Mergers, Acquisitions and Corporate Restructuring
Prof. Chandra Sekhar Mishra
Vinod Gupta School of Management
Indian Institute of Technology – Kharagpur

Lecture - 32
Legal Aspects of M and A - 2

Hello friends welcome to another session on mergers acquisitions and corporate restructuring in this particular unit we are discussing about the legal aspects of mergers acquisition we are discussing about select legal provisions as for its government concerned in the context of India. In the previous session we talked about the laws related to the corporate law that is the Companies act 2013. In this session we will discuss about the provisions and the regulations with relation to competition or competition act competition commission of India regulations.

That how this competition commission of India regulates the mergers acquisition activity as mandated by the computation act 2002.

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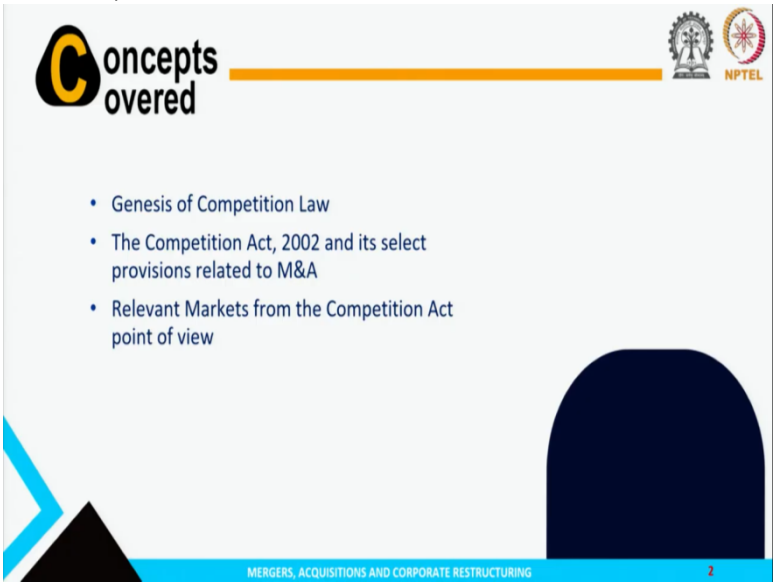

So these are the scope the genesis of computation law then we have computation act 2002 and its select provisions related to mergers acquisition. We will also discuss about relevant markets from the competition act point of view.

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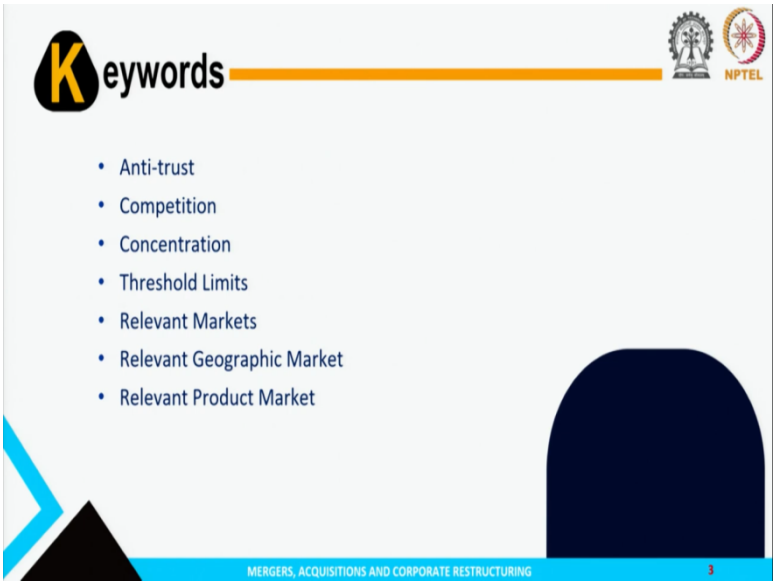

So these are the keywords that you have anti-trust, competition, concentration we will talk about threshold limits, relevant markets, relevant geographic market and relevant product market.

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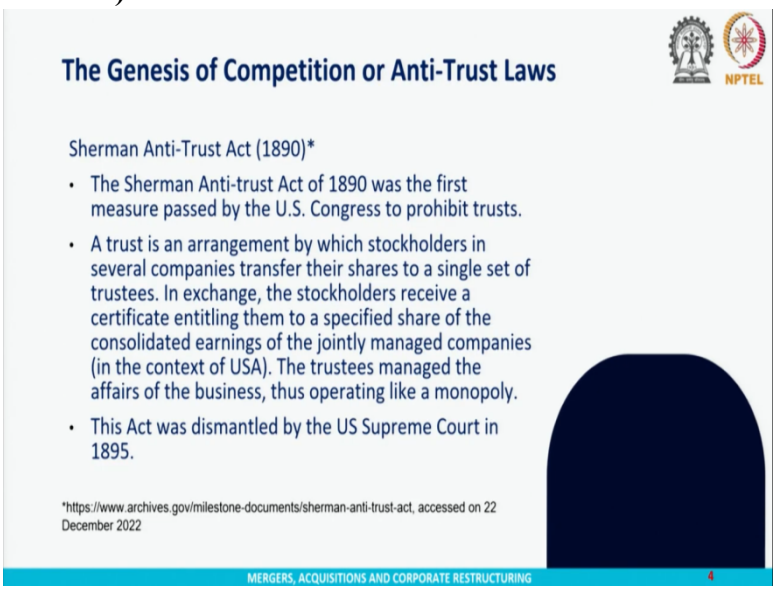

