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# **DISSECTING THE COMPETITION COMMISSION OF INDIA'S REGULATORY FRAMEWORK FOR COMBINATION APPROVAL**

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## **ABSTRACT**

Combinations, also known as amalgamations, refers to the process of enterprises being acquired by other entities or the process of two or more enterprises merging. The nature of such transactions is that the acquirer or the new combined enterprise, as the case may be, expands into a larger enterprise either through market share, product offerings, geographical presence or any other relevant factor. The role of “the Competition Commission of India” in such transactions is to authorise or reject the proposed combination, in light of the effect it would have on competition in the market. To that effect, “the Competition Commission of India” regulates combinations in the Indian market, mainly under the provisions of “the Competition Act, 2002” and “the Competition Commission of India” (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011. This paper shall detail the regulatory framework and procedure in regard to seeking the approval of combinations from “the Competition Commission of India”. By highlighting the nature of transactions which require approval, detailing the disclosure requirements and elaborating the procedure and various options / avenues to obtain approval in a speedy manner; this paper shall go through the beats of the entire process to give a detailed insight into “the Competition Commission of India's” approvals for Combinations in India.

## 1. Introduction

Combinations are primarily governed by “the Competition Act, 2002” and “the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011” (hereinafter referred to as “Competition Commission of India (Combination Regulations), 2011”). Combinations refers to a person / group of persons or an enterprise / a group of enterprises acquiring another enterprise / group of enterprises as well as the amalgamation or merger of such enterprises.<sup>1</sup> In simpler terms, it refers to agreements / transactions wherein two entities are combined, either under the umbrella of one of the original entities or leading to the creation of a new entity. There are various thresholds laid down in “the Competition Act, 2002”<sup>2</sup>, breaching which, would require the approval of “the Competition Commission of India” (hereinafter also referred to as CCI), in order to ensure that such transactions / agreements shall not create an appreciable adverse effect on competition.<sup>3</sup> Joint ventures do not particularly fall under the ambit of combinations as regulated by “the Competition Commission of India” in light of “the Competition Act, 2002”, probably owing to the reasoning that joint ventures are usually concerned with a project undertaken together or a time bound relationship for mutual benefit. However, in joint ventures where there is a transfer of assets and any of the thresholds detailed hereinbelow are breached, Competition Commission of India approval is required.<sup>4</sup>

## 2. Acquisitions

Acquisitions generally refer to a person / enterprise / group acquiring ownership or control of another enterprise (hereinafter referred to as target enterprise) and thereby transferring to itself, the assets and liabilities of such target enterprise, effecting in the target enterprise ceasing to exist on account of being subsumed into the acquirer. However, the target enterprise may continue to exist under the control of the acquirer, possibly as a subsidiary.

An entity may want to acquire an enterprise for various reasons, some of the most common drivers for acquisitions include increasing market share; entering into new markets; gaining

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<sup>1</sup> “The Competition Act, 2002”, § 5, No. 3 Acts of Parliament, 2003 (India)

<sup>2</sup> Id

<sup>3</sup> “The Competition Act, 2002”, § 6(1), No. 3 Acts of Parliament, 2003 (India)

<sup>4</sup> Payaswini Kakkar, ‘Competition Regulator Clarifies Law on Joint Ventures’, (BQ Prime, 12 November 2016), <https://www.bqprime.com/business/competition-regulator-clarifies-law-on-joint-ventures>, accessed 29 March 2023

control over proprietary technology or other intellectual property; acquiring the management and other personnel of the target enterprise etc.<sup>5</sup>

## 2.1.Nature of Acquisitions

Legally, acquisition refers to acquiring, either directly or indirectly (through intermediaries), shares or voting rights or control over the target company.<sup>6</sup> Control is the key term in this definition and there has been extensive discussion over the meaning of the term control. The generally accepted definition of control is the right to appoint majority of the directors on the board of directors of a company, or to exercise control over the management or policy decisions through shareholding or any voting agreements or management rights<sup>7</sup>.

Therefore, if the control of an enterprise / a group of enterprises is being acquired by another entity / group of entities, it falls within the ambit of acquisition. This includes the control of one or more entities over another entity / group of entities, either individually or jointly through concerted action.<sup>8</sup>

## 2.2.Thresholds for Combination Provisions to be Triggered

There are various thresholds enumerated in “the Competition Act, 2002” in regard to combinations. Breaching any one of these thresholds would bring the agreement / transaction in question under the ambit of combination as per “the Competition Act, 2002”, and thereby trigger the regulatory requirements to be complied with by the entities.

All the monetary thresholds enumerated in the following tables, refer to figures derived from the audited financial statement of the concerned enterprises for the preceding financial year.<sup>9</sup>

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<sup>5</sup> Will Kenton, ‘What Is an Acquisition? Definition, Meaning, Types, and Examples’, (*Investopedia*, 30 June 2022), <https://www.investopedia.com/terms/a/acquisition.asp>, accessed 29 March 2023

<sup>6</sup> Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, R.2(1)(b)

<sup>7</sup> Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, R.2(1)(e)

<sup>8</sup> “The Competition Act, 2002”, § 5 Explanation (a), No. 3 Acts of Parliament, 2003 (India)

<sup>9</sup> “The Competition Act, 2002”, § 5(c), No. 3 Acts of Parliament, 2003 (India)

**2.2.1. Non – Group Acquisitions**

Acquirer + Target Enterprise Jointly	In India	Globally including India
Assets	Exceeding Rs. 1,000 Crores <sup>10 11</sup>	Exceeding USD 500 Million (Approx. Rs. 4,120 Crores)  including atleast Rs. 500 Crores in India <sup>12 13</sup>
Turnover	Exceeding Rs. 3,000 Crores <sup>14</sup>	Exceeding USD 1,500 Million (Approx. Rs. 12,360 Crores)  including atleast Rs. 1,500 Crores in India <sup>15</sup>

In the circumstances of an enterprise being acquired by another enterprise or a person, if the joint assets or joint turnover as of the last financial year, of the combined entity, meet any of the above four corresponding criteria respectively, it triggers the combinations regulatory framework, and the approval of the CCI is mandatory for such agreements / transactions.

