DISSENTATION ON

IMPLICATION OF THE COMPETITION ACT, 2002 ON CROSS BORDER MERGER: AN INDIAN PERSPECTIVE

UNDER GUIDANCE OF

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Bhagwati Dan Charan
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CHAPTER-1

INTRODUCTION
Mergers and acquisitions (M&A) have been an important element of corporate strategies across the world for several decades. These have been used to gain or increase the margin of profits or revenue of the buying company by merging with or acquiring the target company. There are different ways of mergers and acquisitions that can be followed depending on the buying company's strategy. The different aspects that are associated with any M&A process include the choice of merger and acquisition, target company business valuation, financing M&A, motives behind M&A and effect on management.¹

The term ‘merger’ is not defined under the Companies Act, 1956 (the ‘Companies Act’), the Income Tax Act, 1961 (‘ITA’) or any other Indian law. In Black's Law Dictionary (Eighth Edition), the definition of merger has been provided as, “Merger means the act or an instance of combining or uniting”.² It also defines the merger of corporation as “The absorption of one organization that ceases to exist into another that retains its own name and identity and acquire the assets and liabilities of the former”³. It can be said that merger is a combination of two or more enterprises whereby the assets and liabilities of one are vested in the other, with the effect that the former enterprise loses its identity.

Simply putting, a merger is a combination of two or more distinct entities into one; the desired effect being not just the accumulation of assets and liabilities of the distinct entities, but to achieve several other benefits such as, economies of scale, acquisition of cutting edge technologies, obtaining access into sectors / markets with established players etc. Generally, in a merger, the merging entities would cease to be in existence and would merge into a single surviving entity.⁴ In India the Companies Act, 1956 provide the provisions related to amalgamations (Section 390 to 396 of the Companies Act, 1956). These provisions elucidate the procedure by which the scheme of merger and amalgamation can take place.

² Black’s Law Dictionary, (Eighth Edi.), pg. 1009.
³ Ibid.
Cross border merger is a term which means merger of two or more corporations/organizations which are incorporated in two different countries. The Companies Act, 1956 prohibits the cross border merger. The Companies Act, 1956 provides the scheme of merger only for the companies which are incorporated in India. However, the Companies Bill, 2011 which is pending before the parliament which specifically provides for the regulations related to the cross border mergers. The proposed bill provides provisions for both inbound\(^5\) as well as outbound\(^6\) merger.

From last few decades after introducing the scheme of globalization, liberalization, privatization, in 1990s, a great need of cross border merger was realized by India, to become an active participant at the international economic market. With that objective only many cross border mergers have taken place in India and outside India, such as merger of Tata Steel (India) and Corus (U.K.), Hindalco Industries (India) and NovelisInc (USA) etc. Therefore, a question arises that if the Companies Act, 1956 does not deal with the provisions related to cross border merger then which law in India provides procedure for the same. Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations, 2000 (FEMA Regulations) is the law which deals with the procedure by which cross border merger can take place for India. This act deals with the procedure by which a person who is ‘non-resident of India’\(^7\) can invest in India through FDI Policy and an Indian can invest in any of the foreign company. There are some restrictions which have been imposed on the person resident outside India as to who can invest or to whom a person resident of India can make investments. Persons who are non-resident of India (other than the citizens of Bangladesh or Pakistan or Sri Lanka) or an entity outside India, whether incorporated or not, (other than an entity in Bangladesh or Pakistan) may purchase shares or convertible debentures of an Indian company under Foreign


\(^6\)Outbound Merger means, the Companies which has origin in India and making and initiative in investments in the foreign based companies. Available at: http://layman-blog.blogspot.in/2010/04/top-10-outbound-merger-and.html, Last visited on: 7.05.2012

\(^7\)Reg. 2 (vi), Foreign Exchange Management (Deposit) Regulations, 2000:

‘Non-Resident Indian (NRI)’ means a person resident outside India who is a citizen of India or is a person of Indian origin.
Direct Investment Scheme subject to the specified terms and conditions. Accordingly, the Registered Foreign Institutional Investors may purchase shares or convertible debentures of an Indian company under Foreign Direct Investment Scheme, subject to the specified terms and conditions.

Along with FEMA regulations, another law in India which deals with the provisions related to the cross border merger is the Competition Act, 2002. The Competition Act, 2002 deals with the provisions related to anti-competitive agreement, abuse of dominant position and regulation combination. The provisions of the act specifically deal with the combinations of two or more enterprises whether all of them are incorporated in India or any one or more but not all are incorporated outside India. The Competition Act, 2002 also deals with the provisions under which this Act will be applicable on every activity which creates appreciable adverse effect on competition in the relevant market in India, even if such activity has taken place outside India.

The present paper specifically studies the implications of the provisions of the Competition Act, 2002 on the cross border merger. The paper tries to explain the provisions of the Competition Act, 2002 related to combinations and effect doctrine, compare the Indian laws for cross border merger with the laws of EU, and U.S.A. with the help of judicial pronouncements.

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8 Reg.5 (1), of the Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations, 2000
9 Reg. (iii) of the Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations, 2000: 'Registered Foreign Institutional Investor (FII)' means the foreign institutional investor registered with SEBI.
10 Reg. 5 (2) of the Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations, 2000
11 Section 5, ‘The Competition Act, 2002’. 
**RESEARCH PROBLEM:**

When it comes to the cross border merger in India, the following issues arise:

- If the Companies Act, 1956 does not allow or provide procedure for Cross Border Merger, which Law in India provides provisions for the same?

- How does the Competition Act, 2002 prevents the market from any activity which takes place outside India but has adverse effect on the competition in the relevant market in India?

**RELEVANT QUESTION:**

Following are the relevant questions which arise in the present research:

- What is procedure for a cross border merger in India?
- What are the effects of the cross border merger if it takes place?
- What is effect doctrine under The Competition Act, 2002 and how it is applicable to the activities which are taking place outside India but has adverse effect on the competition in the relevant market in India?

**AIMS & OBJECTIVES OF THE STUDY:**

Following are the objectives of the study:

- To know which Law in India deals with the provisions related to cross border merger.
- To know the procedure by which cross border merger takes place in India.
- To know the effects of the cross border merger, if it takes place.
- To understand the effect doctrine and how it comes into application.
- To also look into the foreign jurisdiction such as U.K, EU, related to the cross border merger and the effect doctrine.

**SCOPE:**

The writer has confined the scope of the study to the procedure and effect of the cross border merger along with the implications of the Competition Act, 2002.
CHAPTER-2

CROSS BORDER MERGER IN INDIA
As already stated, according to the Black's Law Dictionary, "Merger means the act or an instance of combining or uniting".\textsuperscript{12} It also defines the merger of corporation as "The absorption of one organization that ceases to exist into another that retains its own name and identity and acquire the assets and liabilities of the former"\textsuperscript{13}.

The history of the high merger activities in India may be documented in five major periods or waves. The first wave occurred in the early part of the 20th century, when the companies undertook M&A activities with the explicit objective of dominating their industries and creating monopolies.\textsuperscript{14} The second wave coincided with the rising market of 1920s, when the firms again embarked on M&A activities as a way of extending their reach into new markets and expanding their market share.\textsuperscript{15} The third wave occurred in 1960s and 1970s, when the firms focused on acquiring firms in other lines of business, with the intent of diversifying and forming conglomerates.\textsuperscript{16} The fourth wave occurred in the mid 1980s, when the firms were acquired primarily for restructuring assets. This wave ended as deals became pricier and it became more difficult to find willing lenders.\textsuperscript{17} The era of reforms under the then prime minister saw the emergence of large scale corporate ambition and the last fifth wave occurred towards the end of 1990s when the firms focused on the acquired firms with the aim of restructuring. It saw the commencement of the selling of the non-core businesses.\textsuperscript{18}

Cross Border Merger is a merger between two or more organizations of different countries. In India 1991 was the year when for the first time India opened its economy at the global level and put its steps towards liberalization, privatization and globalization. The trade practice in India after the globalization went through radical changes from being extremely restrictive to being more competitive, global and comprehensive.

