Evolution of Antitrust laws in U.S.A. In Context to Merger and Acquisition

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Evolution of Antitrust laws in U.S.A. In Context to Merger and Acquisition

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Thanks to all.............
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**ACRONYMS:**

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<tr>
<td>CC</td>
<td>Competition Commission</td>
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<td>CCI</td>
<td>Competition Commission of India</td>
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<td>DOJ</td>
<td>Department of Justice (USA)</td>
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<td>HHI</td>
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<td>M &amp; A</td>
<td>Merger and Acquisition</td>
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<td>MRTPC</td>
<td>Monopolies restrictive trade practices</td>
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<tr>
<td>SSNIP</td>
<td>Small but significant and non-transitory increase in price</td>
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<td>HHUDRS</td>
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1. **Introduction:**

Economic liberalisation has led to the growing concern over the rising trends of mergers and acquisitions over the countries during the past decade. In order to combat this rising concern each country has prepared its own measures in order to regulate the growing trend of merger and acquisitions. Mergers are not usually considered as bad by the countries but those mergers which tend to have ill effect on the competition are generally discouraged because they are considered as detrimental to the consumer welfare, in such a situation, it is the inherent duty of the competition regimes in the respective countries to intervene in such a matter and take reasonable steps. The competition regimes have the authority to refrain the merging companies from doing so if at all the merger and acquisitions is against the spirit of the competition. Competition law thus, intervenes in such situations to regulate the mergers and acquisitions market and thereby foster healthy competition.

Mergers and Acquisitions have become a part and parcel of today’s economic life and the prospective mergers are usually encouraged with exception to those which aim at eliminating the competition from the prevalent market. Merging entities desire to monopolise their business by merging with the ongoing competitors in order to gain full control over the pricing of their products, output and quality related issues. Such monopolisation, if it aims to lessen competition is hazardous for the customers in many aspects such as they do not get access to varied quality products and have to accept whatever price is quoted by the manufacturer. In order to diminish such a situation, competition regime takes active measures against such practices which hamper competition through blocking the mergers and acquisitions which have appreciable adverse effect on competition.
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Merger and acquisition regulation has a very interesting history. It came to U.S.A in the name of “Sherman Act” 1890 and is evolving till date. In India mergers and acquisitions were being placed within the domain of “Monopolies restrictive trade practices Act”, 1969 which was later being repealed by the “Competition Act”, 2002. Since then the concerned regulations have been revolving around a series of amendments inspired by judicial pronouncements in various landmark cases so it would not be hard to derive that the judiciary plays a very active role in correcting the flaws inscribed within these regulations through its judgements. The aim of this article is to reflect how the antitrust revolution took place in U.S.A by virtue of relevant cases which took place from time to time and led to enactment of various statutes and amendments to the current statutes.

2. Mergers and Acquisitions:

2.1 Mergers

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.

Very often, the two expressions "merger" and "amalgamation" are used synonymously. But there is, in fact, a difference. Merger generally refers to a circumstance in which the assets and liabilities of a company (merging company) are vested in another company (the merged company). The merging entity loses its identity and its shareholders become shareholders of the merged company. On the other hand, an amalgamation is an arrangement, whereby the assets and liabilities of two or more companies (amalgamating companies) become vested in another
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company (the amalgamated company). The amalgamating companies all lose their identity and emerge as the amalgamated company; though in certain transaction structures the amalgamated company may or may not be one of the original companies. The shareholders of the amalgamating companies become shareholders of the amalgamated company.

Mergers may be of several types, depending on the requirements of the merging entities:

**Horizontal Mergers** - Also referred to as a ‘horizontal integration’, this kind of merger takes place between entities engaged in competing businesses which are at the same stage of the industrial process. Horizontal mergers occur when two companies sell similar products to the same markets. A merger between Coca-Cola and the Pepsi beverage division, for example, would be horizontal in nature. The goal of a horizontal merger is to create a new, larger organization with more market share. Because the merging companies’ business operations may be very similar, there may be opportunities to join certain operations, such as manufacturing, and reduce costs.

**Vertical mergers** - A vertical merger joins two companies that may not compete with each other, but exist in the same supply chain. An automobile company joining with a parts supplier would be an example of a vertical merger. Such a deal would allow the automobile division to obtain better pricing on parts and have better control over the manufacturing process. The parts division, in turn, would be guaranteed a steady stream of business.

**Congeneric Mergers** - These are mergers between entities engaged in the same general industry and somewhat interrelated, but having no common customer-supplier relationship. A company uses this type of merger in order to use the

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resulting ability to use the same sales and distribution channels to reach the customers of both businesses\(^2\).

**Conglomerate Mergers** - A conglomerate merger is a merger between two entities in unrelated industries. The principal reason for a conglomerate merger is utilization of financial resources, enlargement of debt capacity, and increase in the value of outstanding shares by increased leverage and earnings per share, and by lowering the average cost of capital\(^3\). Conglomerate mergers occur when two organizations sell products in completely different markets. There may be little or no synergy between their product lines or areas of business. The benefit of a conglomerate merger is that the new, parent organization gains diversity in its business portfolio. A shoe company may join with a water filter manufacturer in accordance with a theory that business would rarely be down in both markets at the same time. Many holding companies are built upon this theory.

**Cash Merger** - In a typical merger, the merged entity combines the assets of the two companies and grants the shareholders of each original company shares in the new company based on the relative valuations of the two original companies. However, in the case of a ‘cash merger’, also known as a ‘cash-out merger’, the shareholders of one entity receives cash in place of shares in the merged entity. This is a common practice in cases where the shareholders of one of the merging entities do not want to be a part of the merged entity.

**Triangular Merger** - A triangular merger is often resorted to for regulatory and tax reasons. As the name suggests, it is a tripartite arrangement in which the target merges with a subsidiary of the acquirer. Based on which entity is the survivor after such merger, a triangular merger may be forward (when the target merges into the

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\(^3\) ibid, note 4, at p. 59
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subsidiary and the subsidiary survives), or reverse (when the subsidiary merges into the target and the target survives).

2.2 Acquisitions

An acquisition or takeover is the purchase by one company of controlling interest in the share capital, or all or substantially all of the assets and/or liabilities, of another company. A takeover may be friendly or hostile, depending on the offeror company’s approach, and may be affected through agreements between the offeror and the majority shareholders, purchase of shares from the open market, or by making an offer for acquisition of the offeree’s shares to the entire body of shareholders. Kinds of acquisitions are as follows:-

**Friendly takeover**- Also commonly referred to as ‘negotiated takeover’, a friendly takeover involves an acquisition of the target company through negotiations between the existing promoters and prospective investors. This kind of takeover is resorted to further some common objectives of both the parties.

