A review of Mergers & Acquisitions in India

(Research Paper prepared under the Internship Programme of Competition Commission of India)

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Hari Krishan
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New Delhi, September 27, 2012
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<td>Act</td>
<td>Competition Act, 2002</td>
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<td>CCI</td>
<td>Competition Commission of India</td>
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<td>COMPAT</td>
<td>Competition Appellant Tribunal</td>
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<td>Combination</td>
<td>The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 as amended on 23rd February, 2012</td>
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<td>DG</td>
<td>Director General</td>
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<td>FIPB</td>
<td>Foreign Investment Promotion Board</td>
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<td>Federal Trade Commission</td>
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<td>GOI</td>
<td>The Government of India</td>
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<td>Industries (Development &amp; Regulation) Act, 1951</td>
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<td>SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011</td>
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1. ORIGIN OF ANTITRUST LAWS
1. ORIGIN OF ANTITRUST LAWS

1.1. INTRODUCTION

Competition laws also known as antitrust laws has often made the first page headlines of the newspapers. High profile cases have grabbed the attention of the society. Although the antitrust laws are very much new to the Indian regulatory framework but the western countries especially the United States of America has this kind of regulatory framework since last decade of 19th century. Canada became the first country of world to enact the antitrust law i.e. Combines Act of 1889 followed by the US & then the European countries followed the antitrust framework.

Monopoly imposes heavy costs in every society. Monopoly acts against the public, as it raises prices. Whereas the competition lowers prices to a level which is fair and competitive under a competitive environment.

1Adam Smith spoke of “the wretched spirit of monopoly”, the “mean rapacity, the monopolizing spirit” in which “the oppression of the poor must establish the monopoly of the rich”. The purpose of monopoly is to earn maximum profit at the cost of a fair and free competition. Monopoly destroys efficiency and discourages innovation.

1.2. BRIEF HISTORY OF ANTITRUST POLICY

a. Anti-Trust Laws in United States

The foot prints of evolution of antitrust law could be evidenced by the first ever public deliberations in America around 1888 and 1890. During the late 19th Century, the booming US economy entered a period of rapid consolidation."Trusts" (or holding companies) were created to bring together all the firms in a particular industry - The Sugar Trust, The Tobacco Trust, The Steel Trust. These trusts were vast enterprises that dominated the industry and in some cases production worldwide. This era’s symbol was John D. Rockefeller’s “Standard Oil Trust”, which was the biggest at that time, depicted in the popular press as a menacing octopus with tentacles stretching across the country. The modus operandi of these trusts was very simple i.e. to acquire smaller firms. Eventually the standard oil trusts got control over 90% of U.S. oil-refining capacity. American Tobacco gained control of up to 90% of the market for most tobacco products, excluding cigars.

Prior to the enactment of Sherman Antitrust Act, competition between business firms was governed by the common law. Under the common law, only those restraints that the courts

2 “Competition Policy in America” Rudolph J.R. Peritz, Oxford University Press
determined to be unreasonable were invalid. Restraints that accorded with the public interest were considered reasonable and, therefore, lawful. There was no per se prohibition against price-fixing or other cartel agreements, and even attempts to monopolize were generally valid as long as they fell short of actually preventing or attempting to prevent other firms from competing in the same line of business. The underlying principle was that the law needed only to protect the rights of business owners to compete freely, not that it needed to protect the public from the exercise of market power. The common law jurisprudence was thus consistent with private property rights and principles of the liberty of contract and laissez-faire economics in the late nineteenth century.

- Sherman antitrust act is the USA’s oldest antitrust law. Passed in 1890, it makes it illegal for competitors to make agreements with each other that would limit competition. So, for example, the competitor can’t agree to set a price for a product—that’d be price fixing. The Act also makes it illegal for a business to be a monopoly if that company is cheating or not competing fairly. Corporate executives who conduct their business in violation of Sherman Act could land up paying huge fines—and even go to jail!
- The Clayton Act was passed in 1914. With the Sherman Act in place, and trusts being broken up, business practices in America were changing. But some companies discovered merging as a way to control prices and production as now instead of forming trusts, the competitors united into a single company. The Clayton Act helps protect American consumers by stopping mergers or acquisitions that are likely to stifle competition.
- With the Federal Trade Commission (FTC) Act (1914), the Congress created a new federal agency to watch out for unfair business practices—and gave the Federal Trade Commission the authority to investigate and stop unfair methods of competition and deceptive practices.

b. Competition laws in India

Background

The Indian corporate landscape has been dominated by two types of corporate i.e. Public Sector Undertakings (owned by Union or State Government) and Private Corporations. The architect of Indian economy after independence adopted the policies known as “Command-and-Control”. These policies were implemented through five yearly plans, 1st of which was presented to the Parliament of India on December 8, 1951 by the first Indian Prime Minister of India, Sh. Jawaharlal Nehru. Ever since then eleven five year plans have been formulated, latest of which is 3Eleventh Five-Year Plan (from 2007–2012)

The government intervention and control pervaded almost all areas of economic activity in the country. Influenced by the British socialist economic model, then prime minister adopted the same strategy in India hoping for strong growth through a centralized economy. The government planners determined the output allowed in each industry because they did not want to see “overinvestment” and “waste” in a country with limited resources. Therefore,

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3 Eleventh Five Year Plan 2007-12, Oxford University Press.
companies needed licenses for everything - from setting up an industrial undertaking, to its expansion or layoff of workers and closing it down. The era was also known as “License- Raj”

The tight control of the government on industry was aptly captured by a leading cartoonist in a 1980s comic strip showing the industry minister tell his staff,

“We shouldn’t encourage big industry – that is our policy, I know. But I say we shouldn’t encourage small industries either. If we do, they are bound to become big....”

Need and evolution of MRTP Act, 1969

The outcome of the “License- Raj” system was restriction of freedom to entry into industry, which ultimately resulted in concentration of power into few individuals or groups. 4The Industrial license Procedure was first studied by Hazari Committee chaired by Mr. Hazari. The Committee studied the procedure under the Industries (Development & Regulation) Act, 1951. The report concluded that the working of the licensing system had resulted in disproportionate growth of some of the big business houses in India. Concerned with this, the Government appointed a Committee on Distribution of Income and Levels of Living (Mahalanobis Committee) in October 1960. The Committee noted that big business houses were emerging because of the “planned economy” model practiced by the Government and recommended looking at industrial structure, and whether there was concentration. Subsequently, the Government appointed the Monopolies Inquiry Commission in April 1964, which reported that there was concentration, and that large-scale restrictive and monopolistic trade practices existed in the market.

The Monopolies Inquiry Commission drafted a bill, which provided for the control of monopolies and prohibition of monopolistic and restrictive trade practices. The 5MRTP Act, 1969 which was in line with the draft bill of Monopolies Inquiry Commission, was enforced w.e.f. June 1, 1970. The MRTP Act, 1969 drew its inspiration from the mandate enshrined in the Directive Principles of State Policy provided in the Constitution of India. The Directive Principles of State are contained in Part IV, Articles 36 to 50 of the Constitution of India.

Articles 38 and 39 of the Constitution of India provide Directive Principles of State Policy. The text of article 38 & 39 is reproduced below:

38. **State to secure a social order for the promotion of welfare of the people.**—

(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

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4 “Towards a Functional Competition Policy for India” by Mr. Pradeep S Mehta, Cuts International, Pg- 44
5 The Ministry of Corporate Affairs, Government of India vide Notification dated August 28, 2009 w.e.f. from September 1, 2009, repealed the Monopolies and Restrictive Trade Practices Act, 1969.
(2) The State shall, in particular, strive to minimise the inequalities in income, and endeavor to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

39. Certain principles of policy to be followed by the State. – The State shall, in particular, direct its policy towards securing –

(a) that the citizens, men and women equally, have the right to an adequate means of livelihood;

(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;

(d) that there is equal pay for equal work for both men and women;

(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;

(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

Articles 38 and 39 of the Constitution of India mandate, inter alia, that the State shall strive to promote the welfare of the people by securing and protecting as effectively, as it may, a social order in which justice – social, economic and political – shall inform all the institutions of the national life, and the State shall, in particular, direct its policy towards securing such social order.

The MRTP Commission was set up under the provisions of MRTP Act, 1969. The law provided for suo moto action on the part of the MRTP Commission if it received information from any source or on its own knowledge.

The principal objectives sought to be achieved through the MRTP Act were:

i) prevention of concentration of economic power to the common detriment;

ii) control of monopolies;

iii) prohibition of Monopolistic Trade Practices (MTP);

iv) prohibition of Restrictive Trade Practices (RTP);

v) prohibition of Unfair Trade Practices (UTP).
Evolution of modern competition law

Over the period of time the factors which lead the Monopolies Inquiry Commission to frame MRTP Act, 1969 underwent some sea changes, which lead to the reason for framing of a new competition law. The policies of the Government of India were also changed from Command-and-Control to liberalization and globalization.

In line with the Antitrust legislation being an integral part of the economic life in many countries, India’s outgoing law, namely, the MRTP Act is regarded as the competition law of India, because it defines a restrictive trade practice to mean a trade practice, which has, or may have the effect of preventing, distorting or restricting competition in any manner. But the MRTP Act, in comparison with competition laws of many countries, was inadequate for fostering competition in the market and trade and for reducing, if not eliminating, anti-competitive practices in the country’s domestic and international trade.