The genesis of competition or antitrust law when we in certain countries they say it is antitrust law like first particular country U.S. the term is antitrust law. So the possible origin of antitrust law goes to the Sherman Antitrust act 1890. It was the first such measure which is passed by the U.S. congress to prohibit trust, for the trust was actually, form in such a manner so that the competition was restricted.

So what was the trust? The trust is an arrangement where the stockholders in different companies transfer their shares to a single set of trustees who manage a trust and extend the shareholders will be getting a certificate which are entitled to them to a specified share of the

consolidated earnings of the jointly managed companies. So few companies shareholders they exchange these shares in the favor of the trusted trustees.

And the trust is managed by trustees and the trust has now on in its portfolio of several companies and the shareholders are getting a certificate in the trust which says that how much share the profit they are going to receive in future. So that what will be happened in the name of the trust that it was the competition was restricted because so many companies came together and 1 trust was there and the trust was possible in the market.

So both from customer's point of view it is demand side as well as supply side restrictions might be there or the bargaining power may be trust to control the market for that matter. So that was not taken kindly by the U.S. congress so they prohibit the trust, but there are certain lacuna in this particular act so later in few years later this act was actually dismantle by the U.S. supreme court in 1995 but the origin of the word trust antitrust comes from this particular act.

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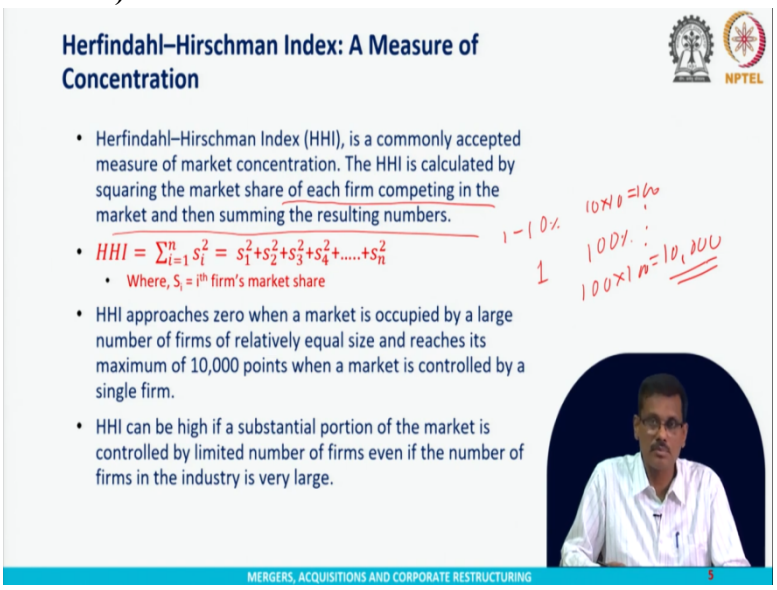

In India we have computation commission of India we talk about genesis of competition combination subsequently. Now before you go to the regulations the computation commission, we look at a simple measure of computation or concentration so how to say that in a particular industry what is the level of competition or the concentration. Concentration means few players are controlling the market maybe market demand market or maybe the supply also.

They may form cattle also so that they have a bargaining power with respect to the customers or they may have bargaining with respect supplier because supplier will be forced to supplied only them as per their terms and condition. So there is an index Herfindahl-Hirschman Index or HHI of popular energy HHI which talks in the market concentration and the HHI is calculated by squaring the market share of each firm in a particular market and then summing it up and the resulting number comes.

So this is the formula we have so S 1 square S 2 square mean this a 1 2 3 4 up to n, n number of firms in a particular industry and that markets here may be whatever that square. Suppose the company has their 2 companies 1 company is a 10% market share so for the S 1 square will be there in the company 1 this S 1 score will be 10 into 10 100 so like that it is found for different companies or the firms in the same market and the sum it up and then we get the value that is called HHI.

So what will happen suppose there is only 1 player in the market 1 firm in the industry or the market then the firm is 100 percent stake 100 percent stake the market so in that case 100 into 100 it is 10000. So 10000 is the maximum possible value of HHI and if the competition is very large the large known players require dispersed market that means the n numbers players are there which may have small market share in that case in the share sum it up if the value may become almost 0.