**Hostile Takeover**- A hostile takeover can happen by way of any of the following actions: if the board rejects the offer, but the bidder continues to pursue it or the bidder makes the offer without informing the board beforehand.

**Leveraged Buyout**- These are a form of takeovers where the acquisition is funded by borrowed money. Often the assets of the target company are used as collateral for the loan. This is a common structure when acquirers wish to make large acquisitions without having to commit too much capital, and hope to make the acquired business service the debt so raised.

**Bailout Takeover**- Another form of takeover is a ‘bail out takeover’ in which a profit making company acquires a sick company. This kind of takeover is usually pursuant to a scheme of reconstruction/rehabilitation with the approval of lender banks/financial institutions. One of the primary motives for a profit making company
to acquire a sick/loss making company would be to set off of the losses of the sick company against the profits of the acquirer, thereby reducing the tax payable by the acquirer. This would be true in the case of a merger between such companies as well.

Acquisitions may be by way of acquisition of shares of the target, or acquisition of assets and liabilities of the target. In the latter case it is usual for the business of the target to be acquired by the acquirer on a going concern basis, i.e. without attributing specific values to each asset / liability, but by arriving at a valuation for the business as a whole. An acquirer may also acquire a target by other contractual means without the acquisition of shares, such as agreements providing the acquirer with voting rights or board rights.

3. **Evolution of Antitrust laws in U.S.A:**

The antitrust laws are the original and in many aspects the most important component of United States federal economic regulatory scheme. The antitrust laws seeks to protect free markets and robust competition by setting limits on collusive and predatory conduct and monopolistic abuses that free market often breed.

The antitrust laws primarily focus upon competition. American antitrust has its roots in English common law tort of unfair competition. Indeed, in England and Europe, what America calls antitrust law is commonly referred to as the competition law.

The first antitrust law in U.S.A was the Sherman Act, passed in 1890 to attack the trusts—oligopolistic cartels that acted collusively rather than competitively and that dominated portions of American commerce during the industrial age. Since that time U.S federal government has created a serious of statutes and regulations concerning about the competition issues. These Statutes include:-

i. Clayton Act (1914)

ii. Robinson Patman Act (1936)
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iii. Cellar Kefauver Amendments to the Clayton Act (1950) and

As earlier stated prior to the Sherman Act, the competition between business firms was governed by the common law⁴. Under the common law, only those restraints that the courts determined to be unreasonable were invalid. Restraints that were in accordance with the public interest were considered reasonable and, therefore, lawful. There was no per se prohibition against price-fixing or other cartel agreements, and even attempts to monopolize were generally valid as long as they fell short of actually preventing or attempting to prevent other firms from competing in the same line of business. The underlying principle was that the law needed only to protect the rights of business owners to compete freely, not that it needed to protect the public from the exercise of market power. The common law jurisprudence was thus consistent with private property rights and principles of the liberty of contract and laissez-faire economics in the late nineteenth century.

The Sherman Anti-Trust Act aimed to stop the concentration of wealth and economic power in the hands of the few. The Act sought to regulate the growth and expansion of `trusts`, through which business competitors coordinated their activities, effectively running entire the industries as monopolies.

The federal statutes of U.S.A therefore include provisions that outlaw price fixing, certain tying arrangements, bid-rigging, monopolisation, anticompetitive mergers and acquisitions, price discrimination, predatory pricing and other restraints of trade or unfair methods of competition that are deemed incompatible with an open and competitive market place. To underscore their seriousness, the antitrust laws, have,

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from the beginning, treated violations as criminal as well as civil offences. Lengthy prison terms and substantial fines await both individual and corporate violators. To further encourage compliance and to encourage private as well as government enforcement, antitrust laws permit individuals or companies injured by the violations, to sue for three times their actual damages (‘Treble damages’) and in a departure from a usual American rule that each party to the litigation is liable to pay its own attorney’s fees, their court costs and attorney’s fees from the defendants. In such a way the U.S was able to restrict anti-competitive activities to some extent but still many areas were still there which were rendered untouched after the enactment of the Sherman Act.

The antitrust laws in U.S.A since the passing of the Sherman Act have spawned a large regulatory and enforcement framework. Two federal agencies, the Department of Justice’s Antitrust Division (DOJ) and the Federal Trade Commission (FTC) are responsible for the enforcement of antitrust laws and creation and implementation of additional rules and regulations in U.S. As per the view of the Supreme court of America:

“Antitrust laws in general and the Sherman Act in particular are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our enterprise system as the bill of rights is to the protection of our fundamental Personal freedoms.”

4. Origin of trusts to fix prices and control output:

Antitrust law originated in U.S.A in reaction to a public outcry over trusts, which were late-nineteenth-century corporate monopolies that dominated U.S. manufacturing

5 United States v Topco Assocs 405 U.S. 596,610 (1972)
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and mining. Trusts took their name from the legal device of business incorporation called trusteeship, which consolidated control of industries by transferring stock in exchange for trust certificates. The practice grew out of necessity. Twenty-five years after the American Civil War, rapid industrialization had blessed as well as cursed business. Markets expanded and productivity grew, but output exceeded demand and competition intensified. Rivals sought greater security and profits in cartels (mutual agreements to fix prices and control output). Out of these arrangements sprang the trusts. From sugar to whiskey to beef to tobacco, the process of merger and consolidation brought entire industries under the control of a few powerful people. Oil and steel, the backbone of the nation's heavy industries, lay in the hands of the corporate giants John D. Rockefeller and J. P. Morgan. The trusts could fix prices at any level. If a competitor entered the market, the trusts would sell their goods at a loss until the competitor went out of business and then raise prices again. By the 1880s, abuses by the trusts brought demands for reform.

Competition Commission of India

However the History gave only contradictory direction to the reformers. Before the eighteenth century, common law concerned itself with contracts, combinations, and conspiracies that resulted in restraint of free trade, but it did little about them. English courts generally let restrictive contracts stand because they did not consider themselves suited to judging adequacy or fairness. Over time, courts looked more closely into both the purpose and the effect of any restraint of trade. The turning point came in 1711 with the establishment of the basic standard for judging close cases, "the rule of reason." Courts asked whether the goal of a contract was a general restraint of competition (naked restraint) or particularly limited in time and geography (ancillary restraint). Naked restraints were unreasonable, but ancillary restraints were often acceptable. Exceptions to the rule grew as the economic philosophy of laissez-faire (meaning "let the people do what they please") spread its doctrine of non interference in business. As rival businesses formed cartels to fix
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prices and control output, the late-eighteenth-century English courts often nodded in approval.