Then Finance Minister of India in his Budget Speech on 27th February, 1999 stated that:

“...The Monopolies and Restrictive Trade Practices Act has become obsolete in certain areas in the light of international economic developments relating to competition laws. We need to shift our focus from curbing monopolies to promoting competition. The Government has decided to appoint a commission to examine this range of issues and propose a modern competition law suitable for our conditions.

The Government of India constituted a High Level Committee on Competition Policy and Law (Raghavan Committee) to examine its various aspects and make suggestions keeping in view the competition policy of India. This Committee made recommendations and submitted its report on 22nd of May, 2002. After completion of the consultation process, the Competition Act, 2002 was enacted.

The following timeline shows the evolution of modern competition law in India.

Table No. 1

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
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<td>1977</td>
<td>Recommendations by Sachar Committee to widen the scope of MRTPA, 1969.</td>
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<td>1984</td>
<td>MRTPA, 1969 amended as per Sachar committee report.</td>
</tr>
<tr>
<td>1999</td>
<td>High level committee on Competition policy &amp; Competition law.</td>
</tr>
<tr>
<td>2000</td>
<td>Raghavan Committee’s Report on law in India (Raghavan Committee)</td>
</tr>
<tr>
<td>2001</td>
<td>Competition Bill, 2001 drafted.</td>
</tr>
<tr>
<td>2003</td>
<td>Bill passed &amp; received the assent of the President on the 13th January, 2003 for enactment of Competition Act, 2002.</td>
</tr>
<tr>
<td>2007</td>
<td>Competition (Amendment) Act, 2007 passed.</td>
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1.3. **OBJECTIVE**

a. **Promoting competition in India, Need of the hour.**

There is an old saying that “Every coin has two sides.” This old adage applies properly on the “Command-and-Control” or “License Raj” regime. The consequences of planned and controlled economy were that there exists no healthy competition in the Indian economy. There was no incentive for cost reduction. There was clearly a climate for the existence of technical inefficiency.

6 Raghavan Committee report on Competition Law observed as follows: -

“…The absence of domestic competition, along with the unconditional protection from imports provided to domestic industry together with the other aspects of the licensing regime discussed above, fostered a high cost industrial structure which was domestically inefficient in the utilization of resources and not competitive abroad. In addition to the static mis-allocation and inefficient utilization of recourses, the system was also dynamically inefficient insofar as it was not likely to encourage technical change. On the other hand, a competitive market structure with ‘right’ prices would have promoted a dynamic, efficient, productive and competitive industrial sector. Competitive financial sectors ensure better utilization of scare financial resources and have had a positive impact on the productivity of industrial sector”

7 William Lewis, in ‘The Power of Productivity’ and economist Paul London in ‘The Competition Solution’ in carefully researched analyses of the resurgent prosperity of the late 1990s in the United States, have concluded that more than technology or tax cuts or budget policies and any other factors, the element that has counted the most has been competition. Competitive pressures have helped suppress inflation, raise living standards, and pushed manufacturing productivity up by 4% a year. It has brought down real air fares, telephone rates and lot of other costs. Jobs lost in one industry were more than compensated by jobs created in more efficient industries.

In India, the first step of the country towards modern Competition law as always mentioned above was establishment of ‘high level committee on competition policy and law’. The Committee provided the basic framework for the enactment of modern Competition Law.

The objective of formulating the modern competition law can be understood by the high level Committee’s report.

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6 “Competition Law & Practice” D.P. Mittal, P-1.1, Taxmann Publishers
7 Essays On Competition Law And Policy By Vinod Dhall
The below are excerpts taken from Chapter I, preamble to the Report of the committee, which provided the objectives of the Competition policy.

A broad definition of competition is “a situation in a market in which firms or sellers independently strive for the buyers’ patronage in order to achieve a particular business objective for example, profits, sales, or market share” (World Bank, 1999)

The question that is very often asked is whether we need a new competition law at all. The present MRTP, 1969 and Consumer Protection act, 1986, should be sufficient to deal with anti competitive practices. So the argument goes. The present MRTP, 1969 is limited in its sweep and hence fails to fulfill the need of a competition law in an age of growing liberalization and globalization. It should not be forgotten that by April, 2001, all quantitative restrictions (QRs) would have been completely phased out and with low level tariff already negotiated during WTO rounds; India will be facing severe competition from abroad. Practically, the entire range of consumer goods will bear the brunt of open imports, combined with a lowering of tariffs walls in the coming years. Lots of other sectors too will have to be shaped up to face competition. From toy makers, plastic processors and urea manufacturers to giants of industry like automobile makers, steel producers and textile mills, all will have to face competition from the world over.

One more valid argument for the introduction of a domestic competition law is that it will prevent international cartels from indulging in anti competitive practices in our country.

In India, the MRTP Act was enacted in 1969; however, its focus was more on the control of monopolies and prohibition of monopolistic and restrictive trade practices, not on promoting competition, which was the requirement in the new economic order. This realization led to the enactment of a new competition law, on the lines of similar laws elsewhere, viz The Competition Act, 2002 which came on the statute book in January, 2003.

b. Other factors of Competition Policy

The previous short historical review illustrates the reasons which lead to modern competition policy in India. However there are certain other economical reasons which effects & supports the modern competition law. The below are some of those briefly explained.

i) Defense of smaller firms

The defense of smaller firms has been often the root cause of adoption of competition policy. The most famous instance is given by antitrust laws introduced in the US at the end of the 19th Century, which were initiated due to the complaints of farmers and small firms against

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8 Massimo Motta: Competition Policy, Theory & Practice (Cambridge University Press)

Hari Krishan, Intern - CCI, September 2012
the large trusts, but this motivation probably lies behind restrictions to discriminatory practices introduced by many pieces of legislation.

The main purpose of the competition policy may sometimes limited to protecting the smaller firms from ‘abuse of dominance’ by larger firms. The European commission has taken view that small and medium sized enterprises (SMEs) are more dynamic, more likely to innovate and more likely to create employment than larger firms.

ii) Promoting market integration
The main objective to achieve through market integration is to forbid de facto price discrimination across national borders. Cartelization and anti-competitive agreements between two competing enterprise to divide the nation in region and then charging prices on discretionary basis effects competition and discourages healthy practices with customers. It is not easy to draw simple and practical policy implications on price discrimination. Rule of per se or rule of reason is one of the doctrine used in these alleged cartelization activities.

iii) Economic freedom
Vertical restraints imposed by the manufacturer of product on the retailer, through contract between them restraints the economic freedom of retailer. Although territorial restraints, resale price maintenance and other practices often find strong justification in economic efficiency terms (for instance, by stimulating the efforts of retailer or by making sure that they would not set prices above those which are optimal for the manufacturers), it is straightforward that they limit the economic freedom of the retailers.

iv) Fighting inflation
In Germany one of the main causes of competition policy to control over cartels, is to fight inflation. However, some authors are not in total favor of it and pleas that ‘if firms are colluding, then breaking the cartel would give a one-time reduction of prices, rather than contributing to a permanent decrease of inflation.

v) Fairness and equity
Competition laws might also incorporate objectives such as fairness and equity, forcing firms to behave in certain way both with respect to customers and to rivals. As for fairness towards customers, the law might prevent dominant firms from charging excessive prices. In economics this practice of law is not desirable, because there should not be any barrier to entry. However free entry in a industry is merely on papers. The market does not allow any new entrant to enter into market, reason being discriminatory practices by the dominant firms. Providing the level playing field is one of core area of competition policy.

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9 <www.business-standard.com>
Let’s take instance of politically sensitive issue of small shopkeepers’ vs. large supermarket chains. In many countries (as in India right now), concern is often voiced that the supermarket chains exploit their bigger volumes so as to have bargaining power and buy from manufacturers much more cheaply than small shops, this allows former to sell at lower final prices than the latter. As result, small shops have economic difficulties and could be forced to close down. Some people would argue that this is unfair and that small shops should accordingly be protected. The author is of opinion that whenever there exists economies of scale in a market, larger firms will have lower costs and will be more competitive. Small firms which fail to reach the minimum efficient scale of production (or distribution) will have to either content themselves with lower profits or exit the markets. This process of rationalizing whereby only the most efficient firms will stay in the market is beneficial for a community as a whole, as it will bring market prices down to benefit of consumers. Interfering in this process by limiting the ability of larger firms to charge lower prices would damage welfare.

In extreme conditions where the super-market stores already have a high share (say, 70%) and they systematically charges below costs with aim to force all rivals out of the market (they could not cover their cost at the price charged by the super-market). In this case, this practice (which is called predatory) is both unfair and welfare detrimental. (in India CCI is equipped with relevant provision to stop these kind of anti-competitive practices)

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11 An Italian law passed in 2001 prohibited selling books at a discount higher than 10% of the cover price. (later on amended, 15% discount allowed) this is an example of a law which distorts competition in the market place to protect smaller firms.

12 Massimo Motta
2. MERGERS AND ACQUISITION
2. MERGERS AND ACQUISITIONS

2.1. MERGERS & ACQUISITIONS AS A GROWTH STRATEGY

As a business gets bigger, the growth will be organic or inorganic. Organic growth, also called internal growth, occurs when the company grows from its own business activity using funds from one year to expand the company the following year. While ploughing back profits into a business is a cheap source of finance, it is also a slow way to expand and many firms want to grow faster. A company can do so by inorganic growth. Inorganic growth, or external growth, occurs when the company grows by merger or acquisition of another business. Getting involved with another company in this way makes good business sense as it can give a new source of fresh ideas and access to new markets.