So the range from for this HHI is 0 to 10000 so as you close to goes to as the high score is higher than we feel that is indicating that there is a concentration of market in the hands of few players. So they that is not desirable for any economy for that matter that is why the regulatory authorities like computation commission in India and other countries they will try to see that the customers have a choice whether there are no more so many players are there.

So that you can switch to another producer or supplier similarly the input suppliers also have a choice they can also choose between several customers to supply their items. So that nobody is in a position to control the market and dictate the terms and condition which is not desirable for any free market for that matter. So HHI also can be high even if there are several players in the market but if the few players in the market have substantial market share then HHI can also be high so in the sub sequential we will look at an example a calculation of HHI.

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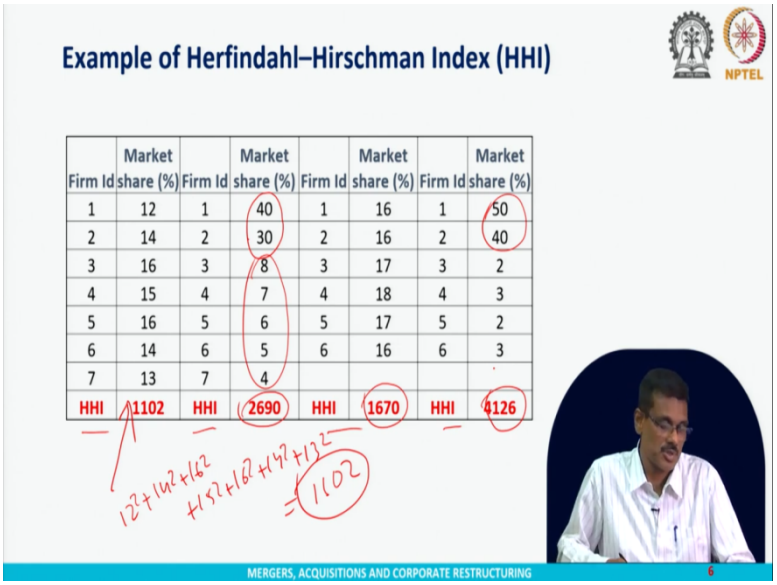

Like so there are 4 different scenarios 1 2 3 4 so there are 1 scenario, scenario 1 7 players are in particular sector and they have markets are like 12 14 16 up to 13 so when we sum it of the squares like 12 square + 14 square + 16 square + 15 square + 16 square + 14 square and plus 13 square that is where the add amount comes that number comes to 1102 that is the explanation for this particular value.

Similarly, when you do this particular calculation for the second scenario where you have 7 players. So HHI comes to 2690 what the difference here both these scenarios there are 7 members are there 7 firms are there but if you look at 2 firms have 70 percent market share whereas rest of the 5 firms of 30 percent market share. So all the 7 players are there but still concentration is very high which is not desirable.

Similarly you have another case of 16 6 companies 6 firms in a sector where the market share is almost similar distributed equally 16 16 17 like that. So the score comes 1670 for 6 firms whereas in this case where a 90 percent market share is by 2 companies. So there you can see that this score comes to 4126 so this is not desirable so the competition regulators will look at different look at different aspects.

So another things that can be seen to look at concentration is that finding out the HHI and do that also they look at the aspects like whether a customer can switch suppose there is a change in the price by the one of the player. So can a customer switch to another company another product without any problem as so that means customer choice as it is if they cannot switch then becomes a problem.

Because they may be only one so that what will happen the company will have a dominant situation which will keep an increasing price and customers have to pay that. So if a merger acquisition leads to such type of scenario in the industry on the market then the computation commission of India can intervene and they may not approve the particular M and A in that case or they may suggest to modify the M and A agreement between these 2 parties for that matter we will discuss those things subsequently.

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So computation law in India it is nothing but the history you talk about so any agreement between business regarding the acquisition or control of knowledge and information, the production, distribution and purchase of good services. If that results in a monopoly in that case that has a negative influence the competition. So what happens in the when mergers and acquisitions takes place a mergers or acquisition they have potential to end the competition.

Because people come together and for 1 company so competition is reduced and they will establish monopolies which is not healthy for economy is detrimental to the interest of general public also consumers as well as other market competitors will be detrimental. So in that case every nation will strive towards eliminating the unfair trade practices they will try to promote healthy competition and prevent the formation of monopolies.

So that the economy functions in a better in a discipline manual desired manner for that matter at the same time in any competitive market it is generally suggested that the firms in the system must adhere to 2 major constraints that is the demand justice substitution and supply

substitution. So demand substitution means market is competitive the customers have a choice they can choose among range of products with similar characteristics and features and from the supplier substitution that.