Before 1991, the question of competition never arose because there was monopoly of government in certain key areas such as telecommunication and banking etc. But post globalization, a need for competition law was felt because the Indian companies at that time were

\begin{itemize}
  \item \textsuperscript{12} Black’s Law Dictionary, (Eighth Edi.), pg. 1009.
  \item \textsuperscript{13} Ibid.
  \item \textsuperscript{14} Manthan India,Cross Border Mergers and Takeovers: Recent Trends, Available at: http://manthanindia.blogspot.in/2007/08/cross-border-mergers-and-takeovers.html, Last visited on: May, 9, 2012.
  \item \textsuperscript{15} Ibid.
  \item \textsuperscript{16} Ibid.
  \item \textsuperscript{17} Ibid.
  \item \textsuperscript{18} Ibid.
\end{itemize}
aggressively looking at North American and European markets to spread their wings and become global players in the true sense. At this stage of development one of the major responsibilities of the government was to promote and maintain a favourable atmosphere for international trade.

Generally in India the merger and amalgamation of two or more companies is dealt by The Companies Act, 1956. However, with regard to the cross border merger, the Companies Act, 1956 does not provide any provision elucidating the procedure for the same. It also specifically states that the provisions of the Companies Act related to the merger and amalgamation is only for those companies which are eligible to be wound up under this Act only. However, as the government of India has realised the need of the provisions related to the cross border merger, the Companies Bill 2011, which is pending before the Parliament, talks about the scheme of merger and amalgamation of the companies and provides specific clauses which state that the provisions which deal with the scheme of merger and amalgamation will also be applicable to the foreign companies which are notified by the central government.

The specific clause also states that there is a need for the prior approval of the Reserve bank of India for a foreign company to be merged with a company incorporated in India and vice versa. The explanation also specifically clarifies that the term ‘foreign company’ which has been used in the provisions as the company which has been incorporated outside India and not necessarily having place of business in India.

It is necessary to note that even after the Companies Bill, 2011 comes into existence, it does not serve the purpose of the issues such as competition and the effect of the cross border

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19 Section 390 (a), The Companies Act, 1956.
20 Clause 234. (1), The Companies Bill, 2011:
   The provisions of this Chapter unless otherwise provided under any other law for the time being in force, shall apply 
   mutatis mutandis to schemes of mergers and amalgamations between companies registered under this Act and 
   companies incorporated in the jurisdictions of such countries as may be notified from time to time by the Central 
   Government:
   Provided that the Central Government may make rules, in consultation with the Reserve Bank of India, in 
   connection with mergers and amalgamations provided under this section.
21 Clause 234 (2), The Companies Bill, 2011:
   Subject to the provisions of any other law for the time being in force, a foreign company, may with the prior 
   approval of the Reserve Bank of India, merge into a company registered under this Act or vice versa and the terms 
   and conditions of the scheme of merger may provide, among other things, for the payment of consideration to the 
   shareholders of the merging company in cash, or in Depository Receipts, or partly in cash and partly in Depository 
   Receipts, as the case may be, as per the scheme to be drawn up for the purpose.
22 Clause 234 (Explanation), The Companies Bill, 2011:
   For the purposes of sub-section (2), the expression “foreign company” means any company or body corporate 
   incorporated outside India whether having a place of business in India or not.
mergers. The Bill does not provide for any provision which states what will be the solution for a
situation when there is the difference between the laws of both the countries and due to such
difference the deals come to an end and cannot be completed. This kind of situation arose in the
proposed merger of the Indian company ‘Bharti enterprises’ with the South African company
‘MTN Ltd.’ Wherein due to lack of the regulatory provisions related to dual listing the deal
could not be succeeded. Therefore even if The Companies Bill, 2011 comes into existence then
also it does not provide with such provisions which deals with such situations which arose in the
deal of Bharti Enterprises and MTN Ltd as when there is one country provides for something and
other does not then what will be the procedure by which the deal can be succeeded and in what
manner both the countries must deal such situation.

In the last decade many cross border deals took place involving the Indian companies
acquiring the foreign companies. Some of the deals are as follows:

**TABLE-1**

**TOP 10 CROSS BORDERS MERGERS BY INDIAN COMPANY**

<table>
<thead>
<tr>
<th>Acquirer</th>
<th>Target company</th>
<th>Country Targeted</th>
<th>Deal value ($ Million)</th>
<th>Industry</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tata Steel</td>
<td>Corus Group Plc</td>
<td>U.K</td>
<td>12000</td>
<td>Steel</td>
</tr>
<tr>
<td>Hindalco</td>
<td>Novelis</td>
<td>Canada</td>
<td>5,982</td>
<td>Steel</td>
</tr>
<tr>
<td>Videocon</td>
<td>Daewoo Electronics Corp.</td>
<td>Korea</td>
<td>729</td>
<td>Electronics</td>
</tr>
</tbody>
</table>

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25 DLC structures are effectively mergers between two companies in which the companies agree to combine their operations and cash flows, but retain separate shareholder registries and identities. In this respect, a dual listing is quite different to a cross listing. Whereas a dual listing involves the (quasi) merger of two separate entities, a cross listing occurs when an individual company establishes a secondary listing on a foreign exchange, the most prominent arrangement being via American Depositary Receipts (ADRs).


<table>
<thead>
<tr>
<th>Company</th>
<th>Entity</th>
<th>Country</th>
<th>Amount</th>
<th>Industry</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dr. Reddy’s Labs</td>
<td>Betapharm</td>
<td>Germany</td>
<td>597</td>
<td>Pharmaceutical</td>
</tr>
<tr>
<td>Suzlon Energy</td>
<td>Hansen Group</td>
<td>Belgium</td>
<td>565</td>
<td>Energy</td>
</tr>
<tr>
<td>HPCL</td>
<td>Kenya Petroleum Refinery Ltd</td>
<td>Kenya</td>
<td>500</td>
<td>Oil and Gas</td>
</tr>
<tr>
<td>Ranbaxy Labs</td>
<td>Terapia SA</td>
<td>Romania</td>
<td>324</td>
<td>Pharmaceutical</td>
</tr>
<tr>
<td>Tata steel</td>
<td>Natsteel</td>
<td>Singapore</td>
<td>292</td>
<td>Steel</td>
</tr>
<tr>
<td>Videocon</td>
<td>Thomson SA</td>
<td>France</td>
<td>290</td>
<td>Electronics</td>
</tr>
<tr>
<td>VSNL</td>
<td>Teleglobe</td>
<td>Canada</td>
<td>239</td>
<td>Telecom</td>
</tr>
</tbody>
</table>

**INVESTMENT BY THE FOREIGN ENTITIES TO THE COMPANIES INCORPORATED IN INDIA:**

In India under the Foreign Exchange Management Act, 1999\(^{27}\) the regulations for the issuance and allotment of the shares and the securities to the foreign entity has been provided by virtue of ‘Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations, 2000.’\(^ {28}\) General guidelines has been provided by these regulation for the issuance of shares and security by an Indian entity to a person residing outside India or recording in its books any transfer of security from or to such person. “Foreign Direct Investment Scheme” contained in the schedule 1 of the said regulations, which has been issued by the RBI, has provided the detailed guidelines for foreign investment in India.

Foreign Direct Investment (FDI) flows are usually preferred over other forms of external finance because they are non-debt creating, non-volatile and their returns depend on the performance of the projects financed by the investors. FDI also facilitates international trade and transfer of knowledge, skills and technology.”\(^ {29}\)

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\(^{27}\) FEMA, 1999 was introduced with objective to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India.

\(^{28}\) The RBI has introduced these regulations in exercise of the powers conferred by clause (b) of sub-section (3) of Section 6 and Section 47 of the Foreign Exchange Management Act, 1999 ( 42 of 1999), with the objective to prohibit, restrict or regulate, transfer or issue security by a person resident outside India.

