ANALYSIS OF MERGER CONTROL UNDER INDIAN COMPETITION LAW

PROJECT REPORT
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PROJECT GUIDE

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DISCLAIMER

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INTRODUCTION

Merger is amalgamation of two or more business enterprises for better and efficient functioning. Entities merge for different business and commercial reasons, few of those could be, to achieve economies of scale and scope, to expand business capacity, to be operative in different markets, to produce at lowest marginal cost and various others. Though mergers being normal and regular practice in the market; there could be many reasons why Governments, market players, shareholders and individuals might object to mergers. Governments may object mergers because it may be against the industrial or foreign policy, or a transaction which could lead to production of illegal quality or quantity of a particular product. Market players might object to a merger transaction, at it could lead to monopoly or could create barriers to entry and similar anti-competitive practices. Shareholders might oppose to mergers which result in reduction of share value or share effectiveness or transaction. Similarly, individuals could oppose to a transaction which might result in higher market prices, decrease in quantity or quality of goods and other analogous practices. Hence, a merger transaction could result in adversely affecting competition and therefore merger control is required. Merger control is based on the preventive theory and generally operates ex ante, i.e. to prevent a transaction adversely affecting competition, before it is put into practice. Also, practically, cost of de-merging entities after the merger transaction is very heavy and not an easy operation for competition and other regulatory authorities.

International trade and commercial activities have been increasing in recent past, as singular nation states do not possess all requirements for efficient and cheap production of commercial products. This has resulted in increase in cross-border merger transactions between nations, and has become almost imperative for nation states to have merger laws which are in concord with the international trade community. This paper will attempt to briefly examine the important principles under competition regimes of developed jurisdiction such as US, EU and UK and of developing jurisdiction such as South Africa and India. This author will try to analyze the recently implemented merger laws of India and will compare them with the other mentioned jurisdictions. The author will at the outset list down in brief the laws and other important principles controlling merger transactions in these jurisdictions. Along with this, the author will try to explain different types of mergers and will elaborate on effects and consequences of these merger transactions. The author will then attempt to elucidate on important aspect of threshold limits in different jurisdictions and would point out ways in which Indian and other jurisdictions deal with mergers above and below the threshold limits. In conjunction, the author will importantly explicate substantive tests used for assessment of mergers in these jurisdictions and the factors considered by competition authorities before deciding the fate of
mergers. The author will also look into the much debated aspect of control of joint ventures under merger laws and will examine how different jurisdictions have dealt with the same. In lieu of conclusion, the author will provide certain recommendations and proposal which could be deliberated and adopted in the developing Indian competition merger regime.
RESEARCH METHODOLOGY

AIMS AND OBJECTIVES

This paper is an attempt to examine the merger laws and regulation in India and other jurisdictions such as United States (‘US’), European Union (‘EU’), United Kingdom (‘UK’) and South Africa.

RESEARCH QUESTIONS

This project will explore the answers to certain questions with specific reference to the period being studied, including:

- What are the existing laws and regulations on merger control in these jurisdictions?
- What are the different types of mergers and what are their effects on competition?
- What are the thresholds limits and substantive assessment procedures for determining fate of mergers in these jurisdictions?
- How are joint venture transactions dealt under competition law by these jurisdictions?

SCOPE AND LIMITATIONS

This paper is limited to the issues surrounding types of merger, thresholds for mergers and joint ventures, and other factors considered for permitting or blocking mergers. Due to constraints of space and time, the researcher has not extensively gone into the procedural requirements while inspecting mergers, but rather has dealt with these subjects only to the extent that they are required to explain the arguments put forth.

METHOD OF WRITING

This paper has largely been written in an analytical style.

SOURCES OF DATA

The researcher has predominantly referred to primary sources, such as statutes, regulations and guidelines, in the course of writing this paper, and has also referred to a few relevant commentaries and observations of jurists and experts in order to elucidate his arguments.
MODE OF CITATION

A uniform mode of citation has been used throughout this project, based loosely on the style specified in *THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION* (Columbia Law Review Ass’n et al. eds., 18th ed. 2000).
Merger Control under US antitrust regime is well developed. Sherman Act of 1890 was the first statute that governed antitrust practices in US. Though this act largely regulated illegal trade and monopoly practices, it also provided for governing combination of trusts which led to illegal trade practices. However, this was not clear and explanatory. A wide-ranging statute, i.e. the Clayton Act, was enacted to fill up the gaps left by this act. Clayton Act was passed in 1914 is the principle statute governing mergers and acquisitions in US. The Clayton Act prevents any merger or acquisition which ‘may substantially lessen competition or tends to create monopoly'.