The supplier also cannot choose the customer to whom they can supply so they do not face any obstacle while supplying products or services to in that particular market. If these 2 things are taken care then you can say it is a market healthy system for that matter.

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So coming to the again the genesis the competition act 2002 came into operation that occurs enacted in 2002 it was notified and it replaced the erstwhile called Monopolies and Restrictive Trade Practices that is called MRTP act. So because in global competitive environment changing the computation and lot of deregulation as was taken place in Indian market so that failed that MRTP act was not suiting the needs of the market.

At that point of time it was set up it was established or passed at a particular time where the condition was like that which are special desirable possibly later the fillet is not because MRTP act was more to cause. It is more to cause the monopolies and it was successful or not successful another this discussion point, but the competitions are the motto or the focus is to promote competition.

So they does not stifle the competition they facilitate even there is a concentration they will talk about how this concentration can be removed and there may be penalties also for valuation of certain laws and regulations, but the ethos of this particular law is to promote

competition or facilitate competition in the market. So these are the basic premise of competition act versus the MRTP act.

So as per the competition act a competition commission of India is there which regulates the anti-competitive agreements, abuse of dominant position in the market and also consolidation which results into monopoly in the market and if competition commission in India may make take a decision about certain thing and the affected parties may not like and they will like to go against that.

So they can always go to the competition appellate tribunal which regulates the competition commission for that matter. Although the competition act was passed in 2002 name but it was actually it also actually came into effect in 2009 and all the provisions were not notified initially and slowly new regulation guidelines came into picture and the now computation act is in fully implemented in India.

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So the 4 different things are there which actually are part of competition regulation in India come related to competition commission. So first is the rules regulation given competition act 2002 then there is a competition commission of India has talked about different procedures related to business combination. So then competition commission regulation 2009 those regulations and from time to time the competition commission of India notifies several rules and regulations. So all these 4 things are applicable as far as regulation related to M and A in the contest competition in India is considered concerned.

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So the scope of the competition act there are competition act besides dealing with mergers acquisition they also do something else that is the first 1 is over the provision of certain agreements. So we do not talk about a mergers acquisition here but there may be some parties together come together they have an agreement and where with respect of production, supply distribution storage acquisition or control of goods or provision of services which are actually essential features of a functional market.

They do well such an agreement where it can cause, an Appreciable Adverse Effect that is called on competition that is called AAEC within India in that case competition commission will come to play the role of regulating. So any agreement entered into the contribution this provision which leads to AAEC that is taken as wide so it is not legally trainable. Then there will be some other situation where a player may have a dominant position so it is not appreciated.

It is not regulated so directly or indirectly imposing discretionary condition in the purchase or cell include predatory price. So they may have a predatory price that they may charge a particular price with the people have to accept and on goods and services. Similarly some there is agreement there is a some situation where a particular player is limiting the production of goods and provision of services.

It is possible restricting the technical or scientific development if these things have 1 particular company or player is able to do. Then 1 can say that they are in a dominant position so then the competition commission regulation will come into play and so that the dominant position

is a done have with so these are certain things as per this act all the scope of this particular session is related to mergers acquisition we thought that we should talk about the other 2 major areas where the competition act is applicable.

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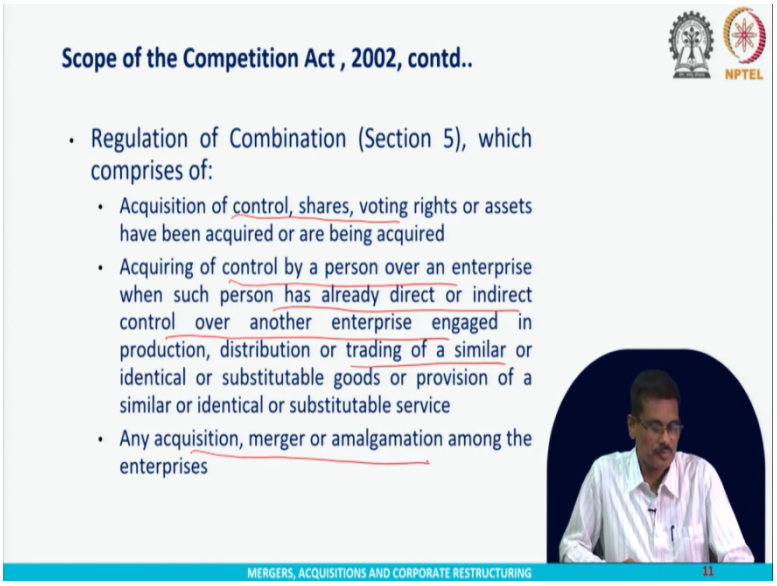

Then third one is the regulation of combination, combination means business combination where section 5 of the act also section 6 of the competition act deals with that which deals with acquisition of control, shares, voting rights or assets which has been already done or going to be done. So already acquired or being acquired even it has been already acquired then the also regulations can come to play in role and the particular M and A may not be approved by the competition commission all that has taken effect.

