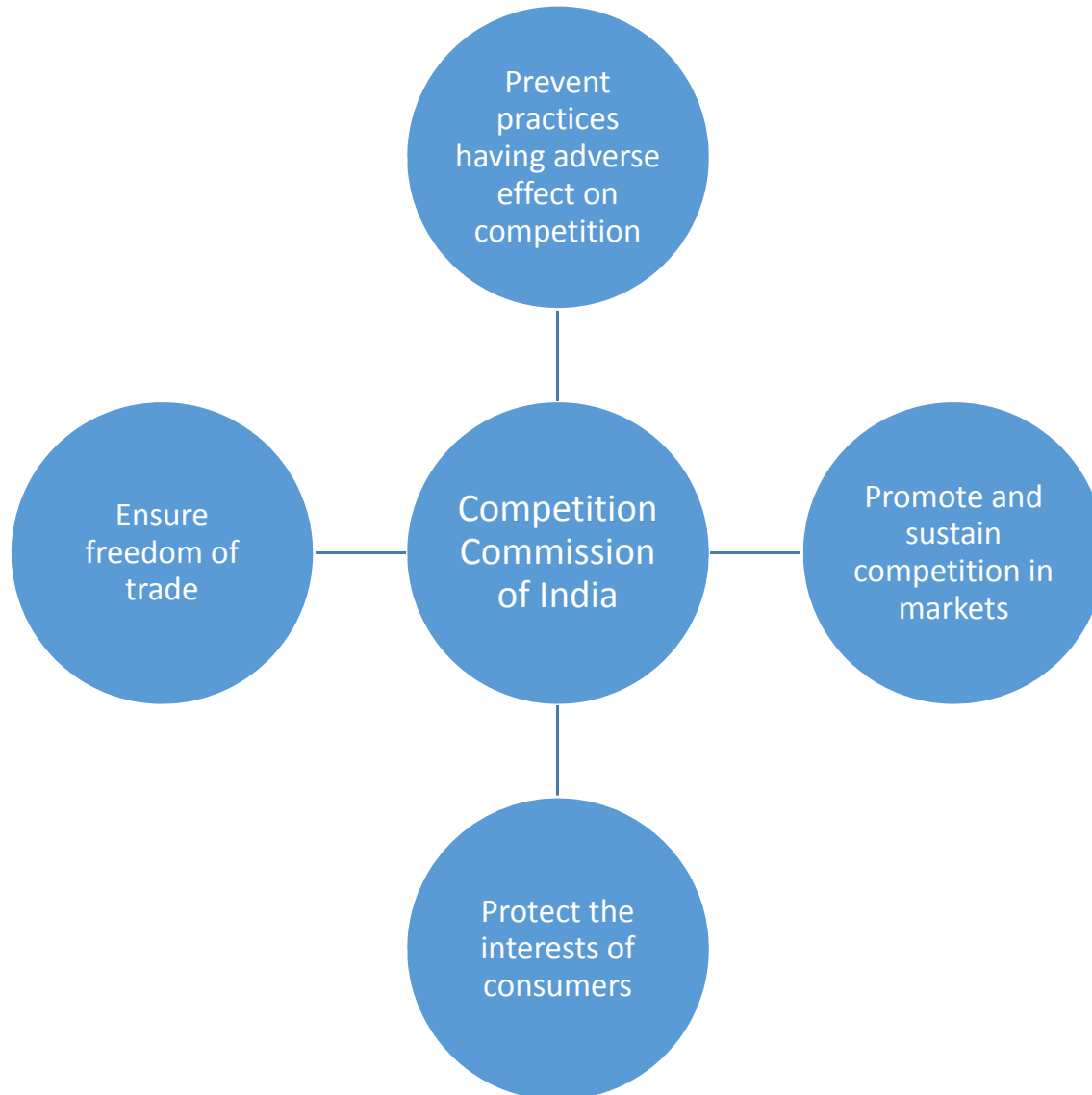


Competition Act – Recent Developments and Case Studies

24th December, 2016

Key Concepts – Objective of the Competition Act, 2002



Key Concepts – Key Sections at glance

Section 3

Anti-Competitive Agreements

- Agreements in relation to goods / services which have an 'Appreciable Adverse Effect on Competition ("**AAEC**")' in India shall be void

Section 4

Abuse of Dominant Position

- Specified practices prohibited if carried out by dominant enterprises which results into abuse of dominance position

Section 5&6

Combinations

- Combination which causes or is likely to cause an AAEC within the relevant market in India shall be void

Key Concepts - Section 5 Combination

Acquisition of one or more enterprises by one or more persons or merger / amalgamation of enterprises if it involves:

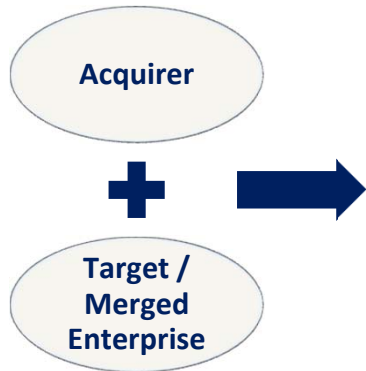
- a. Any acquisition of **control, shares, voting rights or assets**;
- b. **Acquiring of control** over an enterprise if the person already has direct/ indirect control over another enterprise in similar product/service; and
- c. **Merger or amalgamation**

The above shall be regarded as “combinations” under Competition Act if they meet the threshold requirements and would require pre-approval from CCI unless exempted

CCI filing mandatory within 30 days u/s. 6(2) of Competition Act for all combinations on and after 1 June 2011

Penalty leviable upon failure to give notice to CCI, which may extend to 1% of Total Turnover or Assets of such combination, whichever is higher

Key Concepts – Threshold Limits (as amended upto March, 2016)



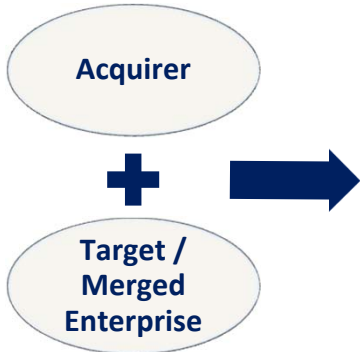
Individual Enterprise

- Assets > INR 2000 Cr
- or
- Turnover > INR 6000 Cr

India

Group of enterprises

- Assets > INR 8000 Cr
- or
- Turnover > INR 24,000 Cr



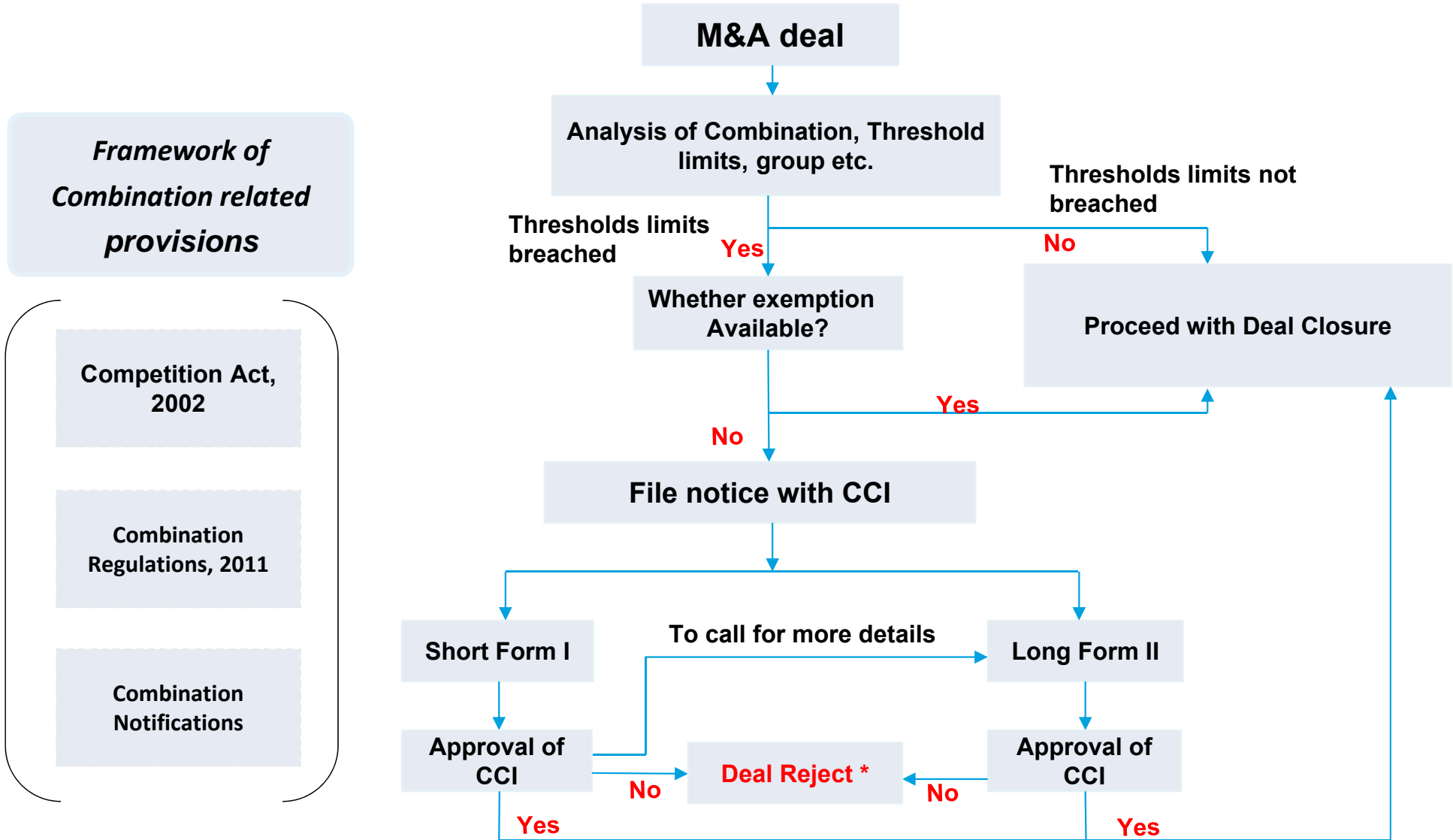
- Assets > \$ 1000 mn (≥ INR 1000 Cr in India)
- or
- Turnover > \$ 3000 mn (≥ INR 3000 Cr in India)

