Regulating the unregulated: Exempted Combinations

K K Sharma*

Compared to the other enforcement provisions of the Act, the merger control provisions, or regulation of combinations as these are called in India, are of more recent origin. The regulations drafted by the Competition Commission of India (the Commission) for regulation of the combinations, in an attempt to make the combination regulations more business friendly, have given a window of not filing the merger filings before the Commission in some cases of combinations where the possibilities of the Appreciable Adverse Effect on Combination (AAEC) are lesser. The question arises as to how to deal with the instances where the parties do not file the details of any combination and the Commission is of the opinion that the combination either causes or is likely to cause an AAEC in the relevant market.

The author, who was the architect of the introduction of schedule 1 for the exempt type categories while drafting the combination regulations for India as the first Head of Merger Control in India and thus making regulation of combinations a reality in India, delves deep into the issue and looks at the possible solutions. In his view, the Commission still has freedom to act against any combination causing AAEC – whether above or below thresholds.

As is well known worldwide the competition law, generally speaking, broadly has four limbs not necessarily be found in all the jurisdictions uniformly. These four limbs are prohibition of anticompetitive agreements, prohibition of abuse of dominant position, regulation of combinations and competition advocacy. Let it be understood, right in the beginning, that the terminology of these four limbs is considerably influenced by the terminology used in the Competition Act, 2002 as amended from time to time (the Act) though different limbs may have different wordings used, in different jurisdictions. As an example, the regulation of combinations is frequently referred to as concentration or merger control in various jurisdictions. Similarly, the names of prohibition of anticompetitive agreements and abuse of dominant position may have slight variations depending on the local usage, language and acceptability. However, it does not take us away from the basics of the competition law which, though not being universally applicable, do have adequate similarities for facilitating learning from one jurisdiction to other. Similarly, the competition advocacy is

* Chairman, KK Sharma Law Offices and ex Director General and Head of Merger Control and Antitrust Divisions, CCI. The author can be contacted on kksharmairs@gmail.com or kksharma@kkslawoffices.com.

not necessarily available in all the jurisdictions as this progressive measure is not necessarily found everywhere in all the jurisdictions.

Out of these four limbs, in an enquiry into the anti-competitive agreements and abuse of dominant position, the first two limbs of law, enforceable in India effective from May 20, 2009, the role of the competition agency is ex-post. The third limb of the competition law, enforceable in India effective from June 1, 2011, i.e. regulation of combinations, in contrast is ex-ante in nature. This implies that before any merger or acquisition comes into effect, the impact of its potential anti-competitive conduct, after combination, needs to be examined prior to the combined entity having come into existence. It is from the very nature of this job of regulation of combinations, also called merger control in some jurisdictions, that it becomes extremely complex. Imagine the misery of the priest if he were to predict the potential misconduct of the progeny after looking into the present health, conduct and overall status of the bride and bridegroom even before the marriage can be allowed to be solemnized by him. However, the complexity of any duty certainly does not give a license to the agency to put excessive regulatory burden on the regulated enterprises.

The relevant provisions of the Act dealing with the thresholds for the parties to the combination are contained in the Act. Section 5 details the thresholds above which the mandatory merger filing requirements are triggered. For a ready reference, the operative part of section 5 of the Act is extracted below:

> 5. 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, if—
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> (a) any acquisition where—
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> (i) 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,—
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> (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 ....

From the above definition of 'combination', we notice that any acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be treated as a combination for filing purposes depending on the triggering event. The triggering event may be leading to either an acquisition or acquiring of control or any merger or amalgamation.