So similarly if there is an acquiring of control by a person over an enterprise when search person has already direct indirect control over another enterprise engaged in this production, distribution and trading of similar item that means effectively 1 percent has a control in company X. They he is now having going to control our control and company Y and company and X and Y are actually similar product services that what person a is controlling both the company.

Then it can be taken that if there is a scope up there is a combination and the rules of competition regulator or competition act will be info. Similarly any acquisition merger amalgamation among the enterprises can also attract the provisions of the competition act 2002.

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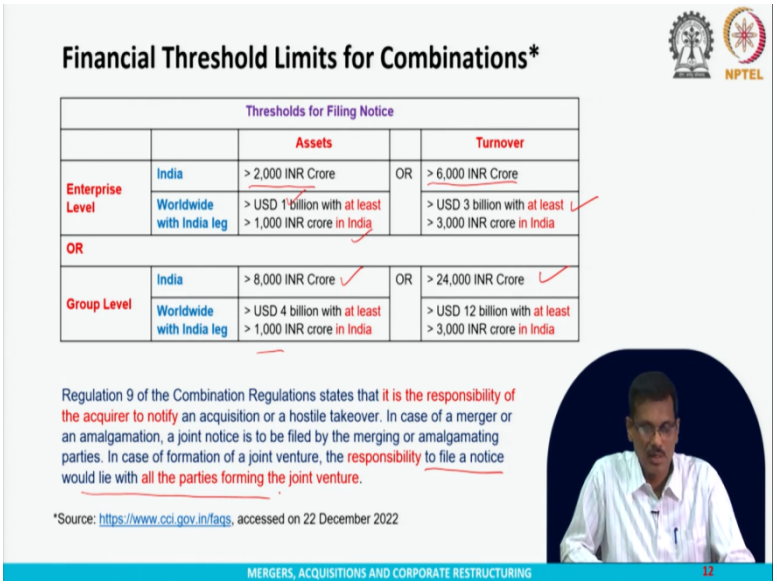

Then it is not that all the M and A merger acquisitions are actually subject to the restrictions by compare they are approved by the competition commission. There are certain thresholds there; that is an enterprise level it could be only in India or including India the companies. So threshold limits like we have suppose there is a company is acquiring another company and they are merging or they are being state separate but the control is in 1 group now.

If the combined turnover combined assets of these 2 companies is going to be more than 2000 crore or anyone the revenue are turnover the company 2 companies together let us say then acquiring company and target company. So acquiring company target company together if the turnover is going to more than 6000 crore and providers in India it was worldwide from organization is there with Indian leg is there in worldwide total is 1 billion USD.

Where at least 1000 crore in India similarly if it is a turnover terms 3 billion at least 3 billion US dollar revenue or turnover in entire world but at least 3000 crore revenue in India the combined company has. Then the players the company which are involved they have notified this to the competition commission that this actual combination actually taking place. Similarly if the group level when there is a business group level where 1 particular owner or the group is having come several companies on its float that is called the group.

In the group level it is the higher limit that is 8000 those things are there 8000 crore in the assets if it is only in India operations 4 billion dollar assets if it is worldwide operation provided 1000 crore in India. Similarly we have 12 billion dollar and 12 dollar assets if it is in worldwide and 25000 crore only in India operations and that is group together has this much

then in that case this gets invoked that means these players were involved this particular company for this particular M and A process.

They have to notify the competition commission that this has happened otherwise they can attract the penalty and possibly M and A may not be afraid there actually having a appreciable adverse effect on the competition subsequent if the computational commission find out. So regulation 9 in the combination regulation states that is the responsibility of the acquirer to notify an acquisition or a hostile takeover for that because hostile also the acquiring company has to notify.

Suppose there is merging amalgamating 2 companies is coming together and 1 competition form so both the companies have the responsible notify and otherwise at the responsible there so they have to file a notice with the competition commission.