‘Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations, 2000’, specifically states that any person resident outside India or any entity may purchase shares or any convertible debentures of an Indian company under the foreign Direct Investment scheme.30 In the said provision, some of the persons or entities belonging from countries like Bangladesh, Pakistan and Sri Lanka are strictly prohibited to purchase shares or any other convertible debentures of an Indian company. Under the portfolio investment scheme any Foreign Institutional Investor may invest in the Indian Companies, by way of purchasing shares or any other convertible debentures.

The Foreign Direct Investment Scheme provides with the ways by which a foreign company can invest in the company incorporated in India. The scheme provided that a person resident outside India can purchase shares or convertible debentures issued by an Indian company.31 For that purpose there are terms and conditions has been given in the scheme, which should be followed by the foreign investor before investing in an Indian company.

The FDI Scheme provides the following three different routes by which a person resident outside India or any enterprise whether incorporated or not, outside India, can purchase shares or convertible debentures of the company incorporated in India;

a) **Automatic Route of Reserve Bank for Issue of shares by an Indian company:**

Any Indian company can issue its shares and convertible debentures to a foreign company if the Indian company is not engaged in any activities such as, banking, NBFC’s activities in finance services sector, civil aviation or any other activities which are enumerated in Annexure-A32 of Schedule 1 of the Foreign Exchange Regulations.33 The Foreign Exchange

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30Reg. 5 (1), Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations, 2000: A person resident outside India (other than a citizen of Bangladesh or Pakistan or Sri Lanka) or an entity outside India, whether incorporated or not, (other than an entity in Bangladesh or Pakistan), may purchase shares or convertible debentures of an Indian company under Foreign Direct Investment Scheme, subject to the terms and conditions specified in Schedule 1.

31Para 1, Schedule 1, Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations, 2000: A person resident outside India referred to in sub-regulation (1) of Regulation 5, may purchase shares or convertible debentures issued by an Indian company up to the extent and subject to the terms and conditions set out in this schedule.

32Annexure-A, Schedule-1, Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations, 2000: List of activities or items for which automatic route of Reserve Bank for Investment from Persons Resident Outside India is not available:

1. Banking
2. NBFC’s activities in Financial Services Sector
3. Civil Aviation
4. Petroleum including exploration/refinery/marketing
Regulation also states that the issue of shares or convertible debentures should be in accordance with the limits provided in the Annexure ‘B’ of the FDI Scheme. Annexure ‘B’ of the FDI Scheme provides with an investment cap in to which a person resident outside India can invest in an Indian company. The automatic route provides that FDI upto 100 percent is allowed in all the activities/sectors except the following which require approval of the government:

- activities/items that require an industrial license.
- proposals in which the foreign collaborator has an existing venture/tie up in India in the same field.
- proposals for acquisition of shares in an existing Indian company in some cases.
- All proposals falling outside notified sectoral policy/caps or under sectors in which FDI is not permitted.

Therefore it can be said that there are several industries in India where a foreign company does not need a prior approval for investment. The intimation to the RBI for FDI should be within thirty days of remittance while submitting the relevant forms on allotment of shares. The automatic route allows Indian companies engaged in various industries to issue shares to foreign investors up to 100 percent of their paid up capital in Indian companies.  

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5. Housing & Real Estate Development sector for investment from persons other than NRIs/OCBs.  
6. Venture Capital Fund & Venture Capital Company  
7. Investing companies in Infrastructure & Service Sector  
8. Atomic Energy & related projects  
9. Defense and strategic industries  
10. Agriculture (including plantation)  
11. Print Media  
12. Broadcasting  
13. Postal services

33Para 2 (1), Schedule 1, Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations, 2000: An Indian company which is not engaged in any activity, or in manufacturing of item included in Annexure ‘A’ to this Schedule, may issue shares or convertible debentures to a person resident outside India, referred to in paragraph 1 up to the extent specified in Annexure B, subject to compliance with the provisions of the Industrial Policy and Procedures as notified by Secretariat for Industrial Assistance (SIA) in the Ministry of Commerce and Industry, Govt. of India, from time to time.

34Annexure-B, Schedule-1, Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations, 2000: This schedule provides with the table of the Sectoral cap on Investments by Persons Resident Outside India.

b) **Issue of shares by a company requiring the Government approval:**

There are two conditions prescribed in the FDI Scheme in which the government approval is needed. Those are:

- A company which is engaged or proposes to engage in any activity specified in Annexure 'A'.
- A company which proposes to issue shares to a person resident outside India beyond thesectoral limits stipulated in Annexure 'B'.
- A company which is otherwise not eligible for issuing the shares or convertible Debentures to the person outside India.

Only in abovementioned situations a company needs to take prior approval from either Secretariat for Industrial Assistance or, as the case maybe of the Foreign Investment Promotion Board of the Government of India. It is necessary to look into that the terms and conditions of such approval is complied with. The approval from the Government is only needed in the situations where the automatic route is not applicable.

c) **Issue of Shares by International offering through ADR and/or GDR:**

FEMA Regulations mention that rupee denominated shares of an Indian company may be issued to a person outside India being a depository for the purpose of issuing Global Depository Receipt or American Depository Receipt. According to the FEMA regulations there are few conditions
which are required to be fulfilled by an Indian company to issue ADR or GDR. Those conditions are:

- The Indian company must have approval from the Ministry of Finance, Government of India.
- The company is not otherwise ineligible to issue shares in terms of the FEMA, Regulations.
- The ADR and GDR are issued by the company in accordance with the Scheme for issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993 as well as guidelines issued by the Central Government thereunder from time to time.

If abovementioned conditions are fulfilled then only an Indian company can issue its shares to the person resident outside India. The Indian company which is issuing such ADR or GDR must fulfill certain more requirements which are as follows:

- The Indian company shall furnish all the details of such issue to the RBI within 30 days from the date of closing of such issue.\(^{38}\)
- The Indian company, issuing shares must furnish quarterly return to the RBI as specified.\(^{39}\)

If all the above mentioned requirements are fulfilled by the Indian company, it may then be authorized to issue ADR and GDR. If any of the requirements is not fulfilled, the issue of ADR or GDR is liable to be cancelled.

It can therefore be said that FEMA Regulations, 2000 regulate the foreign investment in India through three ways as discussed above by the virtue of the Foreign Direct Investment Scheme as enumerated in the Schedule 1 of the FEMA Regulations. This is the way provided by the Government through which the foreign investors can invest in the Indian companies and therefore the M&A of the Indian company can take place.

\(^{38}\) Para 4 (2), Schedule 1, Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations, 2000: The Indian company issuing shares under sub-paragraph (1), shall furnish to the Reserve Bank, full details of such issue in the form specified in Annexure ‘C’, within 30 days from the date of closing of the issue.

\(^{39}\) Para 4 (3), Schedule 1, Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations, 2000: The Indian company issuing shares against ADRs/GDRs shall furnish a quarterly return in the form specified in Annexure ‘D’ to Reserve Bank within fifteen days of the close of the calendar quarter.
INVESTMENT BY INDIAN ENTITIES TO A COMPANY INCORPORATED OUTSIDE INDIA:

It has been already discussed that how a person or company outside India can invest in an Indian company. Now the question pertains to a situation when Indian person or company goes for investment in the foreign company. Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004 (‘TIFS Regulations’), deal with the provisions related to the investment outside India by a person resident of India or a company incorporated in India. There are two options provided by the regulation 3 and 5 of TIFS Regulations and those are:

a. To make investment outside India in accordance with and subject to provisions of the TIFS Regulations;
b. To make investment outside India after obtaining prior approval from the RBI. The approval is required from RBI where the investment to be made is over and above the limits prescribed in the TIFS Regulations; or is specifically required to be sought; or where mode/manner of investment to be made is not prescribed in the TIFS Regulations.

