A RESEARCH PAPER ON

POLICING MERGERS; REMEDIES & PROCEDURE

Submitted to:
THE COMPETITION COMMISSION OF INDIA

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I. INTRODUCTION

Firms merge for many reasons. These reasons include increased synergies between the merging entities, diversification or sharpening of business focus, economies of scope or scale, increase in buying power, increase in supply chain pricing power and better competitive strength in the market. However, the flip side of mergers is that many would allow the merging entities to eliminate future competition and gain a larger market share in its product market. Competition Authorities across the world thus keep a close eye on such merging entities and try to ascertain, as far as possible, that there would be no anti-competitive effects on the market post merger. Merger control is generally ex-ante, with competition authorities having the burden of proving any anti-competitive outcomes of the mergers using comprehensive economic analysis. This analysis further needs to lead to a legally binding decision. There are three broadly defined ways in which merger control decisions go –

a) The competition authority, recognising that there are no post merger effects that may lead to any appreciable detrimental effect on competition in the market, clears / approves it unconditionally.

b) The competition authority, recognizing upon economic analysis (in varying degrees) that there will be an appreciable negative effect on competition, declines to clear it, or in the case of voluntary regimes like the UK, ask the parties to undo the deal.

c) The competition authority recognises that there may be some post merger anticompetitive effects but believes those effects can be mitigated / eliminate by institution section condition. It thus clears the merger conditionally.

These conditions that the competition authority attaches to its decision clearing the merger are broadly classified as merger remedies. Therefore, merger remedies may be considered as structural and behavioural measures and tools available to competition authorities to remedy competitive detriments resulting from individual mergers, ie, the harm to the competitive process that would contravene the merger law of the jurisdiction. The key contribution of remedies is to enable a modified outcome to merger transactions which restores or maintains competition while permitting the realisation of relevant merger benefits, thus achieving a better outcome than straightforward prohibit or permit decisions. The application and scope of such prescribed remedies varies from jurisdiction to jurisdiction. Some competition authorities have to take account of broader public interest issues in addition to their core
objective of preserving competition. Such issues may include national security considerations, preserving diversity of media ownership, employment and environmental issues etc. Therefore, while the European Commission is tough in its stance in such issues, the Competition Commission of India will not be as pro-active for the simple reason that an emerging economy like India needs investment and market consolidation. An example of this is the high market threshold under the Competition Act 2002. Set at 1000 crores or assets or 3000 crores in turnover (in India) and USD 500 million in assets and USD 1500 million in turnover (outside India) out of which at least INR 500 crores and INR 1500 crores must be in India, it is argued that these threshold accommodate the majority of combinations taking place in India without the need to any notification to the Competition Commission of India.

Indian Law of the Regulation of Combinations.

1.1 OVERVIEW OF THE INDIAN LAW OF COMBINATIONS

Section 6 and 31 of the competition Act of 2002 lay down the Indian law of combination regulation. Section 6 lays down that any combination which causes or is likely to cause an appreciable effect on competition within the relevant market in India shall be void.\(^1\) Furthermore, it also lays down that prior notice of the pending merger must be given to the Commission\(^2\) and no that merger shall come into force until a certain time period (in this case, 210 days) have passed from the giving of the aforesaid notice.\(^3\) Thus, it stands to reason that the Indian regime is an involuntary or mandatory regime of merger control like South Africa as opposed to a voluntary one as is present in the United Kingdom, where parties are not required to notify relevant merger situations to the Office of Fair Trade. However, the OFT may ask them to keep the two businesses separate pending investigation.