By that time, the U.S. public was complaining about the trusts, Common law in U.S. courts was somewhat tougher on restraint of trade. Yet it was still contradictory. The courts took two basic views of cartels: tolerant and condemning. The first view accepted cartels as long as they did not stop other merchants from entering the market. It used the rule of reason to determine this, and put a high premium on the freedom to enter contracts. The Businesses and contracts mattered, where as the Consumers, who suffered from price-fixing, were irrelevant; as the wisdom of the market would be there to protect them from exploitation. The second view saw cartels as thoroughly bad. It reserved the rule of reason only for judging more limited ancillary restrictions. Given these competing views, which varied from state to state, no comprehensive common law could be said to exist. But one approach was destined to win out.

5. A historical perspective: Early merger law in U.S.:

During the last quarter of nineteenth century the industrial revolution expanded the markets, triggered capital investments and technological change and brought firms that had once enjoyed local market power into vigorous competition. Seeking an escape route from competition, the firms cartelized. When antitrust enforcers broke up cartels, firms consolidated. At first consolidation was in the form of a “trust”; a small group of trustees, typically dominated by the great American industrialists, held the stock of competitors and exercised control to their mutual advantage.

New state corporation’s laws paved the way for mergers and acquisitions. In 1890 New Jersey became the first state to allow the corporation to hold the stock of the other corporations. While many consolidations were means to avoid competition
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others were a way to achieve efficiencies and a response to changing demand of economy.

Over time, the driving forces of mergers shifted. In the 1940’s, huge German corporations worked hand in glove with Hitler to carry out the production tasks of Hitler’s wars. The fearsome role of industrial concentration in Germany led American legislators to strengthen the U.S. merger law; and it led, as well, to Americans ‘export’ of Antitrust, especially to Germany and Japan to help root the democracy and decentralise power. American merger law was thus applied to prohibit horizontal mergers of any significant competitors. In the 1960s, as a result, the merger movement was conglomerate.

Conglomerate mergers too, came under attack, as far flung enterprises exercised political if not economical power. ITT Corporation, the exemplar of conglomerate growth, exploited its contracts with U.S. government to help overthrow Allende in Chile and bring Pinochet to power. Ford corporations brought or build plants around the world, closing them abruptly when better profit opportunities sprang up elsewhere.

Hostile takeovers became a common vehicle for corporate expansion. The hostile takeovers were seen as destroying jobs, cultures and values. Anti bigness and conservative forces coalesced in 1968 for amendment of Securities Exchange Act of 1934 by the William’s Act, a takeover legislation that aggressor to make detailed disclosures to the target shareholders, that gave shareholders the right to withdraw tendered shares, and that established the duty not to discriminate among tendering shareholders.

Meanwhile friendly deals between major corporations were engineered as “midnight mergers.” Merger partners closed their deals quickly, out of the sight of the government watchdogs, leaving the federal agencies and the courts to contemplate
how to “unscramble” the eggs. The phenomenon of midnight mergers brought to the enactment of the Hart—Scott—Rodino Act of 1976, which instituted the now all pervasive and important regimen of premerger notification and reporting requirements, with waiting periods to give the agencies the time and information necessary to seek preliminary injunctions. An unintended byproduct of enactment of Hart—Scott—Rodino Act was a shift of most Antitrust merger activities from the courts to the level of bureaucrats; from a liability regime to a pre transaction regulation.

The early 1980’s brought both the budding of new information economy, and, in United States, a laissez faire stance towards business conduct and transactions. Huge horizontal consolidations took place unchallenged noticeably in airlines and oil. Strategic alliance between U.S and non U.S firms became a common vehicle for expanding American presence abroad, and for gaining U.S footholds.

In short, there have been numerous merger waves spanning much of the twentieth century and extending into the twenty first century. These have persisted whether federal enforcement was permissive, as in early years or became aggressive after 1950.

6. **The Sherman Act of 1890:**

The Sherman Antitrust is a landmark federal statute on competition law passed by Congress in 1890. It prohibits certain business activities that reduce competition in the marketplace, and requires the United States federal government to investigate and pursue trusts, companies, and organizations suspected of being in violation. It was the first Federal statute to limit cartels and monopolies, and today still forms the basis for most antitrust litigation by the United States federal government.
The Sherman Antitrust Act was the first major legislation passed to address oppressive business practices associated with cartels and oppressive monopolies. The Sherman Antitrust Act is a federal law prohibiting any contract, trust, or conspiracy in restraint of interstate or foreign trade. Even though the title of the act refers to trusts, the Sherman Antitrust Act actually has a much broader scope. It provides that no person shall monopolize, attempt to monopolize or conspire with another to monopolize interstate or foreign trade or commerce, regardless of the type of business entity. Penalties for violating the act can range from civil to criminal penalties; as an individual violating these laws may be jailed for up to three years and fined up to $350,000 per violation, whereas corporations may be fined up to $10 million per violation. Like most laws, the Sherman Antitrust Act has been expanded by court rulings and other legislative amendments since its passage.

6.1. **Standard Oil Co v. United States**: 
Public concern over the practices of Standard Oil grew in the 1880s and continued to expand following the passage of the Sherman Antitrust Act of 1890. The Sherman Act prohibited unfair business practices designed to drive out competition but the government and courts were not willing to apply it very aggressively. By 1906 Standard Oil had become a monopoly, controlling over 80 percent of oil production in the United States. Majority ownership of the company was led by John D. Rockefeller wherein a $70 million dollar investment, establishing the company in the early 1880s, earned $700 million of profits in only fifteen years.

With little competition for some products, such as kerosene, Standard Oil charged excessive prices leading to remarkable profits. For products where competition did exist, Standard Oil could afford to drastically cut prices driving the smaller companies out of business. In addition, Standard Oil offered rebates to oil producing companies,

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6 221.U.S. 1 (1911)
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enticing them to ship their oil only through Standard Oil pipelines. All of these practices were unfair restrictions on interstate commerce (conducting economic trade or business across state lines). A phrase often applied to these practices is "restraint of trade."

Although evidence was uncovered describing the unfair practices Standard Oil used in restricting competition, the U.S. government long refused to act. Finally, under President Theodore Roosevelt’s second term of office, public pressure resulted in an investigation of Standard Oil’s practices and a lawsuit. The government charged that Standard Oil violated the Sherman Antitrust Act by illegally restricting interstate commerce. Standard Oil responded that many of the individual companies controlled by Standard Oil were actually competitive on their own, relatively free of the overarching trust company. Roosevelt’s successor President, William Howard Taft, inherited the case and kept pursuing prosecution.

Argued for eight months in St. Louis Federal Circuit Court, a decision was issued on November 20, 1909. Judge Walter Henry Sanborn ruled that indeed Standard Oil acted inappropriately to restrict interstate commerce. Although Standard Oil’s individual companies might be capable of independent competition, actually they were sufficiently controlled by the Standard Oil trust company to prevent competition. Through this control, Standard Oil had tried to monopolize the petroleum industry. The court stated that "the combination and conspiracy in restraint of trade and its continued execution which have been found to exist, constitute illegal means by which the conspiring defendants combined, and still combine and conspire to monopolize a part of interstate and international commerce."