The provisions which are laid down by the TIFS regulations are broadly provided to both for a person resident in India and an Indian Party.

a.) PERSON RESIDENT IN INDIA:

Section 2 (v) of the Foreign Exchange Management Act, 1999 lays down the conditions as to when a person is to be regarded as being a person resident in India. Sub section (u) of section 2 defines the term ‘person’ to mean and include an individual, company, firm, body corporate,

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41 “person resident in India” means—

(i) a person residing in India for more than one hundred and eighty-two days during the course of the preceding financial year but does not include—

(A) a person who has gone out of India or who stays outside India, in either case-

(a) for or on taking up employment outside India, or

(b) for carrying on outside India a business or vocation outside India, or

(c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period;

(B) a person who has come to or stays in India, in either case, otherwise than—

(a) for or on taking up employment in India, or

(b) for carrying on in India a business or vocation in India, or

(c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period;

(ii) any person or body corporate registered or incorporated in India,

(iii) an office, branch or agency in India owned or controlled by a person resident outside India,

(iv) an office, branch or agency outside India owned or controlled by a person resident in India;

42 “person” includes—
etc. In other words when an individual or a company satisfies conditions laid down in sub-section (v) of Section 2 then it shall be regarded as a person resident in India for all the purposes of FEMA Act and Rules and Regulations framed thereunder.

An individual or a company which is a person resident in India as defined in sub-section (v) of Section 2 of the FEMA can make foreign investment outside India in accordance with the provisions of the TIFS Regulations. The TIFS Regulations which deal with the person resident in India are equally applicable to a company and an individual and they can make foreign investment as laid down in those provisions.

A person resident in India is allowed to make following foreign investments in following manner:

- He may purchase foreign security out of funds maintained in Resident Foreign currency Accounts (RFC) in accordance with FEM (Foreign Currency Accounts) Regulations, 2000.
- He may acquire bonus shares on foreign securities held in accordance with the provisions of the Act and Regulations.
- When not permanently resident in India he may purchase foreign security out of foreign resources outside India.
- May invest in foreign equity securities of an overseas company listed on a recognised stock exchange and has shareholding of not less than 10% in a listed Indian Company.
- Rated bonds /fixed income securities issued by the above mentioned companies.
- Employees of Indian Companies in the knowledge based sectors can purchase foreign securities under ADR / GDR linked stock option schemes provided consideration paid for such purchase do not exceed US$ 50,000 in blocks of five calendar years.

(i) an individual,
(ii) a Hindu undivided family,
(iii) a company,
(iv) a firm,
(v) an association of persons or a body of individuals, whether incorporated or not,
(vi) every artificial juridical person, not falling within any of the preceding sub clauses, and
(vii) any agency, office or branch owned or controlled by such person.
b.) **INDIAN PARTY:**

‘Indian party’ has been defined to mean a company incorporated under the Companies Act, 1956 or a firm registered under the Indian Partnership Act, 1932.

An Indian Party can make foreign investment in the following manner:

- Investment upto 200 percent of its net worth in a joint venture or a wholly owned subsidiary outside India as on the date of last audited balance sheet;
- Investment in overseas companies without being subject to any monetary limits out of funds raised by international offering of its securities by way of ADR / GDR mechanism;
- May acquire equity shares of a foreign company in exchange of ADR / GDR of the Indian party issued to concerned foreign company;

By virtue of the TIFS Regulations issued under Foreign Exchange Management Act, 1999, the procedure has been provided for the person resident of India and a company incorporated in India to invest in the foreign companies.

Through the above discussion an attempt has been made to clarify as to how cross border merger takes place in India. Both the ways has been discussed that how a foreign company can invest in an Indian company as well as the way by which an Indian company can invest in the company incorporated outside India.

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CHAPTER-3

COMPETITION LAW IN INDIA AND

IT'S IMPLICATION ON

CROSS BORDER MERGER
After throwing light on procedure through which cross border merger takes place in India, it is necessary to understand the implication of law related to such activities. A merger is sought to be effected for a variety of reasons such as, it is an easier way of entering into a new activity or a new market; it gives the opportunity to use the spare capacity in the acquiring company with the assets of the other company and where the companies are under the control of the same group, a merger may be seen as a means of effective economies. Many mergers enable the merged firm to reduce costs and become more efficient, leading to lower prices, higher quality products, or increased investments for innovation. Some mergers, however, may harm competition by creating or enhancing the merged firm’s ability or incentives to exercise market power either unilaterally or through coordination with rivals resulting in price increases above competitive levels for a significant period of time, reductions in quality or a slowing of innovation. The purpose of competition law merger analysis is to identify and prevent or remedy only those mergers that are likely to harm competition significantly. It has been argued time and again that the Agencies should only intervene to prohibit or remedy a merger when it is necessary to prevent anticompetitive effects that may be caused by that merger. The appropriate goal of agency intervention to prohibit or remedy a merger is to restore or maintain competition affected by the merger and not to enhance premerger competition.

As regards to the M&A Regulations, the Competition Act, 2002 deals with the provisions related to the control on the activities of combinations which takes place in India or outside India and have effect in the market in India. It ascertains certain threshold limits for that purpose as well as it gives powers to the Commission to interfere in the matter if a combination is not in accordance with the relevant provisions of the Act or has adverse effect on the competition in the relevant market in India.

The Competition Act, 2002 provides threshold limits for the purpose of a combination. The provisions of the Act are such that it is only applicable to those combinations which are above the threshold limits. The Act provides that any M&A will be considered as combination

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46 Ibid.
47 Ibid.
only if it crosses the threshold limits as provided in ‘Section 5 of the Competition Act’\(^{48}\). The Central Government has vide Notification No.S.O.480 (E) dated 4\(^{th}\) March, 2011 has in exercise of the powers conferred by sub-section (3) of Section 20 of the Competition Act, 2002, has

\(^{48}\)The acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises, if—

(a) any acquisition where—

(i) the parties to the acquisition, being the acquirer and the enterprise, whose control, shares, voting rights or assets have been acquired or are being acquired jointly have, —

(A) either, in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or

(B) \([in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or]\)

(ii) the group, to which the enterprise whose control, shares, voting rights have been acquired or are being acquired, would belong after the acquisition, jointly have or would jointly have, —

(A) either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or

(B) \([in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees fifteen hundred crores in India, or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India; or]\)

(b) acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service, if—

(i) the enterprise over which control has been acquired along with the enterprise over which the acquirer already has direct or indirect control jointly have, —

(A) either in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or

(B) \([in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or]\)

(ii) the group, to which enterprise whose control has been acquired, or is being acquired, would belong after the acquisition, jointly have or would jointly have, —

(A) either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or

(B) \([in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees fifteen hundred crores in India, or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India; or]\)

(c) any merger or amalgamation in which—

(i) the enterprise remaining after merger or the enterprise created as a result of the amalgamation, as the case may be, have, —

(A) either in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or

(B) \([in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or]\)

(ii) the group, to which the enterprise remaining after the merger or the enterprise created as a result of the amalgamation, would belong after the merger or the amalgamation, as the case may be, have or would have, —

(A) either in India, the assets of the value of more than rupees four-thousand crores or turnover more than rupees twelve thousand crores; or

(B) \([in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India, or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India;]\)
enhanced on the basis of wholesale price index, the value of assets and the value of turnover, by fifty per cent for the purposes of the Act.