Section 31 lays down that only when a combination is unlikely to have an appreciable effect on competition, shall the Commission approve it.\(^4\) If the combination will or is likely to have any such effects, then the Commission shall direct that the combination not take effect.\(^5\) This report, however, focuses on Section 31(3) which lays down that when the Commission believes that the appreciable adverse effects on competition that are generated by any

\(^1\) Competition Act 2002 (Act No. 12 of 2003), Section 6(1)
\(^2\) Ibid, Section 6(2)
\(^3\) Ibid, Section 6(3)
\(^4\) Ibid, Section 31(1)
\(^5\) Ibid, Section 31(2)
competition can be eliminated by any suitable modification to such combination, it may propose such modifications to the parties. The parties can accept these modifications\(^6\) or suggest amendments to them.\(^7\) The Commission may\(^8\) or may not approve of these modifications, in which case the parties would have to abide by the modifications suggested by the Commission itself.\(^9\) In case the parties don’t abide by these conditions, then the combination would be treated as one which has an appreciable effect on competition and proceeded against accordingly.

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\(^6\) Ibid, Section 31(4)  
\(^7\) Ibid, Section 31(6)  
\(^8\) Ibid, Section 31(7)  
\(^9\) Ibid, Section
II. THE PRINCIPLES OF REMEDIAL ACTION BY COMPETITION AUTHORITIES.

Through the system of merger remedies, competition authorities seek to restore or maintain competition while permitting the realisation of relevant merger efficiencies and other benefits. In order to achieve this objective, potential remedies should be assessed in relation to their effectiveness in dealing with competitive detriments and their burden of operation in terms of costs incurred and merger benefits foregone. Though such assessment is different for different jurisdictions, the procedures and remedies that are established need to be laid down in such a manner that they are easily administrable. There are three main principles which competition authorities usually take into account while designing and implementing remedies -

a. **Proportionality:** Competition authorities normally seek to implement the least burdensome remedy, or package of remedies, that will be fully effective in eliminating the specific competitive detriments expected from a merger. Some competition authorities, however, may choose to apply a principle of proportionality, whereby they might decide to permit the merger with no remedies if even the least burdensome effective remedy will be disproportionate compared to the degree of the competitive detriment. This might occur, for example, where the merger concerns a very small market. However, it is recognised that other jurisdictions do not believe it appropriate to apply a concept of proportionality in designing remedies once a finding of competitive detriment has been made in any relevant market. In India, Section 31(3) clearly lays down that the Commission considers any modification only if it believes that such modification would be successful in elimination any appreciable effects on competition.

b. **Effectiveness:** Competition authorities would use several dimensions to assess the effectiveness of any suggested modification / modifications. First and foremost the *comprehensive impact* of the merger or all the elements of the expected appreciable impacts on competition in the market need to be judged. The *acceptable risk* also needs to be gauged. The doctrine of acceptable risk is that competition authorities should look to implement those remedies that have a low level of risk in not addressing competitive detriments adequately. This is especially important in the case of India since the Competition Act 2002 does not give
the Competition Commission of India the authority to modify a remedy in the event of it failing to perform as anticipated. Another extremely important feature is practicality. The implementation and operation of a remedy should be clearly expressed. A remedy should also be capable of practical implementation. Furthermore, a pro-active time schedule is an added bonus. Remedies which act quickly in addressing competition concerns are preferable to those that have only take effect in the long run.

c. Costs: Competition authorities across the world also take into account the potential economic and social cost of a merger remedy. First and foremost, merger remedies have to be tailored to make sure that at least some of the merger efficiencies that were expected from this merger should be preserved. Therefore, it is a fine balancing act between preserving these efficiencies and still mitigating or eliminating any potential detrimental effect on competition. Furthermore, remedy impact costs have to be considered. Remedies may result in distortions or inefficiencies in market outcomes. This is more likely to be the case in instances where behavioural remedies are used which intervene directly in market outcomes, especially over a long period. For example, price caps may discourage market entry by creating doubt concerning the ability to recoup investment or to maintain profitability. Similarly, non-price restraints may adversely affect investment decisions. Some remedies also have operating costs i.e the cost of implementation. One particular example could be the cost of trustees in case of a divestiture remedy.