The same thresholds apply when a person acquires control over an enterprise engaged in similar business as another enterprise already under the direct or indirect control of such person. Similar business would entail the production of or dealing in similar / identical / substitutable goods or services. If the combined assets or turnover of the enterprises controlled by the same person, meet any of the corresponding criteria detailed in the table above, it would fall under the purview of combinations requiring CCI approval.<sup>16</sup>

<sup>10</sup> “The Competition Act, 2002”, § 5(a)(i)(A), No. 3 Acts of Parliament, 2003 (India)

<sup>11</sup> “The Competition Act, 2002”, § 5(b)(i)(A), No. 3 Acts of Parliament, 2003 (India)

<sup>12</sup> “The Competition Act, 2002”, § 5(a)(i)(B), No. 3 Acts of Parliament, 2003 (India)

<sup>13</sup> “The Competition Act, 2002”, § 5(b)(i)(B), No. 3 Acts of Parliament, 2003 (India)

<sup>14</sup> Supra Note 10; Supra Note 11

<sup>15</sup> Supra Note 12; Supra Note 13

<sup>16</sup> “The Competition Act, 2002”, § 5(b), No. 3 Acts of Parliament, 2003 (India)

### 2.2.2. Group Acquisitions

Acquirer Group + Target Enterprise Jointly	In India	Globally including India
Assets	Exceeding Rs. 4,000 Crores <sup>17 18</sup>	Exceeding USD 2 Billion (Approx. Rs. 16,470 Crores)  including atleast Rs. 500 Crores in India <sup>19 20</sup>
Turnover	Exceeding Rs. 12,000 Crores <sup>21</sup>	Exceeding USD 6 Billion (Approx. Rs. 49,410 Crores)  including atleast Rs. 1,500 Crores in India <sup>22</sup>

For the purposes of the provisions stated hereinabove, the term ‘group’ refers to two or more enterprises who exercise 26% or more of the voting rights in the target enterprise; or have the power to appoint more than 50% of the directors on the Board of Directors of the target enterprise; or exercise control, in the manner discussed hereinabove, over the management and affairs of the target enterprise.<sup>23</sup>

In the transactions where the acquirer is a group of enterprises, and the post combination assets or the combined turnover as of the last financial year, of the group including the target enterprise, meet any of the corresponding four criteria stated hereinabove, the combinations

<sup>17</sup> “The Competition Act, 2002”, § 5(a)(ii)(A), No. 3 Acts of Parliament, 2003 (India)

<sup>18</sup> “The Competition Act, 2002”, § 5(b)(ii)(A), No. 3 Acts of Parliament, 2003 (India)

<sup>19</sup> “The Competition Act, 2002”, § 5(a)(ii)(B), No. 3 Acts of Parliament, 2003 (India)

<sup>20</sup> “The Competition Act, 2002”, § 5(b)(ii)(B), No. 3 Acts of Parliament, 2003 (India)

<sup>21</sup> Supra Note 17; Supra Note 18

<sup>22</sup> Supra Note 19; Supra Note 20

<sup>23</sup> “The Competition Act, 2002”, § 5 Explanation (b), No. 3 Acts of Parliament, 2003 (India)

regulatory framework comes into play and the group needs the CCI's approval for such acquisition.

Similarly, when the group to which the target enterprise would belong post the acquisition, already consists of or exercises direct or indirect control over an enterprise engaged in similar business as that of the target enterprise; if the combined assets or turnover of the group post such acquisition meet any of the four corresponding criteria detailed hereinabove, CCI's approval would be required for such acquisition.<sup>24</sup>

### 3. Mergers

A merger, as the name suggests, refers to two or more existing enterprises merging themselves into one entity, whereby the previous entities cease to exist and all the assets and liabilities of the predecessor entities are now held by the one merged entity. The purposes for mergers are largely similar to that of acquisitions with the key difference that both (or all) the predecessor entities mutually agree to come together and operate as one new entity, instead of one entity being subsumed by the other. Mergers are usually entered into for the purpose of boosting efficiency and reaping the benefits of both (or all) entities from the one surviving entity. Expanding market presence, product offerings, capital, distribution channels, technical and managerial expertise, consumer loyalty etc. are some of the main drivers for mergers.

There are two fundamental ideas behind a merger – economies of scale and synergy. Economies of scale refers to the principle that with a larger scale of operations, the cost per unit or average cost reduces, thereby boosting profitability. Synergy refers to the phenomenon wherein the combined entity is more valuable and profitable than the sum of its parts. This means the merging entities are more efficient and profitable as one entity than as compared to the sum of their individual profitabilities and efficiencies.<sup>25</sup>

#### 3.1.Thresholds for Combination Provisions to be Triggered

In order to prevent an appreciable adverse effect on competition brought on by a merger, “the Competition Act, 2002” lays down financial thresholds, similar to that of acquisitions, which

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<sup>24</sup> “The Competition Act, 2002”, § 5(b)(ii), No. 3 Acts of Parliament, 2003 (India)

<sup>25</sup> Marshall Hargrave, ‘Merger: Definition, How It Works with Types and Examples’, (*Investopedia*, 8 May 2022), <https://www.investopedia.com/terms/m/merger.asp>, accessed 29 March 2023

upon breach, trigger the statutory requirement of obtaining CCI approval for such mergers.

### 3.1.1. *Non – Group Mergers*

Merged Entity	In India	Globally including India
Assets	Exceeding Rs. 1,000 Crores <sup>26</sup>	Exceeding USD 500 Million (Approx. Rs. 4,120 Crores) including atleast Rs. 500 Crores in India <sup>27</sup>
Turnover	Exceeding Rs. 3,000 Crores <sup>28</sup>	Exceeding USD 1,500 Million (Approx. Rs. 12,360 Crores) including atleast Rs. 1,500 Crores in India <sup>29</sup>

When two or more enterprises merge to form one new enterprise, if the combined assets or turnover of the merged parties, as per the audited financial statements of the preceding financial year<sup>30</sup>, meet any of the corresponding 4 thresholds stated hereinabove, the merger is subject to the approval of the CCI.