Sections 23 and 24 of the erstwhile MRTP Act, 1969 now repealed, only required examinations that the proposed scheme of the merger and takeover was not likely to lead to a concentration of economic power to common detriment or was not likely to be prejudicial to the public interest in any other manner. 49 Under The MRTP Act the effect of a merger or takeover on competition did not have to be examined in approving the proposal. 50

A combination attracts the provisions of the Competition Act, 2002 only if the combined size of the acquirer and the enterprises whose control, shares, voting rights or assets have been acquired or are being acquired jointly have or any merger or amalgamation in which the enterprise remaining after merger or the enterprise created as a result of amalgamation, as the case may be, have:

**TABLE-2**

<table>
<thead>
<tr>
<th>In India</th>
<th>ASSETS</th>
<th>TURNOVER</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Group</td>
<td>INR 1,500 crores</td>
<td>INR 4,500 crores</td>
</tr>
<tr>
<td>Group</td>
<td>INR 6,000 crores</td>
<td>INR 18,000 crores</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>In India or outside (in aggregate)</th>
<th>ASSETS</th>
<th>TURNOVER</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Group</td>
<td>USD 750 million</td>
<td>INR 750 crores</td>
</tr>
<tr>
<td>Group</td>
<td>USD 3 billion</td>
<td>INR 750 crores</td>
</tr>
</tbody>
</table>

50 Ibid
In addition to above, vide its Notification dated 4th March, 2011 and 27th May, 2011, the Government of India has also exempted an enterprise, whose control, shares, voting rights or assets are being acquired, having turnover less than INR 750 crores in India or having assets less than INR 250 crores in India, from pre-filing requirement for a period of five years.

Once a merger or acquisition is proposed takes place, and comes into the ambit of the combination as provided under Section 5 of the Competition Act, 2002, another question which arises is of control on the activities which will take place subsequent to that merger. The problem would arise if the activities take place outside India and have adverse effect in India. It maybe possible for an enterprise without having a fixed place in India to control the operations of any enterprise in India in a manner injuring the process of competition in India. In such a situation the ‘Effect Doctrine’ is made applicable, which deals with the jurisdiction of the domestic laws on the activities taking place outside the territories of a country but which have adverse effect inside the territories of that country.

WHAT IS EFFECT DOCTRINE?

This doctrine talks about the situations where an act takes place outside the territory of a country but has adverse effect on that country. This doctrine talks about the extra territorial jurisdiction. In the landmark judgment of United States v. Aluminum Company of America (ALCOA) Case, the judge learned Hand there stated that, “It was settled law that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its border that has consequences within its border which the state reprehends”. According to this doctrine, domestic competition laws are applicable to foreign firms, and also to domestic firms located outside the state’s territory, when their behavior or transactions produce an "effect" within the domestic territory. The "nationality" of firms is irrelevant for the purposes of antitrust enforcement and the effect doctrine covers all firms irrespective of their nationality. The situation however was not similar, in American Banana Case; wherein the Supreme Court of U.S. refused the view that extra territorial jurisdictions can be exercised by the court on any

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51 Ibid, at pg. 275.
52 United States v. Aluminum Co. of America, 148 F. 2d 416, 443 (2nd Cir. 1945)
activity taking place outside the country. The Supreme Court ruled that “where the acts in restraint of trade were committed within a foreign jurisdiction, they would not fall under the prohibitions of the Sherman Act”. However, the conditions changed with the time as most of the corporations in U.S. were involved in the cross border activities and a need was felt for initiating principle on the extraterritorial jurisdiction. The Supreme Court in ALCOA Case, allowed such jurisdiction and held that, “such activities of a foreign national may be enjoined by our courts where they are intended to and do restrain our commerce.”55 The "effect doctrine" was also embraced by the Court of First Instance in Gencor case in EU stating that the application of the Merger Regulation to a merger between the companies located outside EU territory "is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community."56 In India, the ‘Effect Doctrine’ is therefore, made applicable to those acts which takes place outside India and has direct, substantial and reasonable foreseeable’ effects within the country.

**EVOLUTION OF EFFECT DOCTRINE:**

**EC MERGER REGULATIONS:**

The Treaty of Rome of 1957, creating the European Economic Community (the predecessor to the European Union (EU)) and its institutions, the Council of Ministers, the European Parliament, the Court of Justice, and the European Commission, also included articles (now revised as Articles 101 and 102 of TFEU), condemning anticompetitive agreements among competitors and abuse of dominant position. Merger control was not specifically mentioned in the articles of the Treaty of Rome. The need for merger control at the Community level was recognized in the early 1970s. Coincidentally, this happened at a time that Germany amended its antitrust law to give the Bundeskartellamt merger control authority and shortly before the U.S. Congress enacted the Hart-Scott-Rodino Act, in 1976 requiring pre-merger notification. As the EC’s attempts to apply Articles 85 and 86 of the Treaty of Rome (new Article 101 and 102 of the TFEU) to mergers had their shortcomings, the European Commission (EC) did not obtain merger control authority, however, until 1989, when the enactment of merger regulations provisions was viewed as one of many measures necessary to facilitate the development of a single, integrated,

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55 United States v. Aluminum Co. of America, 148 F. 2d 416, 443 (2nd Cir. 1945)
or “common,” European market. The enactment of EC Merger Regulation (ECMR) in 1989 was intended to provide a “level playing field” in a “one-stop shop” for the review of mergers including the ones with significant cross border effects. However, reflecting, both the reluctance of the EU’s Member States to grant the EC such authority and skepticism towards the EC’s ability to act in a timely manner, the Council of Ministers, in enacting the ECMR, placed jurisdictional and procedural restrictions on the EC’s authority. The former limited the scope of the EC’s merger control authority vis-à-vis the Member States and the latter subjected the EC to certain, non-waivable decision deadlines. Amendments and revision to the ECMR, adopted in 2003 and effective since May 1, 2004, made evolutionary changes that preserved these distinctive elements of EU merger control. The EC, coincidentally, also adopted consequential administrative and organizational changes.

**JURISDICTIONAL ELEMENTS-THE SCOPE OF THE COMMISSION’S AUTHORITY:**

Merger control authority in Europe is divided between the EC and the EU Member States. The EC has exclusive jurisdiction over a “concentration” of a “community dimension.” EU Member States may not apply their merger regimes to such transactions (ECMR, Art. 21(3.)), except where the EC refers such a transaction to Member State authorities under ECMR Art. 9.57

**WHAT IS A “CONCENTRATION” WITH A “COMMUNITY DIMENSION”?**

a.) A “concentration” arises under ECMR, 2004 (Art. 3) where a change of control on a lasting basis results from:

(i) the merger of two or more previously independent undertakings,

(ii) the acquisition of one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings,3 or

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57 The thresholds delineating the EC’s jurisdiction and triggering the premerger notification obligation are the same; by contrast, the U.S. Clayton Act, § 7, covers mergers that are not reportable under the Hart-Scott-Rodino Act (HSR). The EC has exclusive jurisdiction over concentrations of a “Community dimension;” by contrast, U.S. states have concurrent jurisdiction with the U.S. federal agencies under the Clayton Act.
(iii) the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity.

b.) “Community dimension” is delineated in ECMR, 2004(Art. 1.) Concentrations are of a “Community dimension” either where the merging parties’ (the “undertakings concerned”):

(i) combined world-wide turnover is > € 5 billion and each of at least two of the merging parties realized > € 250 million turnover in the EU, or

(ii) combined world-wide turnover is > € 2.5 billion; their combined turnover is > € 100 million in each of at least 3 Member States; in each of those 3 Member States, the turnover of each of at least two of the merging parties is > € 25 million; the Community-wide turnover of each of at least two of the merging parties is > € 100 million unless each of the merging parties obtains > 2/3 of its EU turnover in one Member State.

WHEN MEMBER STATES MAY REVIEW CONCENTRATIONS OF A COMMUNITY DIMENSION:

ECMR, 2004(Art. 9) permits the EC to refer such a concentration to a requesting Member State where it:

• threatens to affect significantly competition in a market within that Member State, which presents all the characteristics of a distinct market; or
• affects competition in a market within that Member State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market.