Standard Oil appealed the decision to the U.S. Supreme Court. The Supreme Court thereafter delivered the Court’s lengthy unanimous opinion in favour of the United States upholding the lower court’s decision. Court first found that the vagueness of
the Antitrust Act necessarily called for the exercise of judgement. Then the Court proceeded to introduce a standard to be used in outlawing specific monopolies. This was called the "rule of reason" as it helped aimed in outlawing specific monopolies

The" rule of reason” stated that, if the company could justify a restraint of trade as a necessary part of a business transaction, and it was considered reasonable by the participating companies and the general public, then it would not be considered illegal. It would be up to the courts to decide on each case.

7. The Clayton Act, 1914 and the 1950 amendment to it:

In 1914, congress adopted its first Antitrust law specific to acquisitions. Section 8 (later section 7) prohibited stock acquisitions whose effect may be substantially to lessen competition between the acquired and acquiring companies.

For the next three decades, however apart from railroad consolidations, both the Sherman Act and the Clayton Act proved to be toothless against mergers. In United States v. U.S. Steel Corporation\(^7\) the Supreme Court approved U.S. Steel’s acquisition of nearly 200 competitors, on ground that U.S. Steel had no market power. The company’s leader wishing to raise prices had been relegated to hosting gentlemanly price fixing dinners; this being taken as evidence that U.S. steel alone had no power. In United States v. Columbia Steel co\(^8\), the Supreme Court approved U.S. Steel’s subsidiary’s acquisition of Consolidated Steel, the largest independent west coast steel fabricator. The decision was much criticized and triggered a call for stricter antitrust. Moreover by 1940’s, there was both a major merger wave and nationwide fear that increasing industrial concentration could facilitate either fascism or communism. Increasing concentration was conceived as the threat to the democracy.

\(^7\) 251 U.S.417 (1920)
\(^8\) 334 U.S.495 (1948)
Meanwhile, the Congress held hearings throughout most of 1940`s on the need for tougher merger law and on forum such a law should take. The Supreme Court assented to the U.S. Steel`s acquisition of Consolidated Steel fuelled the fire which ultimately after two years led to the enactment of the Celler Kefauver Amendment in 1950 to Section 7 of the Clayton Act.  

The amended merger law extended the proscriptions of 1914 law to asset (as well as stock) transactions. Also it prescribed the mergers and acquisitions that may lessen the competition in any market, not just those that may lessen the competition between the merging parties. The new law was intended to have a broad sweep; it was intended to nip concentration in the bud. It was thus intended to apply to all the mergers whether horizontal, vertical or conglomerate.

In the opinion of the Federal Trade Commission (FTC), and of many members of Congress, the prohibitions of Section 7 of the Clayton Act as originally enacted were not sufficient to cope with the problems presented by the merger movement. As a result, Congress was repeatedly asked to revise Section 7, and a large number of bills to this effect were introduced. In 1950 Congress amended Section 7 and in so doing broadened its applicability. The amended Act reads as follows:  

“No corporation engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of assets of another person engaged also in commerce or in any activity affecting Commerce where in any line of Commerce or any activity affecting Commerce in any section of the country, the effect of such

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9 The Statute was amended to change “corporation” to a person and to lower the threshold of the interstate commerce requirement.

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*acquisition may be substantially to lessen competition, or tend to create a monopoly*”.

It should be clear from the wording of the statute that for a violation to exist, it is not necessary that competition already be substantially lessened, or that a monopoly already is created. It is only necessary that the court find that the merger may lead to the prohibited result, and that a substantial lessening of competition is a probable consequence of the merger.

The legislative intent was summarized at length by the Supreme Court in Brown Shoe co v. United States. It was the first Supreme Court case to apply to the Celler-Kefauver Amendment.

8. Robinson Patman Act of 1936:

The Robinson–Patman Act of 1936 was passed by the Congress to reinforce the Clayton Act’s structure against price discrimination, the practice of selling the same product to different, but similarly situated, customers at different prices. The intention behind the enactment of this Act was that would be monopolists were using the practice, as well as predatory pricing to target, and drive out of business weaker competitors. It was also considered that price discrimination was being used to take unfair advantage of smaller customers, i.e. those with less leverage to demand price concessions.

The Act aims at prohibiting the anticompetitive practices by producers, specifically price discrimination. It grew out of practices in which chain stores were allowed to purchase goods at lower prices than other retailers. It prevented unfair price discrimination for the first time, by requiring that the seller offer the same price

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11 370 U.S.294 (1962)
terms to customers at a given level of trade. The Act provided for criminal penalties, but contained a specific exemption for “cooperative association”.

The United States Department of Justice (DOJ) and the Federal Trade Commission (FTC) have joint responsibilities for enforcement of the antitrust laws. Though the Federal trade commission has some overlapping responsibilities with the Department of Justice, and although the Robinson Patman Act is an amendment to the Clayton Act, the Robinson Patman Act is not widely considered to be in the core area of the antitrust laws. The FTC is active in enforcement of the Robinson Patman Act and the Department of Justice is not.

9. **Hart-Scott-Rodino Act of 1976**


The HSR Act provides that the parties must not complete certain merger and acquisitions or transfers of securities or assets, including grants of executive compensation, until they have made a detailed filing with the U.S. based competition regimes which are the Federal trade commission and the Department of Justice and waited for those agencies to determine that the transaction will not adversely affect U.S. commerce under the antitrust laws. Before the enactment of HSR Act the situation was perhaps more detrimental to the Nation because the federal agencies charged with merger enforcement (FTC and DOJ) would not learn of proposed mergers, acquisitions, joint ventures until the transactions were publicly announced and often well on their way to completion or already complete. Most merger enforcement thus involved either hasty races to enjoin imminent closings or after the facts attempt by the agencies to undo completed transactions. The process which
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was both inefficient and highly adversarial, did not serve the interest of the enforcement agencies, those being regulated, or most importantly the public.

With the HSR Act the concept that before certain mergers, tender offers or other acquisition transactions (including certain grants of executive compensation) can be completed, both parties must file a "Notification and Report Form" with the FTC and the Assistant Attorney General in charge of the Antitrust Division of the DOJ. The filing must describe the proposed transaction and the parties to it. It requires disclosure of the parties' financial information and various planning and evaluation documents prepared by the parties concerning the transaction and other recent transactions. Upon the filing, a 30-day waiting period then ensues during which time those regulatory agencies may request further information in order to help them assess whether the proposed transaction violates the antitrust laws of the United States or could cause an anti-competitive effect in the parties' markets. The filing is not made public, but the agencies may disclose some information about the transaction, especially in the case of publicly-announced transactions as per their own prerogative.