### 3.1.2. *Group Mergers*

Merged Entity + Group to which it belongs	In India	Globally including India
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<sup>26</sup> “The Competition Act, 2002”, § 5(c)(i)(A), No. 3 Acts of Parliament, 2003 (India)

<sup>27</sup> “The Competition Act, 2002”, § 5(c)(i)(B), No. 3 Acts of Parliament, 2003 (India)

<sup>28</sup> Supra Note 26

<sup>29</sup> Supra Note 27

<sup>30</sup> Supra Note 9

Assets	Exceeding Rs. 4,000 Crores <sup>31</sup>	Exceeding USD 2 Billion (Approx. Rs. 16,470 Crores) including atleast Rs. 500 Crores in India <sup>32</sup>
Turnover	Exceeding Rs. 12,000 Crores <sup>33</sup>	Exceeding USD 6 Billion (Approx. Rs. 49,410 Crores) including atleast Rs. 1,500 Crores in India <sup>34</sup>

In the situation where the merged entity forms part of a group of enterprises, CCI approval is required if the assets or turnover of the merged entity and the group to which it belongs, jointly meet any of the four corresponding criteria stated hereinabove.

#### 4. Regulation of Combinations

Agreements which meet the criteria detailed in the foregoing sections and thereby fall within the ambit of combinations for the purposes of Competition Act, 2002, are expressly prohibited and deemed void if they cause or are likely to cause an appreciable adverse effect on competition in the concerned relevant market in India.<sup>35</sup>

If a combination meeting the criteria detailed hereinabove, is proposed to be executed, the concerned entities have to apply for the approval and consent of the CCI in order to execute such combination.<sup>36</sup>

#### 5. Pre – Filing Consultation

The CCI provides for an informal pre – filing consultation wherein the parties seeking to enter

<sup>31</sup> “The Competition Act, 2002”, § 5(c)(ii)(A), No. 3 Acts of Parliament, 2003 (India)

<sup>32</sup> “The Competition Act, 2002”, § 5(c)(ii)(B), No. 3 Acts of Parliament, 2003 (India)

<sup>33</sup> Supra Note 31

<sup>34</sup> Supra Note 32

<sup>35</sup> “The Competition Act, 2002”, § 6(1), No. 3 Acts of Parliament, 2003 (India)

<sup>36</sup> “The Competition Act, 2002”, § 6(2), No. 3 Acts of Parliament, 2003 (India)



into a combination can approach the CCI for guidance on form filling and clarification of any uncertainties in the filing requirements and the procedure etc.<sup>37</sup> This open discussion allows for the parties to better understand each other's perspectives and enable a smoother and more efficient approval process. To that effect, the applicants can minimise delays by eliminating the need for additional information being called for upon filing formal Notice, by ensuring the initial filing has all the details required by the CCI.<sup>38</sup>

These informal sessions allow for the parties to discuss potential issues that may act as a speed breaker in their approval process and accordingly mitigate such potential issues in consonance with the CCI. That being said, such guidance from the CCI is entirely informal and non-binding<sup>39</sup> and is aimed simply at easing the process. Basic preliminary documents and draft Notices may be prepared<sup>40</sup> and an application for pre – filing consultation can be made via email.<sup>41</sup>

## 6. Green Channel Exemption

In order to speed up the approval process for combinations which are highly unlikely to impose an appreciable adverse impact on competition, the CCI vide the CCI (Procedure in regard to the Transaction of Business relating to Combinations) Amendment Regulations, 2019 introduced the concept of Green Channel filing<sup>42</sup>, wherein the eligible enterprises need only submit the Notice under Form I, with the limited disclosures, and such Notice shall be deemed accepted upon acknowledgement of receipt, thereby bypassing the relatively lengthy and tedious approval process for other combination proposals. The CCI shall still review the filing and conduct a hearing to determine the eligibility of the parties, in order to ensure there is actually no likelihood of an appreciable adverse effect on competition.<sup>43</sup>

Combinations meeting the below mentioned criteria need only select 'Green Channel' in their Form I filing and submit for approval on acknowledgement of receipt of the Notice and

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<sup>37</sup> Competition Commission of India Pre – Filing Consultations Guidance Note, Para 1

<sup>38</sup> Competition Commission of India Pre – Filing Consultations Guidance Note, Para 2

<sup>39</sup> Competition Commission of India Pre – Filing Consultations Guidance Note, Para 9

<sup>40</sup> Competition Commission of India Pre – Filing Consultations Guidance Note, Para 4, Para 5

<sup>41</sup> Competition Commission of India Pre – Filing Consultations Guidance Note, Para 7

<sup>42</sup> Competition Commission of India Notification dated 13 August 2019, <https://www.cci.gov.in/combination/green-channel-view>, accessed 31 March 2023

<sup>43</sup> "The Competition Commission of India (Combination Regulations), 2011", R.5A

specified fee of Rs. 20,00,000/- (rupees twenty lakhs).<sup>44</sup>

### **Eligibility Criteria for Green Channel Filing**

- i. The entities do not produce or provide identical / similar / substitutable goods or services
- ii. The entities are not engaged in business at different levels (suppliers, manufacturers, distributors, retailers etc.) in the same production chain
- iii. The entities are not engaged in the production or provision of complementary goods or services.<sup>45</sup>

If the combination meets all the three abovementioned criteria, which essentially means the businesses of the parties have no relation with each other, they can seek approval under the Green Channel. If the details furnished are found to be false / misrepresented, the approval is deemed void ab initio and the CCI shall take necessary action against the parties<sup>46</sup>, which may include having to restart the approval process, going through the entire lengthy procedure.

### **7. Formal Notice**

Within 30 days of the execution of any agreement or document relating to the acquisition of an enterprise or the board resolution approving the merger, as the case may be, the concerned enterprises have to notify the CCI about their intent to execute a combination<sup>47</sup>.