d. Transparency & Consistency in the Merger Review System: The effectiveness of a remedy is optimised and it is legitimised by having a merger review system which is transparent and consistent. Such transparency is required to provide an optimum framework for the proposal, discussion and adoption of remedies. Consistency provides a reliable basis for corporate decisions and expectations. However, in such decisions, consistency is not a very specific principle due to the different merits, facts and circumstances of every case.
III. TYPES & CHARACTERISTICS OF REMEDIES

3.1 GENERAL:

The constraints of national jurisdictions usually have a great bearing on the selection and design of remedies. Keeping an eye on market realities and need for continued growth and investment, the Competition Commission of India takes the view that behavioural remedies are preferable.\(^{10}\) Arguably, the CCI’s policy tilts towards not prohibiting mergers until there is no alternative. This may be due to an institutional willingness to enable the post merger benefits to percolate into the Indian economy.

There are other difficulties which can occur in this regard. If the competition authority in question has jurisdiction on only a small part of a supra-national merger, it may find itself in a position where it seeks to address any detriment to competition from a weak negotiating position. Since enforcement is an issue, an international merger may limit the choice of both behavioural and structural remedies. A competition authority can, of course, seek structural or behavioural relief outside its jurisdiction to address any competition concerns in the national market. In this it may liaise and co-operate with foreign competition and antitrust authorities. However, the preference is always given to remedies that can be enforced within its own jurisdiction.

The CCI is empowered by Section 32 of the Competition Act 2002 to take any action in accordance with the Act with respect to any combination which takes place outside India\(^{11}\) or where one of the parties to the combination is outside India\(^{12}\) and if the CCI is of the opinion that the combination is likely to have an appreciable adverse effect on competition in the relevant market in India. However, in dealing with cross border mergers, the effectiveness of any remedy provided by the CCI is severely reduced due to the enforceability issues.

In such scenarios, co-operation with foreign competition authorities is desirable especially where each is considering aspects of the same merger. This helps to avoid inconsistency of approach in applying remedies and is normally also in the merger parties’ best interests.

\(^{10}\) CCI Advocacy Series, Provisions Relating to Combinations, p.11
\(^{11}\) Competition Act 2002, Section 32(d)
\(^{12}\) Ibid, Section 32(e)
3.2 CLASSIFICATION OF MERGER REMEDIES

The merger remedies universe is broadly divided into two main types of remedies, structural as well as behavioural. A diagram\(^\text{13}\) of the same can be seen below:

Structural remedies are generally one-off remedies that intend to restore the competitive structure of the market. Behavioural remedies are normally ongoing remedies that are designed to modify or constrain the behaviour of merging firms. An effective package of remedies may contain both structural and behavioural elements. An added complication is that some remedies, like remedies based on intellectual property are difficult to classify. Most jurisdictions prefer a structural remedy (like divestitures)\(^\text{14}\) at least in the case of horizontal mergers. The reasoning is that they address the cause of the competitive detriment directly. Furthermore, there are low monitoring costs or possible market distortion. However,

\(^{13}\) ICN Merger Working Group, ‘Merger Remedies Review Project’, Bonn, June 2005

\(^{14}\) The EC has a stated preference for structural remedies:

“commitments which are structural in nature, such as the commitment to sell a business unit, are, as a rule, preferable from the point of view of the Merger Regulation’s objective, inasmuch as such commitments prevent, durably, the competition concerns which would be raised by the merger as notified, and do not, moreover, require medium or long-term monitoring measures.” (EC notice on acceptable remedies, 2008: 13)

It considers behavioural remedies appropriate “only exceptionally in very specific circumstances” (EC, 2008: 17). Interestingly, and in contrast to the approach of the South African authorities, the EC does not regard undertakings by the merging parties not to engage in anti-competitive behaviour as sufficient to allay their concerns in the case of horizontal issues, regardless of the ease and cost of monitoring and enforcement, stating that:

“In particular, commitments in the form of undertakings not to raise prices, to reduce product ranges or to remove brands, etc., will generally not eliminate competition concerns resulting from horizontal overlaps.” (EC notice on acceptable remedies, 2008: 17)
structural remedies have other serious disadvantages like purchaser risk and asset risk which can prove to be a strong disincentive to the merging parties. On the other hand, behavioural remedies require a certain level monitoring which increases the operating costs. Even the Competition Commission of India, which prefers behavioural remedies, admits that their implementation is difficult.\textsuperscript{15} Most jurisdictions employ a mixture of structural and behavioural remedies to offset these inherent disadvantages.