In some cases, the EC has made a ‘partial’ referral to one or more Member States. Such referrals fragment review of the proposed concentration and potentially can result in conflicting decisions.58

58 See, e.g., SEB/Moulinex, Case no COMP/M.2621 of 8 Jan. 2002. The EC referred this matter, insofar as it affected markets in France, to the French authorities. The EC investigated effects elsewhere in the EU and reached a settlement requiring remedies in nine Member States, but not in five others. Third parties challenged, inter alia, the EC’s referral decision. The CFI upheld the referral but noted the potential for conflicting decisions in such “partial” referral cases. See Philips v. Comm., Case T-119/02, Judgment of the Court of First Instance, pg. 311-358, 3 Apr. 2003:
ECMR, 2004{Art. 4(4.)} permits the merging parties to request the EC to refer such a concentration to the appropriate Member State.

**WHEN A CONCENTRATION IS NOT OF A COMMUNITY DIMENSION:**

- EU Member State merger control regimes may apply. Of the 27 EU Member States, only Luxembourg does not have a merger control regime. The jurisdictional, procedural, and substantive rules in the member States are not necessarily harmonized with the ECMR.
- Where such a concentration “is capable of being reviewed under the competition laws of at least three Member States,” ECMR Art. 4(5.) provides a process whereby the merging parties may request that the matter be referred to the EC. If no Member State objects, the merger shall be deemed to be of a Community dimension and shall be notified to the EC.
- The Member State(s) may, under ECMR Art. 22, refer to the EC a concentration that is not of a Community dimension but that affects trade between Member States and threatens to significantly affect competition within the referring Member State(s).

**EFFECT DOCTRINE: JUDICIAL PRONOUNCEMENT IN EU CASES:**

**WORLD PULP CASE**:60

This was a case where the EC had imposed fine on certain enterprises, having their registered offices outside the EC, for violation of Art. 85 (Art. 101 of TFEU). The charges against them were that they fixed, in concert, prices to consumers in the EC, provided exchange of individualized data concerning prices with certain other wood pulp producers, and made price recommendation through the trade association. The appellants, producer of wood pulp and two associations of wood pulp producers challenged that decision in an appel in the European court of justice.

The Commission based its decision on the ground that all the affected parties of the decision were either exporting directly to purchaser within the community, or were doing business with the community through branches, subsidiaries, agencies and other establishments...
in the community and that the action in concert applied to the vast majority of the sales of those undertakings to and in the community. The Commission concluded that: ‘the Effect of the agreement and practices on prices announced and/or charge to customer on resale of pulp within the EEC was therefore not only substantial but intended, and was the primary and the direct result of the agreement and the practices.

The jurisdiction of the Commission to apply its competition rules to them was challenged by some appellants. The argument was that conduct outside the community could not be sought to be regulated merely because the repercussions of that conduct were felt within the community; the court held that:

“Where would pulp producers established in those countries sell directly to purchasers established in the community and engaged in price competition in order to win orders from those customers that constitute competition within the common market. It follows that where those producers concert on the prices to be charged to their customers in the community and put that concentration into effect by selling at prices which are actually coordinated, they are taking part in the concentration which has the object and effect of restricting competition within the common market within the meaning Art. 85 of the treaty (now Art. 101 of TFEU)”

The court pointed out that such conduct had two elements, one relating to the formation of the agreement or decision and the other, the implementation and that the place of the implementation which was the decisive factor. Holding that in as such the place of implementation was within the community, the communities’ jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as recognized in the public international law. The court added that when the overseas enterprises implemented their decision within the community, it was immaterial whether or not they had recourse to subsidiaries, agents, sub-agents, or branches within the community in order to make their contracts within the community.
GENCOR CASE:\textsuperscript{61}

The decision of the World pulp case was confirmed in the Gencor case concerning a merger of two South African companies, in which the territorial scope of the E.E.C. Merger Regulation (Regulation 4064/89) and its justification under international law was reviewed. The Court of First Instance of the European Community observed that:

“According to Wood Pulp, the criterion as to the implementation of an agreement is satisfied by mere sale within the Community, irrespective of the location of the sources of supply and the production plant. It is not disputed that Gencor and Lonrho carried out sales in the Community before the concentration and would have continued to do so thereafter. Accordingly, the Commission did not err in its assessment of the territorial scope of the Regulation by applying it in this case to a proposed concentration notified by undertakings whose registered offices and mining and production operations are outside the Community.” The Court further observed that the: “application of the Regulation is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community”. And then after having applied the three criteria of immediate, substantial, and foreseeable effect to the case held that, “the application of the Regulation to the proposed concentration was consistent with public international law.” In should be noted that in Gencor Case, although the Wood Pulp case was referred to and the “implementation” test was applied in connection with the territorial scope of the E.E.C. Merger Regulation of 1989, the effect doctrine was applied for the justification of jurisdiction under public international law. The case was however, never challenged in the European Court of Justice.

US MERGER REGULATIONS:

America's antitrust policy was first given statutory definition in the Sherman Act, 1890. That act was aimed at restraints of trade "among the several states" andalso "with foreign nations." Initially it was open for the courts to determinewhether the words "with foreign nations" meant that our courts may takejurisdiction over acts performed abroad, the effects of which may be to restrainUnited States commerce, or whether these words were merely intendedto extend the act's coverage to domestic activities in restraint of this country'simport or

export trade. Complicating the question further was the fact that no foreign industrial nation had an exact counterpart to the Sherman Act, and therefore it had to be considered whether United States courts could take jurisdiction of acts performed on foreign soil, even though those acts were legal where performed. Even if the answer to this question was in the affirmative, that is, if the ultimate testis to be the effects on United States commerce regardless of the location of the individual act involved, there yet remained the question of what action our courts could take to restrain the illegal activity engaged in outside the limits of their jurisdiction.62

The question arises here is that “Whether an American statute is to be construed as applying to acts committed abroad”? In Blackner v. United States63, the court held that it has “a question of congressional power and rather more of congressional intent.” Normally, where a law does not immediately affect national interest, it is construed to apply within the jurisdiction only, unless Congress has specifically provided otherwise.64 The question, then arose as to what powers did Congress intend to confer on US courts for the enforcement of antitrust laws.

At the first instance, the Supreme Court of US has refused to construe the Sherman Act on the activities that took place outside the territory of it. In American Banana Co. v. United Fruit Co.65, the defendant, as part of a larger plan to monopolize the tropical fruit market, induced the Puerto Rican Government to seize a plantation and a railroad owned by its competitor, the plaintiff, who brought suit under the Sherman Act. In affirming the lower court’s holding that no cause of action would lie, the US Supreme Court held: "In the first place the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States and within that of other states. It is surprising to hear it argued that they were governed by the act of Congress."66 Thus the Supreme Court took pains67 to announce the rule that where the acts in restraint of trade were committed within a foreign jurisdiction, they would not fall under the prohibitions of the Sherman Act.

62 Extraterritorial Antitrust Enforcement: The American Banana Case a Half Century Later, 26 Fordham L. Rev. 319 (1957), Available at: http://ir.lawnet.fordham.edu/flr/vol26/iss2/7
63 284 U.S. 421 (1932).
66 Ibid.
67 The case did not have to be decided on this ground. See the district court and court of appeals opinions: 160 Fed. 184 (S.D.N.Y. 1908), 166 Fed. 261 (2d Cir. 1908).
As American corporations became more involved in international business, the courts of US found the American Banana ruling too confining. Therefore, the later cases, seizing upon the fact that in the American Banana case all of the accused acts had been performed outside the United States, took jurisdiction even though the acts were performed partly, or even principally, within another jurisdiction so long as some acts in furtherance of the conspiracy were performed within the United States.