The form filing will cover all the transactions / series of transactions required to implement the combination under the same form filing. Therefore, regardless of whether or not the combination is to be carried out in a staggered manner, phased timeline or through a series of agreements for different components; the disclosures in the form filing would be as per the final combined entity as shall exist post the entire combination process.<sup>48</sup> All transactions and agreements being carried out towards the combination must be covered in the single form

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<sup>44</sup> “The Competition Commission of India (Combination Regulations), 2011”, R.11(a)

<sup>45</sup> “The Competition Commission of India (Combination Regulations), 2011”, Schedule III

<sup>46</sup> Supra Note 43

<sup>47</sup> “The Competition Act, 2002”, § 6(2)(a), No. 3 Acts of Parliament, 2003 (India)

<sup>48</sup> “The Competition Commission of India (Combination Regulations), 2011”, R.5(9)

filing.<sup>49</sup>

This Notice has to be filed with the CCI in the relevant formats prescribed under Schedule II of the CCI (Combination Regulations), 2011<sup>50</sup>, along with the prescribed fees.

## **7.1. Formats to file Notice**

### **7.1.1. Form I**

This is the form to be used by most entities applying for CCI approval for their combination proposal. This is the ordinary form applicable upon all entities requiring such permission.<sup>51</sup> Green Channel applications are also made through Form I along with the declaration under Schedule 4 of the CCI (Combination Regulations), 2011.<sup>52</sup> The fee payable for the filing of this form to seek CCI approval is Rs.20,00,000/- (rupees twenty lakhs).<sup>53</sup>

### **7.1.2. Form II**

This form is intended for proposed combination between entities engaged in similar business (similar / identical / substitutable goods or services) and their post combination market share exceeds 15% in their relevant market. It is also applicable upon combinations involving entities operating at different levels of production, ergo different markets; if their individual or combined market share exceeds 25% in a particular relevant market.<sup>54</sup> The fee payable for the filing of this form to seek CCI approval is Rs.65,00,000/- (rupees sixty-five lakhs)<sup>55</sup>. This fee is considerably more than the fee for Form I as Form II deals with combinations of a more complex nature requiring extensive scrutiny and review to ensure there is no appreciable adverse effect on competition.

### **7.1.3. Form III**

This form is intended for acquisitions, share subscriptions or financing facilities by public financial institutions, foreign institutional investors, banks or venture capital funds, pursuant

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<sup>49</sup> “The Competition Commission of India (Combination Regulations), 2011”, R.9(4)

<sup>50</sup> “The Competition Commission of India (Combination Regulations), 2011”, Schedule II

<sup>51</sup> “The Competition Commission of India (Combination Regulations), 2011”, R.5(2)

<sup>52</sup> “The Competition Commission of India (Combination Regulations), 2011”, R.5A(1)

<sup>53</sup> “The Competition Commission of India (Combination Regulations), 2011”, R.11(a)

<sup>54</sup> “The Competition Commission of India (Combination Regulations), 2011”, R.5(3)

<sup>55</sup> “The Competition Commission of India (Combination Regulations), 2011”, R.11(b)

to any covenant of a loan agreement or investment agreement. Such transactions are exempt from the general provisions relating to combinations meeting the prescribed thresholds, and hence there is a separate form filing for such agreements.

When the application is made jointly by two or more enterprises, as would generally be the case for mergers, the fee is payable either jointly or severally by the parties.<sup>56</sup> In the situation of mergers, parties have to file their application jointly.<sup>57</sup>

The purpose of these forms is to brief the CCI on the business of the entities proposing to execute a combination, in order for the CCI to evaluate whether such combination would be pro – competitive or anti – competitive in nature. For this purpose, the forms are fairly elaborate and require the entities to disclose a vast array of information to give the CCI the full picture.

## 7.2.Disclosures in Forms

These details *inter – alia* include the following:

- i. General details of parties including name, type of entity, registered address and jurisdiction, registration number if any, authorised signatory etc.<sup>58</sup>
- ii. The break – up of the assets and turnover between the parties which is meeting the specified thresholds<sup>59</sup>
- iii. Description of the combination including nature of transaction, proposed timelines, value propositions etc.<sup>60</sup>
- iv. Group details if applicable<sup>61</sup>
- v. List of product offerings and overlaps if any<sup>62</sup>

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<sup>56</sup> “The Competition Commission of India (Combination Regulations), 2011”, R.10(2)

<sup>57</sup> “The Competition Commission of India (Combination Regulations), 2011”, R.9(3)

<sup>58</sup> “The Competition Commission of India (Combination Regulations), 2011”, Schedule II, Form I, Part 1

<sup>59</sup> “The Competition Commission of India (Combination Regulations), 2011”, Schedule II, Form I, Part 4

<sup>60</sup> “The Competition Commission of India (Combination Regulations), 2011”, Schedule II, Form I, Part 5

<sup>61</sup> “The Competition Commission of India (Combination Regulations), 2011”, Schedule II, Form I, Part 6.1

<sup>62</sup> “The Competition Commission of India (Combination Regulations), 2011”, Schedule II, Form I, Part 6.3; Part 6.4.1

- vi. Market details including market size, market share, top 5 competitor's details<sup>63</sup>
- vii. Details of purpose, strategy, rationale and end objective of combination<sup>64</sup>
- viii. Precise details of control factors including shareholding, voting rights etc.<sup>65</sup>
- ix. Details of studies undertaken by parties to evaluate the proposed combination's impact on competition and the market<sup>66</sup>
- x. Annual reports and financial accounts of all parties<sup>67</sup>
- xi. List of major shareholders (shareholding > 5%)<sup>68</sup>
- xii. Details of specialised suppliers and distributors etc.<sup>69</sup>

In order to gauge the difference in disclosure intensity between Form I and Form II, it is relevant to note that Form I has about 50 fairly straight forward mostly factual / objective disclosures<sup>70</sup> whereas Form II has about 90 highly subjective and qualitative disclosures<sup>71</sup>.