3.3 STRUCTURAL REMEDIES

Divestitures are the most common form of structural remedies. They can be full divestitures or partial divestitures. To be effective, a divestiture will require the sale of an appropriate divestiture package to a suitable purchaser through an effective divestiture process. This will, in theory, create a new source of competition in the market or strengthen existing competition by sale to a competitor which stands independent of the two merging parties. In general a suitable divestiture package may be defined as the smallest operating unit of a business (e.g., a subsidiary or a division) that contain all the relevant operations pertinent to the area of competitive overlap and that can compete successfully on a stand-alone basis.

There are three key elements to any divestiture: the scope of the divestiture package, a suitable purchaser and an effective divestiture process. These elements are subject to three types of risks –

a. Composition Risk: The divestiture package has to be tailored to attract a suitable purchaser or to allow this purchaser to operate effectively. Merging firms also have an incentive to degrade the quality of the divestiture package to enfeeble future competition. In India, Section 31(6) of the Act allows parties to suggest amendments to the proposed modifications. This may very well lead to undermining of the future competitive impact of the divestiture. Composition risk may be reduced by requiring the divestiture of an existing business operating on a standalone basis rather than a collection of assets or part of an existing business. A classic example of such a tactic would be the Bopreco / Royal Ahold / G Barbosa case. A merger deal between supermarket chains in Brazil which was found to create high concentrations in the

\textsuperscript{15} CCI Advocacy Series, \textit{Provisions Relating to Combinations}, p.11
market, the deal was cleared by CADE (the Brazilian antitrust authority) by requiring the sale of a connected set of stores with its own distribution centre. Bompreco was not allowed to choose which stores to sell off (it originally wanted to see of some stores of its own and others from the other parties to the merger). Composition risk may also be reduced by insisting that the assets to be divested come from one of the merging parties rather than in part from both the parties. This was also seen in the Bompreco case.16

b. **Asset Risk:** A divestiture may have several parallel effects like loss of key staff and customers. This may make it less attractive to any potential buyers or as a stand-alone unit, too weak to offer any appreciable competition to the merging parties post merger. Asset risk may be decreased by requiring the parties to manage the divestiture package separately from the retained business pending divestiture. An independent monitoring trustee may also be appointed to make sure that the ‘hold separate’ conditions are not violated and that the assets do not deteriorate.

c. **Purchaser Risk:** The asset risk or the economic climate at the moment may lead to a lack of suitable purchasers. The merging firms also have an incentive to come up with weak or inappropriate purchasers who, post merger, would not be able to compete effectively with the merged entity. The purchaser risk is also enhanced when the assets to be divested do not form a stand-alone business but are in part from both the parties to the merger. This shifts the onus to the purchaser and his capabilities to successfully integrate them into his operations so as to effectively compete with the merged entity.

Where time is of the essence, some competition authorities may require the divestiture of a more readily divestible group of assets, called the ‘crown jewels’. However, others use methods such as ‘selling trustees’ to expedite a divestiture.

There are many other parameters that the competition authority delves into before selecting a purchaser. A suitable purchaser should generally have no significant connection post merger, such as any financial ties, to the acquiring parties. However, it is recognised that purchasers

may sometimes require access to key inputs on appropriate terms from the merger parties for an interim period. A flip side of such access commitments is when the merged entity holds an equity stake in the divested business. Such equity holdings may reduce the incentive of the firm to compete with the divested business and vice versa. In this case, if the authority allows the merging parties to retain any partial equity interest (rather than insisting on full equity divestiture), then they should be made to adhere to behavioural remedies like preventing access to sensitive and confidential competitive information. Furthermore, the purchaser should have the necessary resources and expertise to be an effective competitor and should not itself be subject to significant competitive concerns if the divestiture proceeds. A competition authority will also wish to satisfy itself that the purchaser has appropriate business plans and incentives for competing in the relevant markets before approving disposal to the specified purchaser.