Most business enterprises are constantly faced with the challenge of ‘prospering and growing their businesses’. Growth is generally measured in terms of increased revenue, profits or assets. Businesses can choose to build their in-house competencies, invest to create competitive advantages, differentiate and innovate in the product or service line (Organic Growth) or leverage upon the market, products and revenues of other companies (In-organic Growth).

Apple Inc. is probably an excellent example of Organic Growth. Growth at Apple is driven by trend-setting product innovation. Macintosh, iMac, iPod and the latest technological breakthrough pioneered by Apple is the iPhone. Steve Jobs, Founder, Apple Inc. commented that - “Our belief was that if we kept putting great products in front of customers, they would continue to open their wallets.”

Microsoft, on the other hand is a clear case of In-Organic growth as it has successfully completed more than 100 acquisitions since 1986.

a. Classification of growth strategies:

In finance literature the growth strategies followed by companies can be broadly classified into organic and inorganic growth strategies. Organic strategies refer to internal growth strategies that focus on growth by the process of asset replication, exploitation of technology, better customer relationship, innovation of new technology and products to fill gaps in the market place. It is a gradual growth process spread over a few years (Bruner, 2004).

Inorganic growth strategies refer to external growth by takeovers, mergers and acquisitions. It is fast and allows immediate utilization of acquired assets. Bruner (2004).
Table no. 2: brief illustration of growth strategies

Growth Strategies

Organic growth
- Expansion
- Diversifications
- Innovation
....et al

In-Organic growth

Merger & Acquisition

Joint Ventures
An agreement is executed between the parties containing certain covenants and a new legal entity is formed.

Strategic Alliances
An agreement is executed between the contracting parties containing certain covenants while they remain independent legal entities.

Acquisition of Assets
- Itemized sale
- Slump Sale

Acquisition of Control

Merger & Amalgamation

Takeovers
- Hostile
- Friendly
- Bailout

Management Buy-out

Management Buy-in

Merger
- Co-Generic
  - Vertical
  - Horizontal
- Conglomerate

Demerger
- Total Demerger
- Partial Demerger
2.2. **WHY TO REGULATE MERGERS & ACQUISITIONS**

When two companies are merged or combined, they must have some objectives behind this merger. One motive is of merger may be to realize economies of scale, improving operative performance or expanding the business in order to gain more assets. However, on the other the motive may be to create anti-competitive effects like to reduce the numbers of competitors or to create dominance in the market. This can be explained by Porter’s five sector model, as below:

The Michael Porter provided a framework that models an industry as being influenced by five forces. The strategic business manager seeking to develop an edge over rival firms can use this model to better understand the industry context in which the firm operates. Firms in order to

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13 Pradeep S. Mehta : Merger norms way to economic democracy
gain advantage over its rival firm may merger and eliminate the threats as explained in the model above. According to Fairburn and Kay (1989), from the past it is evident that mergers may cause more harm than bring the advantages to the merging firms. The merger and acquisition activities have increased in the past and firms merge because they think by doing so various advantages will be realized and therefore increase the profits of the firm.

14 This basically happens more in horizontal merger as they create more anti-competitive effects in the market. Similarly vertical mergers can also have the same potential effects; on one side it may be combined with substantial market power and on the level it may permit the extension of that market power. For example, if a firm has a monopoly over the supply of a particular input and it integrates downstream into processing of the input into finished products. An anti-competitive effect may arise if the firm charges a high price for the input supplies and a low price for the finished products. This differential price jeopardizes the economic viability of all the other firms in the downstream finished product market. This practice is mainly prevailed in the steel industry, where integrated steel manufacturers follow differential pricing in hot-rolled coils to harm the interest of cold-rolled steel manufacturers, the downstream players. But in case of conglomerate merger, such anti-competitive effect is not shown so much as it is perceived in case of horizontal and vertical mergers. Such Conglomerate merger is generally beyond the purview of law on merger.

Effects of merger

a) **Unilateral effect**: The merged entity may also have a unilateral incentive to increase the price of one or more of the products sold by the merging firms if a significant proportion of consumers view the two merging firms as their first and second choices. In the pre-merger equilibrium, firms have chosen their prices to maximize profits, taking into account their perceptions about consumers’ willingness to switch to other products. Thus, a firm would not have an incentive to increase its price independently prior to the merger because it has already determined that the benefit of a higher price would be outweighed by the cost of lost sales to competitors. However, if a large enough proportion of the lost sales by one merging firm would be captured by the other merging firm, then a price increase could be profitable after the merger.

b) **Coordinated effects**: It occur when a merger increases the likelihood that competitors will coordinate - either tacitly or expressly - to raise prices. A merger may enhance the ability to coordinate by reducing the number of independent competitors. This is more likely to occur if the existing number of competitors is already relatively small. Many other factors also affect the ability to coordinate. For example, all other things equal, it is easier for competitors to reach and monitor agreements if the products are relatively homogeneous and the pricing by individual competitors is relatively transparent.

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14 Essays on Competition Law and Policy by VINOD DHALL
2.3. **REMEDIES**

Successful merger enforcement is defined by obtaining effective remedies, whether that means blocking a transaction or settling under terms that avoid or resolve a contested litigation while protecting consumer welfare. In situations where a merger remedy can protect consumers while otherwise allowing the merger to proceed, appropriate remedies may include a divestiture of assets (to limit the merged firm’s ability to use the combined assets to harm competition) or limitations on the firm’s conduct (to ensure that consumers will not be harmed by anticompetitive behavior).

In India, till date all M&A transaction has been approved, thus in order to study remedies in mergers we have to study the practices used by different antitrust authorities. Although in different parts of the world different remedies are used by respective antitrust authority, but the below are some of most widely used remedies.

a) **Structural Remedies:**

Structural remedies modify the allocation of property rights; they include divestiture of an ongoing business, either fully or partially. The goal of a divestiture is to ensure that the purchaser possesses both the means and the incentive to effectively preserve competition. In divestitures tangible or intangible assets from the merging firms are sold to the third-party purchaser.

b) **Behavioral or Conduct Remedies:**

The most common forms of Behavioral or conduct relief are firewall, non-discrimination, mandatory licensing, transparency, and anti-retaliation provisions, as well as prohibitions on certain contracting practices.
3.
COMBINATION REGULATIONS
3. COMBINATION REGULATIONS

3.1. REGULATION OF COMBINATIONS IN COMPETITION ACT, 2002

The Competition Act, 2002 (as amended), follows the philosophy of modern competition laws and aims at fostering competition and protecting Indian markets against anti-competitive practices. The Act prohibits anti-competitive agreements, abuse of dominant position and regulates combinations (mergers and acquisitions) with a view to ensure that there is no adverse effect on competition in India. The provisions of the Act relating to regulation of combinations have been enforced with effect from 1st June, 2011.

A combination is not void *per se* but if CCI is of a *prima facie* opinion that the outcome of such transaction may result in appreciable adverse effect on competition (AAEC) then the CCI may issue a show cause notice to the parties under Section 29(1) of the Act to take the case to Phase II detailed investigation. The provisions related to combination are provided in Section 5, 6, 20, 29, 30, 31, 43A & 44 of the Act read with The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 as amended on 23rd February, 2012 (in short Combinations Regulations).

Section 5 of the Competition Act, 2002 provides the definition of the “combination”. If any transaction falls under Section 5, then as per Section 6(2) the parties are required to give notice to CCI in the prescribed form along with the requisite filing fee within 30 days of the trigger event.

The following are three forms as prescribed to be filed with CCI as per Competition Act, 2002:

<table>
<thead>
<tr>
<th>Forms</th>
<th>Relevant provisions</th>
<th>Filing Fee (in INR)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Form I (Short Form)</td>
<td>Section 6(2) of the Act read with Regulation 5(2) &amp; Schedule II of Combinations Regulations</td>
<td>10,00,000/-</td>
</tr>
<tr>
<td>Form II (Long Form)</td>
<td>Section 6(2) of the Act read with Regulation 5(3), 5(5) &amp; Schedule II of Combinations Regulations</td>
<td>40,00,000/-</td>
</tr>
<tr>
<td>Form III</td>
<td>Section 6(5) of the Act read with Regulation 6(1) &amp; Schedule II of Combinations Regulations</td>
<td>No fee prescribed</td>
</tr>
</tbody>
</table>

The ‘Trigger event’ in a combination is:

(i) Board approval of the enterprises in case of a proposed merger/ amalgamation; or
(ii) Execution of any agreement or ‘other document’ in case of a proposed acquisition
**Option for filing short or long form**

Regulation 5 of the Combinations Regulations requires filing of Form I or Form II as specified in the Schedule II of the said Regulations; however, the parties voluntarily can file Form II to CCI.

**Filing fee**

As per Regulation 11 of Combinations Regulations filing fee has been revised w.e.f. 23rd February, 2012. The amount of fee payable along with the notice filed in Form I is Rs. 10 lakhs and filed with Form II is Rs. 40 lakhs.

**Belated notice**

Without prejudicing the provisions of the Act, the CCI may admit belated notice but subject to penalty under Section 43A of the Act. These provisions are provided in the Regulation 7 of Combinations Regulations.

