29(1B) of the Act, whichever is earlier (See Section 6(2A) of the Act).

If a combination meets the requirements of Green Channel and the parties exercise the option to file the notice under Green Channel, then the notifying parties may give effect to the combination, *i.e.*, consummate the combination, immediately upon filing of the notice under Section 6(4) of the Act read with Regulation 5(5) of the Combination Regulations 2024 and receipt of the acknowledgement from the Commission, without waiting for the completion of the statutory standstill obligation of 150 days.

154. Which combinations are eligible for Green Channel Filing?

Ans. Green Channel Rules prescribes the categories of combinations that can avail the benefit of Green Channel. Rule 3 of the Green Channel Rules states as under:

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

- (a) they do not produce or provide similar or identical or substitutable product or service;*
- (b) they are not engaged in any activity relating to production, supply, distribution, storage, sale and service or trade in product or provision of service, -*

(i) which are at different stage or level of production; or
(ii) which are complementary to each other.

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

155. Is there separate form for filing a notice under Green Channel?

Ans. There is no separate form for filing a notice under Green Channel. The same Form I that is specified to be filed under a normal filing can be used for Green Channel filing, along with a declaration (as prescribed in Schedule III of Combination Regulations 2024).

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

Ans. No. The filing is the same as that for filing through the normal route. The filing fee of INR 30,00,000 for Form I needs to be paid as prescribed in Regulation 11(a) of the Competition Commission of India (Combinations) Regulations 2024.

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

Ans. Green Channel filing is a facilitative option and not a mandatory requirement. Thus, parties always have the option of filing through the normal route if they are unsure about the eligibility. However, it is encouraged to avail the option of Green Channel filing whenever a proposed combination meets the requirements of the Green Channel. The parties can also avail the facility of Pre-Filing Consultation (PFC) provided by the Commission at no additional cost and get a clarification about the eligibility of Green Channel for their respective proposed combination. The advice provided by the officers of the Commission during PFC is neither binding on the Commission or the person seeking PFC.

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

Ans. The parties to a proposed combination can avail the facility of PFC by sending the request for PFC to the email cci-consult@nic.in along with brief details of the combination to the email. A copy of the draft application comprising Form I, as the case may be, and supporting documents, may also be forwarded along with the request for scheduling a pre-filing consultation. [Please see relevant section of PFC]

159. Overlaps are required to be mapped among the acquirer group and the target. Under Rule 3(2)(a)(i) of the Competition (Criteria of Combination) Rules, 2024, the "ultimate controlling person" requires parties to go up to the "ultimate controlling person" for mapping overlaps.

a. Would this exclude (1) entities not controlled by a single "person" and (2) personal investments of an ultimate controlling person?

Ans. Investee enterprise of the UCP that are under control of the UCP or meeting "affiliate" criteria need to be considered for overlap mapping.

b. Does this definition of Acquirer group for mapping overlaps up till ultimate controlling person, apply to only Green Channel notifications?

Ans. No. It applies to mapping of overlaps in all transactions.

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

Ans. Section 6(6) of the Act provides that if the Commission within the period prescribed under Section 20(1) of the Act finds that a transaction notified to it under the Green Channel does not fulfil the requirements specified under Section 6(4) of the Act or the information or declarations provided are materially incorrect or incomplete, the approval under sub-section (5) shall be void ab initio and the Commission may pass such order as it may deem fit: However, no such order can be passed unless the parties to the combination have been given an opportunity of being heard.

Further, if the transaction has already been consummated, in part or whole, consequences under Section 43A of the Act may follow. However, if a notice is given within a period of thirty days of the order of the Commission under Section 6(6) of the Act, no action under Section 43A shall be taken by the Commission till the expiry of such period of thirty days.

Further the consequences under Section 44 and /or 45 of the Act may also follow.

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

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

M. Acquisition through Stock Exchanges (Section 6A of the Act)

162. What is the purpose of Section 6A of the Act?

Ans. Section 6A provides an exception to the provisions under sub-section (2A) of Section 6 and Section 43A of the Act, allowing the implementation of an open offer or acquisition of shares or convertible securities through a regulated stock exchange, subject to certain conditions.

163. What are the conditions for an acquisition to proceed under Section 6A?

Ans. An acquisition can proceed if:

- a. A notice of acquisition is filed with the Commission within thirty days from the date of first acquisition of shares pursuant to the implementation of an open offer or an acquisition of shares or securities convertible into other securities, through a series of transactions on a regulated stock exchange, along with the declaration specified in schedule II of Combination Regulations 2024, and accompanied by evidence of payment of requisite fee.
- b. The acquirer does not exercise ownership or beneficial rights over the acquired securities until the Commission approves the acquisition, except as specified by regulations.