A subsequent legislation, i.e. The Hart-Scott-Rodino Antitrust Improvements Act, 1976 (HSR Act), which amended certain provision of the Clayton Act, provided for two agencies to look into the merger activities in US. Two federal agencies viz. the Federal Trade Commission and the Antitrust Division of Department of Justice are empowered by the HSR Act to review into the mergers and acquisitions having antitrust implications. The Antitrust Division looks into the implementation of Sherman Act, whereas the Federal Trade Commission has joint authority along with the Antitrust Division for enforcement of Clayton Act. Generally, only one of the two agencies looks into a particular merger or acquisition. Over a period of time, certain other statutes, and guidelines have been passed to control merger transactions.

Similar to the US, the competition merger laws are highly developed in UK. Chief legislation controlling mergers in UK is the Enterprise Act, 2002. Unlike the US, this is Act along with other guidelines and regulations, is the sole legislation under competition law to control merger transactions. This Act repeals the earlier provisions regarding merger regulations set out in Fair Trading Act, 1973. The Enterprise Act provides for two body structure i.e. the Office of Fair Trading and Competition

1 United States, The Sherman Act, 1890, sec 1, 2
3 Important introduced to settle the ‘rule of reason’ debate initiated by the Supreme Court in Standard Oil Co. v. United States, 221 U.S. 1 (1911)
4 United States, Clayton Act, 1914, sec 7
6 Global Competition Review (GCR), Merger Control, 8th ed., 2004, 293
7 Id; See also Hart-Scott-Rodino Antitrust Improvements Act, 1976, sec 18 explanation by Legal Information Institute, Cornell University Law School available at http://www.law.cornell.edu/uscode/15/ussec_15_00000018----000.html (last visited on October 30th, 2011)
Commission to inspect in mergers which ‘substantially lessen competition’. The Office of Fair Trading may refer a merger to the Commission if it believes that there is or there may be substantial lessening of competition. The Commission inspects the referred merger to check its anti-competitive effects. If Commission concludes that the merger is anti-competitive in nature, it has power to determine remedy, prevention or mitigation.

Another developed system of merger control is seen in the European Union. The European Commission Merger Regulation (‘ECMR’) which was enforced in September, 1990 is the primary legislation governing large scale mergers in the European Union. The Regulations provide for various control and mechanisms to ensure no anti-competitive activities are caused due to mergers. Since, its enforcement, the regulations created Merger Task Force, which was a regulating body to inspect into merger activities. However, subsequently, this Task Force has been replaced by sector specific units with integrated merger control competence. The ECMR prevents Member states from applying national laws over cross-border merger transaction. Once a merger application is initiated under ECMR, one stop solution is provided by the Commission and national laws are subdued.

Amongst the developing nations, competition law has gained momentum in South Africa and is highly valued. The South African competition law has been substantially codified through the Competition Act of 1998. This Act along with the regulations and certain amendments came into force in February, 2002. Various subsequent rules and regulations have been issued by the authorities to supplement the enforced legislation. The Act creates three enforcement agencies viz. the Competition Commission, the Competition Tribunal, and Competition Appellate Court which inspect into prevention of anti-competitive practices.

Almost after a decade of undertaking economic reforms, India enacted a new competition law to replace the earlier Monopolies and Restrictive Trade Practices Act of 1969. A new Competition Act was legislated in 2002 and was partly enforced since 2003. The provision regarding merger control and merger regulations were enforced after detailed deliberations in June 2011. The Act provides for constitution of Competition Commission which is the focal regulatory body to check anti-competitive

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9 United Kingdom, The Enterprise Act, 2002, sec 44, 45; Substantial lessening of competition (‘SLC Test’) provided in sec 35, 36;
10 United Kingdom, The Enterprise Act, 2002, sec 41
13 Id at sec 26
14 Id at sec 36
practices. The Act also provides for creation of an Appellate Tribunal which is empowered to hear appeals from the orders of the Commission. Provisions for appeal to the Supreme Court have also been provided from the orders of Appellate Tribunal, have also been included in the legislation.

As understood from above laws governing merger transactions in different jurisdictions, the recently introduced laws in the developing regimes have adopted system of providing all factors regarding merger control in single legislation, unlike the US, which provides for merger control under competition law in at least three different statues. Both, South Africa and India, have followed the EU and UK procedure of issuing guidelines or regulations, in furtherance of the provisions in the main statute. These jurisdictions have also provided for two to three quasi-judicial regulatory bodies which are empowered to adjudge over the actions and transactions carried out by different players. The paper will now examine what mergers are, different types of mergers and how these jurisdictions act towards merger.