**Time period of approval**

No combination can take effect unless **210 days** has been passed from the day when notice was given to CCI. The calculation of days will be started from the day of service of notice under Section 6(2) of the Act.

**Self-imposed time limit to clear cases**

Regulation 28(6) provides that the CCI shall endeavor to make its final determination on the combination notice within **180 days** of filing of details of combination in Form I or Form II. Regulation 19(1) of the Combination Regulation also provides that the Commission shall form its prima facie opinion for the purpose of Section 29(1) of the Act.

**Stopping of clock provisions**

Regulation 5 and Regulation 19 provide that the time taken by the parties in providing information on direction of CCI is excluded from the relevant review period. These cases are:

1) Removing defects in notice, or 
2) Furnishing additional information by the parties.

**Exemption Gateway**

However by virtue of Section 6(4) and 6 (5) of the Competition Act, 2002, for acquisition, share subscription facility or financial facility, the following categories of persons would be exempted from the provisions of the Competition Act, 2002.

- **i) Public Financial institution,**
- **ii) Foreign Institutional Investor,**
- **iii) Bank,**
- **iv) Venture Capital Fund**

The category of these persons have to intimate the CCI within 7 days of such transaction in Form III under Section 6(5) of the Competition Act, 2002 read with Regulation 6(1) and Schedule II of Combinations Regulations.
Regulation 4 read with Schedule - I of Combinations Regulations provides exemption gateway to the following transactions which ordinarily are not likely to have any adverse competitive impact and, therefore, the parties to such transaction do not require filing notice to the CCI.

The list of the exempted transactions includes:

1) Acquisition up to 24.99% of the shares or voting rights of the target enterprise, solely as an investment or in the ordinary course of business provided no other controlling rights are acquired.

2) Acquisition of the shares or voting rights where the acquirer prior to acquisition has at least 50% of the shares or voting rights in the target enterprise except when it leads from joint to sole control.

3) Intra-group acquisition within the meaning of “group” also, a merger or amalgamation involving a holding company and its subsidiary wholly owned by enterprises belonging to the same group and/or involving subsidiaries wholly owned by enterprises belonging to the same group.

4) Deals “taking place entirely outside India with insignificant local nexus and effects on markets in India”.

5) Acquisition of stock in trade, raw material, stores, spares or current assets in the ordinary course of business.

6) Acquisition of shares or voting right pursuant to a bonus issue, stock split or consolidation or buy back of shares or right issue provided no control is acquired.

7) Amended or renewed tender offer where a notice has been filed prior to such amendment or renewal offer.

8) Acquisitions of assets that are not directly related to the business activity of the party acquiring the assets or made solely as an investment or in the ordinary course of the business, not leading to the control of the seller, except where the assets being acquired represent substantial business operations in a particular location or for a particular product or services of the seller.

9) Acquisition of shares or voting rights by a person acting as a securities underwriter or a registered stock broker in the ordinary course of the business and in the process of underwriting or stock broking.

**Assessment of Combination**

Regulation 19 of Combinations Regulations provide for Phase I review period and requires that as already stated, Commission make a “prima facie” opinion, whether the combination causes or likely to cause an “appreciable adverse effect on competition”, within the relevant market in India, within 30 calendar days of receiving a valid form, regardless of whether the details are filed in Form I or Form II.

Section 20(4) of the Competition Act, 2002 provides the substantive test whether the combination has or is likely to have “appreciable adverse effect on combination” in the relevant
market in India. The substantive test encompasses examination of the factors provided in the said Section. The list of these factors are:

a) Actual and potential level of competition through imports in the market;
b) Extent of barriers to entry into the market;
c) Level of combination in the market;
d) Degree of countervailing power in the market;
e) Likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
f) Extent of effective competition likely to sustain in a market;
g) Extent to which substitutes are available or are likely to be available in the market;
h) Market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;
i) Likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;
j) Nature and extent of vertical integration in the market;
k) Possibility of a failing business;
l) Nature and extent of innovation;
m) Relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;
n) Whether the benefits of the combination outweigh the adverse impact of the combination, if any”. 
Table No. 4: A check list for the parties to the notice of the proposed combination.
3.2. MAJOR AMENDMENTS IN COMBINATION REGULATIONS ON 23RD FEBRUARY, 2012

The Combination Regulations have been in force w.e.f. 1st June, 2011. The Competition Commission of India, after gaining experience of implementation of the Combination Regulations for almost nine months, amended the Regulations with a view to provide relief to the corporate entities from making filings for combinations which are unlikely to raise adverse competition concerns, reduce their compliance requirements, make filings simpler and to move towards certainty in the application of the Act and the Regulations.

Table showing comparison of the old and amended Combination Regulation

<table>
<thead>
<tr>
<th>Sr. No.</th>
<th>Heading</th>
<th>Before amendment</th>
<th>After amendment in 23rd February, 2012</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Type of form</td>
<td>Parties to combination were to file the Form I (part I or complete Form I) depending upon the criteria specified in Regulation 5(2)(a) to (e).</td>
<td>Form I is the default Form to be filed. However, if parties desire, they can file Form II.</td>
</tr>
<tr>
<td>2.</td>
<td>Simplicity of Form I</td>
<td>In Form I, the distinction for filling up Part I for certain types of transactions and Part II for the remaining transactions was there.</td>
<td>In Form I, the distinction for filling up Part I for certain types of transactions and Part II for the remaining transactions has been removed, leading to clarity and uniformity.</td>
</tr>
<tr>
<td>3.</td>
<td>Filing of Form II</td>
<td>Notice could ordinarily be filed in Form I, however, the Commission under Regulation 5(5) could require information in Form III.</td>
<td>In those cases where there may be significant horizontal overlap (&gt;15%) and/or significant vertical relationship (&gt;25%) between the parties, the parties, optionally could file notice in Form II as per Regulation 5(3) or the Commission could ask parties to file notice in Form II as per Regulation 5(5).</td>
</tr>
</tbody>
</table>
### Series of transactions

Provisions related to series of transactions or *salami transaction* carried out with intention to defeat the threshold limit as given in Section 5 was not there.  
Regulation 5(9) inserted to include such transactions with in CCI’s ambit, by way of attributing the assets/turnover of the transferor company with the transferee company, where series of interrelated transactions are there.

### Certified copy of loan/Investment agreement in case of a PFI/FII/VC/Bank along with Form III

No such requirement was there earlier.  
By amending Regulation 6(1), certified true copy of loan/Investment agreement to be provided in case of a acquisition by PFI/FII/VC/Bank, along with Form III.

### Increase in filing fee

For Form I: Rs. 50,000/-  
For Form II: Rs. 10,00,000/-  
Regulation 11 has been amended and following filing fee has been prescribed.  
For Form I: Rs. 10,00,000/-  
For Form II: Rs. 40,00,000/-

### Summary of combination along with the notice filed under Section 6(2) of the Act

No such requirement was there earlier.  
In order to facilitate a quick review of the notice, the parties are now required to file a brief summary of not less than 2,000 words of the combination, when filing the notice *vide* newly inserted Regulation 13(1A).

### Exemption limit for acquisition of shares in ordinary course of business without acquiring control under category (1) of Schedule 1.

Exemption upto 15% of the shares acquisition was prescribed under category (1) of Schedule 1.  
The Regulations now do not require a notice to be filed for acquisitions of less than 25% of the shares or voting rights of a company on cumulative basis, to bring the exemption limit at par with SEBI Takeover Code, however if not leading to acquisition of control.
<table>
<thead>
<tr>
<th></th>
<th>Intra group mergers and amalgamation.</th>
<th>There was no provision for such exemption. Earlier under category (8) of Schedule 1, such exemptions existed for intra group acquisition.</th>
<th>Category 8A inserted to include intra-group mergers or amalgamations involving enterprises wholly owned by the enterprises belonging to the same group companies.</th>
</tr>
</thead>
<tbody>
<tr>
<td>9.</td>
<td>Exemption for buy back of shares and subscription to right issue.</td>
<td>No such exemption was there earlier for buy back of shares. Exemption of subscription to right issue was there to the extent of the entitled portion, not leading to control.</td>
<td>Acquisition of shares or voting rights pursuant to buy backs and acquisition of shares or voting rights pursuant to subscription of rights issue (without the restriction of their ‘entitled proportion’), not leading to acquisition of control, included in the category 6 of Schedule I, that normally would not require a filing with the Commission.</td>
</tr>
<tr>
<td>10.</td>
<td>Company Secretary authorized to sign and verify combination notice with the CCI.</td>
<td>No authority to Company Secretary to sign combination notice to CCI was there earlier.</td>
<td>The Company Secretary of the company, duly authorised by the Board of Directors of the company, has been authorised by CCI to sign the Form I or Form II, in addition to those persons specified under Regulations 11 of General Regulations. Inserted <em>vide</em> proviso to Regulation 9(1) of the Combination Regulation.</td>
</tr>
</tbody>
</table>
4. CASE STUDIES
(Pre - Combination Regulation cases)
Two case studies one each from Banking and Pharma sector before enforcement of Combination Regulations i.e. prior to 1st June, 2011
4. **CASE STUDIES (Pre-combination Regulation cases)**

The Competition Act, 2002 was made fully operational from June 1, 2011 by making the Combination Regulations effective on this date. The merger & Acquisition which took place prior to enactment of Combination Regulations are discussed in brief and emphasis is made on current state of affairs. The cases which took place after Regulation of combination under competition act are provided in other part of this study.