Global

- Assets > \$4000 mn (≥ INR 1000 Cr in India)
- or
- Turnover > \$ 12000 mn (≥ INR 3000 Cr in India)

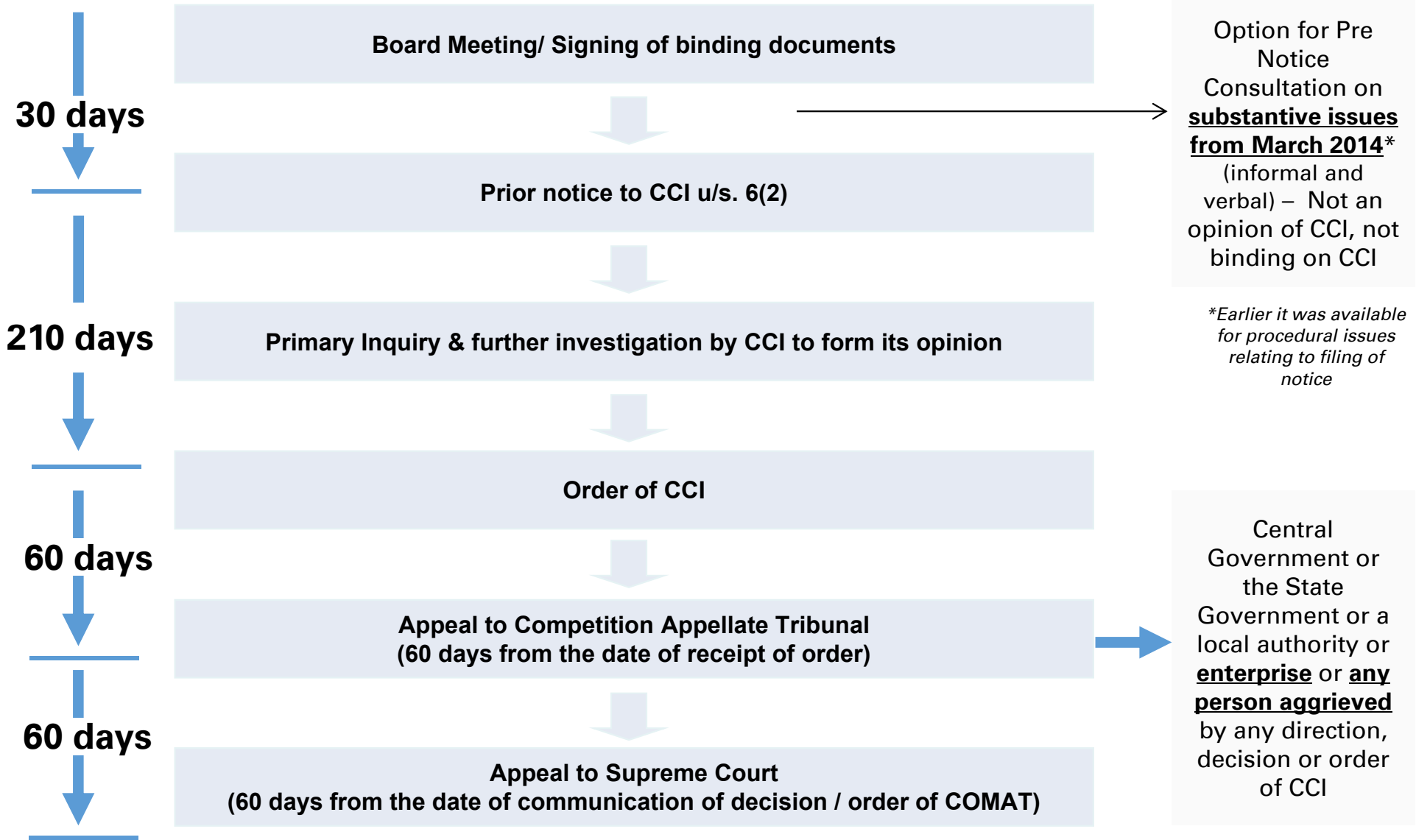
Exemption: A Government of India Notifications No. S.O. 674(E) dated March 4, 2016 provides an exemption for filing for a period of 5 years in the event that enterprise being acquired i.e. Target co. has Assets less than INR 350 crores or a turnover of INR 1000 crores in India.

Process Flowchart - Combinations



* Grounds for rejection - If combination causes AAE or modifications to Combination sought by CCI are not carried out, etc.

Process Overview



Key Concepts - Definitions

'Acquisition' means directly or indirectly acquiring or agreeing to acquire

- shares, voting rights or assets of any enterprise; or
- control over management or control over assets of any enterprise

'Control' includes controlling the affairs or management by –

- i. one or more enterprises, either jointly or singly, over another enterprise or group;
- ii. one or more groups, either jointly or singly, over another group or enterprise

'Group'* means two or more enterprises which, directly or indirectly, are in a position to –

- (i) exercise 26% or more of voting rights in the other enterprise; or
- (ii) appoint more than 50% of Board of directors in the other enterprise; or
- (iii) control the management or affairs of the other enterprise

**Definition of Group has been relaxed in public interest vide Notification S.O. 673(E) dated 4 March 2016 - 'Group' exercising less than 50% of voting rights in other enterprise exempted from the provisions of section 5 for a period of 5 years.*

Key Concepts - Definitions

‘Value of Assets’ shall be determined by taking book value of assets as shown in the audited books of accounts of the enterprise of **financial year immediately preceding the financial year in which merger falls** and

- reduced by depreciation;
- to include brand value, value of goodwill, copyright, patent, permitted use, collective mark, registered proprietor, registered trademark, registered user, homonymous geographical indication, geographical indications, design or layout design or similar other commercial rights, if any, referred to in Sec. 3(5)

‘Turnover’ includes value of sale of goods or services

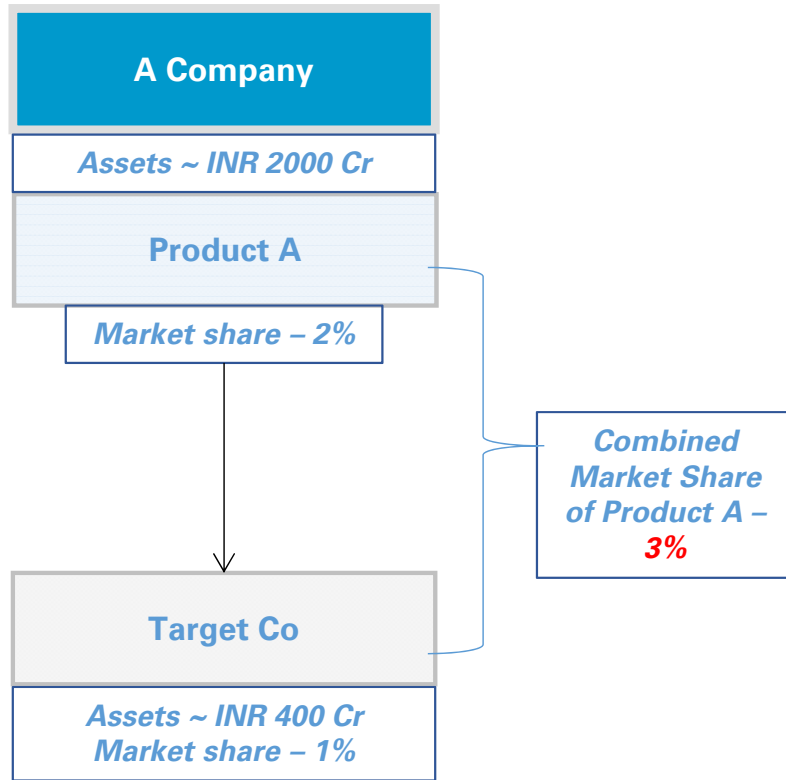
Whether intangibles not recorded in books of accounts to be taken?

Turnover for which year to be considered – preceding FY or the year of combination?

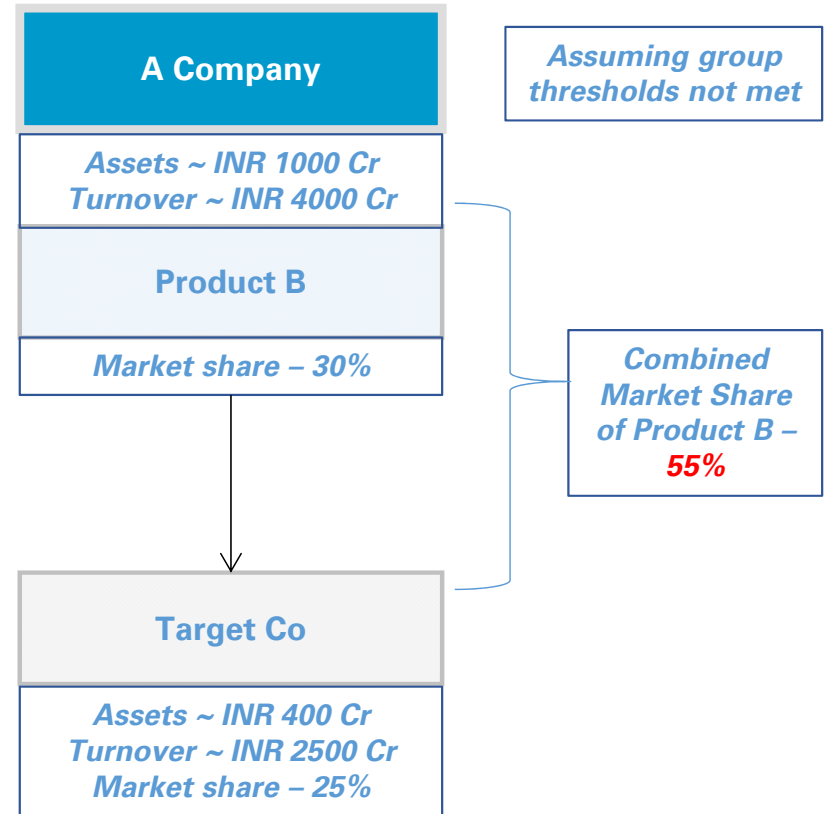
Whether other / miscellaneous income be considered in Turnover?