16 India, The Competition Act, 2002, sec. 7
17 Id at sec 53A
MERGER AND ITS TYPES

A true (or full) merger involves two separate undertakings merging entirely into a new entity. However, under competition law, the term ‘merger’ is used in a wider sense to mean and include amalgamation, acquisition of shares, voting rights, assets or acquisition of control over enterprise. In an extensive ambit, the term merger is a transaction that brings change in control of different business entities enabling one business entity to effectively control a significant part of assets or decision making process of another. An effective control through any form of acquisition mentioned above, amounts to merger as per the ECMR guidelines if there is a ‘possibility of exercising decisive influence’ by the acquiring firm over the acquired. In various decision, the European Commission has determined that the question, whether a particular transaction results in a merger (or concentration as used in the ECMR) is to be determined by analyzing, if the market in future will function less competitively than it did prior to merger. Similarly, the Indian Competition Act uses the terminology ‘causes or likely to cause appreciable adverse effects on competition’ to determine the veracity of a transaction.

Mergers are classified on the basis of the position of merging parties in the economic chain prior to the merger. The most common type of merger is horizontal merger. Horizontal merger occurs when actual or potential competitors of the same product and market and at same level of production or distribution merge. A transaction between two entities ‘A’ and ‘B’ producing the same product ‘x’, to form new entity for better production the product ‘x’ is horizontal merger. The other type of mergers i.e. the non-horizontal mergers include vertical mergers and conglomerate mergers. Vertical merger occurs when two entities which operate at different but complimentary levels of production chain. Hence, a merger between a raw material supplier and manufacturer of final product from that raw material is a vertical merger.
material is a vertical merger. Vertical merger may have backward integration, as the example given above of transaction between supplier and manufacturer and can also be forward integration, for example, between the manufacturer and retailer. Conglomerate mergers are mergers between entities which are not linked or connected in any form. These entities are neither competitor in market nor are vertically connected for manufacturing of particular product. Conglomerate mergers in economic sense can be classified further as: a) pure conglomerate, where merging entities are not connected in any manner; b) product extension merger, where the product of the acquiring entity is complementary to that of acquired entity, and c) market extension merger, where the merging entities seek to enter into a new market.

- **Horizontal Mergers**

As seen from the explanation above, horizontal mergers are considered as most blemish to competition than the other type of mergers. These mergers have effect on market concentration and use of market power as they lead to, a) reduction in number of market players, and b) increase the market share of the merged entity. The European Commission’s Horizontal Merger Guidelines also mention two similar conditions where horizontal merger affect healthy competition in the market. These conditions are creation or strengthening of dominant position of one firm having high market share post-merger. The second being reduction in competition restraints which existed pre-merger.

The ICN Merger Guidelines Workbook (‘Workbook’) produced by a Subgroup of International Competition Network, states theories of competitive harm through mergers, having coordinated or non-coordinated effects. As explained in the EC’s Horizontal merger guidelines, and Office of Fair

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27 *Id*; See Tiwari, *Supra* note 25

28 Whish, *Supra* note 19 at 800

29 Tiwari, *Supra* note 25


32 *Id*

33 *Id*

Trading (‘OFT’) guidance[^35] and United Kingdom’s Competition Commission (‘CC’) Guidelines[^37], anti-competitive effects arising post-merger, but due to non-coordinated action by market players are known as non-coordinated or unilateral effects. The most common non-coordinated effect of a merger arises when post-merger, the market players are reduced in number and their market power increases, due to which they are vastly empowered to increase profit margins or able to reduce output, quality or variety.[^38] For example, if there are three market players viz. ‘A’, ‘B’ and ‘C’ and merger occurs between two of them to form ‘AB’, the number of competitors in the market is reduced and market share of the players increase post-merger. Now, if ‘AB’ increases profit margin, and customers start preferring ‘C’; ‘C’ may also increase its profit margin due to its position in the market post-merger. This situation is referred as ‘non-collusive oligopoly’ in paragraph 25 of EC Horizontal Merger Guideline, where with little or no coordination, the market players are in a position to act such that consumer interest is at detriment.[^40] The ICN Workbook, the EC’s Horizontal Merger Guideline, OFT guidance and CC Guidelines explain various factors which may be relevant in determining whether non-coordinated effects might occur due to merger. The list being only illustrative in nature, mention a range of factors such as high market concentration, restricted consumer choice, weak competitive constraints from other market players, buyer power, elimination of potential competitor or new entrant, amongst others.[^41]

Coordinated effects arising out of mergers have also been explained by the ICN Workbook, and other state legislations. Coordinated effects arise where competitive constraints amongst the market players are reduced post-merger, thus creating or strengthening the situations whereby the players are able to


[^38]: ICN Workbook, Supra note 34 at 39, ¶ C.4; Other non-coordinated effects can also arise from merger as mentioned in ICN Workbook at 40, ¶ C.8 ‘Unilateral effects can also arise in other contexts, including bidding or auction markets, where different firms compete to win orders. The specific model used will vary depending upon the circumstances of the market, but should have a common thread of attempting to assess whether there is any increase in market power as a result of the merger, for example, by combining the two lowest-cost bidders and thus allowing the merged firm to win with a higher bid.’; See also Whish, Supra note 19 at 808.