After filing such Notice, the entities are expressly prohibited from effecting the intended combination until 210 days from the date of filing the Notice, or until the CCI passes its order on the combination (final authorisation or rejection), whichever is earlier.<sup>72</sup>

Upon receipt of the Notice, the CCI may call upon the parties to furnish some additional information that the CCI requires to evaluate the application; and the time taken to furnish such information is excluded from the period of 210 days as mentioned in the foregoing paragraph.<sup>73</sup>

In the event where a filing has been made under Form I and the CCI requires disclosures as per Form II in order to form an opinion, it may direct the parties to file Form II, while adjusting

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<sup>63</sup> "The Competition Commission of India (Combination Regulations), 2011", Schedule II, Form I, Part 6.5.2; Part 6.5.3; Part 6.5.4

<sup>64</sup> "The Competition Commission of India (Combination Regulations), 2011", Schedule II, Form II, Part 1.1; Part 2

<sup>65</sup> "The Competition Commission of India (Combination Regulations), 2011", Schedule II, Form II, Part 6.2

<sup>66</sup> "The Competition Commission of India (Combination Regulations), 2011", Schedule II, Form II, Part 7.2

<sup>67</sup> "The Competition Commission of India (Combination Regulations), 2011", Schedule II, Form II, Part 7.4

<sup>68</sup> "The Competition Commission of India (Combination Regulations), 2011", Schedule II, Form II, Part 7.5

<sup>69</sup> "The Competition Commission of India (Combination Regulations), 2011", Schedule II, Form II, Part 10.1(f)

<sup>70</sup> "The Competition Commission of India (Combination Regulations), 2011", Schedule II, Form I

<sup>71</sup> "The Competition Commission of India (Combination Regulations), 2011", Schedule II, Form II

<sup>72</sup> "The Competition Act, 2002", § 6(2A), No. 3 Acts of Parliament, 2003 (India)

<sup>73</sup> "The Competition Commission of India (Combination Regulations), 2011", R.5(4)

for the already paid fees and the period of 210 days shall restart from the date of filing Form II.<sup>74</sup>

If any details required by Form I or Form II as the case may be, are not available at the time of filing the said form, the date upon which such information shall be furnished must be indicated in the respective columns and the time taken to furnish such information shall be excluded from the period of 210 days.<sup>75</sup>

In regard to the enterprises filing Form III (Public Financial Institutions, Foreign Financial Institutions, Banks, Venture Capital Funds filing pursuant to a loan agreement or investment agreement); no fee is payable for the filing and there is no approval process required, as mentioned hereinabove.<sup>76</sup> Upon receipt of the Notice in Form III, the CCI need only admit such details in its records, thereby closing the process for such combinations.<sup>77</sup>

### **7.3.Failure to Submit Notice**

In the event that enterprises breaching the thresholds enumerated hereinabove, fail to comply with the statutory Notice requirement, the CCI can initiate a suo moto investigation based upon its own information or information obtained from elsewhere / information reported to the CCI; into the likelihood of the concerned combination having an appreciable adverse effect on competition.<sup>78</sup> Such inquiry would be initiated in addition to the levying of a penalty<sup>79</sup> amounting to 1% of the total turnover or assets of the combined entity, whichever is higher.<sup>80</sup> At the commencement of such inquiry, the CCI shall call for the parties to make the relevant form filing under Form I or Form II as the case may be<sup>81</sup>, which must be filed within 30 days of receipt of the CCI's direction to file the form.<sup>82</sup>

### **7.4.Change in Circumstances**

If there has been any change in the circumstances / facts of the combination post the filing and

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<sup>74</sup> "The Competition Commission of India (Combination Regulations), 2011", R.5(5)

<sup>75</sup> "The Competition Commission of India (Combination Regulations), 2011", R.5(6)

<sup>76</sup> "The Competition Commission of India (Combination Regulations), 2011", R.6(1)

<sup>77</sup> "The Competition Commission of India (Combination Regulations), 2011", R.6(3)

<sup>78</sup> "The Competition Commission of India (Combination Regulations), 2011", R.8(1)

<sup>79</sup> "The Competition Commission of India (Combination Regulations), 2011", R.8(2)

<sup>80</sup> "The Competition Act, 2002", § 43A, No. 3 Acts of Parliament, 2003 (India)

<sup>81</sup> Supra Note 79

<sup>82</sup> "The Competition Commission of India (Combination Regulations), 2011", R.8(3)

during the proceedings, the same must be notified to the CCI.<sup>83</sup> Upon assessment of the changes, if the CCI is of the opinion that the changes have a material impact on their determination of whether the combination poses an appreciable adverse effect on competition, it may, after giving the parties a reasonable opportunity to be present their case, invalidate the Notice<sup>84</sup> and call for refiling, which if done within 30 days of such order of invalidation, shall not attract any additional fee.<sup>85</sup>

### **7.5.Hostile Takeovers / Involuntary Acquisition**

In the circumstances of a hostile takeover, wherein the target enterprise is being acquired without its consent, the procedural requirements for such filings are modified. The acquirer must make the relevant form filing with the information known about the target enterprise, and the balance unknown information should be furnished within 15 days of filing the Notice with the CCI. In the event wherein the information regarding the target enterprise cannot be obtained by the acquirer even after the expiry of 15 days, the CCI may direct the target enterprise to furnish the required information and the time taken for such information to be submitted, shall be excluded from the 210-day period.<sup>86</sup>

### **8. Scrutiny of Notice by the CCI**

Upon receipt of the Notice through the concerned Form, the CCI shall issue an acknowledgement<sup>87</sup> proceed with the evaluation of the combination based on the form filing. Forms found incomplete except for under the provisions where the parties may submit the remaining details later, or found to not be in compliance with the CCI (Combination Regulations), 2011, shall be deemed invalid upon submission<sup>88</sup> or upon evaluation by the CCI, and such invalidation shall be notified to the parties within 7 days of the decision to invalidate.<sup>89</sup> This system of invalidation prevents the CCI from wasting time and resources calling for the missing information, which again delays the entire process, keeping in mind the 210 day

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<sup>83</sup> “The Competition Commission of India (Combination Regulations), 2011”, R.16(1)

<sup>84</sup> “The Competition Commission of India (Combination Regulations), 2011”, R.16(4)

<sup>85</sup> “The Competition Commission of India (Combination Regulations), 2011”, R.16(5)

<sup>86</sup> “The Competition Commission of India (Combination Regulations), 2011”, R.9(2)

<sup>87</sup> “The Competition Commission of India (Combination Regulations), 2011”, R.14(2)

<sup>88</sup> “The Competition Commission of India (Combination Regulations), 2011”, R.14(1)

<sup>89</sup> “The Competition Commission of India (Combination Regulations), 2011”, R.14(2A)

deadline. Therefore, it is imperative that the parties submit complete Notices in adherence with the statutory framework.