Should turnover be considered on Gross or Net of taxes?

Case Study – Thresholds vs. Market share of the Product

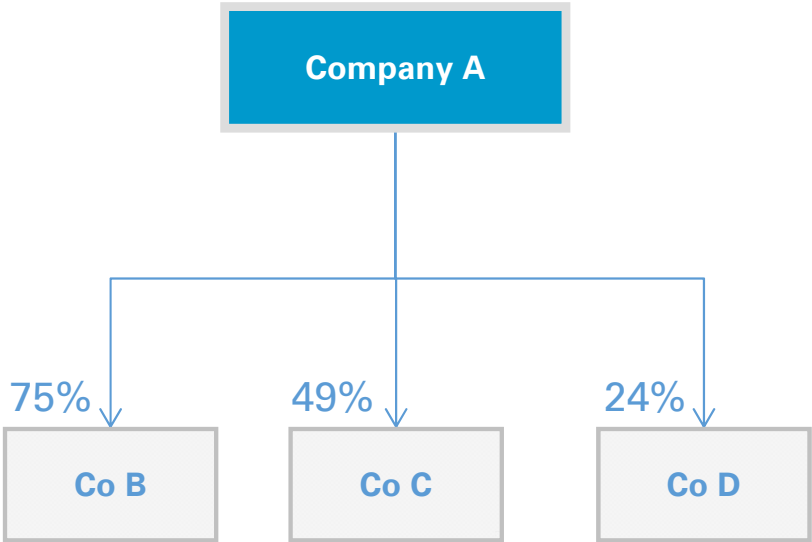


Whether notice to CCI u/s. 6(2) required?

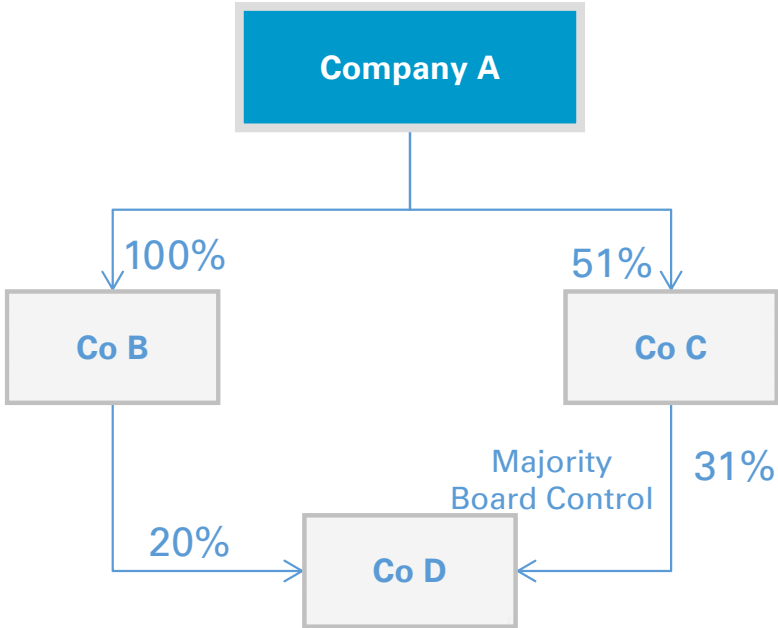


Whether notice to CCI u/s. 6(2) required?

Case Study – Group



Which companies be included for "Group"?

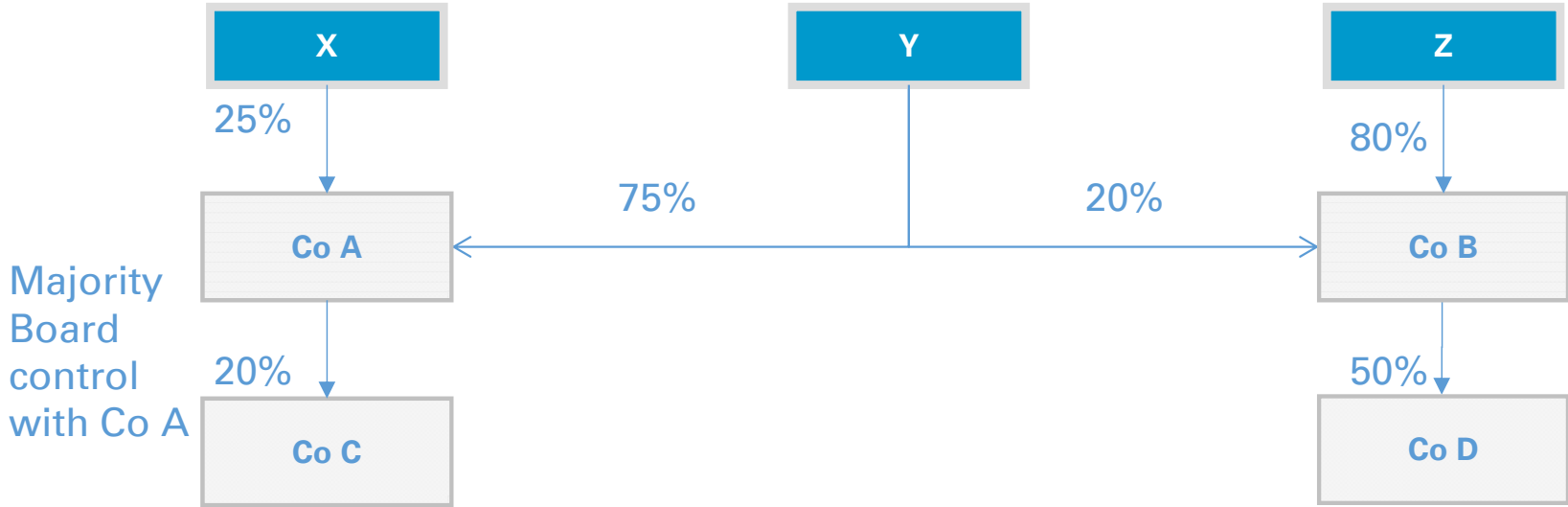


Which companies be included for "Group"?

What if Co A holds 49% in Co C?

Case Study – Group

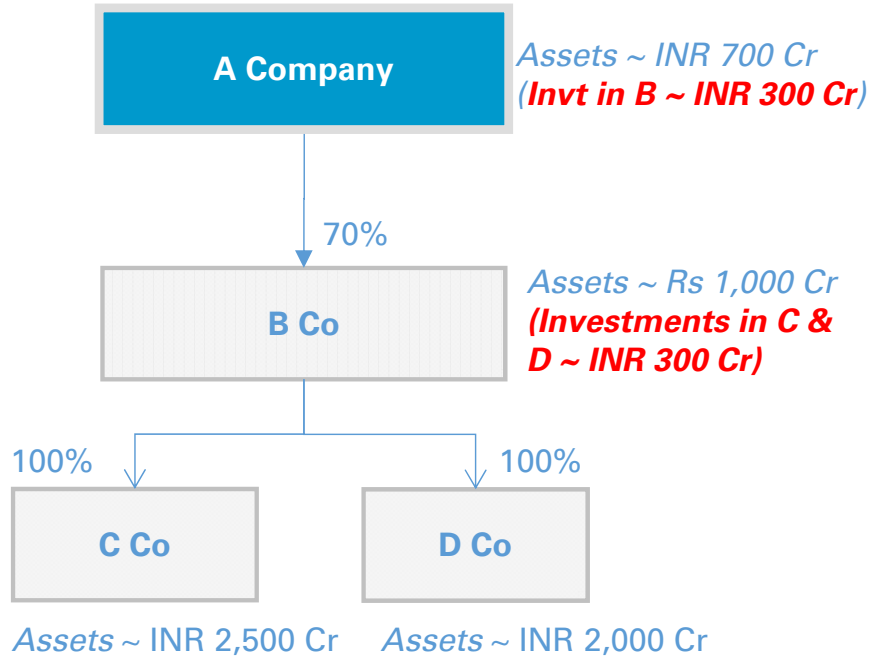
X, Y and Z are individual



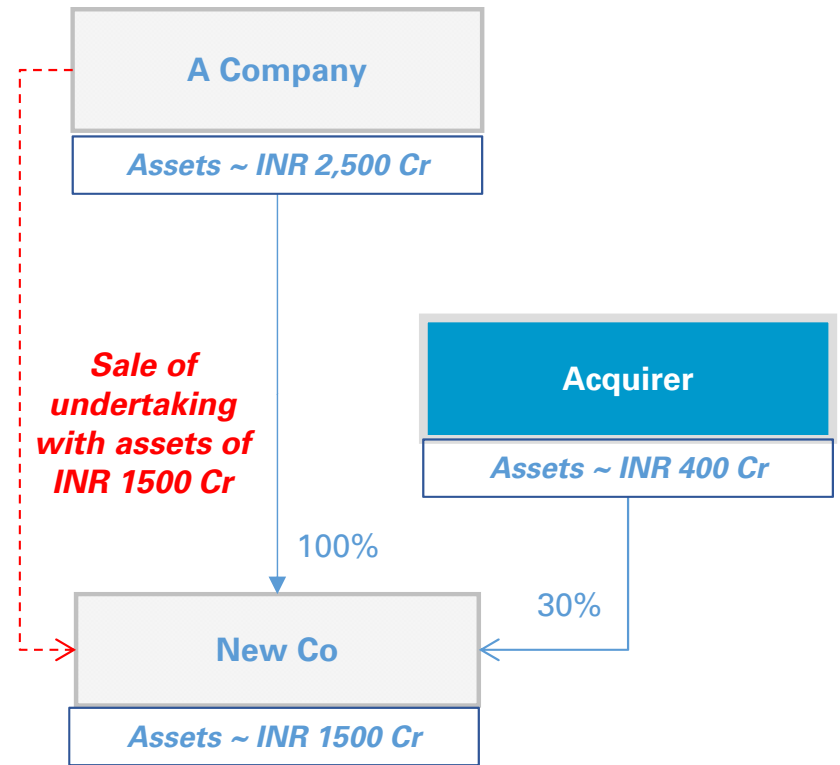
How many "group" are formed ?