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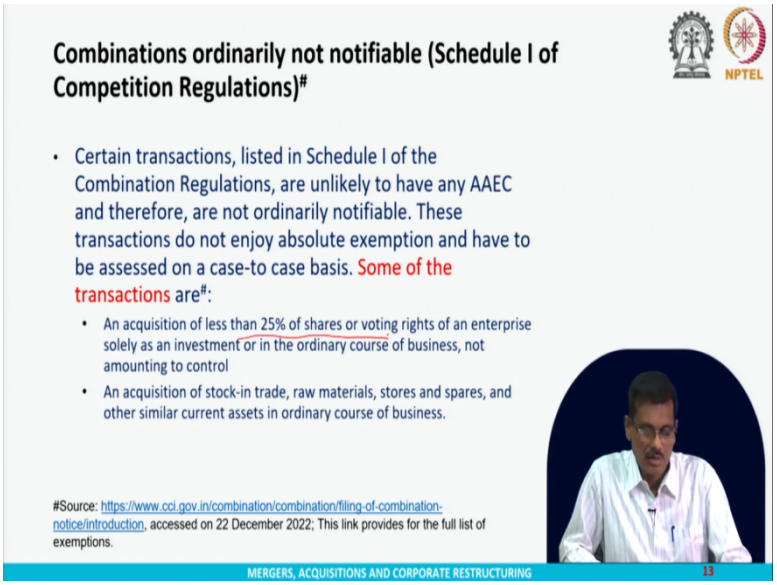

So we talked about the thresholds applicable in terms of turnover assets when that has to notify by the companies which is effect in the mergers and acquisition and there could be such there could set a certain conditions where combination is not notifiable. Even if they exceed the limit but this cases can be dealt on a case to case basis separately, but the exemptions are like that suppose an acquisition is there which involves less than 25 percent shares of voting rights of an enterprise.

It is just for an investment ordinary course of business which is does not amount to any control. Then this transaction will be notified similarly suppose somebody is acquisition of

stock in trade, raw material store spares, and some current assets in the ordinary course of business then it is not going to be notified but the important point is that even if they are exempted. But if the there is a feeling that this type of things can lead to some appreciable adverse effect on the competition.

Then it can be notified or the competition commission of India can take slow motto cognitions of this particular transaction and have an inquiry about those things whether they have an adverse effect on the competition that to appreciable adverse effect on the competition or not so this particular link has got all the other list.

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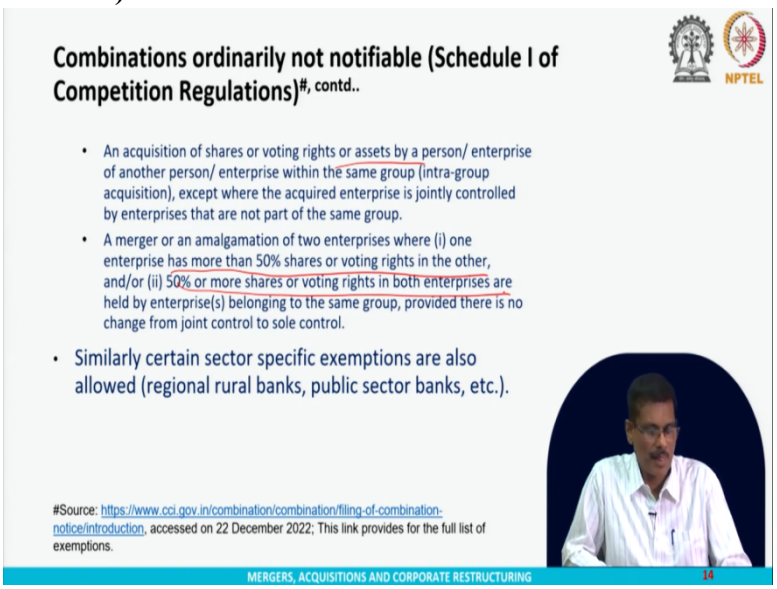

So you have 2 more for example also if there is acquisition of shares voting rights or assets by person enterprise another person the same group so intra group transaction business group transactions are there and they are jointly controlled by enterprise that not part of the same group then also not to be notification is not necessary. Similarly when there are the mergers taking place where 50 percent voting rights in another enterprise has more than 50 percent share voting rates in the other.

Or 50% more supporting the both enterprise are held by enterprises belong to same wave is in margin acquisition between company in the same business group are not required to notifier to the competition commission. Similar there are certain sector specializes like we had merger acquisition regional, rural banks then nationalized public sector banks are there also there are certain Government Of India's notified that these rules are not applicable when those companies are also merging also there are certain regulations to the oil and gas sector.

So the government of India from time to time comes relaxation with respect notification of the mergers acquisition to the competition combination of India.

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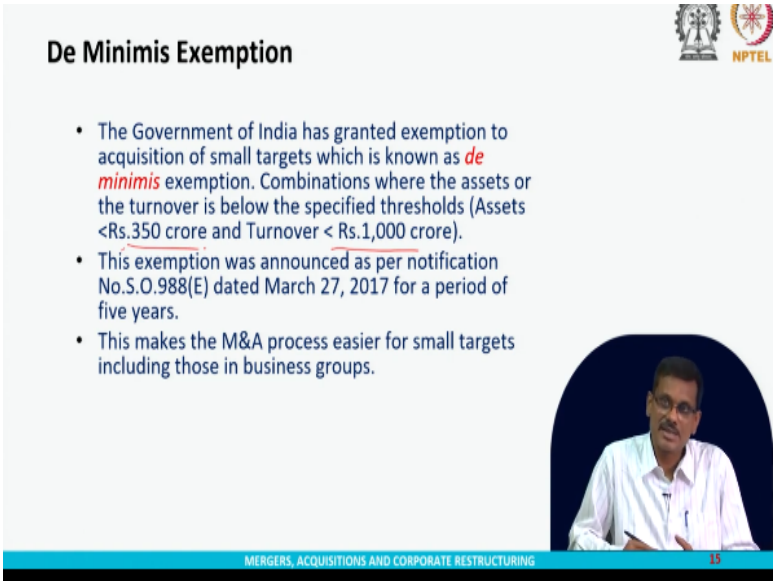