Prior to such invalidation, the CCI may give the parties an opportunity to be heard and present their case on why the Notice should not be invalidated.<sup>90</sup> This opportunity to explain themselves and the reasoning behind their compliance failure is to reduce the economic and time loss of having to refile a Notice, in the interest of the parties, the CCI and the market as a whole.

In case the CCI finds for the need of further information or finds a defect in the Notice or any additional filing pursuant thereto, the parties have to furnish the additional information or correct the defect<sup>91</sup>, as the case may be within the time limit stipulated by the CCI, or else the application shall be deemed invalid.<sup>92</sup> The time taken to furnish such information or correct the defect, as the case may be, shall be excluded from the period of 210 days.<sup>93</sup>

## 9. Evaluation of Notice

After the successful filing of a valid Notice, the CCI shall proceed to evaluate the proposed combination to ascertain whether it shall cause or is likely to cause an appreciable adverse effect on competition, in light of the details furnished in the Notice.<sup>94</sup> As per the design of the statutory framework, the combination proposals being filed under Form II are more likely to have an appreciable adverse effect on competition and hence are likely to be subjected to stricter scrutiny and more detailed evaluation. That being said, those combination proposals being filed under Form I are also to be evaluated in a diligent manner, owing to the fact that such combinations may also pose the risk of an appreciable adverse effect on competition, or they may actually be required to file under Form II.

When the CCI is making its determination, there are various factors which it may take into consideration. The following is an indicative and not exhaustive list of aspects contemplated by the CCI when forming its opinion on the combination.

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<sup>90</sup> Id

<sup>91</sup> “The Competition Commission of India (Combination Regulations), 2011”, R.14(3)

<sup>92</sup> “The Competition Commission of India (Combination Regulations), 2011”, R.14(6)

<sup>93</sup> “The Competition Commission of India (Combination Regulations), 2011”, R.14(5)

<sup>94</sup> “The Competition Act, 2002”, § 20(2), No. 3 Acts of Parliament, 2003 (India)



- i. The extent of the barriers to entry into the concerned relevant market / markets.<sup>95</sup>
- ii. The existing level of combination in the market, that is, the number of combined entities operating in the market and their overall impact on the relevant market.<sup>96</sup>
- iii. The actual and potential level of competition in the concerned relevant market / markets, including imports.<sup>97</sup>
- iv. The extent to which substitutes are available or are likely to be available in the market.<sup>98</sup>
- v. The market share of the parties to the combination, individually and collectively, in the relevant market.<sup>99</sup>
- vi. The degree of countervailing power in the market, that is, the buyers' power to determine prices and seek discounts / price reductions etc.<sup>100</sup>
- vii. The possibility of the combination being unsuccessful and leading to the failure of the combined entity.<sup>101</sup>
- viii. The likelihood that the post combination entity could significantly and sustainably increase prices or profit margins in the relevant market / markets.<sup>102</sup>
- ix. The extent of effective competition likely to sustain in a market post the combination, taking into consideration the possibility of competitors being driven out of the market due to the size and power of the combined entity.<sup>103</sup>
- x. The likelihood that the combination would result in the removal of a competent and effective competitor or competitors in the relevant market.<sup>104</sup>

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<sup>95</sup> "The Competition Act, 2002", § 20(4)(b), No. 3 Acts of Parliament, 2003 (India)

<sup>96</sup> "The Competition Act, 2002", § 20(4)(c), No. 3 Acts of Parliament, 2003 (India)

<sup>97</sup> "The Competition Act, 2002", § 20(4)(a), No. 3 Acts of Parliament, 2003 (India)

<sup>98</sup> "The Competition Act, 2002", § 20(4)(g), No. 3 Acts of Parliament, 2003 (India)

<sup>99</sup> "The Competition Act, 2002", § 20(4)(h), No. 3 Acts of Parliament, 2003 (India)

<sup>100</sup> "The Competition Act, 2002", § 20(4)(d), No. 3 Acts of Parliament, 2003 (India)

<sup>101</sup> "The Competition Act, 2002", § 20(4)(k), No. 3 Acts of Parliament, 2003 (India)

<sup>102</sup> "The Competition Act, 2002", § 20(4)(e), No. 3 Acts of Parliament, 2003 (India)

<sup>103</sup> "The Competition Act, 2002", § 20(4)(f), No. 3 Acts of Parliament, 2003 (India)

<sup>104</sup> "The Competition Act, 2002", § 20(4)(i), No. 3 Acts of Parliament, 2003 (India)

- xi. The nature and extent of vertical integration in the concerned markets.<sup>105</sup>
- xii. The nature and extent of innovation in the market and the potential impact of the combination upon innovation and development in the relevant market / markets.<sup>106</sup>

While weighing the abovementioned factors in regard to a detrimental effect on the market or an appreciable adverse effect on competition, the CCI shall also take into consideration the potential positive impact of the proposed combination by weighing the benefits against any apprehended drawbacks.<sup>107</sup>

These considerations include the economic development that can be expected as a result of the combination<sup>108</sup>, owing to the ability to expand operations, increase employment, boost innovation and development and being able to offer a larger range of better-quality goods / services in the market.

Further, the CCI will also consider the factor of economies of scale and efficiency benefits resulting from the proposed combination. The efficiency improvement could result in lower costs leading to lower consumer prices and could simultaneously encourage technological development which benefits the consumers and the market as a whole.

The CCI, by weighing these potential procompetitive factors against the potential anti – competitive elements, in order to form its opinion and make a determination of whether or not to grant the approval for the proposed combination.