What happens if X, Y & Z are related and exercise control ?

Case Study – Thresholds

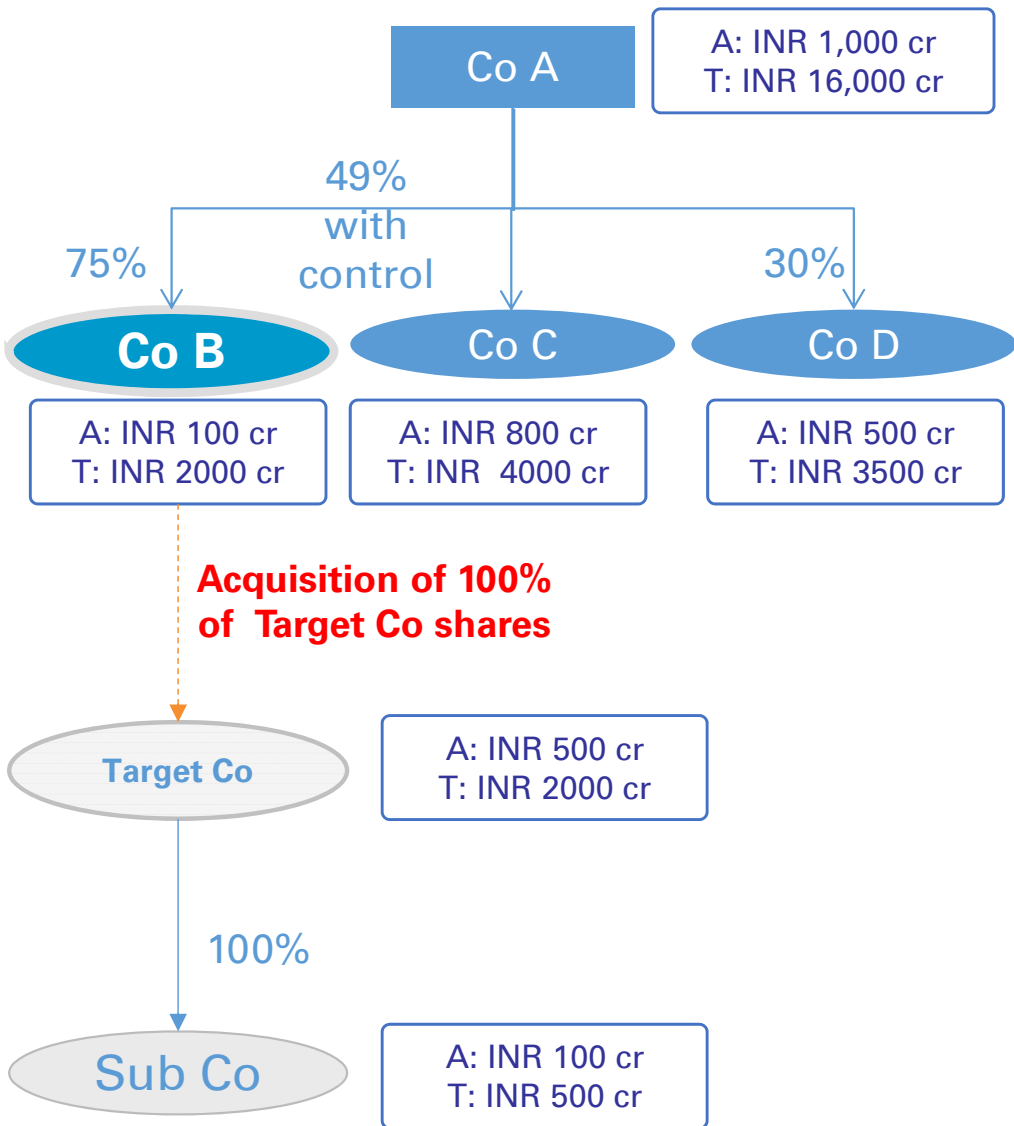


What is the 'value of assets' of the Group
- INR. 6,200 cr or INR 5,600 cr?



Does acquisition of 30% stake in New Co require CCI notification

Case Study – Thresholds



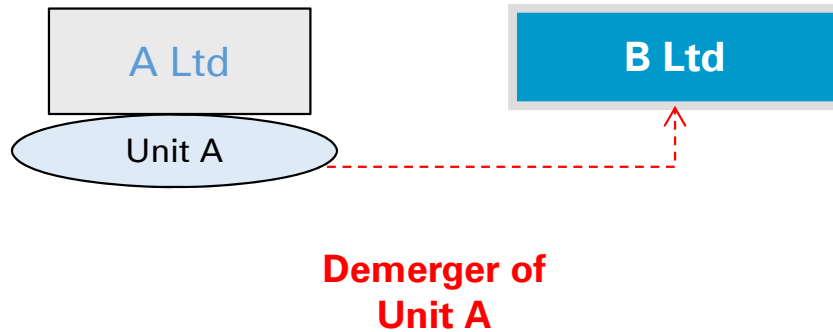
Party test

Name of Co	Assets (INR cr)	Turnover (INR cr)
Co B	100	2,000
Target Co	500	2,000
Target Sub Co ?	100	500
Total	700	4,500

Group test

Name of Co	Assets (INR cr)	Turnover (INR cr)
Co A	1,000	16,000
Co B	100	2,000
Co C	800	4,000
Target Co	500	2,000
Target Sub Co	100	500
Total	2,500	24,500

Combination - Demerger



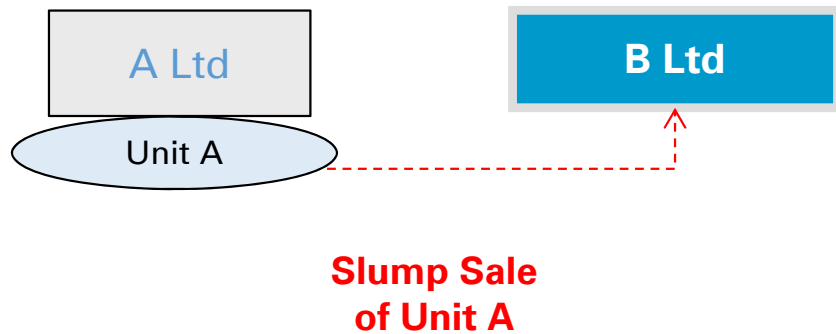
Transaction: Demerger of Unit A to B Ltd through a court approved scheme

Whether notice to CCI required?

Whether covered under clause 5(a) or 5(c)?

What would be the binding document for demerger?

Combination – Slump sale



Transaction: Transfer of Unit A to B Ltd through slump sale

Whether notice to CCI required?

Whether covered under clause 5(a) or 5(c)?

Criteria to be tested for undertaking or target as a whole?

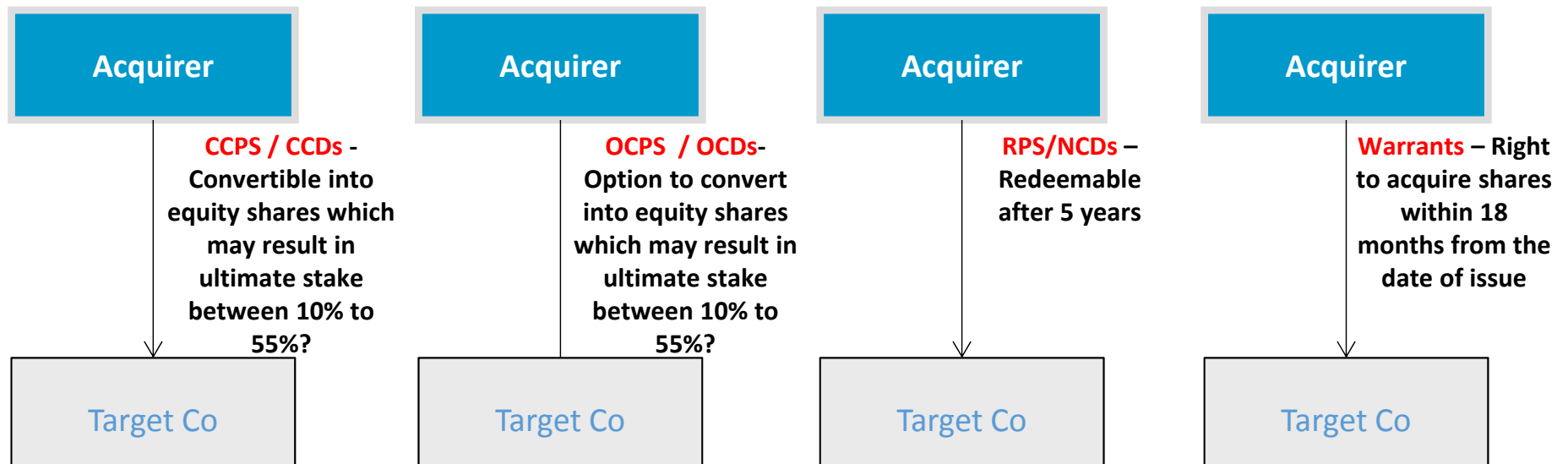
If slump sale under the Scheme of Arrangement under section 391 to 394 of the Cos Act, 1956?