The question arises as to what is 'acquisition'. Acquisition has been referred to in Section 5(a) of the Act. It may imply that the control, shares, voting rights or assets of an enterprise may be acquired by another enterprise. The triggering threshold talks of the joint assets or turnover of the enterprises or persons after combination. It does not state anything about the size of acquisition of shares, voting rights or assets of one enterprise by another at all. Implication of this can be that, theoretically, even the acquisition of a single share or assets of a very minimum value could trigger the filing of combination, or merger filing as it is also popularly known, before the competition agency. Therefore every time there is some minor acquisition, whether leading to control or not, it may lead to the triggering of merger filing requirement if the joint size of the two enterprises is above thresholds. If true, it would really make life of big enterprises miserable by excessive regulatory burden. This was one of the preliminary oppositions of the entire business lobby against the merger

control becoming a reality in India. The argument being advanced by those parties at that time was that, just because any enterprise happens to be of a big size, that would oblige it to come before the Competition Commission of India (the Commission/CCI) whether it was acquiring a refrigerator, an air conditioner, a car, helicopter or even a single share or things like that. This was indeed a farfetched argument but, being theoretically tenable, it was still a quite potent argument. It was explained to the stakeholders that only the transactions which were likely to cause an appreciable adverse effect on competition (AAEC) were the ones likely to be examined by the Commission but the claim of the existence of a legal provision which puts burden on size of enterprises made voices of dissent louder.

Therefore it was indeed incumbent upon the framers of the secondary legislation, which is The Competition Commission of India (Procedure in Regard to the Transaction of Business Relating to Combinations) Regulations, 2011 (Combination Regulations) that such kind of possibility and doubts are laid to rest. This was the logic behind creating certain categories of transactions which, in normal business world, were expected to be in the nature of normal business transactions , without even having any intent or aim to own control, an therefore not required to come in for merger filing. These are also sometimes called technical merger filings. This is because of the fact that the sole reason of the filing requirements being triggered is the combined assets and turnovers of the parties being above the gross thresholds, as given in section 5 and no other. This being the intent, it was very difficult to get the draft combination regulations passed through the Advisory Committee, which the Commission had constituted to guide it in the process of drafting Combination Regulation without finding a way out of this absurd possibility.

In this background, it was considered appropriate to create a set of business transactions which, on a prima facie look, are not likely to cause any AAEC to the competitive landscape of the market. Thus was born the Schedule to the Combination Regulations. This schedule giving an extra freedom to the enterprises not to make merger filing if the combination was not likely to cause an AAEC was annexed to the main regulations and forms an integral part of the Combination Regulations themselves. It enumerates all possible situations where merger filing may not be necessary to judge the change in competition dynamics. The Regulation 5 of the Regulations and the Schedule I , dealing with this window, are being extracted below for a ready reference:

Regulation 5

Form of notice for the proposed combination-

(1) Any enterprise which proposes to enter into a combination shall give notice of such combination to the Commission in accordance with sub-section (2) of section 6 of the Act and these regulations.

(2) The notice under sub-section(2) of section 6 of the Act, shall ordinarily be filed in Form I as specified in schedule II to these regulations, duly filled in, verified and accompanied by evidence of payment of requisite fee by the parties to the combination…….

Schedule 1

(1) An acquisition of shares or voting rights, referred to in sub-clause (i) or sub-clause (ii) of clause (a) of section 5 of the Act, solely as an investment or in the ordinary course of business in so far as the total shares or voting rights held by the acquirer directly or indirectly, does not entitle the acquirer to hold twenty five per cent (25%) or more of the total shares or voting rights of the company, of which shares or voting rights are being acquired,

directly or indirectly or in accordance with the execution of any document including a share holders agreement or articles of association, not leading to acquisition of control of the enterprise whose shares or voting rights are being acquired.

(1A) An acquisition of additional shares or voting rights of an enterprise by the acquirer or its group, not resulting in gross acquisition of more than five per cent (5%) of the shares or voting rights of such enterprise in a financial year, where the acquirer or its group, prior to acquisition, already holds twenty five per cent (25%) or more shares or voting rights of the enterprise, but does not hold fifty per cent (50%) or more of the shares or voting rights of the enterprise, either prior to or after such acquisition: Provided that such acquisition does not result in acquisition of sole or joint control of such enterprise by the acquirer or its group.