Some of the major transactions which took place before regulation of combination *i.e. 1st June, 2011* are listed below:

1. Tata Steel's acquisition of European steel major Corus for $12.2 billion.
2. Vodafone's purchase of 52% stake in Hutch Essar for about $10 billion. Essar group still holds 32% in the Joint venture.
3. Hindalco’s (Aditya Birla group) acquisition of Novellis for $6 billion.
4. Ranbaxy's acquisition by Japan's Daiichi for $4.5 billion.
5. ONGC’s acquisition of Russia based Imperial Energy for $2.8 billion.
6. NTT DoCoMo-Tata Tele services deal for $2.7 billion.
7. HDFC Bank’s acquisition of Centurion Bank of Punjab for $2.4 billion.
8. Tata Motors’s acquisition of luxury car maker Jaguar Land Rover for $2.3 billion.
9. Suzlon Energy's acquisition of RePower for $1.7 billion.
10. Reliance Industries taking over Reliance Petroleum Limited (RPL) for 8,500 crore or $1.6 billion.

Out of these 10 major transactions, in the report I have selected two cases from banking and pharma sector which took place before regulation of combination in Competition Act, 2002. The cases have been selected with a view to throw light on the current Government policies in this regard.

These cases are enumerated below.
4.1. TAKEOVER OF RANBAXY BY DAIICHI SANKYO

Introduction
Ranbaxy Laboratories Limited was incorporated in 1961, promoted by Ranbir Singh and Gurbax Singh. It was listed on Bombay Stock Exchange on 1973 and it became one of the largest pharmaceutical companies in India.

Rational of takeover

In 2001 India liberalised foreign direct investment (FDI) norms for the pharmaceutical sector. As a result, 100% FDI was allowed through the 'automatic route' (without prior permission) in pharmaceutical manufacturing (except in sectors using DNA technology). The FDI policy did not make any distinctions between 'greenfield' (new facilities) and 'brownfield' (takeover of existing facilities) investments. However, during the last 12 years MNCs did not make any major effort to undertake greenfield investments in India, largely opting for brownfield investments, i.e., acquisition of Indian companies. Ranbaxy at the time of takeover was among the top 100 pharmaceuticals in the world and that it was the 15th fastest growing company in India. Daiichi Sankyo was Japan's third-largest drug maker. Daiichi Sankyo had its operations in 21 countries at the time of the deal. The deal with Ranbaxy would expand its presence to 56 countries and provide it the platform to launch its innovator products at competitive prices and expand its global operations.

15 Trigger point – the binding agreement
In the month of June, 2008, Daiichi entered into a share purchase and share subscription agreement with Ranbaxy and the controlling shareholders (i.e. Promoters), to acquire controlling stake in Ranbaxy. It acquired 129,934,134 fully paid-up equity shares representing 34.81% of the total fully paid-up equity capital of Ranbaxy at a Negotiated price of INR 737/- (Rupees Seven Hundred Thirty-Seven only) per fully paid up equity share in cash.

As per Regulations 10 and 12 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (“Takeover Code”), acquisition of shares/ voting rights in a listed company, which in aggregate, gave the acquirer 15% or more of the voting rights in the company or acquisition of control over a listed company, would immediately trigger an open offer requirement.

On June 27, 2008, Daiichi made the open offer at a price of INR 737 per share to all shareholders of the Company. Daiichi acquired 11.42% shares from the stock market & raised equity stake in Ranbaxy up to 63.92%

Concerns of Government over “Pharma” M&A deals
The policy of government to allow 100% FDI in Pharma industry encouraged big merger & acquisition deals in this industry. 16 Matrix laboratory’s acquisition by US based Mylan Inc in

Source: www.sebi.gov.in, Letter of offer to shareholders of Ranbaxy
August 2006, Dabur Pharma’s acquisition by Singapore based Fresenius Kabi in April 2008, Ranbaxy labs. Ltd’s Acquisition by Daiichi Sankyo in July 2009, as stated above, acquisition of Shantha Biotech by France based Sanofi Aventis in July 2009, Piramal Healthcare acquired by US based Abbott Labs in May 2010 are some such examples.

Concerned over the spree of acquisitions of Indian pharmaceutical companies by foreign pharma companies, the government had decided to bring in a new set of policies to ensure that pharmaceutical sector is not controlled by foreign companies thereby denying availability of cheaper drugs in the domestic market. However, a High-Level Expert Group Report on Universal Health Coverage for India was formed under the chairmanship of Planning Commission Member Shri Arun Maira at the behest of the Cabinet Committee on Economic Affairs suggested status quo in the FDI policy for the pharma sector while recommending oversight by the Competition Commission of India (CCI) on pricing and competition issues. That recommendation was opposed by both Department of Industrial Policy & Promotion (DIPP) and the Health Ministry. As a temporary measure 17 a high-level meeting chaired by the Prime Minister Shri Manmohan Singh on October 11, 2011 decided that all the mergers and acquisitions (M&As) in the pharmaceutical sector should be vetted by the Competition Commission of India (CCI) and not by the Foreign Investment Promotion Board (FIPB) as sought by the Health and Commerce and Industry Ministries.

18 The following are the extracts of press release of the High-level meeting chaired by Prime Minister Shri Manmohan Singh on October 11, 2011:

   a) India will continue to allow FDI without any limits (100%) under the automatic route for Greenfield investments in the pharma sector. This will facilitate addition of manufacturing capacities, technology acquisition and development.

   b) In case of Brownfield investments in the pharma sector, FDI will be allowed through the FIPB approval route for a period of upto six months. During this period, necessary enabling regulations will be put in place by the CCI for effective oversight on mergers and acquisitions to ensure that there is a balance between public health concerns and attracting FDI in the pharma sector. Thereafter, the requisite oversight will be done by the CCI entirely in accordance with the competition laws of the country.

An inter-Ministerial Expert Group also later formed by the Finance Ministry to decide foreign direct Investment (FDI) in pharmaceutical sector. The Finance Ministry has favored two options i.e. a) capping FDI in the pharmaceutical sector at 49 per cent in existing units and b) oversight of all transactions by CCI, whereas the Department of Industrial Policies and Promotions (DIPP) has been supporting 100 per cent FDI through the FIPB’s approval route.
4.2. MERGER OF ICICI BANK AND BANK OF RAJASTHAN

Profile of ICICI Bank

In 1955, ICICI Limited was incorporated with the collective efforts of the major three, named World Bank, Government of India and Indian Industry’s representatives. The establishment has been taken place with a view to aid Indian businesses by acting as a source of finance to medium and long term projects. In 1990’s, the ICICI institution started diversifying its operations, and end up at the wholly owned subsidiary called ICICI Bank. The Bank was established in 1994 and became the first bank listed on NYSE (New York Stock Exchange).

Profile of Bank of Rajasthan

The bank of Rajasthan was established as Joint Stock Bank on 8th May, 1943. The Bank served The Government of Rajasthan as Scheduled bank for more than 14 years starting from 1948. The founder Chairman of Bank of Rajasthan was an industrialist, Late Shri Govind Ram Seksaria.

The Deal

A non-cash merger deal under Section 391 – 394 was approved by the board of directors of ICICI Bank. It was estimated that the merger would further flourish the ICICI’s branch network by 25 percent approximately. On 12th of August 2010, RBI published a press release that “All branches of Bank of Rajasthan Ltd. will function as branches of ICICI Bank Ltd. with effect from August 13, 2010. This is consequent upon the Reserve Bank of India sanctioning the Scheme of Amalgamation of Bank of Rajasthan Ltd. with ICICI Bank Ltd. The Scheme was sanctioned in exercise of the powers contained in Sub-section (4) of Section 44A of the Banking Regulation Act, 1949. The Scheme came into force with effect from close of business on August 12, 2010.”

As the Combinations Regulations under the provisions of The Competition Act, 2002 were brought into force from June 1, 2011, the merger of ICICI Bank & Bank of Rajasthan therefore did not fall within the purview of Competition Act, 2002.

Exemption of Bank M&A from application of The Competition Act, 2002

There is an ongoing debate over the issue that the RBI, the country’s Central Bank, has sought exemption for bank mergers and acquisition (M&A’s) from the application of the provisions of the Competition Act of 2002. The RBI is of the view that the exemption from the application of the provisions of the Competition Act 2002 should be granted following the urgency and unique nature of bank mergers. Since 2009, RBI has been raising voice against the jurisdiction of the Competition Commission of India (CCI) in the banking mergers and acquisitions.

Though, the Banking Laws (Amendment) Bill, 2011, tabled in the Lok Sabha recently in March this year, the Government proposes to insert a new Section 2A in the Banking Regulation Act,
1949, to exempt mergers of the banking companies from applicability of the Competition Act, 2002. This has been proposed to facilitate merger & acquisition activities between banking companies quickly. However, later the Government decided to put on hold the Banking Laws (Amendment) Bill. The relevant extracts of a newspaper article on the subject published recently on August 30, 2012 are provided as follows:

The GoM, set up for considering amendments in the Competition Act, has suggested more powers for CCI. According to a source, the GoM feels matters of competition must be scrutinised by CCI, which is empowered to check the abuse of dominance and unfair trade practices. Therefore, CCI must have a say in clearing mergers and acquisitions, even in sectors like banking and telecom. Earlier, various sectors had opposed CCI’s scrutiny of mergers and acquisitions, taking a plea that specific regulators in various sectors were already looking into the issue and, therefore, overlapping of jurisdiction would occur if CCI also took up the issue. Some sectors also doubted CCI’s ability to monitor mergers and acquisitions.