Case Study - Shares

'Shares' means shares in the share capital of company **carrying voting rights** and includes

- Any security which **entitles the holder to receive shares with voting rights**;
- Stock except where a distinction between stock and share is expressed or implied

Whether notice would need to be given to CCI on signing of the investment agreement for subscribing to below instruments?



Content

Recent Developments

Combination Regulations, 2011 – Key Amendments

Current Law	Amendment
<p>Schedule I – Exemption from filing notice with CCI</p> <p>(1) An acquisition of shares or voting rights <u>solely as an investment</u> in so far as the total shares / voting rights held by the acquirer <u>does not entitle the acquirer to hold 25% or more</u></p>	<p><u>New explanation and proviso inserted</u></p> <p><i>“Explanation:- The acquisition of <u>less than 10% of the total shares or voting rights</u> of an enterprise shall be treated as solely as an investment: Provided that in relation to the said acquisition:</i></p> <ul style="list-style-type: none"><i>- the Acquirer has ability to exercise only such rights that are exercisable by the ordinary shareholders to the extent of their respective shareholding; and</i><i>- the Acquirer is not a member of the board of directors and does not have a right or intention to nominate a director <u>and</u> does not intend to participate in the affairs or management.”</i>
<p>Schedule I – Exemption from filing notice with CCI</p> <p>(1A) An acquisition of additional shares by the acquirer <u>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</u>, where the acquirer already between <u>25% and 50%</u> of the shares / voting rights</p>	<p>Highlighted words deleted</p>

Combination Regulations, 2011 – Key Amendments

Current Law	Amendment
<p>Trigger for CCI notification – 2nd proviso to Regulation 5(8): <i>“Provided further that where such a document has not been executed <u>but the intention to acquire is communicated to a Statutory Authority</u>, the date of such communication shall be deemed to be the date of execution of the other document for acquisition”</i></p>	<p>The said proviso has been substituted as: <i>“Provided further that where <u>a public announcement</u> has been made in terms of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, for acquisition of shares, voting rights or control, such public announcement shall be deemed to be the “other document”</i></p>

Combination Regulations, 2011 – Key Amendments

Other Amendments relevant from a procedural perspective

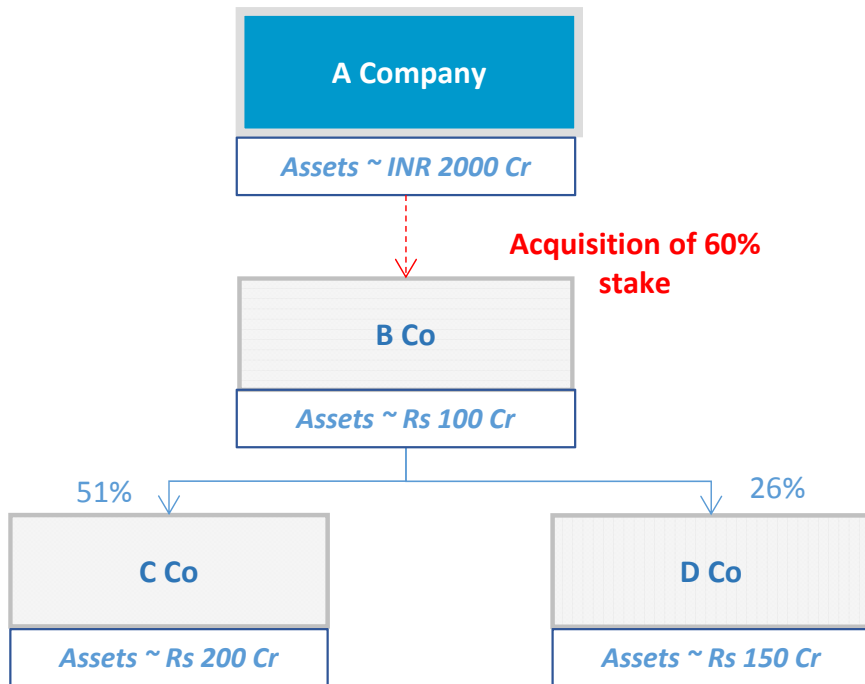
- The commission has amended the provisos to Regulation 9(1) as well as Regulation 9(3) thereby **enabling the 'company' instead of the board of directors to authorize any person to sign Form I/II** apart from the persons specified under clause (c) of sub-regulation (1) of regulation 11 of the Competition Commission of India (General) Regulations, 2009.
- Under Regulation 9(4), a single notice is required to be filed wherein a business transaction is achieved by way of a series of steps or smaller individual transactions which are inter-connected or inter-dependent on each other steps. The amendment omits the words "or inter-dependent on each other".
- Forms I, II & III – The requirement for a verification and notarization of the Form has now been done away with. Instead a declaration in the prescribed format is to be filed by the notifying party confirming the completeness, accuracy and truthfulness of the contents filled in the form.
- New provisos have been inserted to clause 2A under Regulation 14 which provide that Commission may give an opportunity of being heard to the parties to the combination in accordance with regulation 24 of these regulations before deciding to invalidate a notice.

Content

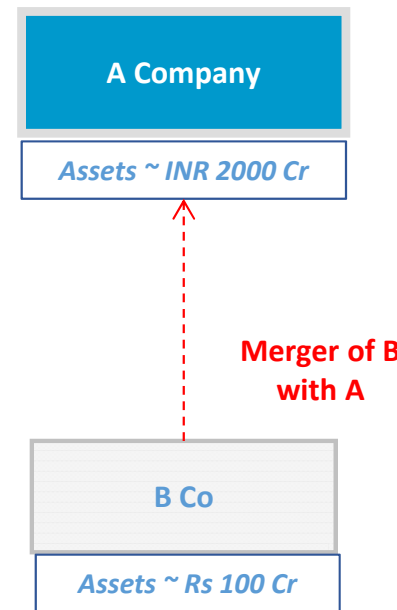
Exemptions

Target Based Exemption

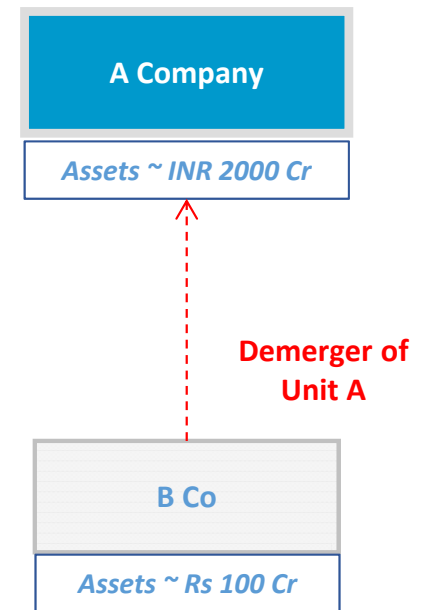
Enterprise, whose control, shares, voting rights or assets are being acquired has assets of the value of not more than Rs 350 crs in India OR turnover of not more than Rs 1000 crs in India is exempted from the provisions of section 5 for a period of 5 years - Notification S.O. 674(E) dt 4 Mar 2016 (as amended)



Whether Target based exemption applicable to target enterprise or target Group for party test?



Whether target based exemption available?



Whether target based exemption available?

B. Exemption under section 6(4)/6(5)

- Combination provisions are not applicable on:
 - Share subscription or financing facility or any acquisition by the following entities pursuant to any covenant of Loan agreement / Investment agreement
 - Public Financial Institution (PFI);
 - Foreign Institutional Investor (FII);
 - Bank; or
 - Venture Capital Fund (VCF)
 - Details of such acquisitions to be filed with the CCI within 7 days of the date of the acquisition ***along with Certified Copy of the Loan Agreement or Investment Agreement***
 - ***CCI has power to condone the delay in filling above notice in Form III***

C. Exemption to Banking Companies

Vide Notification SO 93(E) dated 8th January, 2013, the government has exempted a banking company in respect of which Central Government has issued a notification under Section 45 of Banking Regulation Act from the application of section 5 and 6 of the Act, in the public interest, for a period of 5 years from the date of publication of this notification in the Official Gazette