So another is that there is a de minimis exemption where the government of India has granted exemption to acquisition small target the small companies are being targeted where the target distance very small. For example the target has a turnover of less than 1000 crore or an assets of less than 350 crore in that case those amount is not going to notify that means even if the combined company is that the small target as well as the whatever the acquiring company.

Together turnover is exceeding the threshold limit per square that we discussed earlier because the target is very small then exemption is not necessary that means it is encouraging the small acquisitions. So that lot of procedures regulations are not followed and the execution can be easy proceed but at the same time, if the competition commission feels that it has an adverse if applicable adverse effect on the computation.

Then they can also takes home to cognitions even some other affected parties some other players in the same sector can also complain can lodge a complaint to the competition commission that this merger they appear all the target is small, but it is leading to adverse effect on the competition and the competition commission can of India can make a node and proceed with the inquiry of those things and then pass a judgment for that matter pass an order for that matter.

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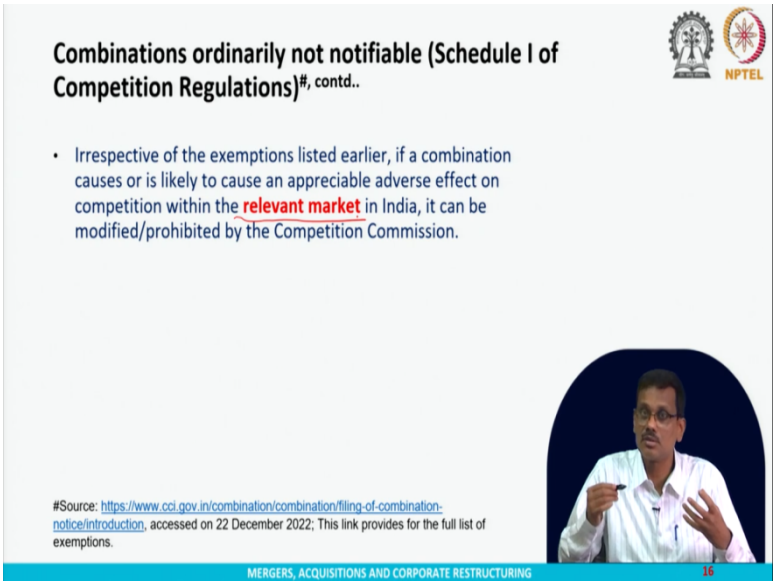

So others also then as you talked about irrespective exemptions that we listed earlier, if a combination causes or likely to cause an appreciable adverse effect on the competition with the relevant market in India. It can be modified can be prohibited by the competition commission. So even if threshold crossed or not cross competition government India can regulate mergers and acquisition even if exemption is there and so the exemptions are there in the particular act for that matter.

Then the mode point is talking about the relevant market, so relevant market is what there is a very important provision in the competition regulation across the world for that matter.

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So relevant market is where which will determined by the commission the reference to the relevant product market or relevant geographic market. So it can market the product again geographic market remains geographic market means comprising in the area in which the

condition of the competition for supply of goods or provision or services or demand of goods or services are distinctly homogeneous the similar things are there in that particular market and it can be distinguished from the condition prevailing the neighboring area.

So the 2 different markets are there so relevant product market is there when the market means comprising all those products or services which are regarded as interchangeable or substitutable by the consumer by reason or characteristics of the products or services their prices and internet use. So the product may not look same they may look same or they may look different, but they can be substituted that there will be those together will be taken as a relevant market.

So the unique product is not 1 particular product 1 particular land market because when you talk about the effect of the M and A or effect the competition or concentration we talk about effect on the relevant market so relevant market has to define that when they are defined and the competition commission look so the impact of the M and A on the competition in the relevant market itself. So the relevant market when they decide whether is a particular geography is relevant market or particular product relevant product market or not so we have a list here.

