

COMPETITION ACT, 2002-(2)

S.4: PROHIBITION OF ABUSE OF DOMINANT POSITION:-

(1): No enterprise shall abuse its dominant position.

It is to be noted that ‘Dominant Position’ itself is not prohibited. What is prohibited is its misuse.

S.4(2): There shall be an abuse of dominant position under sub-section (1), if an enterprise-

- a) directly or indirectly, imposes unfair or discriminatory-
 - i) condition in purchase or sale of goods or services; or
 - ii) price in purchase or sale (including predatory price) of goods or services;

Or

Explanation: For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or services referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such

discriminatory conditions or prices
which may be adopted to meet the
competition; or

Explanation:- For the purposes of this
section, the expression—

a) “Dominant Position” means a
position of strength, enjoyed by an
enterprise, in the relevant market, in
India, which enable it to--

- i) Operate independently of competitive forces prevailing in the relevant market (2-q) and (2-r); or
 - ii) affects its competitors or consumers or the relevant market in its favour;
- b) “Predatory price” means the sale of goods or provision of services, at a price which is below the cost,

as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

S.2(e): CONSUMER: Note that for the purpose of Consumer Protection Act, 1986 person purchasing goods/availing services is for any commercial purpose

will not be 'consumer', but he will be 'consumer' under Competition Act.

S.2(s): Relevant Product Market:
FACTORS TO BE CONSIDERED
WHILE DECIDING WHETHER
ENTERPRISE ENJOYS DOMINANT
POSITION:- S.19(4).

The commission shall, while inquiring

whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the following factors-

- a) market share of the enterprise
- b) size and resources of the enterprise
- c) size and importance of the competitors
- d) economic power of the enterprise

including commercial advantages over
competitors

e) vertical integration of the enterprises
or sale or service network of such
enterprises

f) dependence of consumers on the
enterprise

g) monopoly or dominant position
whether acquired as a result of any
statute or by virtue of being a

Government Company or a public sector undertaking or otherwise

h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers

- i) Countervailing buying power
- j) market structure and size of market
- k) social obligation and social costs
- l) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have appreciable adverse effect on

competition

m) any other factor which the commission may consider relevant for the inquiry.

S.4(2)(b): LIMITING OR RESTRICTING PRODUCTION OR

DEVELOPMENT:- Limiting or restricting i) production of goods or provision of services or market

therefore or; ii) technical or scientific development relating to goods or services to the prejudice of consumers, is abuse of dominant position.

S.4(2)©: DENIAL OF MARKET

ACCESS:- Indulging in practice or practices resulting in denial or market access is abuse of dominant position.

S.4(2)(d): SUPPLEMENTARY OBLIGATIONS UNCONNECTED TO MAIN CONTRACT:- Making conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject to such contracts.

S.4(2)(e): USING DOMINANT POSITION TO ENTER ANOTHER

MARKET:- Using dominant position in one relevant market to enter into, or protect, other relevant market is abuse of dominant power.

Ex: Microsoft used its dominant position in Disk Operating System to dominate browser market and ruined Netscape.

PROVISIONS SIMILAR TO RTP

UNDER MRTP:- Though the words'

Restrictive Trade Practice' (RTP) is not

used in Competition Act, some

provisions in respect of anti-

competitive agreements in section 3

and abuse of dominant position in

section 4 are similar to provisions of

Restrictive Trade Practice under MRTP

Act. Hence, case law under MRTP will be relevant, though not binding, as wordings are different.

S.5:COMBINATION: REGULATION OF COMBINATION:

MEANING OF COMBINATION:-

The acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises

shall be treated as ‘combination’ of such enterprises and persons or enterprises in the following cases:

S.5(a) (i) –(A) and (B):-

ACQUISITION BY LARGE ENTERPRISES: Any acquisition where the parties to the acquisition, being the acquirer and the enterprise, whose control, shares, voting rights or assets have been acquired or are being acquired jointly

have (A) either, in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or (B) in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars or turnover more than fifteen hundred millions US dollars;

will be ‘combination’ (s.5(a) (i))

Thus, if after acquisition, the joint assets/turnover increase the aforesaid limits, it will be ‘combination’.