[^39]: Whish, Supra note 19 at 808

[^40]: EC, Horizontal Merger Guideline, 2004, ¶ 25

[^41]: ICN Workbook, Supra note 34 at 42-43; OFT guidance ¶ 4.26, 4.27; UKCC guidelines, ¶ 3.58; Whish, Supra note 19 at 859; Parisi, Supra note 31 at 13
coordinate their competitive behavior. The Horizontal merger guideline explains that situations may arise, where players without entering into an agreement behave in a coordinated way, towards price fixation, levels of production, expansion of capacity, allocation of markets or contracts in bidding markets. Three important factors have been explained by ICN Workbook and various other legislations including the U.S. Horizontal Merger Guidelines, which are relevant to determine whether coordination effects have occurred due to merger are: a) market transparency must make it possible for the coordinating firms to monitor whether the terms of coordination are followed, b) existence of credible deterrents for the firm to maintain the coordinated policy, and c) no retort from competitors or consumers that would imperil the coordinated policy. Apart from these factors, other aspects such as past coordination or coordination in similar markets may be considered.

- **Non-Horizontal Mergers**

It is generally acknowledged that non-horizontal mergers do not cause harm to competition in the market. The European Commission has issued Non-Horizontal merger guidelines in the year 2007, which also recognize that non-horizontal mergers are less likely to significantly impede competition. The UK’s OFT guidelines also mention the progressive effects to non-horizontal mergers. However, these guidelines also state that there can be circumstances where non-horizontal mergers cause anti-competitive effects. Examining vertical mergers, two possible anti-competitive effects that could arise are: a) non-coordinated effects likely to cause foreclosure of other market players, and b) coordinated effects carried out by the merger entity. Non-coordinated effects are chiefly classified as input foreclosure and customer foreclosure. Input foreclosure occurs when the merged entity is likely to restrict products or services in the downstream market for other market players, thereby increasing their cost of production, leading to higher costs for consumers. Customer foreclosure occurs when the supplier integrates with a customer base in the market, thereby depriving others players’ access to

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42 ICN Workbook, *Supra* note 34 at 45
43 EC *Horizontal Merger Guideline*, 2004 at ¶ 40
45 EC *Horizontal Merger Guideline*, 2004, ¶ 43; Whish, *Supra* note 19 at 861
46 Whish, *Supra* note 19 at 808
48 OFT guidance ¶ 5.3, 5.4
49 EC *Non-Horizontal Merger Guidelines*, 2007, ¶ 18; OFT guidance ¶ 5.4
50 EC *Non-Horizontal Merger Guidelines*, 2007, ¶ 19; OFT guidance ¶ 5.4; See Whish, *Supra* note 19 at 808
51 EC *Non-Horizontal Merger Guidelines*, 2007, ¶ 34
customers.\textsuperscript{52} Coordinated effects may occur in non-horizontal mergers. However, the factors to determine whether coordinated effects have occurred, are the similar to that present in horizontal mergers.\textsuperscript{53} Conglomerate mergers also have minimal anti-competitive effects, however, three concerns arising out of these kinds of these mergers have been detailed by the OFT guidance.\textsuperscript{54} Firstly, conglomerate mergers may lead to market domination over various portfolio of products in market. Secondly, such merger may lead to anti-competitive practices such as predation,\textsuperscript{55} and thirdly it may lead to coordinated behaviour in the market.\textsuperscript{56}

\textsuperscript{52} EC Non-Horizontal Merger Guidelines, 2007, ¶ 58
\textsuperscript{53} Whish, Supra note 19 at 867; EC Non-Horizontal Merger Guidelines, 2007, ¶ 79-90
\textsuperscript{54} OFT guidance ¶ 6.1
\textsuperscript{55} OFT guidance ¶ 6.2,6.3
Threshold limits are important aspect of all competition policies, as these limits determine which transaction is to be notified to or which needs to be reviewed by the competition authorities. The ICN Recommended Practices on Merger Notification Procedures, state that threshold limits should be clear, understandable and determined on objectively quantifiable criterion and information.\(^5\) The laying down of threshold limit also eases the pressure of competition authority of inspecting all mergers, as done in mandatory notifying systems and allows the authorities to focus only on most likely mergers to affect transactions.\(^6\) It is important to note that threshold limits are used in order to provide a straightforward mechanism in determining the jurisdiction of competition authorities over a transaction and should not be considered as means of substantive assessment over the transaction.\(^7\)

