
LEGAL FRAMEWORK GOVERNING COMBINATIONS IN INDIA: AN ANALYTICAL STUDY OF SECTIONS 5 AND 6 OF THE COMPETITION ACT, 2002

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ABSTRACT

There are two ways by which the business organization grows, i.e., organic and inorganic growth. The environment of business is changing rapidly due to technology, globalization, customer choices, geographic markets, etc. To capture maximum market share, gaining competitive edge over other players and to maximize profits, the companies are striving adopting various inorganic growth strategies such as mergers, amalgamation, acquisitions, takeovers, spin offs and many others. Inorganic growth would help the enterprises to increase customer base, access to technology, innovation, retaining best minds, diversification, etc. These inorganic growth strategies are called **corporate restructuring**. Different types of Corporate Restructuring include: merger, demerger, reverse mergers, takeovers. Joint ventures, Strategic Alliances, disinvestment, franchising, slump sale, etc. M&A falls under the purview of the Anti-Trust law because post-mergers and amalgamations, there is decrease in the number of entities in the market which may lead to high prices, poor quality of goods and services and low innovation. The Anti-Trust law in India has recognized these intricacies and has therefore, incorporated the 'Regulation of

Combination' in the Competition Act, 2002. The provisions relating to Combinations (s.5 & 6) was enforced on 1st June, 2011. CCI (Procedure in regard to the transaction of Business relating to Combinations) Regulations, 2011 was also enacted to provide regulations for Combinations u/s 5 and 6 of the Act. S. 5 of the Act provides the power of the CCI to review mergers and amalgamations ex post merger. However, the Competition (Amendment) Act, 2023 allowed the authorities to review ex ante mergers too if they cross the desired threshold based on the assets and turnovers provided under section 5 (d) of the Act. The present research paper would discuss the concept of mergers and amalgamations and the relevant provisions under the Competition Act 2002 post Amendment Act of 2023.

Introduction

There are two ways by which the business organization grows, i.e., organic and inorganic growth. “Organic growth is through internal strategies, which may relate to business or financial restructuring within the organization that results in enhanced customer base, higher sales, increased revenue, without resulting in change of corporate entity. Inorganic growth provides an organization with an avenue for attaining accelerated growth enabling it to skip few steps on the growth ladder. Restructuring through mergers, amalgamations etc. constitute one of the most important methods for securing inorganic growth.”¹ Other reason for inorganic routes could be synergy creation, access to technology and data, gaining competitive edge, diversifying risk, R&D, tax benefits, etc. Merger between Vodafone India and Idea Cellular to form Vodafone Idea Limited, TATA Group acquiring Air India, PVR merger with INOX, Zomato acquiring Blinkit, Tata Steel acquiring Bhushan Steel, Walmart acquiring Flipkart are few of the examples of M&A. According to Statista “India's Mergers and Acquisitions market is experiencing a surge in activity driven by the country's booming tech sector”.¹ Different types of Corporate Restructuring include: merger, demerger, reverse mergers, takeovers. Joint ventures, Strategic Alliances, disinvestment, franchising, slump sale, etc. M& A activity in India witnesses a strong start with a 78% jump in deal value in January, 2024.² M&A falls under the purview of the Anti -Trust law because post- mergers and amalgamations, there is decrease in the number of entities in the market which may led to high prices, poor quality of goods and services and low innovation. There are also the chances that remaining entities joins their hands together to determine the prices and also create barrier for the new entrants. This will tarnish consumer welfare and poses a threat to freedom of trade and profession. Thus, it becomes necessary for the anti- trust regulators to ex ante assess those Mergers and Amalgamations which are likely to cause adverse effect on the competition.

The Anti- Trust law in India has recognized these intricacies and has therefore, incorporated the ‘Regulation of Combination’ in the Competition Act, 2002. As per the official data, in FY 2022-2024, 1015 merger filings were received by the CCI, out of which 1007 merger filings were decided or disposed off by the Commission at the end of the financial year.³

¹ “Corporate Restructuring, valuation and Insolvency” The Institute of Company Secretaries of India

² KR SRIVATS, “Bounce back. India M&A activity jumps 78% to touch \$6.3 billion in January 2024” *The Hindu*, Feb. 22, 2024.