(2) An acquisition of shares or voting rights, referred to in sub-clause (i) or sub-clause (ii) of clause (a) of section 5 of the Act, where the acquirer, prior to acquisition, has fifty percent (50%) or more shares or voting rights in the enterprise whose shares or voting rights are being acquired, except in the cases where the transaction results in transfer from joint control to sole control.

(3) An acquisition of assets, referred to in sub-clause (i) or sub-clause (ii) of clause (a) of section 5 of the Act, not directly related to the business activity of the party acquiring the asset or made solely as an investment or in the ordinary course of business, not leading to control of the enterprise whose assets are being acquired except where the assets being acquired represent substantial business operations in a particular location or for a particular product or service of the enterprise, of which assets are being acquired, irrespective of whether such assets are organized as a separate legal entity or not.

(4) An amended or renewed tender offer where a notice to the Commission has been filed by the party making the offer, prior to such amendment or renewal of the offer: Provided that the compliance with regulation 16 relating to intimation of any change is duly made.

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

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

(7) Any acquisition of shares or voting rights by a person acting as a securities underwriter or a registered stock broker of a stock exchange on behalf of its clients, in the ordinary course of its business and in the process of underwriting or stock broking, as the case may be.

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

(9) A merger or amalgamation of two enterprises where one of the enterprises has more than fifty per cent (50%) shares or voting rights of the other enterprise, and/or merger or amalgamation of enterprises in which more than fifty per cent (50%) shares or voting rights in each of such enterprises are held by enterprise(s) within the same group: Provided that the transaction does not result in

transfer from joint control to sole control.

(10) Acquisition of shares, control, voting rights or assets by a purchaser approved by the Commission pursuant to and in accordance with its order under section 31 of the Act.

The above categories of transactions, being considered as routine business transactions to run a business, was not considered to cause any AAEC and were included in Schedule 1. It was a middle path so as to not having to wait till the amendments to the Act might be made, in order to make the regulations more business friendly and ensure that regulations of combinations becomes a reality in India without putting excessive burden on the regulatory enterprises.

That being so, let us also have a look at the basic obligation to file, as enshrined in section 6 of the Act. This is given in the section 6 of the Act which , for a ready reference, is being quoted as under:

Section 6

6. (1) 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.

(2) Subject to the provisions contained in sub-section (1), any person or enterprise, who or which proposes to enter into a combination, **[shall] 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 [thirty days] of—

(a) approval of the proposal relating to merger or amalgamation, referred to in clause (c) of section 5, by the board of directors of the enterprises concerned with such merger or amalgamation, as the case may be;

(b) execution of any agreement or other document for acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of that section...........

A reading of Section 6 extracted above, indicates that the basic obligation of the Commission is to ensure that no person or enterprise shall enter into a combination which causes or is likely to cause any AAEC within the relevant market in India. The basic requirement contained in section 6(1) is that the Commission has to look at the potentiality of any combination causing AAEC.

Regulation 5 read with Schedule 1 is brought into existence only to help achieve the objectives enshrined in section 6(1) read with section 5 of the Act. These are only the means and not the end. That would imply that all these thresholds, regulations or schedules are only to make the regulation of combination more business friendly, but it is not the end of the road and the Commission is still free and duty bound in terms of section 6 of the Act that nobody gets away with any anti-competitive outcome of any combination.

Section 6 of the Act makes no distinction between combinations needing compulsory filings and others. However the word combination itself has been defined in section 5 of the Act. However section 5 of the Act, being a part of the legislation, deals only with the joint combined assets and turnover and not the smaller categories or the size of the acquisition. Thus, whereas the overall combined assets/ turnover thresholds are non-negotiable, being a part of the Act, the facilitating mechanism in terms of Combination Regulations and the Schedule 1 is not.