## **10. Notice Evaluation Procedure**

### **10.1. Phase 1 Procedure**

The CCI shall form its prima facie opinion on the combination based on the Form I / Form II filing within 30 days of the receipt of such Notice<sup>109</sup>, If the CCI deems it necessary, it may call for the opinion of any other enterprise with regard to the potential appreciable adverse effect

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<sup>105</sup> “The Competition Act, 2002”, § 20(4)(j), No. 3 Acts of Parliament, 2003 (India)

<sup>106</sup> “The Competition Act, 2002”, § 20(4)(l), No. 3 Acts of Parliament, 2003 (India)

<sup>107</sup> “The Competition Act, 2002”, § 20(4)(n), No. 3 Acts of Parliament, 2003 (India)

<sup>108</sup> “The Competition Act, 2002”, § 20(4)(m), No. 3 Acts of Parliament, 2003 (India)

<sup>109</sup> “The Competition Commission of India (Combination Regulations), 2011”, R.19(1)

on competition posed by the combination proposal. The CCI may grant upto 15 days for such opinions to be received, which shall be excluded from the computation of 30 days.<sup>110</sup>

Subsequent thereto, the parties may offer modifications to their proposal<sup>111</sup> or the CCI may recommend some modifications which the parties may incorporate in their proposal<sup>112</sup>. Based upon which, the CCI shall form its prima facie opinion. If such modifications are submitted, the CCI may take upto 15 days to review such modifications, which shall be excluded from the 30-day period provided for the issuance of its prima facie opinion.<sup>113</sup>

If upon the submission of the Notice or the modifications subsequent thereto, the CCI is of the opinion that the combination is not likely to cause an appreciable adverse effect on competition, it shall allow such combination and give it its approval.<sup>114</sup>

## **10.2. Phase 2 Procedure**

### **10.2.1. Initiation**

If the CCI's prima facie opinion is that the combination is likely to cause an appreciable adverse effect on competition, it shall extend its review period to the full 210 days.<sup>115</sup> The CCI shall issue a show cause Notice to the parties as to why a Director General Investigation should not be initiated,<sup>116</sup> and give them an opportunity to present their case. If a Director General report is deemed necessary, the same shall be carried out<sup>117</sup> and the report thereof shall be submitted to the CCI.<sup>118</sup>

### **10.2.2. Publication of Details of Combination**

Pursuant to the hearing on the show cause Notice or the report of the Director General, as the case may be, the CCI shall direct the parties to publish the details of the combination within 10 days of such direction. The idea behind such publication is to inform all potentially affected

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<sup>110</sup> "The Competition Commission of India (Combination Regulations), 2011", R.19(3)

<sup>111</sup> "The Competition Commission of India (Combination Regulations), 2011", R.19(2)

<sup>112</sup> "The Competition Act, 2002", § 31(3), No. 3 Acts of Parliament, 2003 (India)

<sup>113</sup> Supra Note 110

<sup>114</sup> "The Competition Act, 2002", § 31(1); § 31(7), No. 3 Acts of Parliament, 2003 (India)

<sup>115</sup> Gaurav Bansal, 'India: Merger Control (4th Edition)', (7 January 2020), <https://www.azbpartners.com/bank/india-merger-control-4th-edition/> accessed 31 March 2023

<sup>116</sup> "The Competition Act, 2002", § 29(2), No. 3 Acts of Parliament, 2003 (India)

<sup>117</sup> "The Competition Commission of India (Combination Regulations), 2011", R.20

<sup>118</sup> "The Competition Commission of India (Combination Regulations), 2011", R.21

parties of the proposed combination and seek their opinion on the matter, in regard to ascertain the potential impact of such combinations.<sup>119</sup>

This publication of details should be done in four leading daily newspapers of India including atleast two business newspapers<sup>120</sup>, as well as on the websites of the parties<sup>121</sup> to the combination and the CCI may also host this information on its own website<sup>122</sup>. The publication should be in the format prescribed in Form IV in Schedule II of the CCI (Combination Regulations), 2011<sup>123</sup>; which includes a summary of the proposed combination and an invitation seeking objections / suggestions with regard to the combination from people / enterprises likely to be affected by it.<sup>124</sup> This would include competitors, suppliers, distributors, retailers etc. The CCI shall then evaluate the inputs received and conduct hearings as it may deem fit.<sup>125</sup>

### ***10.2.3. Modification to Combination Proposal***

Subsequent thereto, if the CCI believes the concerns can be adequately addressed through modifying the proposal, it may suggest certain changes to alleviate the potential anti – competitive elements.<sup>126</sup> The parties then have the option of accepting the changes and incorporating them or submitting their own amendments.<sup>127</sup> If the parties accept the changes suggested by the CCI, or the CCI accepts their amended proposal, and the parties agree to effect such changes, the CCI shall grant the necessary approval to the combination.<sup>128</sup>

Provided that in the situation where the CCI deems it necessary to appoint a supervisor to ensure the effecting of the modifications, it may appoint a consultancy firm / accounting firm / legal firm / any other professional firm not having a conflict of interest, to supervise the modification by exercising the powers granted to it by the CCI. Upon successful completion of the modifications, the supervisor shall submit its report to the CCI and the fee payable to their supervisor for their services shall be borne by the parties to the combination.<sup>129</sup> If the parties

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<sup>119</sup> “The Competition Act, 2002”, § 29(2), No. 3 Acts of Parliament, 2003 (India)

<sup>120</sup> “The Competition Commission of India (Combination Regulations), 2011”, R.22(5)

<sup>121</sup> “The Competition Commission of India (Combination Regulations), 2011”, R.22(4)

<sup>122</sup> “The Competition Commission of India (Combination Regulations), 2011”, R.22(3)

<sup>123</sup> “The Competition Commission of India (Combination Regulations), 2011”, R.22(2)

<sup>124</sup> “The Competition Commission of India (Combination Regulations), 2011”, Schedule II, Form IV

<sup>125</sup> “The Competition Commission of India (Combination Regulations), 2011”, R.24

<sup>126</sup> The Companies Act, 2013, § 31(3)

<sup>127</sup> “The Competition Commission of India (Combination Regulations), 2011”, R.25(2)

<sup>128</sup> “The Competition Commission of India (Combination Regulations), 2011”, R.25(3)

<sup>129</sup> “The Competition Commission of India (Combination Regulations), 2011”, R.27

fail to carry out the modifications required within the stipulated time period, the CCI shall deal with the matter as it deems fit<sup>130</sup>, which shall likely include rejecting the combination.