Failure to file the form carries a civil penalty of up to $16,000 per day against the parties, their officers, directors or partners, and the agencies may obtain an order requiring an acquirer to divest assets or securities acquired in violation of the Act. It is also unlawful to complete the transaction during the waiting period, and the same penalties apply. Although the waiting period is generally 30 days, the regulators may request additional time to review additional information and the filing parties may request that the waiting period for a particular transaction be terminated early ("early termination"). Early terminations are made public in the Federal Register and posted on the Federal Trade Commission website. Some types of transactions are afforded the special treatment of shorter waiting periods.
10. United States Merger guidelines:

The 1980’s began the modern era in merger law. The justice department issued which reset the terms of merger analysis. The Guidelines were marginally revised in 1984 and in 1992 the DOJ and FTC collaborated in issuing joint Guidelines on horizontal mergers, which made only marginal changes to their predecessor. The modern era U.S. guidelines changed the face of U.S. merger analysis, and indeed have been influential throughout the world.

The Guidelines have been designed to inform lawyers and business people of analysis the agencies use in determining whether merger are anticompetitive. The Guidelines assume that the purpose of merger law is to prevent harm resulting from a misallocation of resources or the accompanying transfer of wealth caused by increases in market power. The Guidelines are intended to identify mergers with those effects, while not interfering with the other large mergers which are devoid of such effects.

For the first time in 1982, the Department Of Justice revealed its view that mergers are usually efficient and therefore usually to be welcomed. The inhospitality tradition had ended.

These rules, which have been revised a number of times in the past four decades, they govern the extent to which these two regulatory bodies will scrutinize and challenge a potential merger on grounds of market concentration or threat to competition within a relevant market.

The first Merger Guidelines set forth by the DOJ were the 1968 Merger Guidelines which remained largely unchanged until 1982. They were, however, a step forward in two ways: they gave more accurate advice to corporate management as to when and how mergers would be examined, and brought new economic ideas
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into antitrust enforcement, specifically the "structure-conduct-performance" model of industrial organization.

In 1982, Associate Attorney General Bill Baxter, released a new set of guidelines, which included the using of Herfindahl index to determine market concentration and it also made the use of modern concepts of microeconomic theory to greater extent. The newer guidelines took a more favourable view of economies of scale and efficiency of production as rationales for integration. Moreover, they raised the level of market concentration necessary for the government to scrutinize mergers, effectively treating competition as a means to greater efficiency rather than as a goal in and of itself.

The guidelines were revised again in 1984 and were later replaced by the 1992 Merger Guidelines that represented a finer version of previously established tools and policies; The 1992 Guidelines were revised in 1997, almost concurrently with the FTC’s challenge of the Staples-Office Depot merger in federal court.\(^{12}\)

The 1997 Horizontal Merger Guidelines were replaced with the most recent version in 2010. The 2010 Guidelines introduced the concept of "upward pricing pressure" resulting from a merger between competing firms.

11. Study of Landmark Cases:

11.1. Brown Shoe Co. V. United States\(^{13}\)

In 1955 the Justice Department brought suit to prevent the Brown Shoe Company Inc. from merging with the G. R. Kinney Company Inc. A motion by the Government for a preliminary injunction was denied, and the companies were allowed to merge on the condition that their operations are kept separate.

\(^{12}\) Ibid
\(^{13}\) 370 U.S. 294 (1962)
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As on 1955 Brown was the fourth largest manufacturer of the shoes in United States, with a market share of 4 percent, and was leading retailer. Kinney on the other hand was the eighth largest Shoe retailer in the United States and the leading family style shoe store chain. It manufactured less than 0.5 percent of the nation’s shoes, and retailed less than 2 percent. There was a definite trend of Shoe manufacturers to acquire retail outlets and brown was the major pace setter of this trend.

Brown proposed to acquire Kinney. The United States Government then sued Brown Shoe and brought a motion for preliminary injunction, and lost. The merger was consummated, and the case went to trial. The district court found no violation as a result of combination of firms manufacturing facilities but found violations by reason of competing manufactures foreclosure from selling their shoes to Kinney stores and it found violations in shoe retailing markets in all cities of 10000 or more population in which both brown and Kinny stores were located. Brown also owned or controlled a large number of retail outlets. Over 1,230 stores were either owned outright by Brown or independently operated under agreements which precluded the sale of lines which competed with those manufactured by Brown. Kinney's manufacturing plants supplied about twenty per cent of the shoes sold in Kinney stores. Before the merger Kinney bought no shoes from Brown. However, after the merger Brown became the largest outside supplier of shoes to Kinney, supplying 7.9 percent of its needs. The court viewed that usually after acquiring retail outlets, shoe manufacturers showed a definite tendency to supply an ever increasing proportion of the retail outlets' needs, "thereby foreclosing other manufacturers from effectively competing for the retail accounts.

Thus the District Court eventually found that the merger would increase concentration in the shoe industry, both in manufacturing and retailing, eliminate one of the corporations as a substantial competitor in the retail field, and establish a manufacturer-retailer relationship which would deprive all but the top firms in the
industry of a fair opportunity to compete, and that, therefore, it probably would result in a further substantial lessening of competition and an increased tendency toward monopoly. It enjoined appellant from having or acquiring any further interest in the business, stock, or assets of the other corporation, required full divestiture by appellant of the other corporation's stock and assets, and ordered appellant to propose in the immediate future a plan for carrying into effect the Court's order of divestiture. By delivering such order the district court upheld the principles of Celler-Kefauver Amendment to the Clayton Act.

11.2. United States v. Philadelphia National Bank

Philadelphia National Bank, the second largest commercial Bank with headquarters in Philadelphia, sought to acquire Girard Trust Corn Exchange Bank, the third largest. The resulting Bank would be the third largest commercial Bank in four county areas. It would hold 36 percent of commercial Bank assets, 36 percent of deposits and 34 percent of loans. Post merger the top two banks would have 59 percent of commercial bank assets, 58 percent of deposits and 58 percent of loans.

The proposed question to be asked here is not where parties to merger do business or even where they compete, but where, within the area of competitive overlap, the effect of merger on competition will be direct and immediate\(^\text{15}\). This depends upon “The geographic structure of supplier customer relations”.\(^\text{16}\) In banking as in most service industries, convenience of location is essential for effective competition. Individuals and corporations typically confer the bulk of their patronage on Banks in their local community; they find it impractical to conduct their banking business at a distance.