³ Competition Commission of India, Annual Report (2022- 2023) p xiv

The provisions relating to Combinations (s.5 &6) was enforced on 1st June, 2011. CCI (Procedure in regard to the transaction of Business relating to Combinations) Regulations, 2011 was also enacted to provide regulations for Combinations u/s 5 and 6 of the Act. The Regulation 2011 is superceded by the CCI (Combinations) Regulation, 2024. The regulation of Combinations is necessary to ensure that new entities have the strength to alter and fix prices in the particular market and to maintain a fair competition in the market. However, the current thresholds are based on assets and turnovers under s.5 of the Act are not sufficient for the CCI to examine such types of transactions ex ante especially in tech space. Thus, the Competition (Amendment) Act 2023 introduced the additional thresholds called as deal value thresholds as a new threshold where a transaction will require the CCI's prior approval if the transaction value is more than INR 20 billion (~USD 240 million / ~EUR 224 million) and the target has substantial business operations in India.

In the next section we would discuss the concept of mergers. Amalgamations and acquisitions.

Mergers, Amalgamations and the Acquisitions

The term 'mergers' and 'amalgamations' are not defined under the Companies Act, 2013. However, the term amalgamation is defined u/s 2(1B) and demerger u/s 2(19AA) of the Income Tax Act, 1961.

Amalgamations

Amalgamations are referred to the merging of two or more companies to form a new entity is called as amalgamations. The Income Tax Act defines amalgamation as "merger of one or more entities with another company, or the merger of two or more entities forming one company". It is a type of merger where two or more companies agrees to combine their assets and operations to form as single entity. This could happen in following ways: "either the companies merge to create a brand-new organization, or one company absorbs the others, continuing its existence with expanded resources".⁴ The aim of amalgamations could be to get competitive edge over the other players, creation of synergy and to combine the resources of both the enterprises which could lead to reduction of cost, increasing in market share and proficiency. Thus, we can say

⁴ Amalgamation of Companies: Meaning, Purpose, Types and Procedure, available at <https://www.geeksforgeeks.org/amalgamation-of-companies-meaning-purpose-types-and-procedure/> (Last Modified on 01 April, 2024)

amalgamation is the “blending of two or more existing undertakings into one undertaking, the shareholders of each blending company becoming substantially the shareholders in company which is to carry on the blended undertakings”.⁵ For example: Maruti Motors in India and Suzuki in Japan merged to create a new entity called Maruti Suzuki (India) Limited.

The Supreme Court explained the effect of amalgamation in the case of **Saraswati Industrial Syndicate Ltd. v. CIT**⁶ “the true effect of and character of amalgamation largely depends on the scheme of the merger. But, when two companies amalgamate and merge into one, the transferor company loses its entity as it ceases to have its business. However, their respective rights and liabilities are determined under the scheme of amalgamation”.

Acquisitions

Acquisition is the process of procurement of target company by the acquiring company. when the target company is acquired the acquiring company, the former losses its becomes the part of purchasing company. The target company can be acquired by the acquiring company by purchasing the assets or the shares of the target company. It is different from merger as in the merger the purchaser and the target both ceases to exist and together forms a new combined entity. Whereas in acquisition, the target retains its separate legal existence in case of stock deal.

- i. The Companies Act, 1956 (s. 391 -394)
- ii. The Companies Act, 2013 (s.230 -232)
- iii. Companies (Court) Rules, 1959
- iv. Income Tax Act, 1961
- v. Listing Agreement
- vi. The Indian Stamp Act, 1899

⁵ Jaykumar Ashokbhai Sathavara, “Reasons and Motives for Amalgamation, Merger and Acquisitions” 3IJRMP 16 (2014)

⁶ 1991 AIR 70

- vii. Competition Act, 2002
- viii. SEBI Takeover Code (in case of acquisition by/of a listed company)
- ix. FEMA (in case of merger of companies having foreign capital)

Thus, there are the slight difference between merger, amalgamations and acquisitions. However, together they are the inorganic strategies for growth. In the next chapter, we'll discuss the need for the Competition Act to regulate merger, amalgamations and acquisitions and the related provisions in the Competition Act, 2002.