Different jurisdictions have set out different threshold limits in the terms of assets, sale, turnover etc of the undertakings involved. In spite of there being difference in criterions, the ICN practices suggest that sufficient assets or sales of the undertakings involved in the transactions should be within the territorial limits of the country where authority is exercising jurisdiction.\(^8\) This is also known as the local nexus provision.

In United States, the HSR Act has set out three ways of determining jurisdictional thresholds. The first is ‘the commerce test’, which states that if the undertakings involved in the transaction i.e. either the acquiring or the acquired party are engaged in US commerce or any activity affecting US commerce, then the authorities have power to inspect.\(^9\) The second is the ‘size of transaction test’ which states to look into the voting securities or assets that will be held by acquiring party through the proposed transaction.\(^10\) This test has been simplified by the 2001 amendment of HSR Act, which now states that the competition authorities will intervene only if the aggregate value of voting securities or assets held by the acquiring party exceeds US$ 50 million.\(^11\) The third and important method of determining jurisdictional threshold is the ‘size of parties’ test. This test looks at size of the parties involved in the transaction and is satisfied if one party has worldwide sales or assets of US$10 million or more and the

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\(^{5}\) OFT guidance ¶ 6.4, 6.5
\(^{7}\) Goldberg, *Supra* note 30 at 96
\(^{8}\) Whish, *Supra* note 19 at 828
\(^{9}\) HSR Act, 1976, sec 7A(a)(1)
\(^{11}\) HSR Act, 1976, sec 7A(a)(2)
other has worldwide sales or assets of US$100 million or more.\textsuperscript{64} It is important to note that the terms of acquired party and acquiring party have been given, very wide understanding in the law and include entire corporate family of the parties involved.

In contrast to the US law, the EU law only looks at turnover as an important aspect for determining jurisdictional threshold. The ECMR for large-scale transactions provides that authorities will have jurisdiction if the aggregate worldwide turnover of the parties exceeds €5 billion and the Community wide turnover of each of at least two parties, exceeds €250 million unless each of the parties achieves more than two-third of its aggregate Community wide turnover in one and the same member state.\textsuperscript{65} Similarly, for small scale transactions the ECMR will intervene if the aggregate worldwide turnover of the parties exceeds €2.5 billion and the Community wide turnover of each of at least two parties exceeds €100 million and in each of at least three member states, the aggregate turnover of all the parties exceeds €100 million and in these three member states, the turnover of each of at least two parties exceeds €25 million unless each of the parties achieves more than two-third of its aggregate Community wide turnover in one and the same member state.\textsuperscript{66} The term turnover is understood as amount derived from the sale of products or provision of services in the preceding financial year.

Similar to the EU law, is the law in UK. However, the jurisdictional tests laid in Enterprise Act of 2002 are much simpler. UK law also mainly follows the turnover test, where a relevant merger situation is created and authorities can inspect, if the value of turnover of the enterprise being acquired exceeds £70 million.\textsuperscript{67} The turnover is determined by aggregating the total value of the turnover in UK of the enterprises which are ceasing to be distinct and deducting: the turnover in UK of any enterprise, which continues to be carried on under the same ownership or control or if no enterprise continues to be carried on under the same ownership and control, the turnover in UK which of all turnovers concerned, is the turnover of the highest value. The Act also provides for ‘share of supply’ test, whereby it states that authorities will intervene if the merger creates or enhances 25 % (one-quarter of the goods or services) share of supply or purchases in UK or in substantial part of it.\textsuperscript{68} The South African law, though largely based on the EU and the UK law, unlike these laws, talks about both turnover and assets. The South African law also differentiates small, intermediate and large mergers, which is not seen in any of the developed jurisdictions worldwide. Intermediate merger is one where if the value of the proposed merger equals or exceeds R560 million (calculated by either

\begin{footnotesize}
\begin{enumerate}
\item Id; See also FTC Premerger Notification Office, To File or Not to File-Introductory Guide, September 2008, 3 available at \url{http://www.ftc.gov/bc/hsr/introguides/guide2.pdf} (last visited on October 30th, 2011)
\item Id at art 46(3)
\item UK, Enterprise Act, 2002, sec 23(1)
\end{enumerate}
\end{footnotesize}
combining the annual turnover of both firms or their assets), and the annual turnover or asset value of the acquired party is at least R80 million.\textsuperscript{69} Similarly, if the combined annual turnover or assets of both the acquiring and acquired party are valued at or above R6.6 billion, and the annual turnover or asset value of acquired party is at least R190 million, it qualifies as large merger and the Commission has power to intervene.\textsuperscript{70}