\(^{14}\) 374 U.S. 321 (1963)

\(^{15}\) See Block Mergers and Markets (1960), 42

\(^{16}\) Kaysen and Turner antitrust policy (1959), 102
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The court emphasized upon the context that “area of effective competition in known line of commerce must be chartered by careful selection of market area in which the seller operates and to which, the purchaser can practicably turn for supplies”

After the determination of the relevant market the next question to be considered under section 7 was: whether the effect of merger may be substantially to lessen competition in the relevant market.

The court stated on the second question that a merger which produces a firm controlling an undue percentage share of relevant market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects. Such a test lightens the burden of proving illegality only with respect to mergers whose size makes them inherently suspect of the violation of the Act. Furthermore the test is fully consonant with the economic theory that competition is likely to be greatest when there is large number of sellers, none of which has any significant market share.

The merger of appellees will result in a single Bank controlling at least 30 percent of banking business in four county Philadelphia metropolitan area. The court believed that 30 percent concentration of business resembled threat. The court also expressed that there is no reason to think that concentration is less inimical to the free play of competition in banking than in any other service industries. On the contrary it is in all probability more inimical.

This Court rejects appellees' pervasive suggestion that application of the pro competitive policy of section 7 to the banking industry will have dire, although

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17 Tampa Electric company v. Nashville Coal co., 365 U.S. 320,327
18 Section 7 of the Clayton Act.
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unspecified, consequences for the national economy and discouraged the concept of “countervailing power”. The court held that:-

This proposed consolidation cannot be justified on the ground that Philadelphia needs a bank larger than it now has in order to bring business to the area and stimulate its economic development.

This proposed consolidation cannot be justified on the ground that the increased lending limit would enable the consolidated bank to compete with the large out-of-state banks, particularly the New York banks, for very large loans.

This proposed consolidation cannot be justified on the theory that only through mergers can banks follow their customers to be suburbs and retain their business, since this can be accomplished by establishing new branches in the suburbs.

The Turning of the Tide

1974 was a watershed year, the Supreme Court went into complete transformation and entire jury was newly appointed into the office. Such a transformation lead to the great outcomes such as the barriers to the trade were lowered, foreign competition became robust, U.S. firms that has seemed invincible in the 1960’s were losing ground to their more efficient German and Japanese competitors, and the country was in economic recession.

11.3. United States .V. General Dynamics Corporation

In this case General Dynamics Corporation and its predecessor ‘material service’, acquired the stock of two major Illinois coal producers, Freeman Coal Mining Corporation and United Electric Companies. In Illinois in 1959 Freeman was no 2 Coal Mining firm with 15 percent of sales and United Electric Companies was no 5 with

more than 8 percent market share; combined the Firms had 23.2 percent market share and became the no 1 firm. Premerger the top two firms had 36.6 percent of Illinois market; post merger the top two firms had 44.3 percent. The number of firms also reduced by 73 percent from 1957 to 1967, from 144 to 39. The United States sued, charging that the ultimate 1959 acquisition of United States Electric by material; service violated Section 7 of the Act\textsuperscript{20}. The district court found no violation, and dismissed the case.

Much of the district court’s opinion was devoted to a description of the changes that have affected the Coal industry since World War II. On the basis of more than three weeks of testimony and a voluminous record, the court discerned a number of clear and significant developments in the industry which were as follows:-

First, it found that Coal has become increasingly less able to compete with other sources of energy in many segments of energy market. Following the War the industry entirely lost its largest single purchaser of Coal-the railroads and faced increasingly stiffer competition from Oil and Natural gas as source of energy for industrial and residential uses. The court reviewed evidence attributing this decline not only to the changing relative economics of alternative fuels and to new distribution and consumption patterns, but also to more recent concerns with the effect of Coal use on the environment and consequent regulation of the extent and means of such Coal consumption.

Second, the court found that to a growing extent since 1954, the electric utility industry has become the mainstay of Coal consumption. While electric utilities consumed only 15.76 percent of the Coal produced nationally in 1947, their share of total consumption increased every year thereafter.

\textsuperscript{20} Section 7 of the Clayton Act
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Third, and most significantly, the court found that to an increasing degree, nearly all Coal sold to utility is transferred under long term requirements contracts, under which Coal producers promise to meet utilities coal consumption requirements for a fixed period of time, and at predetermined prices.

These developments in the patterns of Coal distribution and consumption, the District court found have limited the amounts of Coal immediately available for spot purchases on open market this had happened because of the practice of Coal producers of expanding their own capacity only to meet long term contractual commitments and the gradual disappearance of the small truck mines.

Due to the above mentioned fundamental changes in the structure of the market for Coal, the District court was justified in viewing the statistics relied on by the government as insufficient to sustain its case. Evidence of past production does not, as a matter of logic does not give a proper picture of a company’s future ability to compete.

The testimony and the exhibits in the District Court revealed that United Electric’s Coal reserve prospects were “unpromising”. United Electric Company was found to be facing the future with relatively depleted resources at its disposal and with the vast majority of those resources already committed under contracts allowing no further adjustment in price. In addition the District Court found out that “United Company neither has the possibility of acquiring more reserves nor the ability to develop deep Coal reserves”. And thus was not in a position to increase its reserves to replace those already depleted or committed.21

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21 In most situations of course the unstated assumption is that a company that has maintained a certain share of market in recent past will be in a position to do so in the immediate future. Thus companies that have controlled sufficiently large shares of concentrated market are barred from merger by section 7 of the Clayton Act not because of
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Viewed in terms of present and future reserve prospects United Electric`s weakness as a competitor was fully analysed by the District Court and fully substantiated that Court`s conclusion that its acquisition by Material service would not “substantially lessen competition”.

11.4. United States V. Baker Hughes

Appellee Oy.Tampella AB, a Finnish corporation, through its subsidiary Tamrock AG, manufactures and sells hardrock hydraulic underground drilling rigs (HHUDRs) in the United States and throughout the world. Appellee Baker Hughes Inc., a corporation based in Houston, Texas, owned a French subsidiary, Eimco Secoma, S.A. (Secoma) that was similarly involved in the HHUDR industry. In 1989, Tamrock proposed to acquire Secoma.

The United States challenged the proposed acquisition, charging that it would substantially lessen competition in the United States HHUDR market in violation of section 7 of the Clayton Act.

By presenting statistics showing that combining the market shares of Tamrock and Secoma would significantly increase the concentration in the already highly concentrated U.S. HHUDR market, the government established the prime facia case of anticompetitive effect.

their past acts but because their past performance imply an ability to continue to dominate with at least equal vigour.