In United States v. Sisal Sales Corp., for example, a conspiracy had been entered into in the United States to control the import and sale of sisal from Mexico, and to monopolize internal and external commerce in that commodity. A group of American banks had combined to organize an American company, which in turn had established Mexican sales agents. Aided by discriminatory legislation in Mexico this combination was able to force other buyers out of the sisal market. Though almost all of the acts in furtherance of the conspiracy were performed in Mexico, the court distinguished the American Banana case on the grounds that here the conspiracy was "made effective" by acts done within the United States. Actually these decisions were tacitly recognizing that "effects on United States commerce" were the controlling factor, but they continued to pay lip service to the rule requiring some activity within the United States in furtherance of the conspiracy. In the United States v. Aluminium Company of America, the court held that, while this rule has never been expressly overruled, it has become meaningless in light of the complex activities of today's corporations. Now, even where the accused activity is entirely outside the territorial jurisdiction of the United States, our courts will take jurisdiction if they find that the effect is to restrain our commerce. With regard to the place where the conspiracy was entered into, there has never been much conflict. It has been consistently held that where a conspiracy affects United States commerce, jurisdiction will not be denied because the idea was first formulated in another country. Thus far, we have considered the situation

\[68\] United States v. Pacific & Arctic Ry., 228 U.S. 87 (1913).

\[69\] 274 U.S. 268 (1927).

\[70\] Ibid.; Bulova Watch Co. v. Steele, 194 F.2d 567 (5th Cir.), aff'd, 344 U.S. 280 (1952).

\[71\] United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1944); Branch v. FTC, 141 F.2d 31 (7th Cir. 1944); cf. Strassheim v. Daily, 221 U.S. 280, 285 (1911), where the Court wrote: "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power." In the American Banana case the Court found that it was conjectural what effects, if any, were felt within the United States. Therefore, the case can be reconciled on its facts with the later cases. In its underlying rationale, however, it is entirely contra.

where the court will take jurisdiction over the foreign conduct of a domestic corporation. Where the defendant is not a United States citizen but a citizen of a foreign country, the same tests are applied. It was early held that our courts may control his activities abroad whenever the courts can acquire personal jurisdiction over him. “\(^{73}\)

In *United States v. Aluminum Co. of America*, it was therefore held that such activities of a foreign national may be enjoined by our courts where they are intended to and do restrain our commerce.

After the affirmative view given by the US courts with respect to the Effect Doctrine in the ALCOA case, the US courts started using the power on an excessive manner. After facing severe antagonistic reactions from other countries, against the excessive application of the US anti-trust laws, U.S. courts began to show some restraint in assuming extraterritorial jurisdiction. In the 1984 Timberlane case, the court concluded that it had jurisdiction over alleged anticompetitive conducts committed in Honduras but refrained from asserting extraterritorial jurisdiction.

It can therefore, be argued that the Effect doctrine was not positively taken by the US courts previously but after the changing in the trends of the commerce and business, the courts in the United States changed their views and started looking with broader perspectives and again when the courts in US found that there is some excessive use of the principle, they started imposing some restrictions on the application of the Effect Doctrine.

**EFFECT DOCTRINE: APPLICABILITY IN INDIA**

As far as the issue relating to the anti competitive activities in India is concerned, such activities are directly subject to the territorial jurisdiction of the country. The Competition law made by the legislature will be directly applicable on such activities in India. However it may be possible that an enterprise without having a fixed place of business in India control the

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\(^{73}\) United States v. Pacific & Arctic Ry., 228 U.S. 87 (1913).

\(^{74}\) 148 F.2d 416 (2d Cir. 1945)

\(^{75}\) Australia, France, the United Kingdom, the Netherlands, and New Zealand enacted blocking legislations.

operations of an enterprise in India in a manner injuring the process of competition in India. As the shareholding may not be necessary for that purpose, this could be done through a distribution agreement, price fixing arrangement, or an exclusive dealing agreement that could have as its object the elimination of the competitor or partitioning the market. Therefore it was felt necessary to provide a mechanism which could deal with the anti competitive activities, that takes place outside India.

Section 32 of The Competition Act, 2002 provides that the Commission has the power to make an inquiry into any agreement or abuse of dominant position or combination as to whether that agreement, abuse or combination has, or is likely to have, an appreciable adverse effect on the competition in the relevant market in India even if:

a) an agreement referred to in section 3 has been entered into outside India; or
b) any party to such agreement is outside India; or
c) any enterprise abusing the dominant position is outside India; or
d) a combination has taken place outside India; or
e) any party to combination is outside India; or
f) any other matter or practice or action arising out of such agreement or dominant position or combination is outside India.

The above provision in the Competition Act, 2002, therefore, can be interpreted to mean that the commission has power to inquire into the matters related to the cross border merger. The essential element in the assessment is that the merger causes or is likely to cause an appreciable adverse effect on

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78 Ibid.
79 32. The Commission shall, notwithstanding that,—
(a) an agreement referred to in section 3 has been entered into outside India; or
(b) any party to such agreement is outside India; or
(c) any enterprise abusing the dominant position is outside India; or
(d) a combination has taken place outside India; or
(e) any party to combination is outside India; or
(f) any other matter or practice or action arising out of such agreement or dominant position or combination is outside India,

have power to inquire [in accordance with the provisions contained in sections 19, 20, 26, 29 and 30 of the Act] into such agreement or abuse of dominant position or combination if such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India [and pass such orders as it may deem fit in accordance with the provisions of this Act.]
adverse effect on the competition in the relevant market in India. The 'Relevant Market'\textsuperscript{80} can be either 'Relevant Geographical Market'\textsuperscript{81} or 'Relevant Product Market'\textsuperscript{82}. After determining the relevant market, the Commission is required to further inquire into the effect which the merger is putting on the market. Section 32 of the Competition Act; provides that, the inquiry which the Commission initiates should be in accordance with Sections 20\textsuperscript{83}, and Section 29\textsuperscript{84} of the

\textsuperscript{80} Section 2 (r), The Competition Act, 2002 define relevant market as: "relevant market" means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets.

\textsuperscript{81} Section 2 (s) of The Competition Act, 2002, defines relevant geographical market as: "relevant geographic market" means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas.

\textsuperscript{82} Section 2 (t) of The Competition Act, 2002, defines relevant product market as: "relevant product market" means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use

\textsuperscript{83} Section 20, The Competition Act, 2002, states that: (1) The Commission may, upon its own knowledge or information relating to acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of section 5 or merger or amalgamation referred to in clause (c) of that section, inquire into whether such a combination has caused or is likely to cause an appreciable adverse effect on competition in India:

Provided that the Commission shall not initiate any inquiry under this sub-section after the expiry of one year from the date on which such combination has taken effect.

(2) The Commission shall, on receipt of a notice under sub-section (2) of section 6, inquire whether a combination referred to in that notice or reference has caused or is likely to cause an appreciable adverse effect on competition in India.

(3) Notwithstanding anything contained in section 5, the Central Government shall, on the expiry of a period of two years from the date of commencement of this Act and thereafter every two years, in consultation with the Commission, by notification, enhance or reduce, on the basis of the wholesale price index or fluctuations in exchange rate of rupee or foreign currencies, the value of assets or the value of turnover, for the purposes of that section.

(4) For the purposes of determining whether a combination would have the effect of or is likely to have an appreciable adverse effect on competition in the relevant market, the Commission shall have due regard to all or any of the following factors, namely:

(a) actual and potential level of competition through imports in the market;
(b) extent of barriers to entry into the market;
(c) level of competition 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.

\textsuperscript{84} Section 29, The Competition Act, 2002 states that: (1) Where the Commission is of the [prima facie] opinion that a combination is likely to cause, or has caused an appreciable adverse effect on competition within the relevant market
Act. These sections provide the grounds and the factors on which the appreciable adverse effect on the competition within the relevant market in India can be determined. These provisions of the Act also lay down the procedure by which the Commission can inquire into the matter related to combinations which may have appreciable adverse effect on the competition within the relevant market in India.

There are categories of transaction not likely to cause or is likely to cause appreciable adverse effect on competition in India. These categories have been discussed in the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011. According to the regulations the categories of combination as mentioned in ‘Schedule I’ of the regulations are ordinarily not likely to cause an appreciable adverse effect in India, it shall issue a notice to show cause to the parties to combination calling upon them to respond within thirty days of the receipt of the notice, as to why investigation in respect of such combinations should not be conducted.