The Indian Competition law while dealing with mergers adopts a similar approach to that of the South African law, and considers both assets and turnover while considering jurisdictional thresholds. The Commission can intervene if individually or together the acquirer and acquired party have: a) combined assets in India of INR1500 crores or combined turnover in India of INR4500 crores; or b) combined worldwide assets of US$750 million, including combined assets in India of INR750 crores; or c) combined worldwide turnover of US$2.25 billion, including combined turnover in India of INR2250 crores.\textsuperscript{71} The Commission also intervenes if the combined company group to which the acquired party will belong post-acquisition has: a) assets in India of INR6000 crores or turnover in India of INR18,000 crores; or b) worldwide assets of US$3 billion, including assets in India of INR750 crores; or c) worldwide turnover of US$9 billion including turnover in India of INR 2250 crores.\textsuperscript{72} As seen from the above explanation, the Indian law very specifically mentions different threshold limits for individual parties and group, which is not seen in other jurisdictions.

\textsuperscript{68} Id at sec 23(3) and 23(4)
\textsuperscript{69} South Africa, Merger Thresholds, April 2009 available at http://www.compcom.co.za/merger-thresholds/ (last visited on October 30th, 2011)
\textsuperscript{70} Id
\textsuperscript{71} India, Competition Act, 2002, sec 5(a)
\textsuperscript{72} Id at sec 5(b)
SUBSTANTIVE ASSESSMENT OF MERGERS

Every merger transaction would most likely have certain pro-competitive as well as certain anti-competitive effects. It is the duty of the competition authorities to balance out these effects, through substantive tests and procedures and determine whether the proposed transaction meets the requirements to be blocked. It has been determined through series of cases by the European Courts that the burden of proof is on the competition authorities to produce convincing evidence that the transaction is anti-competitive in nature. There is no presumption for or against any transaction.

In United States, the Clayton Act prohibits transactions that may ‘substantially lessen competition or tend to create a monopoly’. Subsequently various guidelines have laid down ‘test of efficiency’, which states that a merger transaction should not be blocked if it increases substantial efficiency in the market. These guidelines also state that a merger should not be permitted to proceed if it will create or enhance market power or will facilitate its exercise. Merger transactions in US are usually analyzed through the following steps: a) identification of the relevant product and geographic markets which are likely to be affected by the transaction; b) assessment of the market shares of the players involved in transaction and the degree of concentration in the market; c) identification of possible anti-competitive activities to be carried out by the resultant entity of the transaction such as predation, barrier to entry, refusal to deal etc, and d) acknowledging possible pro-competitive effects and efficiency created through the transaction such as reduction in market prices, consumer welfare etc.

The European Commission’s guidelines on merger regulation, similar to the US Law, prohibit any merger transaction which would ‘significantly impede effective competition in common market or in substantial part of it’. The ECMR guidelines lay special importance to check creation or strengthening of dominant position by the resultant entity of the proposed transaction. Similar, to the approach of the US antitrust agencies, the ECMR guidelines also provide for analysis of the relevant market to be affected by the said transaction and the market shares of the players involved in the transaction. As per the Merger Regulation of 1989, the authorities relied on test, whether the merger would create or strengthen a dominant position, which would ‘substantially lessen competition’ (the ‘SLC Test’). Hence, creation of a dominant position was a necessity to block a