However, if the parties reject the changes suggested and the CCI rejects their amendment, the parties will be given a further period of 30 days to accept the CCI's proposed changes<sup>131</sup> or else the combination will be deemed to have an appreciable adverse effect on competition and be subject to legal action under the relevant statutory provisions.<sup>132</sup>

If the final opinion of the CCI, after carrying out all the procedural requirements in the statutory framework, is that the combination is likely to have an appreciable adverse effect on competition and the anti – competitive elements outweigh the pro – competitive factors if any; it shall reject the proposed combination, thereby prohibiting it from taking effect.<sup>133</sup>

## 11. Analysis and Conclusion

The nomenclature varies from combinations to amalgamations to mergers and acquisitions and takeovers; but the undeniable fact remains that such transactions are of paramount economic importance. Not only do they boost economic growth and technical development, but they also expand the market and create new opportunities, paving the way for the future while improving customer benefits along the way. However, there is an equally undisputable fact that such transactions do pose a threat to competition which can be ultimately severely detrimental to the market, consumers and the economy as a whole. Therefore, regulation of these transactions from a competition law perspective is imperative.

The regulatory framework governing combinations, primarily comprising “the Competition Act, 2002” and the CCI (Combination Regulations), 2011, provides a fairly robust and thorough system of evaluation of combination proposals. The different channels of filing for approval enable combinations to be dealt with in the most suitable and fair manner, wherein the simpler combinations posing absolutely no threat can go through the Green Channel for rapid approval, subject to CCI scrutiny; the general masses of combination proposals can go through Form I with a relatively simplified disclosure mandate; and the complex combinations

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<sup>130</sup> “The Competition Commission of India (Combination Regulations), 2011”, R.28(4)

<sup>131</sup> “The Competition Act, 2002”, § 31(8), No. 3 Acts of Parliament, 2003 (India)

<sup>132</sup> “The Competition Act, 2002”, § 31(9), No. 3 Acts of Parliament, 2003 (India); “The Competition Commission of India (Combination Regulations), 2011”, R.25(4)

<sup>133</sup> “The Competition Act, 2002”, § 31(1), No. 3 Acts of Parliament, 2003 (India); “The Competition Act, 2002”, § 31(10); “The Competition Commission of India (Combination Regulations), 2011”, R.28(1)

threatening competition in the market, undergo the detailed disclosure mandate of Form II and the extensive scrutiny of the CCI. This construct is not just fair, but it also reduces the cost and time investment for the applicants and the CCI while benefitting the economy as it encourages healthy business and ensures businesses move forward and grow with minimal hinderance – the benefit of which is ultimately experienced by the people of the country such as consumers, employees and other enterprises, as well as the government, through tax revenue.

The concept of pre – filing consultation is revolutionary. The ability to have a frank discussion with the body having ultimate control over the combination, outside the restrictions and curbs of formal proceedings, is an absolute boon to enterprises; provided that they make proper utilisation of it and come forth with the true facts without any concealment or misrepresentation. The assistance of the CCI in filing the application before itself, is a fantastic catalyst to such approvals, enabling the process to be smoother and faster with few to no hindrances such as calls for additional information etc. Through the pre – filing consultation, the parties can incorporate the suggestions of the CCI in the initial filing itself, instead of having to waste time and resources filing, receiving suggestions formally upon review, incorporating such suggestions and refiling.

The disclosure requirements are reasonable detailed, especially in Form II, which helps ensure the parties give the CCI the full picture with regard to the proposed combination. Furthermore, the procedure allows for open and healthy discussions and negotiations at multiple levels, which aims at resolving any issue at the earliest and approving maximum possible procompetitive combinations. The processes of the CCI offering suggestions either of its own accord or upon inputs of interested parties or as a result of the Director General's Investigation Report, shows the willingness of the regulator and the system to create and support procompetitive combinations while ensuring all stakeholders' legitimate concerns are addressed. The various stages and chances offered to seemingly anti – competitive combinations, represents how the system itself is pro – competitive throughout, offering all possible chances to rectify any issues before rejecting the proposal.

While the fee for the submission of the proposal does seem very expensive, when viewed in comparison to the thresholds which enterprises have to meet in order to need to process such application; it is a drop in the bucket.

One could argue the exclusion of certain time periods from the overall time limit of 210 days as being unfair, it must be remembered that all the excluded time periods are in reference to external information and processes, outside the control of the CCI; including additional information to be submitted by the parties, actions to be undertaken by the parties and information to be submitted by other entities. These excluded time periods are also usually restricted to 15 days in the procedural framework; hence the system does in fact promote rapid processing, especially when keeping in mind the fact that Green Channel applications are deemed approved on acknowledgment of submission; prima facie opinions are delivered within 30 days and only complex cases extend to the full 210 days. Majority of the applications filed in this regard in recent times, have been disposed of in the Green Channel or within the 30-day period of prima facie opinion.<sup>134</sup>

The 2017 approval of the Vodafone – Idea Merger is testament to the fact that the CCI is very encouraging of business growth and though it is the regulator of combinations in India, it is supportive of large businesses as long as it is a procompetitive combination. Despite the merger essentially turning the telecom sector into an oligopoly, and keeping in mind the fact that the combined entity would have a revenue of Rs. 80,000 Crores, and a 35% market share with a 41% revenue market share, the CCI gave its unconditional stamp of approval to the combination as the same was in the interest of efficiency, technical development and customer benefits.<sup>135</sup>

In conclusion, the procedure of the CCI with regard to approvals of combinations appears to be amongst the best regulatory frameworks in the Indian legal system leaving little to no scope of criticism, especially as the efficacy is proved by the statistics of its operations. At par with the regulatory systems of developed economies, the CCI's combination approval system makes it virtually impossible to carry out anti – competitive combinations likely to have an appreciable adverse effect on competition, while ensuring that the regulator intervention is at a minimum and is more supportive than restrictive. It protects all the players in the market, including the competitors, consumers, production chain and the parties to the combination themselves.

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<sup>134</sup> Supra Note 115

<sup>135</sup> Indo Asia News Service, 'Vodafone-Idea merger gets CCI approval', (*Hindustan Times*, 24 July 2017), <https://www.hindustantimes.com/business-news/vodafone-idea-merger-gets-cci-approval/story-bwAf8NulzrojxvOMLqxwOI.html>, accessed 31 March 2023