[1(A) After receipt of the response of the parties to the combination under subsection(1), the Commission may call for a report from the Director General and such report shall be submitted by the Director General within such time as the Commission may direct.]

(2) The Commission, if it is prima facie of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition, it shall, within seven working days from the date of receipt of the response of the parties to the combination, [or the receipt of the report from Director General called undersub section (1A), whichever is later] direct the parties to the said combination to publish details of the combination within ten working days of such direction, in such manner, as it thinks appropriate, for bringing the combination to the knowledge or information of the public and persons affected or likely to be affected by such combination.

(3) The Commission may invite any person or member of the public, affected or likely to be affected by the said combination, to file his written objections, if any, before the Commission within fifteen working days from the date on which the details of the combination were published under sub-section (2).

(4) The Commission may, within fifteen working days from the expiry of the period specified in sub-section (3), call for such additional or other information as it may deem fit from the parties to the said combination.

(5) The additional or other information called for by the Commission shall be furnished by the parties referred to in sub-section (4) within fifteen days from the expiry of the period specified in sub-section (4).

(6) After receipt of all information and within a period of forty-five working days from the expiry of the period specified in sub-section (5), the Commission shall proceed to deal with the case in accordance with the provisions contained in section 31.

85(1) An acquisition of shares or voting rights, referred to in sub-clause (i) or sub-clause (ii) of clause (a) of section 5 of the Act, solely as an investment or in the ordinary course of business in so far as the total shares or voting rights held by the acquirer directly or indirectly, does not entitle the acquirer to hold twenty-five per cent (25%) or more of the total shares or voting rights of the company, of which shares or voting rights are being acquired, directly or indirectly or in accordance with the execution of any document including a shareholders’ agreement or articles of association, not leading to acquisition of control of the enterprise whose shares or voting rights are being acquired.

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

(3) An acquisition of assets, referred to in sub-clause (i) or sub-clause (ii) of clause (a) of section 5 of the Act, not directly related to the business activity of the party acquiring the asset or made solely as an investment or in the ordinary course of business, not leading to control of the enterprise whose assets are being acquired except where the assets being acquired represent substantial business operations in a particular location or for a particular product.
on competition in India.\textsuperscript{86} With respect to the combinations which takes place outside India. Entry 10 of Schedule I read with regulation 4 of the regulations, clarifies that any combination taking place entirely outside India with insignificant local nexus and effect on markets in India shall not be considered as activity causes or is likely to cause appreciable adverse effect on the competition in India. it can, therefore be argued that section 32 of the Competition Act, 2002 shall not be applicable to those combinations which has insignificant local nexus and effect on the market in India.

**CONSTITUTIONAL VALIDITY OF SECTION 32 OF THE COMPETITION ACT:**

The competence of the Parliament to enact legislation having extra territorial effects must be analysed by reference to Article 245 of the Constitution of India. The text of the Article reads as:

\textit{245. Extent of laws made by Parliament and the State Legislatures.}

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86 Regulation 4, Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011: Categories of transactions not likely to have appreciable adverse effect on competition in India: In view of the duty cast upon the Commission under section 18 and powers conferred under section 36 of the Act, and having regard to the mandate given to the Commission to, inter-alia, regulate combinations which have caused or are likely to cause appreciable adverse effect on competition in terms of sub-section (1) of section 6 of the Act, it is clarified that since the categories of combinations mentioned in Schedule I are ordinarily not likely to cause an appreciable adverse effect on competition in India, notice under sub-section (2) of section 6 of the Act need not normally be filed.
(1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extraterritorial application.

Here the doctrine of territorial nexus comes into picture. Article 245(1) effectively mandates that a particular legislature may enact laws for part or whole of the territory for the subject mandated of that legislature. Thus, Parliament can enact laws for the whole or part of India. It is, however, obvious that almost all laws will have some direct or indirect impact on persons or events outside the specific territory. Clearly, the law cannot be in contravention of Article 245(1) merely because of such an impact. Faced with such a situation, the Courts have evolved the doctrine of territorial nexus; according to which a law will satisfy the requirements of the principle behind Article 245(1) if it has a sufficient nexus with the territory of the legislature enacting the law. The position may be summarized briefly according to the decision in State of Bombay v. RMDC, [1957] S.C.R. 874:

The Court observed that:

“The doctrine of territorial nexus is well established and there is no dispute as to the principles. As enunciated by learned counsel for the petitioner, if there is a territorial nexus between the person sought to be charged and the State seeking to tax him the taxing statute may be upheld. Sufficiency of the territorial connection involve a consideration of two elements, namely, (a) the connection must be real and not illusory and (b) the liability sought to be imposed must be pertinent to that connection. It is conceded that it is of no importance on the question of validity that the liability imposed is or may be altogether disproportionate to the territorial connection. In other words, if the connection is sufficient in the sense mentioned above, the extent of such connection affects merely the policy and not validity of the legislation”

Therefore, if we relate the Doctrine of territorial nexus with respect to the application of Section 32 of the Competition Act, 2002 and testing it on the basis of those two elements which were evolved in the above referred judgement, then it can be said that;
a.) The connection between the activity done and the impact on the competition in the relevant market in India must be real then only section 32 is applicable; and

b.) And the liabilities which are being imposed by section 32 should be specifically in accordance with the activity done.
CHAPTER-4

CONCLUSION & SUGGESTION
CONCLUSION:

The paper has thrown light on the procedure under which the cross border merger takes place. It has stated both the ways i.e. (a) how a foreign entity can invest in India and (b) how an Indian company can invest outside India. This paper then discusses the applicability of the Effect Doctrine in India with reference to the Competition Act, 2002 in comparison to the applicability of the doctrine in the countries like EU, United States.

It may again be mentioned here that it may be easy to control the activities performed in the territory of India rather than the activities taking place outside India because the applicability of the domestic laws is directly related to the activities done in the territory. A pressing need was felt for enactment of a competition law in India after the liberalization and globalization. It was felt necessary to protect the competition by controlling the activities taking place in India as well as those activities which takes place outside India but their effect was in India. Therefore, following the ‘Effect Doctrine’ as practices in EU and US section 32 in the Competition Act, 2002 was incorporated to control the activities which take place outside India but have adverse effect in India. Section 32 provides both the powers of inquiry as well as the power to pass order. The situation was different before the amendment of 2007 in the Competition Act, 2002. Before that amendment the Commission was only provided with the powers to inquire into the matters outside India but was not provided with the powers to pass any order in the respect of the finding of any anti-competitive activity outside India. Therefore, as the necessity was felt fora robust effect doctrine with the amendment of 2007 with the Competition Commission of India was empowered with the power to pass any order as it deemed fit on such finding of any anti-competitive activity outside India with its effects in India, in accordance with the provision of the Act.

Section 32 also fulfills the requirement of the Doctrine of territorial nexus and is therefore constitutionally valid even it having its exercise outside the country. It has also been argued, that there are combination which are declared as not having adverse effect on the competition in India, therefore cannot be held as anti-competitive.
SUGGESTIONS:

a.) The Commission should sign MOUs with the anti-trust agencies of different countries so that it can help in the proper implementation of the order passed by the Commission. The Commission has powers to give orders to the parties of the combination even if those parties do not belong to India, but the question arises as to how the Commission will impose its orders on the parties who belongs to outside India?”

b.) The term ‘significant local nexus’ has been used in the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011. However, the term has not been defined in those regulations as to what it would include in the ambit of the term ‘significant local nexus’. It is suggested that proper definition to the term should be provided to help in determining the factors covered by significant local nexus.

c) Section 5 of the Competition Act, 2002 provides the threshold limits for M&A to come into the ambit of combinations. However, in case, both the companies are outside India, the threshold, which Section 5 provides is on the combined basis. It is suggested that the domestic nexus in respect of the enterprises located outside India as provided in Section 5 of the Competition Act, 2002, should be on the basis of each party test.
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