Regulation of Mergers and Amalgamations in Competition Act, 2002

The Anti- Trust law in India has recognized these intricacies and has therefore, incorporated the 'Regulation of Combination' in the Competition Act, 2002. The provisions relating to Combinations (s.5 &6) was enforced on 1st June, 2011. CCI (Procedure in regard to the transaction of Business relating to Combinations) Regulations, 2011 was also enacted to provide regulations for Combinations u/s 5 and 6 of the Act. The regulation of Combinations is necessary to ensure that new entities have the strength to alter and fix prices in the particular market and to maintain a fair competition in the market.

As per the official data, in FY 2022-2024, 1015 merger filings were received by the CCI, out of which 1007 merger filings were decided or disposed off by the Commission at the end of the financial year.⁷

In this section, we will discuss the existing provisions under section 5 and 6 for the regulation of mergers and amalgamations by the CCI.

S.5 of the Act states that "*the acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises*"⁸ if they trigger the desired thresholds under the Act.

Here, according to s. 5(a) of the Act **acquisition** refers to "*the parties to the acquisition or the group to which the enterprises whose control, shares, voting rights or assets have been*

⁷ Competition Commission of India, Annual Report (2022- 2023) p xiv

⁸ The Competition Act, 2002 (Act 12 of 2003), s.5

acquired or being acquired jointly” has passed the following test mentioned in Table (i) and Table (ii).

Whereas, s. 5(c) of the Act states that the following **merger and amalgamation** will be called as Combination under the Act in which “*the enterprise remaining after the merger or the enterprise created as a result of the amalgamation as the case may be*” meets the criteria described in Table (i) and Table (ii).

Following are the thresholds prescribed under the Act:

- Parties to the transaction test

	Assets	Turnover
Either in India	>1000 crores	> 3000 crores
In India or outside India	> USD 500 million (at least 500 cr. in India)	> USD 1500 million (at least 1500 cr. in India)

Table (i)

- Group test

	Assets	Turnover
Either in India	> 4000 crores	> 12000 crores
In India or outside India	> USD 2 billion (at least 500 cr. in India)	> USD 6 billion (at least 1500 cr. in India)

Table (ii)

The explanation of s.5 defines the term ‘control’ as where one or more enterprises or groups exercise controls the affairs and the management over another enterprises or group. The Competition (Amendment) Act, 2023 amended the definition of control providing “*the ability to exercise material influence in any manner over the management of affairs or strategic*

*commercial decisions.”*⁹

S.6 of the Act provides for the regulation of the Combination. It prohibits the person or enterprise to enter into a combination which causes or is likely to cause appreciable adverse effect on competition in the relevant market of India. If that person or enterprises enters into such combination, such will be seen as void. It further provides that:

- **Mandatory notice:** Any person or enterprise entering into combination is mandatorily required to give notice to the CCI within 30 days of to be substituted by ‘*after any of the following, before consummation of the Combination*’¹⁰ vide
 - Competition (Amendment) Act, 2023]
 - approval of proposal for merger or amalgamations by the Board of Directors.
 - Execution of agreement or other document for acquisition or acquiring of control.
- **Waiting Period:** S.6 further states that no combination will come into effect unless 210 days have been passed from the date of receipt of notice to the Commission or any order passed by the Commission under section 31. If no order is passed by the CCI within 210 days of the receipt of notice, such combination will be deemed as approved by the CCI. It is to be noted that Competition Act, 2023 has reduced the overall time period for review the Combinations from 210 days to 150 days.

S. 20 (4) of the Act provides the substantive test to determine whether the proposed transaction have the effect of or likely to cause AAEC. CCI might consider all or any of the transactions at the time of approving the transactions:

- *“Actual and potential level of competition through imports in the market.*
- *Extent of barriers to entry into the market.*
- *Level of combination in the market.*
- *Degree of countervailing power in the market.*