If Acquirer already had those assets or turnover, any further acquisition will be ‘combination’.

S.5(a) (ii)(A)(B):

ACQUISITION BY GROUP:

Any acquisition where the group, to which the enterprise whose control, shares, assets or voting rights have

acquired or are being acquired, would

belong after the acquisition, jointly

have or would jointly have (A) either in

India, the assets of the value of more

than rupees four thousand crores or turnover more than rupees twelve thousand crores; or

(b) in India or outside India, in aggregate, the assets of the value of more than two billion US dollars or turnover more six billion US dollars.

S.5(a)(ii)– Thus, even if individual enterprise is small, if group assets

exceed prescribed limit, any further acquisition will be ‘combination’ if group assets/turnover is above the limit.

S.5(b)(i)(A) (B)

S.5(b)(ii)(A) (B); ©(i)(A)(B),

(ii)(A)(B);

Explanation: (a) (b) ©;

ACQUISITION OF ENTERPRISE HAVING SIMILAR

GOODS/SERVICES:- Acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of

similar or identical or substitutable service, if the enterprise over which control has been acquired along with the enterprise over which the acquirer already has direct or indirect control jointly have,-

(A) either in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees

Three thousand crores; or (B) in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars or turnover more than fifteen hundred million US dollars.

(s.5(b)(i))

ACQUIRING ENTERPRISE HAVING SIMILAR GOODS/SERVICES BY A

GROUP:- Acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or

identical or substitutable service, if the group, or its constituent enterprise remaining after merger or the enterprise created as a result of the amalgamation, as the case may be, have,-(A) either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or

(B) In India or outside India, in aggregate, the assets of the value of more than two billion US dollars or turnover more than six billion US dollars, is combination –S.5(b) (ii).

MERGER OF ENTERPRISES:-

S.5©(i):

Any merger or amalgamation in which the enterprise remaining after merger or the enterprise created as a result of the amalgamation, as the case may be, have,-(A) either in India, the assets of the value of more than rupees one thousand crores or turnover more than

Rupees three thousand crores; or
(B) in India or outside India, in
aggregate, the assets of the value of
more than five hundred million US
dollars or turnover more than fifteen
hundred million US dollars, is
'combination'.

MERGER IN GROUP COMPANY:

S.5© (ii):-

The group, to which the enterprise remaining after the merger or the enterprise created as a result of the amalgamation, would belong after the merger or the amalgamation, as the case may be, have or would have,-

(A) Either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores;
or

(B) in India or outside India, the assets of the value of more than two billion US dollars or turnover more than six billion US dollars, is combination. S.5©(ii).

Turnover-S.2(x)

Acquisition-S.2(a)

Control- Explanation (a) to S.5

Group- Explanation(b) to S.5

Calculation of value of assets-

Explanation © to S.5

S.6: REGULATION OVER

COMBINATIONS:- No person or enterprise shall enter into a

combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant

market in India and such a combination shall be void. S.6(1);

The Act is intended for ‘regulation of combination’.

Combination in itself is not prohibited. It will be held void only if it adversely affects competition.

S.6(2): NOTICE TO COMMISSION ON OPTIONAL BASIS:-

Any person or enterprise, who or which proposes to enter into a combination,

may, at his or its option, give notice to the Commission, in the form as may be specified, and the fee which may be determined, by regulations, disclosing the details of the proposed combination, within seven days of –

a) approval of the proposal relating to merger or amalgamation, referred to in section 5© by the Directors

execution of any agreement or other document for acquisition.

S.6(3): The Commission shall, after receipt of notice u/s 6(2), deal with such notice in accordance with the provisions contained in section 29,30 and 31.

PROVISIONS DOES NOT APPLY
TO ACQUISITION BY PFI/FII:-

S.6(4):

The provisions of this sections shall not apply to share subscription or financing facility or any acquisition, by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant

of a loan agreement or investment
agreement.