Schedule I – Notice need not normally be filed

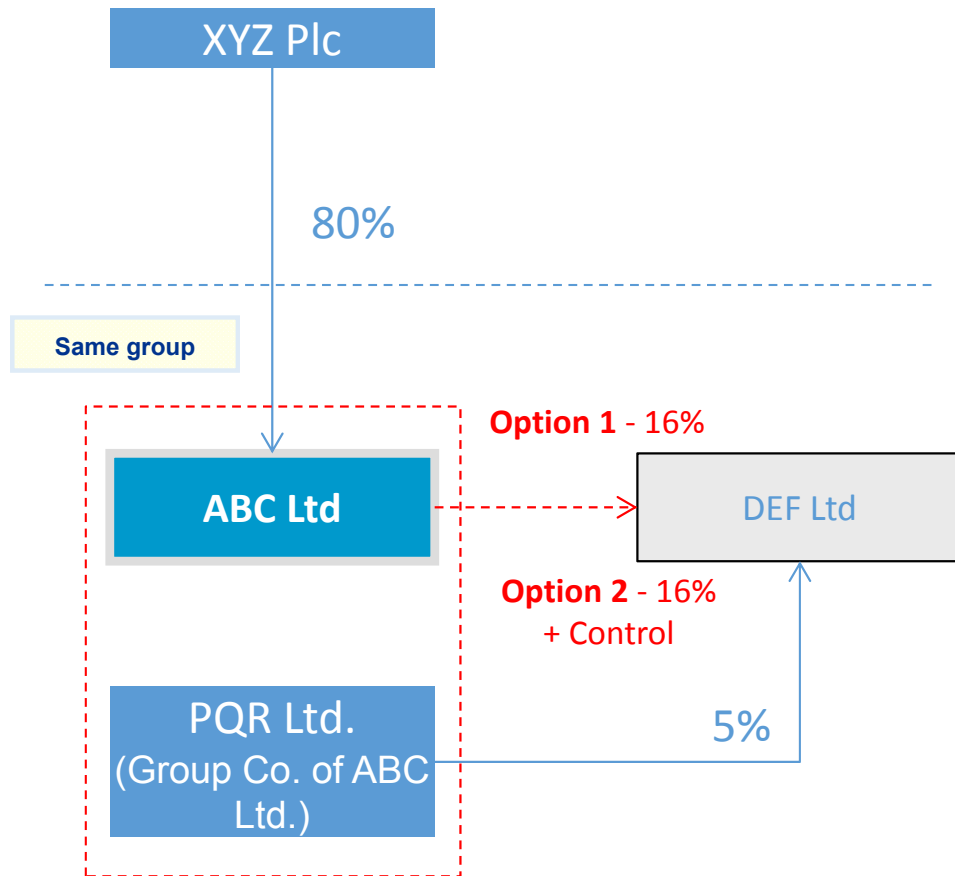
Transactions not ordinarily likely to result in an appreciable adverse effect on competition

- **Acquisition of shares or voting rights** -
 - **Clause 1** - for section 5(a) - solely as an investment or in ordinary course of business with post acquisition stake less than 25% (directly or indirectly), **not leading** to acquisition of control - *A clarification with respect to acquisition of 10% stake has been inserted*
 - **Clause 1A** - Additional acquisition upto 50%, where acquirer /group already holds 25% or more but less than 50%, **except** it results into acquisition of joint or sole control by the acquirer or its group
 - **Clause 2** - for section 5(a) - where acquirer already holds 50% or more, **except** if results in transfer from joint control to sole control
 - **Clause 6** - pursuant to bonus issue, stock splits, consolidation of face value of shares, buy-back of shares or subscription to rights issue of shares, **not leading** to acquisition of control
- **Clause 3 - Acquisition of assets** under section 5(a), not directly related to acquirer's business activity or made solely as an investment or in the ordinary course of business, not leading to control, **except** where assets acquired represent substantial business operation of the target enterprise

Schedule I – Notice need not normally be filed

- **Clause 4** - Amended or renewed tender offer where notice to CCI filed prior to such amendment/renewal
- **Clause 5** - Acquisition of stock-in-trade, raw materials, stores and spares, trade receivables and other similar current assets in the ordinary course of business
- **Clause 7** - Securities underwriter or registered stock broker acting on behalf of its clients in the ordinary course of its business
- **Clause 8** - **Acquisition of shares or voting rights or assets** by one person / enterprise of another person / enterprise within the same Group, ***except*** where acquired enterprise is jointly controlled by enterprises that are not part of the same group
- **Clause 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, ***not resulting*** in transfer from joint to sole control

Case Study – Acquisition of shares/voting rights



Transaction: ABC Ltd to acquire 16% voting rights in DEF Ltd

Facts:

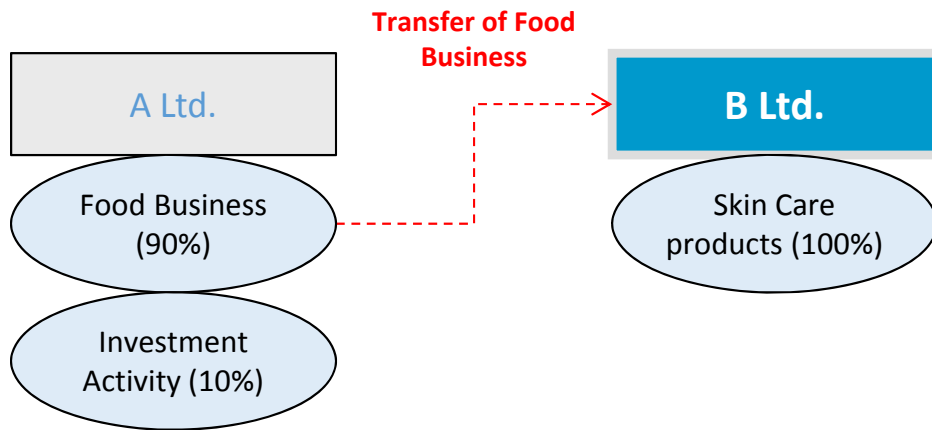
- PQR Ltd is holding 5% voting rights in DEF Ltd.
- ABC Ltd. and PQR Ltd. are part of the same group

Whether CCI approval required?

Option 1 – If ABC Ltd acquires 16% shares of DEF Ltd.?

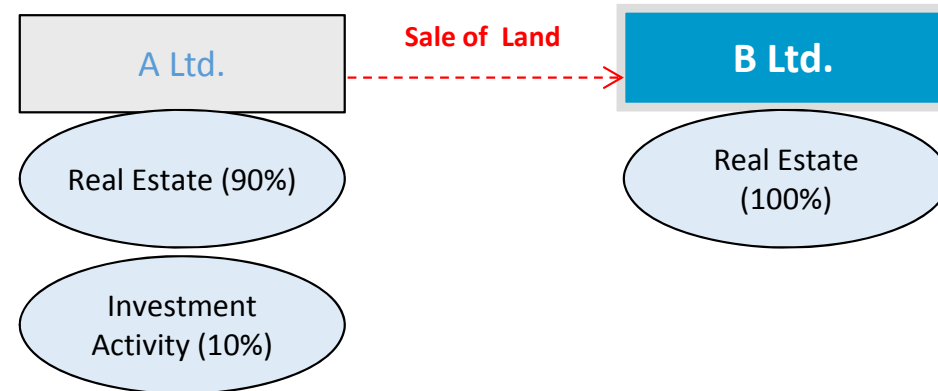
Option 2 – If ABC Ltd acquires 16% shares of DEF Ltd. + control?

Case Study – Acquisition of Business



Transaction: Sale of Food Business of A Ltd. To B Ltd

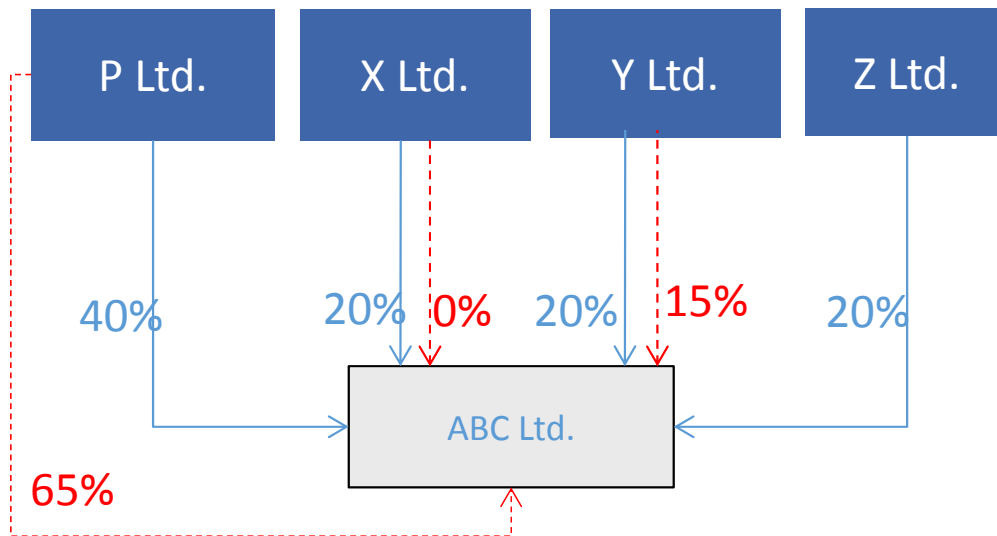
Whether CCI approval required?



Transaction: Sale of Land by A Ltd. To B Ltd.

Whether CCI approval required?

Case Study – Buy-back of shares



Transaction: Buyback of shares of ABC Ltd.