73 Whish, Supra note 19 at 849
74 Shinder, Supra note 62
75 Id
76 US, Clayton Act, 1914, sec 7
77 US, FTC guidelines, Supra note 44 at 29, ¶ 10
79 EC Merger Regulations, 2004, art 2(1)
merger transaction. However, it was very critically fricasseed that there would certain situations in which in spite of not being in dominant position, a merged entity could cause significant harm to competition and such harmful mergers could not be challenged under ECMR. The 2004 amendment to the regulations, removed market dominance as the exclusive test and empowered the authorities to block any merger which would ‘significantly impede effective competition’ (the SIEC Test). The guidelines also provide for ‘appraisal criteria’, whereby the authorities also look into a checklist of factors that should guide the Commission, few of them being: interest of consumers, development of technical and economic progress, alternative players and products in the market etc. The United Kingdom also follows similar approach in inspecting mergers and uses the SLC test in analyzing the pro-competitive and anti-competitive effects of a merger transaction. The antitrust authorities have laid down various procedures for analyzing merger transaction. The OFT has laid down procedures in the ‘Mergers: Substantive Assessment Guidance’ and the Commission has in ‘Merger References: Competition Commission Guidelines’. The guidelines provide for methods for defining market and market infiltration. Guidelines provide for inspection into the coordinated or non coordinated effects likely to be caused by the merger, which could lead to SLC and importantly also provide for relevance of efficiencies. The efficiency test has also been laid down in the Enterprise Act which provides for decision making authorities to consider ‘relevant customer benefits’ from the merger transaction. A merger may be permitted in spite it causing SLC, if parties are able to prove efficiencies which are demonstrable, merger-specific and likely to benefit consumers. Benefit to customers would denote lessening of prices, increase of choices, betterment of quality and other analogous benefits. The OFT guidance and CC guidelines, also in certain cases recognize the ‘failing-firm defense’, where three conditions are importantly analyzed viz. first, the firm would have to exit the market, if merger transaction does not take place; second, the firm is not in a position to stabilize its operations; and third, there is no other less anti-competitive approach than the merger. The South African legislation relying on like method, lays down certain factors which the authorities should consider before clearance of merger. Few of these being: the actual and potential level of

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80 Id at art 2(1) and 2(3)
81 Whish, _Supra_ note 19 at 852
82 EC Merger Regulations, 2004, art 2(1)(a),2(1)(b)
83 UK, _Enterprise Act_, sec 35, 36
84 OFT guidance, _Supra_ note 36
85 UKCC guidelines, _Supra_ note 37
86 OFT guidance ¶ 3.12; CC guidelines ¶ 2.7
87 OFT guidance ¶ 4.39- 4.35; CC guidelines ¶ 3.26, 3.27, 4.34-4.45
88 UK, _Enterprise Act_, sec 30,sec 22(b)
89 OFT guidance ¶ 4.34
90 UK, _Enterprise Act_, sec 30(1)(a)
import competition in the market, the ease of entry into the market, the level, trends of concentration,
and history of collusion, and in the market, the degree of countervailing power in the market etc.92
Considering the socio-economic condition in the country, the South African legislation, very
significantly lays down consideration for public interest and importance to aspects such as
employment; the ability of small businesses, or firms controlled or owned by historically disadvantaged
persons, to become competitive; and the ability of national industries to compete in international
markets.93

The Indian Competition which has largely followed the European and UK law prohibits any merger
which is likely to cause ‘appreciable adverse effects on competition’.94 The law does not mention rigid
modus operandi for inspection of merger transactions. Nonetheless, it does mention various factors to be
considered by the competition authorities while analyzing a merger. These factors being similar to
those present in the South African law, inter alia provide for consideration of actual and potential level
of competition through imports; extent of barriers to entry; the degree of countervailing power in the
market; likelihood of increase in market prices by the merged entities; possibility of failing business.95
However, the Indian law, which is encircled with similar socio-economic conditions as is South Africa,
does not mention about contemplation of factors overtly,96 such as effects on employment,
competition with international counterparts or historical course of the concerned parties before
determining fate of a merger.

91 OFT guidance ¶ 4.37; CC guidance 3.61-3.63; See also Morven Hadden, ‘EC Merger Control Regime’ in Gary
92 South Africa, Competition Act, 1998, sec 16(2)
93 Id at sec 16 (3)
94 India, The Competition Act, 2002, sec. 6
95 Id at sec 20 (4)
Another important aspect under Merger regulations, which has been highly debated worldwide, is that of intrusion of Joint Ventures into these regulations. Whether joint ventures are covered under merger regulations is not a settled position of law and different jurisdictions have taken different stands on this regard. At the outset, Joint Venture may be defined as any arrangement whereby two or more parties co-operate in order to run a business or to achieve a commercial objective. The European Community law earlier provided for concentrative and co-operative joint ventures, whereby concentrative joint ventures which would meet threshold requirements, should be notified to the competition authorities. In contract, were the co-operative joint ventures, where a negative clearance was to be obtained from the competition authorities stating that, the venture would not lead to any anti-competitive practice. However, since the 2004 amendment, ECMR, provide for ‘full function joint ventures’, whereby only fully functional joint ventures which meet threshold criterion have to be notified to the competition authorities. Article 3(4) of the ECMR states three conditions to determine existence of ‘fully functional joint ventures’, these being: a) existence of joint control; b) sufficient resources, assets, and financial resources to operate its business autonomously, and c) existence for a sufficiently long duration as to bring about a lasting change in the structure of the market concerned. A joint venture which does not fulfil the above criterion is inspected to check if it goes/falls under any other competitive principle. The United States FTC and Antitrust Division of Department of Justice, has defined Joint Ventures as, ‘a set of one or more agreements, other than merger agreements, between or among competitor agencies to engage in economic activities, and the economic activity resulting there from’. Joint venture involving acquisition of assets or voting securities for a formation of a for-profit venture are subject to the HSR Act. The Indian Competition Law has not dealt with joint ventures except minor inclusions at few places. The Competition Act, till date does not provide for definition of a joint venture. The Act under section 3(3) provides for