In the past, the lobby group in the pharmaceuticals also argued that the CCI did not have the wherewithal to understand public interest in the pricing of drugs and, therefore, foreign investment in the sector should be cleared by the Foreign Investment Promotion Board.

However, ruling out blanket exemptions to any sector from the purview of the Competition Act, 2002, the GoM suggested there was no reason to keep CCI away. Instead, it maintained competition should be overseen by a specialised agency. It, however, suggested that CCI and sector regulators must consult each other if their jurisdictions overlapped.

It was added in article that the legislative ambiguities would have led to forum shopping and an uncertain legal environment, which would also affect the investment climate adversely.”
5.

CASE STUDIES
(Post - Combination Regulation cases)
Five cases after enforcement of Combination Regulations \textit{i.e.} on or after 1\textsuperscript{st} June, 2011, each from different sector.
5. CASE STUDIES (Post - Combination Regulation cases)

The Competition Act, 2002 [amended by the Competition (Amendment) Act, 2007] became fully operational from 1st June 2011 when the provisions regulating mergers and acquisitions were notified. The provisions related to combination are provided in Section 5, 6, 20, 29, 30, 31, 43A & 44 of the Act read with The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011. The Commission as on date has passed the order under Section 31(1) of the Act in respect of 73 notices filed under Section 6(2) of the Act. The Commission has made the notice not valid in respect of 3 notices, which were filed under Section 6(2) of the Act. The Commission has so far not taken any case of combination notice to the detailed investigation (phase II) under the provisions of Section 29 of the Act.

The Commission has also noted the details of acquisition made by PFI/ VCs/ FIIs/ Banks in terms of covenants of loan/ investment agreement entered into with the parties, in respect of which three cases filed in Form III in terms of Section 6(4) & 6(5) of the Act.

Out of the above I have selected five cases for the purpose of this report with a view to assess the parameters/ framework which the CCI considers while assessing/ analyzing the M&A filing of the proposed combination made under Section 6(2) of the Act. I have based my study only on the basis of the facts in public domain by the Commission. Therefore, in the absence of complete details about the proposed Combination as filed by the parties in the notice(s), my analysis of these cases is only limited in nature & scope.
STUDY OF COMBINATION NOTICES ON WHICH THE COMMISSION HAS PASSED ORDERS UNDER SECTION 31 OF THE COMPETITION ACT, 2002 OR RELEVANT PROVISIONS OF THE COMBINATION REGULATIONS.

Case No. 1: ACQUISITION OF SPRINGS DIVISION OF BOMBAY BURMAH TRADING CORPORATION LTD. BY NHK AUTOMOTIVE

1. SYNOPSIS

1.1. Acquirer: NHK Automotive Components India Pvt. Ltd.
1.2. Group: NHK Spring Co. Ltd. (Japanese Co.)
1.3. Target: Bombay Burmah Trading Corporation Ltd. (BBTCL)
1.4. Type of Acquisition: Slump sale of “BCL Springs Division” of BBTCL
1.5. Combination Regn. No.: C-2011/10/05
1.6. Order: Combination approved u/s 31(1) of the Act.

2. PARTIES TO COMBINATION

2.1. NHK Automotive Components India Pvt. Ltd. (Acquirer) is a wholly owned subsidiary of NHK Japan and was newly incorporated company under the provisions of the Companies Act, 1956. It was specifically incorporated for the proposed combination & it had not started any business activity in India, neither for own or for the holding company.

2.2. NHK Japan is a listed public limited Company incorporated in Japan. The company, 
_inter alia_, operates in the business of automotive suspension springs, automotive seats 
et al.

2.3. Bombay Burmah Trading Corporation Ltd. (Target Co.) a Public limited co. listed on BSE & NSE, it is one of the oldest companies in India, belonging to Wadia Group. and, 
_inter alia_, engaged in the business of plantation, textiles, chemicals 
et al.
3. **GROUP COMPANIES**

3.1. The following chart shows the structure to group companies under NHK Japan.

![Diagram of group companies]

The chart is made as per paras 7, 8, 9, 12 of the order of the CCI, approving the proposed combination under Section 31(1) of the Act.

4. **TRIGGER EVENT**

4.1. The notice under Section 6(2) of the Competition Act, 2002 and Regulation 5, 9(1), 13 of the Combination Regulations and other applicable provisions was filed by the Acquirer. The trigger event was execution of “Business Transfer Agreement” ("binding agreement") dated 7th September, 2011 between the Acquirer, Target Co.

4.2. The binding agreement was executed to acquire one of business divisions of Target Co. i.e. the Springs division by way of slump sale.

5. **THRESHOLD LIMITS**

5.1. Once the trigger event is met, the next criterion to check is the threshold limits provided under Section 5 of the Act (as amended vide GOI Notification on 4th march, 2011). The following table shows the threshold limits u/s 5 of Competition Act, 2002

<table>
<thead>
<tr>
<th>Person/enterprises</th>
<th>In India</th>
<th>Outside India</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Assets</td>
<td>Turnover</td>
</tr>
<tr>
<td>Acquirer + Target</td>
<td>Rs. 1,500 Cr.</td>
<td>Rs. 4,500 Cr.</td>
</tr>
<tr>
<td>(Including at least Rs. 750 Cr. Should be in India)</td>
<td>(Including at least Rs. 2,250 Cr. Should be in India)</td>
<td></td>
</tr>
<tr>
<td>Group (Post Acquisiton)</td>
<td>Rs. 6,000 Cr.</td>
<td>Rs. 18,000 Cr.</td>
</tr>
<tr>
<td>(Including at least Rs. 750 Cr. Should be in India)</td>
<td>(Including at least Rs. 2,250 Cr. Should be in India)</td>
<td></td>
</tr>
</tbody>
</table>
In the present case the order of CCI does not mention how the threshold was met. Thus due to lack of information in public domain, it may be presumed that the threshold was met.

6. **SELECTION OF FORM**

6.1. Regulation 5 of the Combination Regulations read with Section 6(2) of Competition Act, 2002 provides that notice as specified in Schedule II of the Combination Regulations must be filed with the CCI.

Two forms are specified in Schedule II of the Combination Regulations
1) Form – I (Short form); and
2) Form – II (Long Form)

6.2. The parties to the combination can file any of the form *i.e.* Form I or Form II. However, the CCI under Regulation 5(5) of the Combination Regulations can direct the parties to file Form II, if the parties have earlier filed Form I.

6.3. The case mentioned above was cleared by CCI vide its Order dated 4th November 2011. The parties must have filed form I to CCI because the acquisition *prima facie* does not appear to have any “appreciable adverse effect on combination”, as per the CCI Order dated 4th November, 2011.

7. **TIME LIME TO FILE NOTICE**

7.1. Section 6(2) of the Act provide time limit of 30 days to file notice in the prescribed Form with the CCI. The parties to the combination entered into “binding agreement” on 7th September, 2011. The notice under Section 6(2) was filed on 5th October, 2011.

8. **OBLIGATION TO FILE NOTICE**

8.1. Regulation 9 of the Combination Regulations provides that who shall file the notice. The provisions are enumerated as below;

a) In case of acquisition : Acquirer
b) In case of Merger : Joint filing by each party

However, in case where hostile acquisition is made and information required is not available with the Acquirer, then CCI may ask the target enterprise to provide the same information.

9. **PROCEDURE OF FILING**

Regulation 13 of the Combination Regulations provides the procedure of filing notice. The Acquirer (the parties to the combination) must verify each page of the notice. One
original set of notice should be filed along with two set of copies of the same. One electronic version must be filed along with these physical forms. A summary of the combination, not containing any confidential information is not less than 2,000 words, along with nine copies and an electronic version thereof must also be separately provided along with the notice.

10. **FILING FEE**

10.1. The filing fee is prescribed in Regulation 11 of Combination Regulations, which was amended on 23rd February, 2012. The fee as prescribed is mentioned below:

<table>
<thead>
<tr>
<th>Form</th>
<th>Rs.</th>
</tr>
</thead>
<tbody>
<tr>
<td>I</td>
<td>10,00,000/-</td>
</tr>
<tr>
<td>II</td>
<td>40,00,000/-</td>
</tr>
</tbody>
</table>

10.2. The obligation to pay filing fee is prescribed in Regulation 10 of the Combination Regulations. The regulation mandates the obligation to pay the fee on the person who is filing the form i.e. the acquirer or the joint parties in case of merger.

10.3. The mode of payment of the fee is prescribed under Regulation 12 of Combination Regulations.

11. **SCRUTINY OF NOTICE**

11.1. Para 3. of the Order of CCI reads as below:

> In terms of Regulation 14 of the Competition Commission of India (Procedure in regard to transaction of business related to Combination) Regulations, 2011 (hereinafter referred to as “Combination Regulation”), on 11th October, 2011, the acquirer(s) were required to provide certain information and document(s), which were furnished by them on 18th October, 2011.

The relevant provisions of the Combination Regulations are enumerated below.

11.2. CCI on receipt of notice u/s 6 (2) scrutinizes the notice whether under the provisions of Act and the Regulation and the required information is provided or not. In case of any deficiency, Regulation 14 provides the power to CCI to intimate the parties about any such defeat.