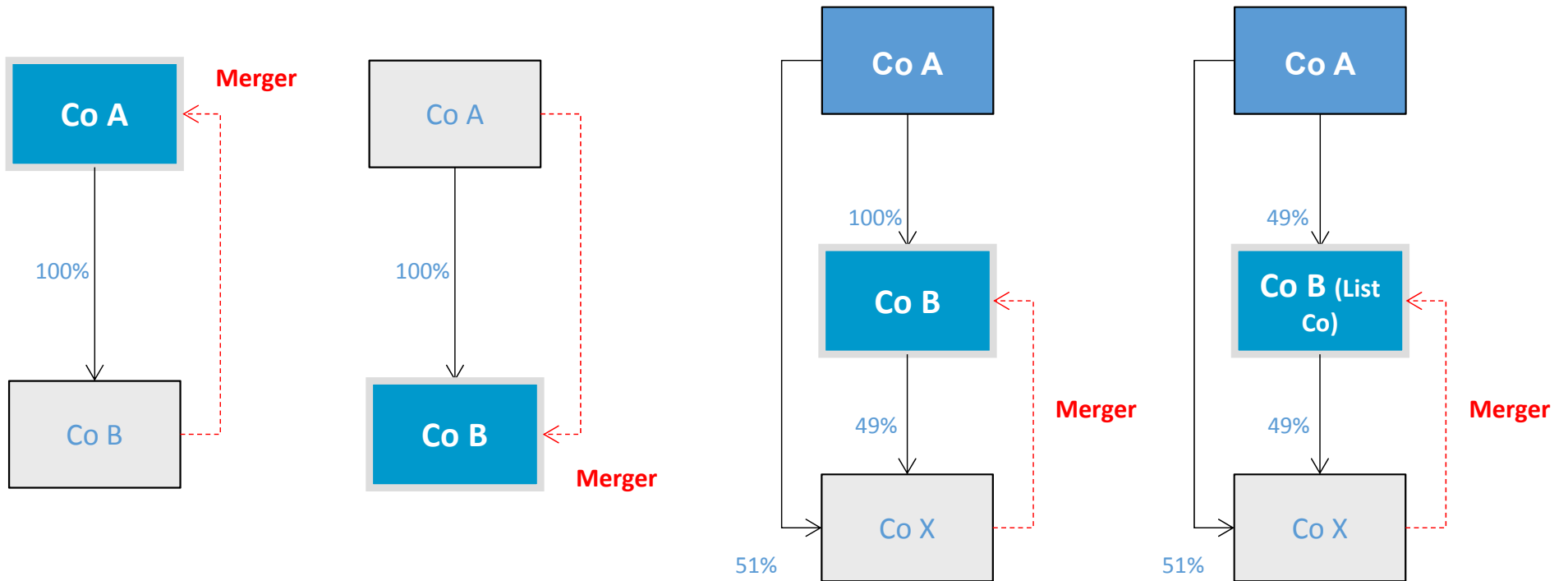
Facts:

- ABC Ltd. proposes to do a buyback of shares
- X Ltd. tenders 20% shares
- Y Ltd. tenders 5% shares
- Pursuant to buyback, P Ltd.'s stake in ABC Ltd goes beyond 50%

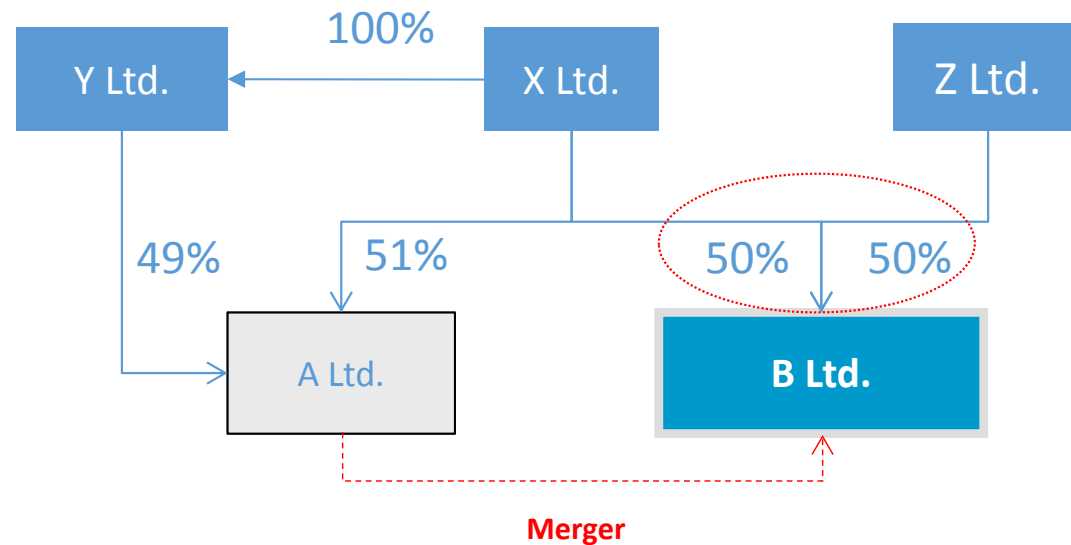
Whether CCI approval required?

Case Study – Merger

Whether exempt under Entry 9 of Schedule 1?



Case Study – Merger and Joint-control



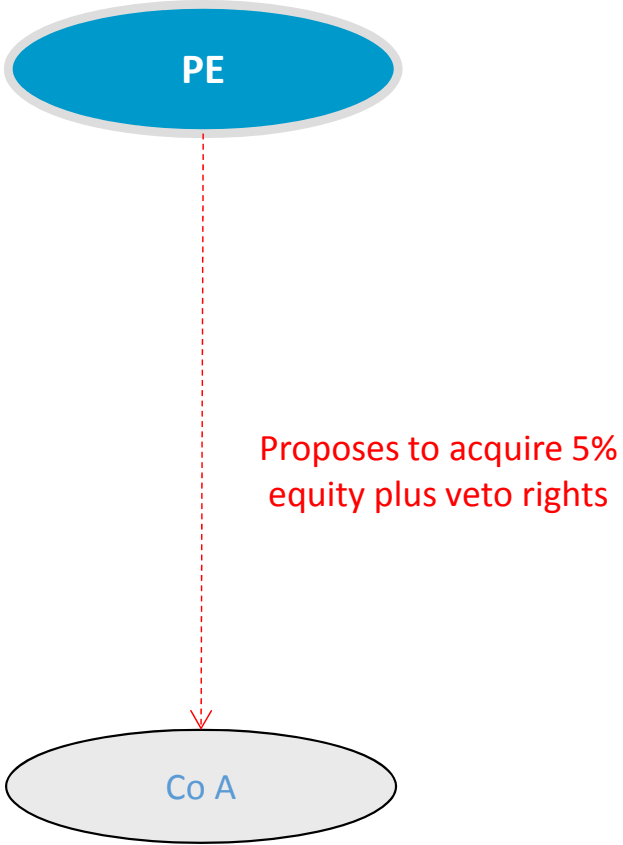
Facts

- Z Ltd. is not related to X Ltd or Y Ltd
- A Ltd. is part of X Ltd.

Whether CCI approval required?

Transaction: A Ltd. to merge with B Ltd.

Case Study – PE with veto rights



Would notice to CCI be required?

Case Study – Filing of notice

Phased Acquisition

Date of SPA – 1st July 2014 between A Ltd (seller) and B Ltd (acquirer) to acquire 35% stake in C Ltd



Acquisition of first tranche of 20% shares on 1st Dec 2014



Acquisition of balance stake of 15% on 1st July 2015

When would the notification to CCI be required?

Merger of A Ltd with B Ltd – Appointed date – 31st March, 2013

Board Resolution of the directors of A Ltd & B Ltd passed on 1st July 2013



High Court approves the merger on 2nd December, 2013



Scheme became effective on 9th December, 2013

When would the notification to CCI be required?

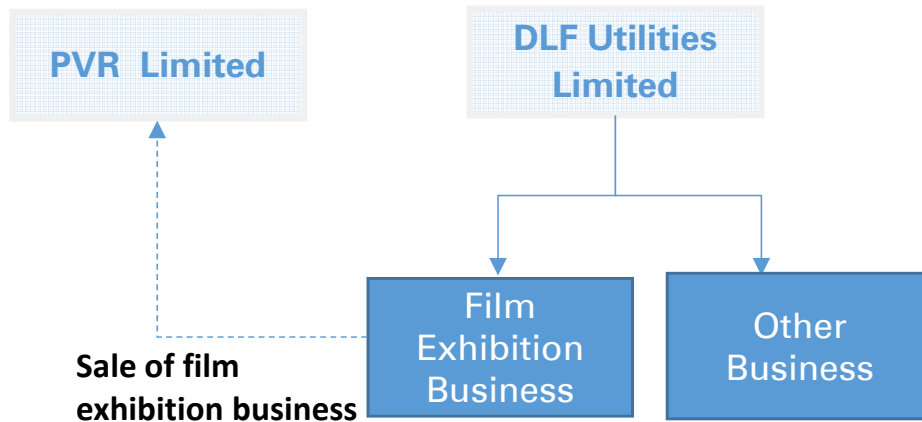
IV. Penalties

- **Section 43A** – Failure to file notice to the Commission u/s 6(2) of the Act shall attract maximum penalty of 1% of the total turnover or assets whichever is higher of such combination.
- **Section 44** - Penalty for making false statement or omission to furnish material information shall be not less than INR 50 Lacs subject to maximum of INR 1 crore as may be determined by Commission.
- **Section 53Q** – Penalty for contravention of order of Appellate Tribunal shall be maximum upto INR 1 crore or imprisonment for a term up to 3 years or both.