Where the competition authority sees an instance of particularly high purchaser or composition risk, it may require the merging firm to identify a suitable purchaser who will buy ‘up front’ the assets to be divested. Here the divestiture is accomplished even before the merger proceeds. Furthermore, there can even be a ‘virtual divestiture’ where the merging parties agree to make production capabilities available to competitors through periodic auctions. However, these may also require short to long term behavioural commitments. An example of this would be the 2009 decision of the Chinese Ministry of Commerce (MOFCOM) acting through its anti-monopoly branch, the AFB, in the *Mitsubishi/Lucite* case i.e Mitsubishi Rayon’s planned purchase of Lucite China. Since the merged entity would have a 64% share in the Chinese methyl methacrylate (MMA) market, MOFCOM ordered Lucite China to divest 50% of its annual MMA production capability to third parties for a period of five years.

3.4 The divestitures of **INTELLECTUAL PROPERTY** can be regarded as a specialised form of asset divestiture. However, they may also contain ongoing behavioural elements such that the remedy is a structural/behavioural hybrid. The key element is the extent to which, if at all, any material link between licensor and licensee will exist post-license. A remedy that requires an assignment or license of an IP right that is exclusive, irrevocable, and non-terminable with

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no ongoing royalties will effectively be structural and call for no or very little behavioural commitments, whereas a license that requires a licensee to rely on the licensor for upgrades, supplies, etc. will most likely result in some form of behavioural hybrid remedy. An example can be seen in the $3 billion acquisition of the Norwegian telecommunications company Tandberg by Cisco Systems. The merged entity would have been the world’s largest video communications company and holds key patents which could restrict market entry. The combination was approved by the European Commission only after the parties divested certain key patents to a neutral industry body. This would enable them to take advantage of their increased economies of scale and scope while not restricting market entry.

The relative specialization of intellectual property puts a heavier burden on the parties and competition authorities to come up with a suitable purchaser who will, post merger maintain effective competition in the market. A competition authority may require independent technical advice from industry experts to come up with such a purchaser. Section 36(3) of the Competition Act gives the CCI the power to call on such expert advice. Furthermore, the relative specialization of IP may create special problems in jurisdictions such as India where the CCI does not have the authority to amend a merger remedy after it’s been put into practise by the parties. For example, in markets which have high innovation (a characteristic of many IP product markets) a shorter duration for the licensing remedy may be better than a longer one. This is because of the high probability that the intellectual property may itself become obsolete. Furthermore, the forms of payment for this intellectual property by the purchaser may create competition concerns. An example would be payment through equity. This might lead to less incentive to compete if the purchaser is a close competitor in the same market; very likely in case of IP divestitures.

3.5 BEHAVIOURAL REMEDIES

A behavioural remedy, also called a conduct remedy, is one that addresses the competitive detriment of a merger by changing the behaviour of the merger parties or others. It usually aims to control the impact of a change in market structure, for example through price controls, non-discrimination provisions, and compulsory licensing or access agreements.