164. Can the acquirer avail any economic benefits from the acquired shares before Commission approval?

Ans. Yes, as per regulation 6 of Combination Regulations 2024, the acquirer can:

- avail economic benefits such as dividends, other distributions, subscriptions to rights issues, bonus shares, stock splits, and buyback of securities.
- exercise voting rights but only in matters related to liquidation or insolvency proceedings.

However, the acquirer, its group entities and other entities forming part of the same group including their affiliates shall not, directly or indirectly, influence the enterprise whose shares or securities are being acquired or any of its affiliate(s), in any manner whatsoever.

165. Can acquisitions undertaken pursuant to a 'block deal' or 'preferential allotment' benefit from the derogation from standstill obligations under Section 6A of the Competition Act, 2002 (Act)?

Ans. A block deal and bulk deal can benefit from the application of Section 6A of the Act. A preferential allotment is different from block deal/bulk deal considering that block deal is a secondary acquisition where existing shares of the company are acquired through a stock exchange while preferential allotment results into primary acquisition, where fresh shares are allotted by the company on preferential basis. Considering the substantive difference, preferential allotment cannot benefit from the provision of Section 6A of the Act.

N. Commercially Sensitive Information

166. What is the information that is considered commercially sensitive information for the purpose of Sections 5 and 6 of the Act?

Ans. 1. Commercially sensitive information often relates to information that is important for an undertaking to protect, maintain or improve its competitive position in the market.

2. Information relating to -

- a) prices, pricing, costs, profit margins;
- b) capacity, capacity utilization, production, output, quantities (including inventories, dispatches, etc.);
- c) quality;
- d) sales, market shares, territories;
- e) terms with customers, customer lists;
- f) variety or innovation, pipeline products;
- g) technologies, research and development, trade secrets, marks and product patents;
- h) strategic planning, marketing plans/strategy/initiatives, promotion plans, plans to enter or exit markets, risks, investments, or concerning other important elements of a firm's strategy including current operating and future business plans;
- i) budgets, annual business plan, and
- j) minutes of board meetings,

are considered as commercially sensitive information. The aforesaid examples are not exhaustive. Other information may also fall in the category of commercially sensitive information depending on the facts of each case.

3. However, the commercially sensitive information does not include information such as:

- a. unaudited/audited financial statements prepared in accordance with generally accepted accounting policies,

- b. information available to an ordinary shareholder of a company, dated (historic i.e., it has lost its commercially sensitive information) that is not ordinarily considered by the management for its commercial decision making,
- c. information that is disclosed by an enterprise in the public domain,
- d. information that is readily ascertainable through appropriate means,
- e. information that can't be linked to a specific company, and
- f. ownership structure.

167. If an acquirer already has the right or ability to access commercially sensitive information of the target, by virtue of being an observer on the board of directors of the target, could it benefit from an exemption under Rule 3 of the Exemption Rules (subject to satisfaction of all the other criteria set out under Rule 3)?

Ans. No

168. Is access to a company's unaudited financials (monthly, quarterly, annual) considered access to CSI?

Ans. No, provided that such periodic unaudited financial statements contain only the information that the annual financial statements of the same entity that is furnished with the Registrar of Companies (or other equivalent authority outside India) contains.

O. Inter-connected Transactions

169. When can the acquisitions by two different persons be considered as inter-connected for the purpose of the Combination Regulations 2024?

- Ans.
1. Regulation 9(4) starts with the phrase “where ultimate intended effect”. The phrase itself governs and guide the determination as to whether a series of steps or smaller individual transactions are interconnected or not.
 2. The key consideration for decision making of inter-connection should be whether different persons have inter-se meeting of mind over decision to invest in an entity. In other words, if different investors come together with mutual understanding with regard to decision of investment in the entity, their acquisition would be considered inter-connected for the purpose of the Combination Regulations 2024.
 3. Mutual understanding to invest in the entity may be inferred from one or more of the factors such as simultaneity, common agreements, mutual interdependence/ conditionality, functional links and internal consideration of the investors. However, separate agreements are not enough to conclude that the transactions are not interconnected, if the other factors suggest that the transactions are interconnected.
 4. The different acquirers may have common or separate share purchase agreements, but if investments are mutually conditional, the same indicates dependent transactions and economic inseparability. Similarly, if the investments/acquisitions are taking place simultaneously, and they are functionally linked or economically dependent, the same shall be considered as a part of a single and shared investment strategy.
 5. Illustrations:
 - a. Acquisitions by the investors in a funding round should not be considered as inter-connected if there is no inter-se meeting of minds between them. However, if the different investors come together and take the investment decision as a single unit, then investments by these different investors should be considered as inter-connected because there is inter-se meeting of minds over decision to invest.
 - b. If in a funding round an investor commit to infuse certain funds and other investors acting independently commit certain fund based on the commitment made by first referred investors. In this scenario, the investments by different investors should not be considered as inter-connected with the investment by first referred investor because there is no meeting of minds between the first referred investor and other investors.