Content

Recent CCI Orders

Case study No 1 – PVR and DLF Utilities Limited



Slump Sale of film exhibition business of DLF Utilities Limited to PVR Limited

Date of Filing of Notice with Commission u/s 6(2) of the Act – 8th July, 2015

Order u/s 31(7) of the Act – 4th May, 2016

Background

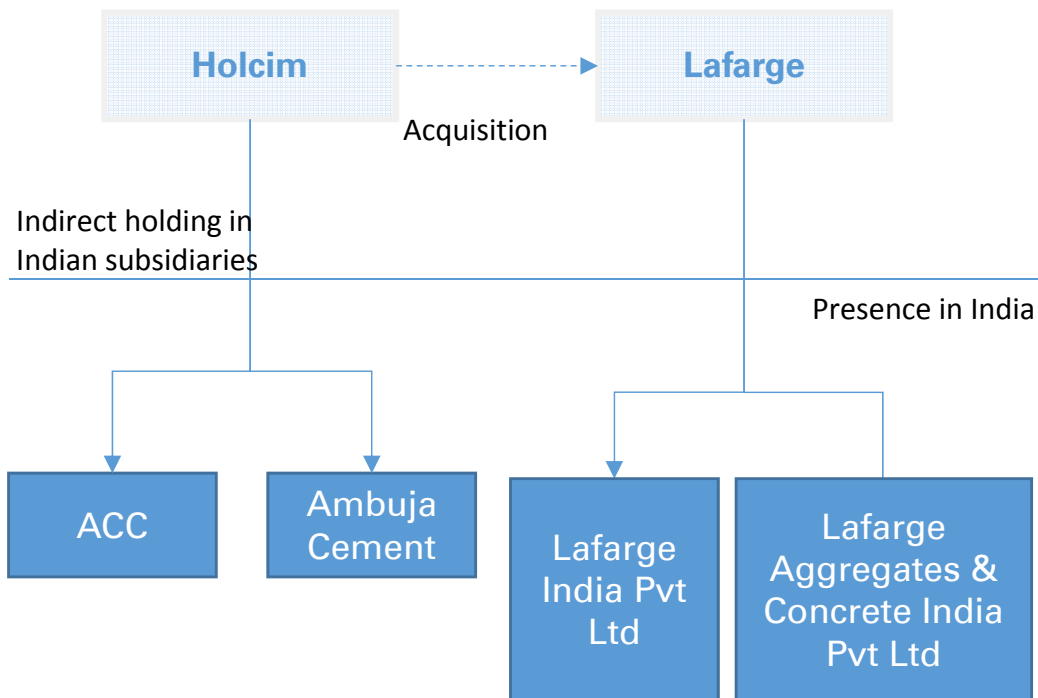
- PVR Limited ('PVR') entered into an agreement with DLF Utilities Limited ('DLF') dated 9th June, 2015 for acquisition of its Film Exhibition Business ('FEB').
- The FEB of DLF comprises of 39 screens (29 existing and 10 upcoming) located at Delhi, Gurgaon and Chandigarh.
- The deal value was agreed at INR 500 crore.

Approval of CCI

CCI would approve the proposed deal subject to certain modifications that include:

- i. The deal shall now include seven screens in South Delhi that would reduce the deal value by INR 50-60 crore.
- ii. PVR not to open any new screen in Noida and Gurgaon for next 3 years and South Delhi for next five years
- iii. DT Cinemas asked to sell seven screens to any other competitor of PVR, or keep them with itself for the next five years
- iv. To terminate certain agreements for development of multiplex in Noida and Gurgaon.

Case study No 2 – Holcim and Lafarge – Part I



Background

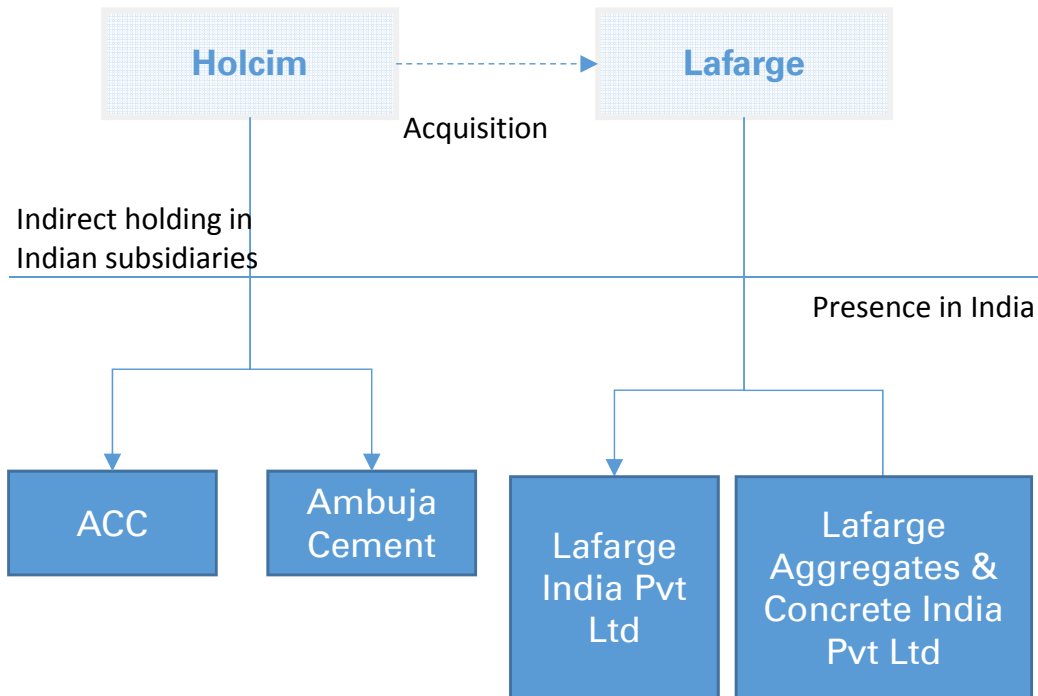
- Holcim global producer of cement. It has presence in India through two indirect subsidiaries i.e. ACC Limited and Ambuja Cements Limited
- Lafarge is also global producer of cement. Lafarge is present in India through its subsidiaries Lafarge India Private Limited and Lafarge Aggregates & Concrete India Private Limited
- Holcim acquired shares of Lafarge. Shareholders of Lafarge got 9 shares in Holcim for 10 shares in Lafarge. Pursuant to the transaction Lafarge became the subsidiary of Holcim.

CCI observations

Following observations were made by CCI

- i. For the purpose of competition assessment the commission identified 2 product segments:- Cement and RMC
- ii. The analysis of the commission revealed AAEC concerns emanating from the proposed combinations in the grey cement in Eastern region
- iii. The combination is not likely to have a AAEC in the RMC segment in any of the Relevant Market

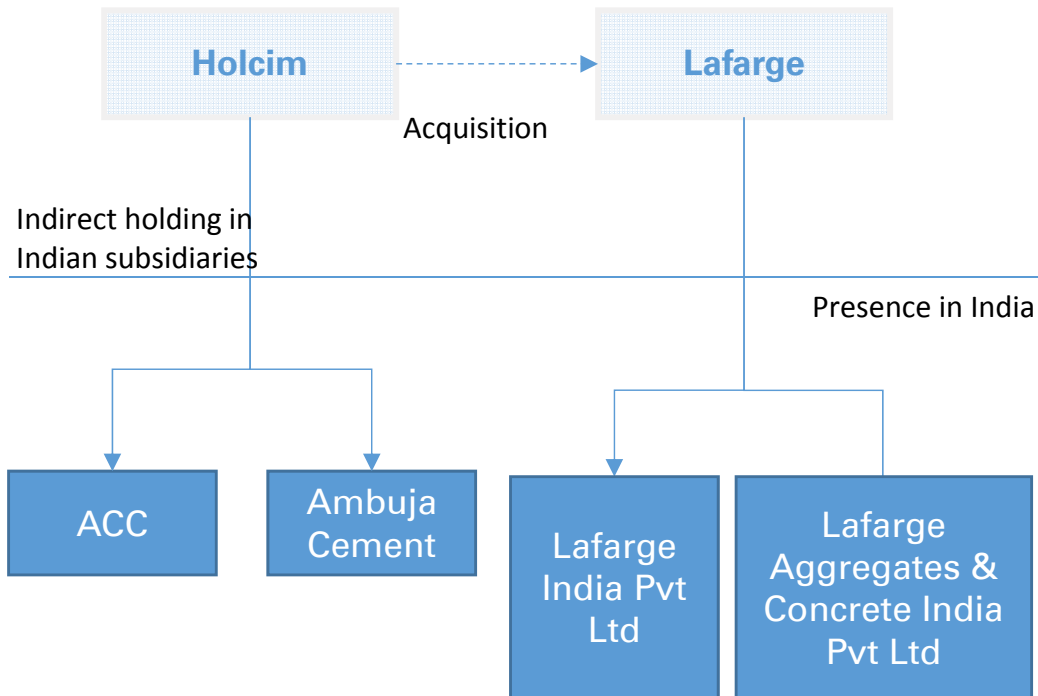
Case study No 2 – Holcim and Lafarge – Part I



Modifications to address AAEC Concerns

- Based on the above assessment of likely adverse effect of the proposed combination in relevant market for grey cement in the eastern region, the commission was of the opinion that AAEC can be eliminated by suitable modification of the combination. And it would be appropriate to propose divesture as a remedy to eliminate competition concerns. Accordingly CCI decided divesture of following plants:-
 - i. Lafarge's Jojobera plant (Jharkhand) – Grinding Capacity 4.6 MTPA
 - ii. Lafarge's integrated unit at Sonadih (Chattisgarh) – Grinding Capacity – 0.55 MTPA & Clinker Capacity – 3.10 MTPA
- The parties to the combination should divest with the prescribed time to an Approved Purchaser. Approved purchaser would be one not having any **structural links or financial links** with **any existing cement producer** in relevant market and shall not **have operational capacity exceeding 5 percent of the total installed capacity in the relevant geographic market.**
- **Further the Divesture should be carried out by way of sale of the Assets**

Case study No 2 – Holcim and Lafarge – Part II



Background

- The commission considered the proposal along with the Business Transfer Agreement along with the Transitional Support Agreement for approval of the Commission of the Approved Purchaser
- Obtaining approvals necessary for the transfer of the mining lease and the mineral rights was one of the conditions for sale of the Divestment Business
- Owing to the uncertainty regarding transfer of mining lease on account of amendment in the Mines and Minerals (Development and Regulation) Act, 1957, the parties in order to ensure compliance with the Order submitted an alternative proposal envisaging sale of 100% percent of share capital of Lafarge India (Alternative Proposal)

Supplementary Order

The Commission approved the Alternative Proposal in the form of share sale option which contemplates sale of 100% of the share capital of Lafarge India to one strategic and one or more financial investors subject to conditions in the Original Order

Thank You

C.A. Devarsh Patel