22 908 F2d 981 (D.C. Cir. 1990)
23 The parties in this case do not seriously contest the district court`s definition of the relevant markets. The court defined the geographic market as the entire United States and the relevant products as three types of HHUDRs: face drills, long hole drills and roof bolting drills as well as associated spare parts, components and accessories and used drills.
24 From 1986 through 1988, Tamrock had an average 40.8 percent share of United States HHUDR market, while Secoma`s share averaged 17.5 percent. In 1988 alone, the two firms enjoyed a combined share of 76 percent of the market. This acquisition has increased the HHI in market from 2878 to 4303
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In December 1989, the government sought and obtained a temporary restraining order blocking the transaction\(^{25}\). In February 1990, the district court held a bench trial and issued a decision rejecting the government's request for a permanent injunction and dismissing the section 7 claim\(^{26}\). The government immediately appealed to Circuit court, requesting expedited proceedings and an injunction pending appeal. Court granted the motion for expedited briefing and argument, but denied the motion for an injunction pending appeal. The appellees consummated the acquisition shortly thereafter.

The district court gave particular weight to two non entry factors: the flawed underpinnings of the government’s prime facia case and the sophistication of the HHUDRs consumers. The court’s consideration of these factors was appropriate and also imperative because in this case these factors significantly affected probability that acquisition would have anticompetitive effects.

With respect to first factor, the statistical basis of the prime facia case, the district court accepted defendant’s argument that the government’s statistics were misleading because the United States HHUDR market is minuscule, market share statistics are "volatile and shifting\(^{27}\), and easily skewed. In 1986, for instance, only 22 HHUDRs were sold in the United States. In 1987, the number rose to 43 and in 1988 it fell to 38. Every HHUDR sold during this period, thus, increased the seller's market share by two to five percent. A contract to provide multiple HHUDRs could catapult a firm from last to first place. The district court found that, in this unusual market, "at any given point in time an individual seller's future competitive strength may not be accurately reflected\(^{28}\). While acknowledging that the HHUDR market would be highly concentrated after Tamrock acquired Secoma, the court found that such

\(^{27}\) 731 F.Supp. At 11
\(^{28}\) Id. at 9
concentration in and of itself would not doom competition. High concentration has long been the norm in this market. For example, only four firms sold HHUDRs in the United States between 1986 and 1989. Nor are concentration surprising where, as here, a product is esoteric and its market small. Indeed, the trial judge found that "concentration has existed for some time (in the United States HHUDR market) but there is no proof of overpricing, excessive profit or any decline in quality, service or diminishing innovation.

The second non-entry factor that the district court considered was the sophistication of HHUDR consumers. HHUDRs currently cost hundreds of thousands of dollars, and orders can exceed $1 million. These products are hardly trinkets sold to small consumers who may possess imperfect information and limited bargaining power. HHUDR buyers closely examine available options and typically insist on receiving multiple, confidential bids for each order. This sophistication, the court found, was likely to promote competition even in a highly concentrated market.

The existence and significance of barriers to entry are frequently, of course, crucial considerations in a rebuttal analysis. In the absence of significant barriers, a company probably cannot maintain super active pricing for any length of time. The Court in this case reviewed the prospects for future entry into the United States HHUDR market and concluded that; overall, entry was likely, particularly if Tamrock's acquisition of Secoma were to lead to super active pricing. The government attacks this conclusion, asserting that, as a matter of law, the court should have required the defendants to show clearly that entry would be "quick and effective."

29 Id. at 8
30 Id. at 11.
31 See, e.g., United States v. Falstaff Brewing Corp., 410 U.S. 526, 532-33, 93 S.Ct. 1096, 1100-01, 35 L.Ed.2d 475 (1973); United States v. Syufy Enters., 903 F.2d 659, 664 (9th Cir.1990); California v. American Stores Co., 872 F.2d 837, 842 (9th Cir.1989).
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The Circuit Court in this case discussed number of considerations that led it to conclude that entry barriers to the United States HHUDR market were not high enough to impede future entry should Tamrock’s acquisition of Secoma led to super active pricing.

Firstly the Court noted that at least two companies had entered U.S. HHUDR market in 1989 and were poised for future expansion.

Second, the Court stressed that number of firms competing in Canada and other Countries had not penetrated in U.S, but could be expected it to do if Tamrock’s acquisition of Secoma led to higher prices.

Third these firms would exert competitive pressure on U.S.HHUDR market even if they never actually entered the market.

Finally the Court noted that there has been tremendous turnover in U.S HHUDR market in the 1980’s. For example Secoma did not sell a single HHUDR in U.S.in 1983 and 1984, but then lowered its price and improved its service, becoming market leader by 1989. Secoma’s growth suggests that competitors not only can, but probably will enter or expand if this acquisition leads to higher prices. The district court to be sure also found some facts suggesting difficulty for entry, but these findings do not negate its ultimate finding to the contrary. Hence the Circuit Court determined that entry into U.S.HHUDR market would likely avert anticompetitive effects from Tamrock’s acquisition of Secoma. Finally the Circuit Court agreed with the district court’s analysis of the case which was fully consonant with precedents and logic.
Conglomerate mergers

11.5. FTC v. Consolidated Foods Corp 32

Consolidated foods, a major food processor with a network of whole sale and retail sales, acquired Gentry the third largest manufacturer of dehydrated onions and Garlic. Consolidated was a large buyer from the firms, such as meat packers that made large purchases of dehydrated onions and Garlic. Consolidated had used reciprocity programmes in past (‘I will buy from you only if you will buy from me’) and could be expected to continue to do so. The court held the acquisition illegal stating:

“We hold at the outset that the reciprocity made possible by such an acquisition is one of the congeries of anticompetitive practices at which the antitrust laws are aimed. The practice results in an irrelevant and alien factor, intruding into choice among competing product, creating at the least a priority on business at equal prices”.

It has been a reasonable and the adequate judgement because if reciprocal buying creates for Gentry a protected market, which others cannot penetrate despite superiority of price, quality or service, competition is lessened whether or not Gentry can expand its market share. It is for this reason that the Court rejected the respondent’s argument that the decline in its share of Garlic market proves the ineffectiveness of reciprocity.

Failing firms

The harsh law against mergers was somewhat tempered in 1969 when the Supreme Court affirmed the failing company defence but specified its narrow purview.

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32 380 U.S. 592 (1965)
11.6. Citizen Publishing Co. v. United States

In 1940, the only two daily newspapers in Tucson, the Citizen, an evening paper, and the Star, a daily and Sunday paper negotiated a joint operating agreement, which was to run for 25 years. Prior thereto, the papers had been vigorous competitors. The agreement provided that each paper was to retain its news and editorial departments and corporate identity, but that generally business operations were to be integrated. Three types of controls were imposed: (1) price-fixing -- papers were to be distributed and advertising sold by a jointly held company, and subscription and advertising rates were to be set jointly; (2) profit pooling -- all profits were to be pooled and distributed under an agreed ratio, and (3) market control -- neither paper nor any of their stockholders or officers were to engage in any other business in the county in conflict with the agreement. In 1953, the agreement was extended until 1990. Combined profits before taxes rose from $27,531 in 1940 to $1,727,217 in 1964. In 1965, the Star's stock was acquired by Citizen's shareholders pursuant to an option in the agreement, and the Star is now published by a company formed as a vehicle for the acquisition. The Government charged appellants with unreasonable restraint of trade in violation of Section 1 of the Sherman Act, monopolization in violation of Section 2 of that Act, and violation of Section 7 of the Clayton Act by the acquisition of the Star stock.