11.3. **STOPPING OF CLOCK PROVISIONS:**

Regulation 5(6), 14(5) and Regulation 19(2) of the Combination Regulations provides for stopping of clock provisions, where the time taken by parties to remove any defect, or providing the information required or any additional Information, as required by CCI, is excluded from the period provided in Section 31(11) of the Act and Regulation 19(1) of the Combination Regulations.
12. **ASSESSMENT OF COMBINATION**

Paras 15 to 26 of the Order passed by the CCI, makes assessment of the combination. The assessment is done on the criteria specified in Section 20(4) of The Competition Act, 2002 (“Act”).

13. **PRIMA FACIE OPINION & ORDER**

13.1. CCI in the Para 27 of the Order passed by it, held that the proposed combination is not likely to raise any adverse effect on combination.

13.2. The order was passed under Section 31(1) of the Act, approving the proposed acquisition.
Case No. 2: PROPOSED ACQUISITION OF PANTALOON’S FORMAT BUSINESS BY MERGER INTO PETER ENGLAND FASHIONS AND RETAIL LIMITED

1. SYNOPSIS

1.1. Acquirer : Peter England Fashions and Retail Limited
1.2. Acquirer Group : Aditya Birla Nuvo Limited
1.3. Target : Future Value Fashions Retail Limited
1.4. Type of Acquisition : Demerger of Pantaloon Format Business from Pantaloon Retail India Limited and Merger of Future Value Retail Limited into Peter England Fashions and Retail Limited
1.5. Combination Regn. No. : C-2012/ 07/ 69
1.6. Order : Invalid notice

2. PARTIES TO COMBINATION

Peter England Fashions and Retail Limited (Acquirer) together with its group Company Aditya Birla Nuvo Limited filed the notice under Section 6(2) of the Competition Act, 2002 to acquire Future Value Fashions Retail Limited (Target Co.), after demerger of Pantaloon’s Format Business from its parent i.e. Pantaloon Retail India Limited.

3. PROPOSED TRANSACTION

The following chart shows the matrix of proposed transaction between Acquirer & Target Co.
4. **DETAILS OF PROPOSED COMBINATION**

On 16th July, 2012, the CCI received the notice of proposed Combination as stated in the table given above, the proposed combination was to regarding acquisition of ‘pantaloons format business’ which would be demerged from its parent company *i.e.* Pantaloon Retail (India) Limited and then be merged into Peter England Fashions & Retail Limited (PEFRL). The notice was filed pursuant to execution of a MoU. In addition to the proposed merger & demerger, the MoU also contemplated that as a part of the scheme, Indigold Trade & Services Limited and / or its affiliate would make voluntary public offer in accordance with the SEBI Takeover Code to the shareholders of Peter England Fashion & Retail Limited. Additionally, PEFRL has also agreed to invest an amount of Rs. 800 Crore in Optionally Fully Convertible Debentures (OFCD) of Pantaloon Retail (India) Limited. These OFCD once converted into equity would comprise of 13.15% of the equity share capital of Pantaloon Retail (India) Limited.

5. **ORDER OF THE CCI**

CCI noticed that the said proposal of demerger and merger was yet to be approved by the Board of directors of the parties. The parties were still in the discussion stage to finalize the exact scope of the acquisition of the assets and share entitlement ratio. Accordingly the proposed terms of transaction were subject to the agreement by the parties in the scheme and other definitive documents to be executed by the parties.

The CCI found that the parties to the proposed acquisition had entered into a MOU between each other, but there was no binding agreement. In terms of Section 5(c) of the Act read with Section 6(2) of the Act, in case of a merger, the notice shall be filed to the CCI in case where the companies has passed a board resolution.

The CCI ordered that the notice was not valid and pre-mature in nature, thus liable to be rejected.
Case No. 3:  **ACQUISITION OF SHARES OF “TATA BP SOLAR LIMITED” BY “TATA POWER COMPANY LIMITED”**

1. **SYNOPSIS**

1.1. Acquirer : Tata Power Company Limited (TPSL)
1.2. Target : Tata BP Solar Limited (TBSL)
1.3. Type of Acquisition : Acquisition of shares of Tata BP Solar Limited
1.4. Combination Regn. No. : C-2012/01/26
1.5. Order : Combination approved u/s 31(1)

2. **PARTIES TO COMBINATION**

2.1. TBSL a public limited Company incorporated under the Companies Act, 1956, is engaged in the business of design, development, manufacture, marketing & after sales services of solar cells, solar modules, solar power generating systems, solar power heating systems, engineering, procurement and construction, operation and maintenance of solar power plants.

2.2. TPCL is a listed public limited company incorporated under the Indian Companies Act, 1919 (now regulated by Indian Companies Act, 1956) having its securities listed on NSE & BSE. TPCL is engaged in the business of, inter alia, generation, transmission, distribution and trading of power.

3. **ASSESSMENT OF COMBINATION**

3.1. The proposed combination related to the acquisition of shares of Target Company by the Acquirer company from BP Alternative Energy Holdings Limited. The proposed combination was under Section 5(a) of the Competition Act, 2002

3.2. The Commission while assessing the proposed combination observed that the Acquirer & Target were not engaged in production, supply, distribution, storage, sale or trade of identical or similar goods or provisions of services. The CCI also observed that due to entry of new players in the solar power, the share of Target Company in generation of solar energy has decreased from 30% in the year 2007 to about 12% in the year 2011. CCI also observed that there are other prominent players in India in the business of solar power modules and other related equipments which were used to convert the solar energy and establishment of solar power plants including providing operational and maintenance services for the same. Therefore, though the Acquirer and Target Company are engaged at different stages or levels of the production chain in different markets of generation of electrical power including solar power and manufacturing products which
were used to convert solar energy into electrical energy in solar power plants, their individual or combined share in the respective markets was not substantial.

4. **ORDER OF CCI**

4.1. The CCI accordingly held that the proposed combination will not make any ‘appreciable adverse effect on Competition’ and approved the combination under Section 31(1) of the Act.
Case No. 4: **ACQUISITION OF CREDIT CARD BUSINESS OF “BARCLAYS INDIA” BY “STANDARD CHARTERED BANK” OF INDIA**

1. **SYNOPSIS**

1.1. **Acquirer** : Standard Chartered Bank, India Branch  
1.2. **Target** : Barclays Bank, India Branch  
1.3. **Type of Acquisition** : Acquisition of Credit Card Business of Barclays Bank, India  
1.4. **Combination Regn. No.** : C-2011/12/15  
1.5. **Order** : Combination approved u/s 31(1) of the Act

2. **PARTIES TO COMBINATION**

2.1. The Acquirer is branch of Standard Chartered Bank Group. The Indian Branch has license granted by Reserve Bank of India under the Banking Regulation Act, 1949 and carries on its business in India through 95 branches/offices. It provides various financial services such as personal banking, preferred banking, priority sector banking, private banking, SME broking, wholesale banking, loans and mortgages, NRI banking, insurance and investment services including credit card(s) facilities.

2.2. The Target Company is a branch of Barclays Bank. The Indian Branch has license granted by Reserve Bank of India under the Banking Regulation Act, 1949 and carries on its business in Indian through 9 offices. It provides services such as credit card facility, retail banking, premier banking, corporate banking and other similar services.

3. **ASSESSMENT OF COMBINATION**

3.1. The Banks issuing credit cards are guided by RBI Master circular dated 1st July, 2010 which states that prior approval of RBI is not necessary for banks desirous of undertaking credit card business either independently or in tie-up arrangement with other card issuing banks and the banks with net worth of Rs. 100 crore and above can undertake credit card business with approval of their respective boards.

3.2. CCI while assessing found that as per publicly available information, the credit card business in India is highly fragmented. Five large players *i.e.* HDFC Bank, ICICI Bank, SBI, Citibank and HSBC have a combined share of approx 77% of the number of active cards in India. CCI found that, for the period ending 31st March, 2011, the aggregate share of both Acquirer and Target, in terms of number of active credit cards and value of sales, is in single digit.
4. ORDER OF CCI

4.1. It was noted that the proposed combination will not make any ‘appreciable adverse effect on competition’ and the combination was approved by the CCI under Section 31(1) of the Act.
Case No. 5: COMBINATION OF G&K BABY CARE PRIVATE LIMITED WITH WOCKHARDT GROUP

1. SYNOPSIS

1.1. Acquirer(s) : G&K Baby Care Private Limited, a SPV
Danone Asia Pacific Holdings Pte Limited

1.2. Target Companies : Wockhardt Limited
: Carol Info Services Limited
: Wockhardt EU Operations (Swiss) AG

1.3. Type of Acquisition : Acquisition of nutrition business of Wockhardt Limited as a going concern on a slum sale basis and other businesses

1.4. Combination Regn. No. : C-2011/08/03

1.5. Order : Combination approved u/s 31(1)

2. PARTIES TO COMBINATION

2.1. The Acquirer is a Special Purpose Vehicle (SPV) Company incorporated under Indian Companies Act, 1956 solely for the purpose of proposed Combination.

2.2. Danone SA, listed French Company, is the ultimate holding of the Acquirer(s). Its main area of operation is bottled water, fresh dairy products, baby food and medical nutrition. However, its activity in India relates only to bottled water, pro-biotic drinks and fresh dairy products and it has no activity related to baby food and medical nutrition.