It may be recalled that the very first draft of combination regulations, unveiled way back in 2008, did contain a clause for allowing express authority to the Commission to look into anti-competitive outcome of any combinations,

irrespective of it being below the threshold size given in the Act. However, the Advisory Committee on combinations, constituted by the Commission to guide it in making Combination Regulations, was not kind enough to allow such a clause and opined that intent of making the regulations more business friendly does not mean to give by one hand and take it back by another. This regulation was not retained and deleted. Therefore, as of now, there are no express provisions in the Act/Combination Regulations to act against combinations not filed before Commission, having been below combination thresholds, if they are found to cause AAEC.

In its over anxiety to make regulation of combinations still more business friendly, the Government of India came up with a notification which was also subsequently amended to make it more generous for filing merger filings. Exercising their powers in terms of Section 54 of the Act, they directed that a transaction need not be reportable unless the requirements of the size of being acquired asset is not less than 250 crores of assets or 750 crores of turnovers are not fulfilled together.

This further liberated the merger regime. The subsequent interpretation of this notification by Commission has been liberal and during the enforcement of merger control, the notification has been sought to mean that unless both these conditions together are triggered, there is no need for merger filing and this has been so since its first introduction. The relevant notification, as on date after amendments, is being reproduced below for a ready reference:

In exercise of the powers conferred by clause (a) of section 54 of the Competition Act, 2002(12 of 2003), the central government, in public interest, hereby exempts an enterprise, whose control, shares, voting rights or assets are being acquired has assets of the value of not more than ₹250 crores or turnover of not more than ₹750 crores from the provisions of section 5 of the said Act for a period of 5 years.[1]

Other countries alleviating notification burden for smaller transactions include Germany and Argentina. In Argentina, an exemption provides that transactions that meet the applicable turnover thresholds need not be notified where the value of the transaction and the relevant assets are below a certain threshold, thereby exempting the need for small transactions to be notified. Similarly, in Germany, merger control law also exempts transactions concerning markets that are of little relevance to the economy as a whole. This so called "minor market clause" applies as far as a market with a sales volume of less than EUR 15 million is concerned and the goods or services on this market have been offered for at least five years. Also, the "de minimis" clause in Germany provides that transactions in which one of the two merging parties is a small business do not fall under German merger control, even if the general thresholds are met[2]. Thus India is not the only country trying to make the merger regime more business friendly. However, simultaneously, the competition agencies do keep a watch if some mergers or acquisitions ,though falling below the threshold limit, are causing any AAEC (or whatever is the substantive test in that country).

Despite the above liberalising measures, it can be noted that the inherent power of section 6 remains. Therefore it is the responsibility of the Commission that no combination causing AAEC should be

1 Ministry of Corporate Affairs notification S.0.482 (E) dated 4th March 2011

2 http://www.internationalcompetitionnetwork.org/uploads/library/doc326.pdf

The exemptions given in the Act/ Combination Regulations and notifications in effect only changed the pattern of burden of compulsory filings on the acquiring parties to make them more business friendly for routine transactions not likely to cause an AAEC but not taken away the power of the CCI to regulate the combinations likely to cause AAEC in terms of section 6 of the Act

allowed to come into existence if it has the effect of causing AAEC.

The thresholds, regulations, notifications and its liberal interpretation should however not be construed as instruments of delimiting the powers of the Commission to prevent combinations with an anti-competitive effect. There may be enterprises which satisfy the jurisdictional as well as threshold criterion of the transaction yet do not cause any AAEC, just like there will be enterprises which could be covered within the exemptions from merger filing but still cause AAEC in the relevant market in more ways than one.

In India the merger control regulations are still in early phase of evolution. There are no express provisions empowering the Commission to try cases exempted from filing regulations. In such cases the duty lies on the shoulders of the parties to the combinations to assess the likely possibility of the anti-competitive outcome and make the necessary notification despite there not being an express obligation under the Act, Combination Regulations and Notifications.

If the parties fail to voluntarily make such notification, CCI isn't bereft of power to prohibit such exempted combinations if they are likely to cause AAEC. The onus to prove that any other combination, not falling within the parameters for compulsory filing, is likely to cause an AAEC lies with the party(s) alleging such a possibility with the required evidence.