⁹ The Competition (Amendment) Act, 2023 (Act 9 of 2023), s.6

¹⁰ The Competition (Amendment) Act, 2023 (Act 9 of 2023), s.7

- *Likelihood that the combination will result in the parties being able to significantly and sustainably increase prices or profit margins.*
- *Extent of effective competition likely to sustain in a market.*
- *Extent to which substitutes are available or are likely to be available in the market.*
- *Market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination.*
- *Likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market.*
- *Nature and extent of vertical integration in the market.*
- *Possibility of a failing business.*
- *Nature and extent of innovation.*
- *Relative advantage, by way of the contribution to the economic development, by any combination having or likely to have an AAEC.*
- *Whether the benefits of the combination outweigh the adverse impact of the combination, if any.”¹¹*

Exemptions under Schedule 1:

Regulation 4 of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 provides that the Combinations which are not likely to cause AAEC need not to get approval from CCI. Thus, Schedule 1 of the Regulations provides the lists of those categories of Combinations which does not require approval of CCI and enables CCI to concentrate those relevant transactions which are likely to cause AAEC. They include the following categories:

¹¹ The Competition Act 2002 (Act 12 of 2003), s. 20(4)

- if an acquisition of shares or voting rights, holds less than 25% of an enterprise's shares or voting rights and such is solely as an investment or in the ordinary course of business.
- Acquirer has 50 % or more stake and wishes to increase its stake
- Creeping acquisition between 25 to 30%
- Acquisition of shares, voting rights pursuant to bonus issue, stock split, consolidation of the face value of shares or buy-back etc.
- Merger or amalgamation of two enterprises where one of the enterprises has more than 50% shares or voting rights of the other enterprise
- Acquisition of shares of voting rights by a person within the same group (intra group acquisitions)
- Acquisition of shares or rights by underwriters or stockbrokers
- Amended tender off Acquisition of stock in trade and raw materials

It is to be noted that Schedule 1 Exemptions would not be applicable to the transactions which are notifiable in the Deal Value Thresholds which was included through the Competition (Amendment) Act, 2023.

Green Channel Route:

The CCI on 13th August, 2019 has introduced the provisions of 'green channel route' in Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011. Under the green channel route, the transaction gets automatic approval from the CCI which is based on the trust-based regulation. The transaction is automatically deemed as approved from the first day of filing if they do not exhibit any horizontal, vertical and complementary overlap. The Amendment Act 2023 has incorporated the said provision in the Act itself.

From the above discussion it is clear that the regulation of Combinations in India is ex- ante as there is the requirement of prior notification for the combination to come to effect. In **SCM**

Solifert Ltd. v. CCI,¹² it was held that it is a legislative mandate to provide

notification to the CCI before entering into the combination. The intention behind this ex- ante provision is to provide opportunity to the CCI to examine whether the Combination would cause or likely to cause adverse effect on the competition. Justice Arun Mishra also in his judgement stated that if the notification is given after the combination i.e. ex post facto, it would defeat the intent behind this requirement. In the bench of Justice Navin Sinha and Justice Arun Mishra, the Supreme Court **CCI v. Thomas Cook (India) Ltd.**,¹³ held that the mandatory provisions of the Act should not be avoided even in structuring of transactions.

Deal Value Thresholds

The Competition Amendment Act, 2023 has introduced the Deal Value Threshold (DVT) as a new threshold where a transaction will require the CCI's prior approval if the transaction value is more than INR 20 billion (~USD 240 million / ~EUR 224 million) and the target has substantial business operations in India. The reason for the amendment is to encompass transactions that presently do not meet the notification requirements set by the existing asset or turnover-based thresholds.

The newly added s. 5(d) of the act provides that *'value of any transaction, in connection with acquisition of any control, shares, voting rights or assets of an enterprise, merger or amalgamation exceeds rupees two thousand crore: Provided that the enterprise which is being acquired, taken control of, merged or amalgamated has such substantial business operations in India as may be specified by regulations.'*¹⁴ would constitute a combination and would come under the ambit of Competition Law.

The Deal value Thresholds will allow the Competition Commission of India to scrutinize transactions based on the value of the transaction. The CCI is required to conduct an initial investigation in cases where transactions cross jurisdictional boundaries and are not exempt. In current markets, assets and turnover does not reveal the true market strength in the financial statements. The goal of this analysis is to ascertain if the deal has significantly harmed competition in the relevant Indian market, or is likely to have such an impact.