96 India, The Competition Act, 2002, sec. 20(4)(m), uses the terminology ‘relative advantage by way of contribution to economic development’.
99 EC Merger Regulations, 2004, art 2(4)
100 Whish, supra note 19; Desai, supra note 98
applicability of *per se* rule whereby certain activities such as price maintenance, division of market shares, bid rigging, collusive bidding and other like activities are presumed to be illegal and anti-competitive in nature. However, here the Act mentions about joint ventures and provides that any agreement entered into by the way of a joint venture shall not be presumed to be anti-competitive if it increases efficiency in production, supply, distribution etc. As noted above, section 5 of the Act provides for acquisition and control and section 3 provides for anti-competitive agreements. A proposed joint venture transaction may fall within the ambit of section 5 if it met the threshold limits, else, it could as well be challenged under section 3 for an agreement being anti-competitive in nature, hence creating an ambiguity over the status of a proposed joint venture.

A certainty over the status of joint venture needs to be elucidated by the Indian Competition Law. If the joint ventures are treated as acquisitions, as done, under the American law, where if two or more parties contribute to form a new company, and as a result receive voting securities of this new company, the contributing parties as treated as acquiring party and the new company in treated as acquired party, then the procedure under section 5 and 6, needs to be followed, which involves, prior consent if the relevant turnover thresholds are satisfied. It is also to be noted that treating such transaction within the ambit of section 3, would increase the burden on the Competition Commission, as the possibility of complaints arising under section 3 is much higher.

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102 India, Competition Act, 2002, sec 3(3)
103 *Id*
104 Desai, *Supra* note 98
CONCLUSION

The Indian Competition Law has largely developed its lineage from the developed jurisdictions such as the EU and US and is in fidelity with these laws. The law amongst other provision regarding merger control provides for definite threshold limits, the factors to be taken into consideration before determining the fate of a merger, prescribed time period for merger notification and the remedies. These provisions help the Competition authorities to work towards its duties of preventing adverse effects on competition, protecting interest of consumers and ensuring freedom of trade. However, there are certain factors which need to be deliberated upon and need further skilled escalation. Importantly, amongst these is a need for lucid and cogent guidelines or strategy principles on types of mergers and there effects. Like the EU or US guidelines of horizontal and non-horizontal mergers, which also prescribe for coordinated and non-coordinated effects caused by mergers, the Indian law should also try to provide for similar.

An essential facet with regard to merger regulations is with respect to setting of threshold limits. Though the Indian law, being progressive in nature mentions both individual and group while describing thresholds, needs to mull over the fact that setting monetary thresholds needs timely restructuring, as the economic and commercial factors keep shifting very rapidly in developing countries like India. The developed jurisdiction have clutched the intricacies of changing economies and market structures which is yet to be confronted and brazened out by India. Also, setting out threshold limits could result in a situation, where small merger which do not meet the monetary requirements to be inspected by the Commission, would come into operation with a possibility of having adverse effects on competition. The law needs to ensure that in spite not meeting threshold requirements, if a transaction affects competition, the Commission should have adequate authority to take action against such transactions.

Another important factor is of clarification on the trepidation of joint ventures. Whether joint ventures are treated under section 5 as merger transactions or under section 3 as anti-competitive agreements needs to be expounded. Both the possibilities having certain gains and certain setbacks, this concern needs apposite and accurate assessment.

Certain definitions like that of failing firm, insignificant local nexus etc need to be provided by the Indian authorities.

Moreover, the Indian Competition law like South Africa and other nations needs to ascertain on crucial concerns of employment, benefits to previously deprived and abandoned entities and very importantly, ability of national entities to compete in international market amongst players from different developed and developing countries. With public interest at roots of every competition law
regime, these factors play a very essential role in development and acceptance amongst the market players and consumers. Hence, the Indian Competition Law should deliberate and resolve these issues for smooth and effective functioning.
BIBLIOGRAPHY