The statutory backing for doing so has been granted by Section 20 of the Act granting the power to the Commission to enquire into any combination either on its own accord or on an information filed by any party. The said section has been reproduced here for further reference:

> **Inquiry into combination by Commission**
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> **20**. (1) The Commission may, upon its own knowledge or information relating to acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of section 5 or merger or amalgamation referred to in clause (c) of that section, inquire into whether such a combination has caused or is likely to cause an appreciable adverse effect on competition in India: Provided that the Commission shall not initiate any inquiry under this subsection after the expiry of one year from the date on which such combination has taken effect.
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> (2) The Commission shall, on receipt of a notice under sub-section (2) of section 6 [***], inquire whether a combination referred to in that notice or reference has caused or is likely to cause an appreciable adverse effect on competition in India......

It can thus be safely held that the exemptions given in the Act/ Combination Regulations and notifications in effect only

changed the pattern of burden of compulsory filings on the acquiring parties to make them more business friendly for routine transactions not likely to cause an AAEC but not taken away the power of the CCI to regulate the combinations likely to cause AAEC in terms of section 6 of the Act.

Alternatively, another option comes into being by virtue of the fact that a combination only comes into effect via an agreement. If a party can show that the agreement in question, through which the combination is coming into effect, is anticompetitive, it can invoke the jurisdiction of the CCI to prohibit such an agreement under section 3 of the Act. This can be done additionally besides reporting under Section 20 of the Act. Historically before the advent of merger control regime in various jurisdictions mergers and acquisitions were regulated as agreements only.

However there are numerous examples in the world where the competition agencies do have authority and also exercise it to review mergers falling below the thresholds.

There are a number of reported instances where in USA, the transactions below filing thresholds have been found to be having some anti-competitive concerns. In United States, having merger control for some time now, the Hart-Scott-Rodino Act (HSR) provides the nature and category of transactions which are subject to compulsory filing. A transaction isn't reportable if it fails the "in commerce" test[3], the "size of transaction" test[4] or the "size-of-person" test[5]. A transaction may also not be reportable if it is exempt pursuant to the HSR or some rules promulgated under the HSR. Non – reportable transactions are nonetheless subject to the antitrust jurisdiction of the Department of Justice (DOJ or Anti-trust Division) and the Federal Trade Commission (FTC) and may be challenged as anticompetitive by these enforcement agencies.

The FTC's recent St. Luke's challenge is a good example. In that case, St. Luke's, a hospital system in Idaho, acquired a local physician practice, Saltzer Medical Group, for about $16 million[6]. Even though the trial court found that "[t]he Acquisition was intended by St. Luke's and Saltzer primarily to improve patient outcomes" through better coordination of care, it nevertheless found the acquisition to be anticompetitive because it likely would result in price increases within the relevant market.[7]

One of the many Non-HSR transactions acted upon by the FTC includes *FTC* v. *Aloha Petroleum*.[8] In this case *FTC* sought and won a permanent injunction on finding that the said transaction, which was not reportable under the HSR, premerger filing guidelines, would reduce the number of gasoline marketers and could lead to higher prices of gas for the consumers.

In the matter of Carilion Clinic[9], FTC issued a complaint challenging Carilion

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3 The in- commerce test requires the acquiring person or the person whose voting rights or assets are being acquired is engaged in US inter-state commerce or it affects the inter-state commerce in US.

4 As of January 2011, to satisfy the 'size-of-transaction' test, the transaction must be valued more than $66 million. This is subject to periodic revision.

5 As of January 2011, to satisfy the 'size-of-transaction' test, the transaction must be between $66 million and $263.8 million. This is subject to periodic revision.