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19 Section 36(3) lays down that ‘the Commission may call upon such experts, from the field of economics, commerce, accountancy, international trade or from any other discipline as it deems necessary to assist the Commission in the conduct of any inquiry by it.’
They can be tailored to fit individual defendants and specific market circumstances. Their flexibility and reversibility make them superior tools in dealing with changing market conditions, especially in technology markets or network industries. They are less controversial and have been applied more frequently in abuse of dominance cases. However, behavioural remedies do not address market power and concentration issues directly and typically require ongoing, and sometimes extensive, oversight and intervention by the authorities. Part of the reason for this is that the firm’s incentive structure remains unchanged, which means that considerable monitoring and compliance provisions are often required, which can be expensive, time consuming and distracting for all parties. In actual practice, competition authorities make use of a wide range of both behavioural and structural remedies together in a package. A pertinent example would be the South African case of Sasol Chemical Industries. The Commission accepted both structural and behavioural remedies in this case where there were complaints of both collusion and abuse of dominance. In terms of the structural remedies, SCI agreed to full divestiture of certain production facilities and partial divestiture of certain business units within the firm. On the behavioural remedies side, SCI had to commit to certain non-discrimination provisions in its pricing and supply of inputs. Though behavioural remedies have significant distortions in terms of cost, effectiveness and risk of market distortion some jurisdictions, like India, prefer them since they are more flexible and prohibiting a merger outright is what their national competition authorities avoid. Broadly, behavioural remedies are preferred when a divestiture is not feasible due to reasons like absence of suitable buyers or where prohibition is not feasible for reasons like multijurisdictional constraints. A good example of the former would be the merger between Bayne Investments (PG Bison) and Clidet 451 (Woodchem). In this case, the South African

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20 One example where a major antitrust authority has woken up to the benefits of behavioral remedies is the US Department of Justice. There has been a marked change in the reasoning of the DoJ in this regard. The merger remedy guidelines issued by the US Department of Justice (US DOI, 2004) state that: “Structural remedies are preferred to conduct remedies in merger cases because they are relatively clean and certain, and generally avoid costly government entanglement in the market... A conduct remedy, on the other hand, typically is more difficult to craft, more cumbersome and costly to administer, and easier than a structural remedy to circumvent.” The US DOI found behavioural remedies to be appropriate only in circumstances where conduct modification is necessary to support an effective structural remedy and in only those industries which were highly regulated. However, in their ‘Updated Remedy Guide’ issued in June 2011, the Antitrust Division has clearly woken up to the benefits of using behavioural remedies in a lot more occasions.


22 Competition Tribunal Case number 31/CR/May05. (South Africa)


24 Bayne Investments(PG Bison)/Clidet 451(Woodchem) Case No 90/LM/ Aug 07
Competitive Commission found that the transaction would result in the vertically integrated firm having the ability and incentive to raise its rival’s costs. A divestiture was proposed to remedy the competition concerns. However, on further investigation revealed that the target firm’s plant was not very readily divisible. Consequentially, a behavioural remedy was imposed on the merged entity for a period of eight years, during which the merged entity would be required to supply the relevant product to rivals.

Furthermore, the benefits of the merger might be significant and national authorities might give preference to preserving those benefits through behavioural remedies over prohibiting the merger outright. There can be other factors like the competitive detriment being a short lived one, for example, in the case of a highly innovative technological market.

However, the use of behavioural remedies mandates that there also be a system of feasible monitoring and effective enforcement. This increases the economic cost of behavioural remedies; an important facture competition authorities need to keep in mind while designing remedy package. Behavioural remedies may sometimes be commonly employed to provide interim protection until structural measures are fully operative as illustrated by the Val Morgan case. Adjudicated by the Australian Competition and Consumer Commission (ACCC), it involved the proposed takeover of Val Morgan’s cinema advertising business (which had a market share of over 60%) by a consortium of three operators. The ACCC imposed a structural remedy wherein two parties out of the three acquirers would divest their shares in Val Morgan within 18 months of the takeover. In the meantime, to main competition in the market, a slew of behavioural remedies ranging from guarantee of services to other independent exhibitors to the maintenance of their lines of revenue were put into place till these structural changes were fully realised.