¹² AIR ONLINE 2018 SC 48

¹³ AIR ONLINE 2018 SC 47

¹⁴ The Competition (Amendment) Act 2023 (Act 9 of 2023), s.6

The Deal Value Threshold is depended on the amount of consideration the acquirer is willing to pay and whether the entities have substantial business operation in India.

According to s. 5(d):

- Transactions exceeding INR 2000 crores and
- Target having substantial business operations in India requires prior approval of Competition Commission of India. It will bring those entities under its ambit who has vast customer reach but few assets in India. For instance WhatsApp purchased by Facebook for \$16 billion in 2014.

The Competition Commission of India (Combinations) Regulations, 2024

The CCI (Combinations) Regulations, 2024 supersedes the CCI (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011. This replacement is necessitated by the traditional thresholds in the 2011 regulations, while the new regulation also introduces provisions for deal value thresholds. The CCI Regulations,

2024 delineates the scope of 'value of transaction' and define what constitutes 'substantial business operations in India'. Regulation 4 of the Regulations 2024 elucidates the methodology for calculating 'value of transaction' and 'substantial business operations in India'.

Calculation of value of transaction

The s.5 (d) of the Act states that states that if the value of transaction exceeds INR 2000 crores, the transaction is to be notified to the CCI. The question arises what would include under value of transaction. Regulation 5 of the Combination Regulations 2024 states that value of transaction includes all types of valuable consideration. It can be direct, indirect, immediate, deferred, cash or any other type.

The Regulations also provide examples of considerations that must be taken into account, including:

- (a) fees on non-compete agreements;
- (b) all subsidiary agreements between the parties involved in the main transaction during

the two-year period prior to it, covering technology transfer arrangements, intellectual property licensing agreements, and material supply contracts among others; and the total value of all interconnected transactions. Additionally, the Regulations 2024 specify that transactions between the parties within two years preceding the main transaction shall be considered interconnected and thus subject to valuation. Where a specific value cannot be determined for any given transaction with a level of certainty above or equal to that required by law, then this value is assumed to be greater than Deal Value. However, the regulation also states that this list is exhaustive.

Calculation of substantial business operations in India

The second aspect of the DVT pertains to the target company possessing 'substantial business operations in India'. The term substantial business operations were introduced to capture the true impact of combinations in the market. The term 'substantial business operations' could include the number of active users, analyzing market share of the enterprise, revenue, profitability, etc.

The Combination Regulations 2024 states that enterprise would be deemed to be in the 'substantial business in India' if:

- i. Any time in the 12 months of the preceding relevant date, the enterprise has
10% or more of the global total users, subscribers, customers, or visitors or ii. The global merchandise value is 10% or more of the total gross merchandise in any time during the preceding 12 months of the relevant date or
- iii. The turnover in India is 10% or more of the global turnover which is obtained from all the products and services during the preceding financial year.

Unlike, Germany and Austria, there is no sector specific considerations such as telecommunications, pharma, banking, energy, etc. to calculate the substantial business operations. There are chances that such specifications can fall short in sectors like pharmaceuticals which would be discussed in the later part of the research.

Conclusion

The regulatory provisions under the Competition Act 2002 for mergers and amalgamations

serve as a critical framework for balancing competitive market conditions and economic growth. The mechanism adopted by the Act ensures that the combinations do not result in appreciable adverse effect on Competition (AAEC) and protects consumer welfare, market efficiency and innovation.

The newly added provisions such as Deal Value Thresholds (DVT) and the green channel route reflect a progressive approach ensuring regulation scrutiny as well as ease of doing business. Also, the inclusion of tests to determine the relevant market, dominance and the anti-competitive transactions have strengthened the quality and consistency of decision making.

However, issues such as delay in approval, complexities in defining relevant markets in digital economies, and the need for clearer guidance on emerging sectors require continuous refinement. The rise of technology-driven markets and cross-border transactions further necessitates dynamic regulatory responses and enhanced international cooperation.

To conclude, the merger and amalgamations under the Competition Act 2002 plays an important role in ensuring corporate restructuring does not undermine competitive integrity. There is a need to adopt a balanced and adaptive approach to foster sustainable economic development in India in the evolving market scenario.