6 FTC v. St. Luke's Health System, Ltd., Findings of Fact and Conclusions of Law, No. 1: 12-CV-00560, at 9

7 Ibid at 12-16

8 CV05 00471 HG KSC

9 No. 9338 (FTC 2009)

Clinic's acquisition of an outpatient imaging centre & surgical centre in Virginia. The cause of action making the acquisition anti-competitive was that if left un-checked it would increase out of pocket expenses for some procedures by more than 800%. The complaint sought divestiture of the acquired clinics and certain related assets. Carilion has now agreed to the full relief sought in the complaint. FTC and *Carilion* reached a settlement. This demonstrates that transactions that are not large enough to trigger HSR filing may nonetheless be subject to post-closing review, and potentially be challenged, by the antitrust agencies.

FTC in MSC Software Corp.[10] challenged a post consummation transaction 28 months after the transaction was closed despite it being a non HSR transaction. MSC Software had allegedly gained monopoly by acquiring two small rival firms. The software company was forced to divide its business into multiple units.

In Polypore International/Daramic LLC[11] the FTC challenged Polypore's consummated acquisition of Polypore's consummated acquisition of Microporous Products in the global market for battery separators, despite it being exempted under the HSR filing regulations. It was opined by the FTC that the said acquisition would inter alia substantially reduce competition in the relevant market.

Similar situations exist in other countries as well.As an example, in Canada in *Commissioner of Competition* v. *CCS Corporation & Ors*.[12], the Commissioner in pursuance to the power granted to him under section 92 of the Competition Act (R.S.C., 1985, c. C-34)[13] dissolved the acquisition of Complete Environmental Inc. by CCS Corporation in 2011. The transaction was non-reportable and when the Bureau learned about it, it obtained a hold separate order pending completion of its investigation. Following a thorough review, the Bureau determined that the transaction would substantially reduce potential competition for the disposal of hazardous waste in northeaster British Columbia. Section 92 is a general provision empowering the commissioner of competition on finding that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially, to apply to the Tribunal seeking the reliefs mentioned therein.

In Brazil, the Pre-Merger Notification system was introduced by Law No. 8,884/94. It requires merging parties to notify a merger to the antitrust authorities no later than 15 days after its "occurrence," on meeting certain notification requirements. The notified mergers wouldn't escape the Commission's review under any circumstances. Under CADE's Resolution No. 13/2015, CADE may review transactions that fall outside the merger thresholds within one year of its closing[14]. In diverse economies, the number of combinations falling under the radar far exceeds the number the fall within it.

The Mexico's Comisión Federal de Competencia Económica can review any merger falling below the notification thresholds within one year from the consummation of the merger[15].

10 No. 9299(FTC 2001)

11 No. 9327 (FTC 2010)

12 http://www.ct-tc.gc.ca/CMFiles/CT-2011-002_Reasons%20for%20Order%20and%20Order_189_38_5-29-2012_5291.pdf

13 http://laws-lois.justice.gc.ca/PDF/C-34.pdf

14 http://www.cade.gov.br/Default.aspx?200000000c0a0a2030 and http://www.cade.gov.br/Default.aspx?87a768a8779597b380c1.

15 Supra, Note 15

The power to review transactions below the notification thresholds, however, is generally limited in time. In most cases, the action must be initiated within one year from the date of execution. In USA, however, some transactions have been caught much beyond one year as well.

In India, the power to inquire into any acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of section 5 or merger or amalgamation referred in clause (c) of that section which either has caused or is likely to cause an AAEC expires after one year from the date on which such combination has taken effect[16]. Section 28 of the Act however empowers the Commission to direct division of an enterprise abusing its dominant position, on an anticipation of AAEC even after the expiry of one year. The Commission is at full liberty to invoke the said section and pass appropriate orders dividing the consummated combination, if the Commission so deems fit.

The above analysis indicates that although the different competition agencies do make an effort to make the merger regime as much business friendly as possible but they still do retain authority to look into 'below the thresholds' transactions also if some adverse effect on competition is feared. In India, though the law, regulations and notifications are not very vocal about it but if an AAEC is feared, the Commission still has enough elbow room to look into the merger and acquisitions which might have not been filed before it by the parties to the combination.

16 Competition Act, 2002, section 20(1), proviso