- c. If different investors sign common agreements such as shareholder's agreement, deed of adherence, which provide that closing will take place simultaneously, etc., the said fact alone does not make their investments as inter-connected because the same does not establish the inter-se meeting of minds over decision to invest. Similarly, as ordinarily shareholder's agreement provides for individual shareholder's rights and do not bind them under a common conduct, a common shareholder's agreement alone does not establish inter-connectedness.

170. In case of inter-connected acquisitions by the different persons, whether all the acquirers need to be notifying parties?

- Ans. 1. Regulation 9(4) of the Combination Regulations 2024 provides that where the ultimate intended effect of a business transaction is achieved by way of a series of steps or smaller individual transactions which are inter-connected, one or more of which may amount to a combination, a single notice, covering all these transactions, shall be filed. Further, Regulation 9 (1) of the Combination Regulations 2024 provides that in case of an acquisition, the acquirer shall give the notice. Therefore, if inter-connected acquisitions require notice to the Commission, all the acquirers are required to be the notifying parties to the notice.

However, if all the acquisitions by an acquirer are eligible for one or more clauses of Schedule to the Competition (Criteria for Exemption of Combinations) Rules, 2024 (Eligible Acquirer), the Eligible Acquirer need not furnish the details relating to horizontal overlaps, vertical interfaces and complementarity. However, based on the facts and the circumstances of the matter, the Commission may direct the Eligible Acquirer to furnish the details, if required.

P. Others

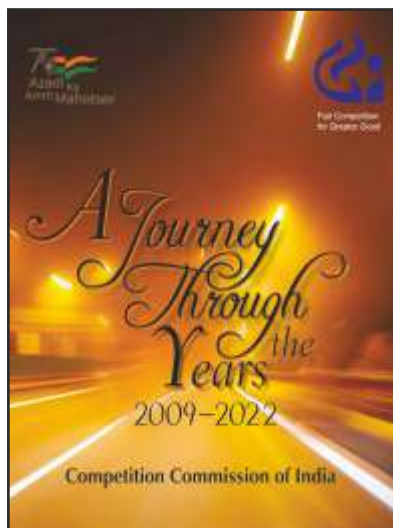
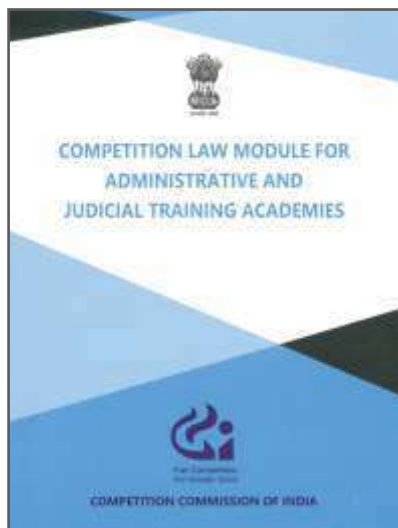
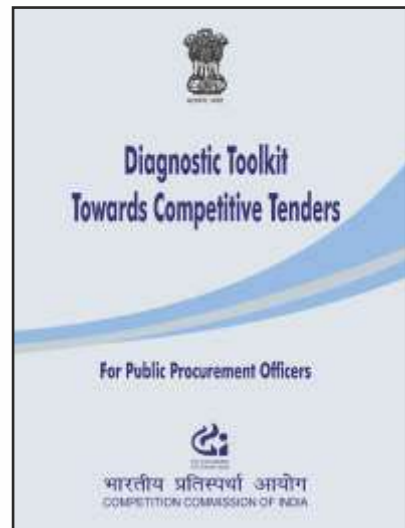
171. Whether the transactions for which agreement or other documents etc. as applicable are executed before the provisions of Competition (Amendment) Act, 2023 come into force would require notice to the Commission?

Ans. The notifiability of the transaction needs to be examined as per the provisions of Competition Act (as amended) and rules and regulations made thereunder. If the same constitutes a notifiable transaction and has not been fully consummated as on the date on which the provisions of the Competition Act (as amended) comes into force, the notice shall be required to be filed.

172. There is a transaction that previously did not require notice to the Commission. However, the same is a notifiable transaction as per the provisions of Competition Act (as amended) and rules and regulations made thereunder. A part of the transaction has been consummated before the Competition Act (as amended) comes into force. Whether consummation of a part of the transaction before the provisions of the Competition Act (as amended) comes into force, would attract a penalty under Section 43A of the Act?

Ans. No. In such cases, the consummation of part of the transaction before the Competition Act (as amended) and rules and regulations made thereunder comes into force would not attract a penalty under Section 43A of the Act.

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