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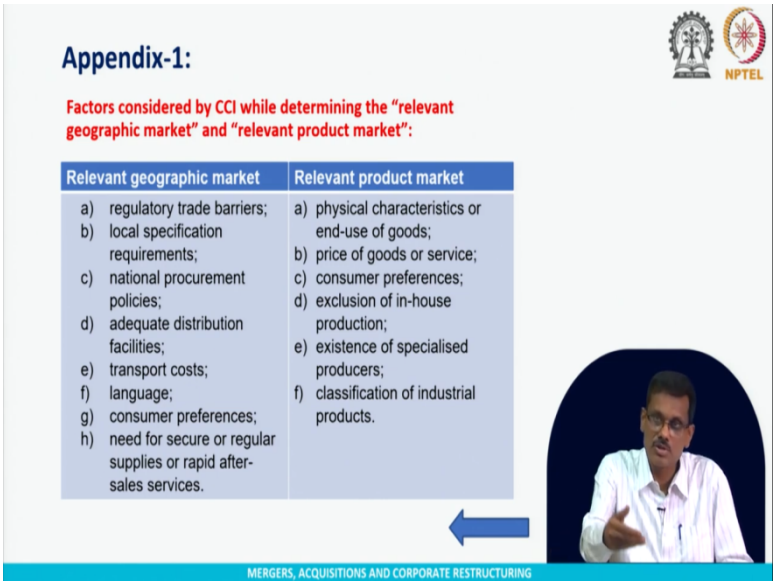

We talks about when the CCI decides relevant geography market relevant program they look at these aspects regular trade barriers, local specific requirements, adequate distribution first they are talked looked at when they decide relevant geographic market. Similarly for relevant

product market they look at those these items that is physical characteristics individual goods price of goods services all those things are there as such.

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Then in view of the because the relevant market is changeable what happens in the competition commission will approve or not approve a particular merger acquisition or particular agreement, particular deal in the market for that matter which little miniature mergers acquisition related to a competition related deals for that matter. So they have to took out the other relevant market or irrelevant market.

So, although they have given a general scope how relevant market is defined but because there; is no specific definition. So from the case to case that the competition commission defines relevant market differently so that is why in 2020 when they dismiss the order in case of lifestyle equities was Amazon. So the commission specifically remarked that delineation of relevant market and competitive assessment are based on market realities as they exist at the time also when they assess the relevant market condition will be different.

So a deal analyze today we say we deal analyze tomorrow although they may look like relevant market, but they may not be so they termed the particular conditions the market can define that or the relevant market is there or not effective in the competition is there or not for that matter. So in rapidly changing markets in particular such as the 1 in the present case that is the lifestyle equities case for that matter.

The market assessment cannot have a static approach so there can be static definition of relevant market or there is a geographic or product for that matter. So this definition can actually change depending on the case that the competition commission is actually handling at that point of time. So we will discuss about the other provisions of competition act or competition commission rules regulations like what type of inquiry the computation commission can undertake. So that the where do they take and what are the time limits for the approval all those things will discuss in the next session.

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So in conclusion the competition commission of India as envisaged in the competition act 2002 deals with the approval of M and A subject to certain exemptions. Depending on threshold limits the acquiring company or the merging companies together has to notify to the competition commission of India about mergers and acquisition affected by them and prior to approving or modifying rejecting the competition commission can approve the M and A merger acquisition.

They may modify they may reject 3 options are there the competition commission actually inquires about the applicable adverse effect on competition of the particular M and A in the particular market it could be geographic market or it could be relevant product market.

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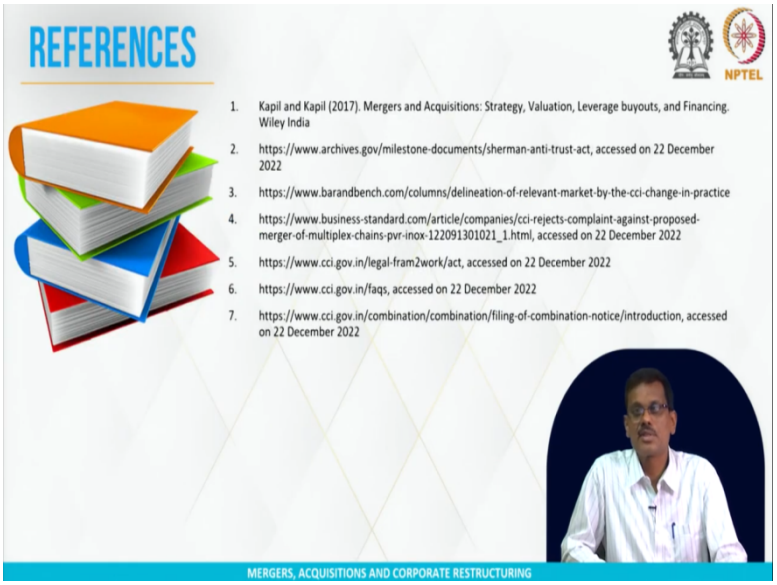

So these are the references. Thank you and happy learning.