2.3. The target companies are as below:

   a) Wockhardt is a listed public limited company incorporated under the provisions of Companies Act, 1956 and is engaged in the business of manufacturing and selling pharmaceutical, nutraceutical and biotech products.

   b) Carol is a subsidiary of Wockhardt and is incorporated under the provisions of Companies Act, 1956 and is engaged in the business of manufacturing activities carried on a contract basis in respect of nutraceutical products.

   c) Wockhardt EU is a wholly-owned subsidiary of Wockhardt, which owns intellectual properties for the Wockhardt group business.
3. **PROPOSED COMBINATION**

3.1. The proposed combination comprises of the following transactions:

   i) G&K Baby Care Private Limited (Acquirer) will acquire the nutrition business of Wockhardt Limited as a going concern, on a slump sale basis which would include intellectual properties consisting of brands and know how, debtors, inventories and other moveable assets, creditors, employees relating to the above business and research and development equipments.

   ii) G&K Baby Care will also acquire the contract manufacturing business of Carol Info Services Limited in respect of Nutrition products, as a going concern, on a slump sale basis which would include manufacturing unit for manufacture of nutrition products, consisting of land, building, plant & machinery, equipments, other fixed assets, employees, debtors and creditors ; and

   iii) Danone Asia Pacific Holdings Pte Limited will acquire certain intellectual properties, by way of sale and assignment, from Wockhardt EU Operations Swiss AG that are used in nutrition business.

4. **ASSESSMENT OF COMBINATION**

4.1. The proposed combination relates to the nutraceutical sector. The nutraceutical sector comprises products extracted from natural resources or manufactured synthetically that supplement the diet to provide nutrition over and above regular food and help prevent nutrition related disorder. As per the publically available reports, the one being “Nutraceutical – Critical Supplement for building a healthy India” (2009), the Indian Nutraceutical sector is in its infancy and is less than one percent of the global nutraceutical sector. The baby food business can be classified as weaning cereals and milk food. Wockhardt group’s share in both the segments of baby food business in India is less than seven percent. Nestle is the leading player in the baby food business in India.

4.2. The target company’s share in the nutrition business is less than ten percent in India. The other prominent players in the medical nutrition business in India are Abbott, British Biological, Zydus Cadila and Raptakos Brett.

4.3. The activities of acquirer company in India relates to bottled water and fresh dairy products and the acquirer group has no presence in India in any activity that either competes or is vertically related to any of the business proposed to be acquired.

5. **ORDER OF CCI**

   The CCI held that the proposed acquisition will not have any ‘Appreciable Adverse Effect on Competition’ and accordingly approved the proposed combination under Section 31(1) of the Act.
6. CONCLUDING OBSERVATIONS
6. CONCLUDING OBSERVATIONS

"We cannot shut the gates after the horses have bolted.

The provisions related to Combination Regulations in Section 5 & 6 of the Act are ex-ante in nature, whereas provisions related to anti-competitive agreement & abuse of dominance position as provided in Section 3 & 4 of the Act respectively are ex post facto in nature. The term ex-ante is a phrase meaning "before the event" whereas ex post facto means "from after the action" or "after the fact". Thus in case of combination it is required to check in advance whether in future the parties to combination will not come in such position where they can attain dominance and thus resulting in abuse of dominance. The rationale is derived from old saying that “prevention is better than cure”.

Till date the CCI has cleared all (or 100%) merger notifications filed to it. None of them were referred for detail investigation. It means that all notifications were cleared within 30 days time frame which was a self imposed mandate by CCI. Although there have been slight delay in filing notice to CCI in some cases, hence attracting penalty under the provisions of Section 43A of the Act, but the CCI has taken liberal view and has not penalized the defaulting parties in any case(s).

The following are some of the issues which can be currently reviewed by the commission in the merger review process as provided under the Act or the Combination Regulations:

1) Acquisition in case of a hostile takeover:

A takeover is considered "hostile" if the target company's board rejects the offer, but the acquirer (along with person acting in concert) continues to pursue it. In India, takeover of listed companies is regulated by the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 [SEBI Takeover Code]. In acquisition cases both SEBI Takeover Code & Competition Act, 2002 are likely to be triggered, and therefore, in such cases the prior approval of the Competition Commission of India would be required. In the case of hostile takeover the 30 days time period of approval of the CCI could become additional hurdle before the raider. During this 30 day time frame the target company could consolidate its shareholding by ‘Intra group restructuring’ activity, as the same is exempt under Para 8 & 8A of schedule I of Combination Regulations.

2) Calculation of threshold limits:

Currently, the Combination Regulations does not make clear how to calculate of turnover and assets. The term “turnover” i.e. in terms of “gross turnover” or “net turnover” has not been defined under The Competition Act, 2002. Therefore, it is could be ascertained from other

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sources, like the Guidance notes on Terms Used in Financial Statements issued by The Institute of Chartered Accountants of India. Since the terms “Asset” and “Turnover” have not been adequately defined under The Competition Act, the parties concerned could dispute the interpretation made by CCI. Therefore, it would be advisable to issue clarification in this regard as it will bring uniformity in manner of calculation of values of asset and turnover.

The informal guidance provided by CCI could only be a temporary measure and it will not help the corporate to make proper compliance of law.

3) **Calculation of threshold limit in case of Slump sale:**

Slump sale is sale of a business undertaking for a lump sum consideration on a going concern basis without assigning individual value to each asset. The CCI in case of slump sale instead of taking value of business undertaking being sold has adopted the approach of taking the total asset value of vendor entity. Although it has broaden the scope of the Competition Act, 2002, but in absence of clear cut provisions it may lead to possible conflict in future with the stakeholders/ corporates.

CCI by virtue of power provided under Section 36 of Competition Act, 2002 regulates its own procedure. It would be desirable to notify the provision regarding calculation of assets/turnover in case of sale/ acquisition of business division of an enterprise on a slum sale basis in the existing Combination Regulations for making it clear to the corporate and reduce possibility of future conflicts of mis-interpretation.

4) **Overlap of jurisdiction:**

a) **Banking Sector**: Regulation of an industry has three primary dimensions; technical, economic and competition. These three elements have to be distributed between the sectoral regulators and competition authority. Sectoral Regulators like RBI should have a free hand in the technical and economic regulation of their respective sector but the competition regulation must be in hands of expert authority *i.e.* CCI.

20A clear example of the requirement to regulate competition is in the banking sector the recent CCI notices to banks asking them to explain the imposition of penalty on borrowers for pre-payment of home loans. CCI’s notice is based on the premise that pre-payment penalty acts as a barrier by preventing customers to shift their loans from one bank to another bank which offer better interest rates. Pre-payment penalties have been in existence for a long time. However, its impact on the Banking sector was never detected or analyzed by RBI, primarily because RBI officials have not been trained to do so.

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20 *CCI January, 2012, Project Report by Gauraan on Interface Between Competition Act And The Petroleum And Natural Gas Regulating Board Act*
There may be slight overlap between different jurisdictions but it can be resolved by taking examples from other countries which have successfully implemented the competition laws. RBI has raised its concerns over the banking M&A deals which would come under scanner of CCI. RBI has taken plea that in case of bailout M&A deals the review period taken by CCI would result in unnecessary delay and loss to economy. My suggestion is that provisions as contained in the SEBI Takeover code in case of a bailout takeover be incorporated in the Competition Act, 2002 and the Combination Regulations also so that in case of a genuine sickness of banks/financial institutions, partial or full exemption of application of Combination Act, 2002 could be provided.

b) Pharma sector M&A deals: in a article published in Third World Resurgence21, titled “An unhealthy future for the Indian pharmaceutical industry?” the author has pointed out the issues related to increased acquisition of Indian pharma Companies by Foreign Companies. The recent deliberations regarding capping FDI in the pharmaceutical sector at 49 per cent in existing units; and oversight of all transactions by CCI is a welcome step. CCI as an expert competition watchdog has been very successful in its areas of its operation. The oversight of pharma deals by CCI would ensure that in future the consumer in India will not suffer from any abuse of dominance by Pharma company acquired by foreign pharma companies. I have already quoted that “We cannot shut the gates after the horses have bolted.”

5) Clarifications regarding insignificant local nexus:

The term ‘insignificant local nexus’ is vague and subjective. The Combination Regulations seem to have clarified that transactions taking place outside India and having insignificant local nexus in India need not be notified. However, there are no objective criteria to determine what ‘insignificant local nexus’ is. In the combination of Nippon Steel Corporation with Sumitomo Metal Industries Ltd., although the CCI has decided that the transaction was not likely to have any appreciable adverse effect on competition due to insignificant size of the combined operations of both the companies in India, but the Order does not explains as to how the de minimus threshold criteria was met despite the insignificant local nexus.

6) Combinations taking place outside India:

Section 32 of the Competition Act, 2002 gives CCI, the power to enforce provisions of The Competition Act, 2002 against foreign entities whose actions have ‘appreciable adverse effect’ on competition in the relevant market in India. In case of a combination which is straight and obvious CCI can suo moto take cognizance of that combination and can serve the show cause notice to the parties However, the mala fide transactions are not always straight and obvious. In case of such indirect acquisitions which fall under Section 5 of the Act, it would be interesting to see how the CCI will track those transactions. Such kind of transactions takes place in tax heaven countries where the local government helps such transactions by not sharing the information about the parties to the transaction.

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21 Third World Resurgence No. 259, March 2012, pp 9-14