The District Court found that the agreement contained provisions unlawful per se under Section 1 of the Sherman Act, and granted the Government's motion for summary judgment. The case was tried on the other charges, and the court found monopolization of the newspaper business in Tucson in violation of Section 2 of Sherman the Act, and held that, the appropriate geographic market, acquisition of the Star caused a substantial lessening of competition in daily newspaper publishing in violation of Section 7 of the Clayton Act. The decree required appellants to submit

33 394 U.S. 131 (1969)
a plan for divestiture of the Star and its reestablishment as an independent competitor and to modify the joint operating agreement to eliminate price-fixing, market control, and profit-pooling provisions.

**Oligopolistic mergers**

11.7. **Hospital corp. of America V. Federal Trade Commission**

Hospital Corporation of America, the largest proprietary hospital chain in the United States, asked the court to set aside the decision by the Federal Trade Commission that it violated section 7 of the Clayton Act, by the acquisition in 1981 and 1982 of two corporations, Hospital Affiliates International, Inc. and Health Care Corporation. Before these acquisitions (which cost Hospital Corporation almost $700 million), Hospital Corporation had owned one hospital in Chattanooga, Tennessee and after that the acquisitions had given it the ownership of two more. Hospital Affiliates International had made to manage two other Chattanooga-area hospitals. So after the acquisitions Hospital Corporation owned or managed 5 of the 11 hospitals in the area.

If all the hospitals brought under common ownership or control by the two challenged acquisitions are treated as a single entity, the acquisitions raised Hospital Corporation’s market share in the Chattanooga area from 14 per cent to 26 per cent. This made it the second largest provider of hospital services in a highly concentrated market where the four largest firms together had a 91 percent market share compared to 79 percent before the acquisitions. These are the FTC’s figures, and Hospital Corporation thinks they are slightly too high; but the discrepancy is too slight to make a legal difference. Nor would expressing the market shares in terms of the Herfindahl index alter the impression of a highly concentrated market.

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34 807 F.2d 1381 (7th circuit.1986), cert, denied,481 U.S. 1038 (1987)
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The administrative law judge concluded that the acquisitions violated Section 7 because of their probable anticompetitive effects in the Chattanooga hospital market. While modifying some of his findings, the Commission agreed that the acquisitions were unlawful and ordered Hospital Corporation to divest the hospitals acquired in Chattanooga and to notify the Commission, in advance, of any similar acquisitions planned for anywhere in the country. The Clayton Act allowed Hospital Corporation to seek judicial review of the Commission's order in any circuit in which it does business.35, Hospital Corporation made three arguments in front of the court:

  a) There is no reasonable probability that its acquisitions in Chattanooga will lessen competition substantially;
  b) The Federal Trade Commission has no constitutional power to bring an enforcement action, because the members of the Commission do not serve at the pleasure of the President;
  c) Hospital Corporation should at least not be required to give the Commission advance notice of all future acquisitions.

Whether the challenged transaction may substantially lessen competition or not is governed by the substantial evidence rule36. Court's only function was to determine whether the Commission's analysis of the probable effects of these acquisitions on hospital competition in Chattanooga is so implausible, so feebly supported by the record, that it flunks even the deferential test of substantial evidence.

With respect to coordinated competitive effects, the guidelines focus on analysing whether the post-merger market structure is one in which firms can likely overcome. Two key impediments to successful coordination are:

35 see 15 U.S.C. § 21(c)
36 See, e.g., National Dairy Products Corp. v. FTC, 412 F.2d 605, 616, 620 (7th Cir. 1969); Dean Milk Co. v. FTC, 395 F.2d 696, 709, 711-13 (7th Cir. 1968); Yamaha Motor Co., Ltd. v. FTC, 657 F.2d 971, 977 and n. 7 (8th Cir. 1981); Fruehauf Corp. v. FTC, supra, 603 F.2d at 355; RSR Corp. v. FTC, 602 F.2d 1317, 1320, 1325 (9th Cir. 1979); Ash Grove Cement Co. v. FTC, 577 F.2d 1368, 1377-79 (9th Cir. 1978). (All but the first two of these decisions were section 7 cases, like this one).
a. Reaching a consensus on terms of coordination such as price and market shares and
b. Discouraging cheating through rapid detection and imposing punishment.

The merger guidelines recognised that change in market structure resulting from merger could make coordination more likely or more effective. The reduction in number of firms could make it easier for the remaining sellers to make out the terms of coordination. From this perspective Judge ‘Posner’ in this case said that “probability that a merger will diminish competition is greatest when post-merger concentration is high and concentration has increased market ably”.

12. Conclusion: 37

This article has been a small initiative on the part of researcher to help in understanding of the evolution of anti-trust laws in U.S.A. in the context of merger and acquisitions, Indian Competition laws and its enforcement by the Competition Commission of India has been of recent origin and do not have a long history. Moreover, the mergers and acquisitions provisions in the Competition Act, 2002 were enforced by the Government of India only with effect from 01st June, 2012. As on date, the Commission has also not taken any merger case to Phase-II stage by way of issuing a show-cause notice to the parties regarding the prima-facie opinion of appreciable adverse effect on competition (AAEC) in the relevant market. As there could be lack of available jurisprudence on mergers and acquisitions cases with respect to theory of harm, the researcher has selected the captioned topic on the evolution of merger jurisprudence and theoretical analysis through legislation and case laws in U.S.A. It is believed that the understanding of the same will be helpful in the assessment of Merger and Acquisition cases which are filed in the Competition Commission of India under the respective provisions of the Competition Act, 2002. It

37 The views expressed here entirely belong to the intern and have no concern with the of Competition Commission of India
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is believed that the understanding of the U.S. mergers and acquisitions case laws as evolved way back from passing of the Sherman Act in 1890 and of the Merger guidelines as issued by the FTC and DOJ from time to time, could contribute in the efforts of the Indian Competition authorities to issue its own combination guidelines later at some appropriate time.

Following the above mentioned suggestions I hope that I have done justice to the report and if at all ever any of such suggestion is being applied in any way possible, I would reckon that my efforts got acclaimed and my task of exploring U.S Competition Law got duly accomplished.

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