3.6 TYPES OF BEHAVIOURAL REMEDIES

Behavioural remedies aimed at overcoming obstacles to competition can be considered in several distinct forms:

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26 Ibid.
a) **Modifying relationships with end customers:** Competition authorities could prevent the merged entity from foreclosing the market to its competitors by preventing practices such as use of long term/exclusive contracts, creation of switching costs for customers, pricing below costs as a predatory measure, tying or bundling etc. An example of this can be seen in the conditional clearance decision of China’s MOFCOM to the proposed acquisition of *Delphi* by *General Motors* in 2009.\(^{27}\) MOFCOM had stated concerns that the merger would be likely to eliminate or restrict competition in the Chinese automobile market and its upstream auto parts market.\(^{28}\) One of the conditions was that ‘Delphi should, upon customer’s lawful requests, assist in the smooth switching of suppliers by its customers, and would not wilfully stall the process or impose restrictive conditions for the purpose of raising the switching costs’.

b) **Restricting Effects of Vertical Relationships:** Where a merged entity controls supplies of key inputs including access to facilities or networks that other firms would need in order to compete with it, competition authorities can impose remedies like price controls, supply commitments, restriction of access to confidential information (also called the ‘firewall provision’), commitments that the merged entity will not discriminate in the supply of key inputs between itself and its competitors as well as prohibition of exclusive supply and distribution agreements when the entity is powerful enough to influence provision of such inputs by third parties. An example can be made of the aforementioned *GM/Delphi case*\(^{29}\) where MOFCOM lay down the condition that Delphi could not disclose any information to GM which could be termed as competitive confidential information about competitors and other third parties.

c) **Facilitating changes in the entities’ behaviour:** Competition authorities may lay down certain conditions which seek to facilitate changes in the behaviour of the entities. These can include the use of an open tender process, changes to any action intended to maximise collective buyer power like collective purchasing agreements. One important aspect of behavioural change is changing the social outlook. Special remedies can be suggested by the Commission in case the proposed merger is going to create social pain. An innovative example was seen in the *Lonmin PLC/Southern*


\(^{28}\) Ibid.

\(^{29}\) Ibid.
Platinum Corp. The parties in this case anticipated more than 400 post-merger retrenchments. The South African Competition Tribunal approved the transaction subject to a maximum of 400 retrenchments and that the merged entity should offer alternative skills training to those employees who were to be retrenched as a result of the proposed transaction. There have been other cases before the South African Competition Tribunal where it has asked the parties to respect the retrenchment figures that it originally communicated to the trade unions. This social policy remedy can be applied by the CCI in case a merger is going to have a huge social cost. It would be a remedy that would arguably be acceptable to both sides, the company as well as the workers.

d) Controlling Outcomes: These comprise measures to control market outcomes to address competitive detriments. These generally have significant disadvantages in terms of cost, effectiveness and market distortion, and should therefore normally only be used for relatively short durations and/or in the absence of effective alternatives. (ICN 2005). These involve actions like imposing price caps, supply commitments and service level agreements. Price caps of products affected by the merger have several parameters like duration and assessment of compliance at regular intervals. Commitment to supply obligations might be absolute, with respect to products supplied elsewhere and with respect to functionality, which is to say, a commitment to supply goods of greater or equivalent functionality when comparable with those supplied before the merger. In setting such commitment obligations, competition authorities have to be vigilant that they are not evaded by acts like changing the name of the product. Authorities also have to ensure that depending on the time period of such commitments, there are provisions that some obsolete goods may be substituted for newer versions. Service agreements impose upon the merged entity the obligation to provide particular standards of service in the markets affected by the merger. These standards could be on general quality of the products themselves out about the timeliness of the supply chain. A case to this point would be the merger between Scaw South Africa (Pty) Ltd & Ozz Industries (Pty)Ltd. The South African Competition Tribunal laid down that the parties were to continue to supply the overlapping

30 Case No. 41/LM/ May 2005
31 Competition Commission & Competition Tribunal (South Africa)
32 Case No. [2008] 2 CPLR 289 (South African Competition Tribunal)
products to current and future customers at a base price, adjusted from time to time according to a price adjustment formula.\textsuperscript{33}

3.7 PACKAGES OF BEHAVIOURAL REMEDIES

Competition authorities frequently prefer to avoid controlling outcomes since these distort natural market processes. They would rather go with remedies that promote competition, for example those that reduce switching costs or gives more information to buyers or opens up tender processes. However, behavioural remedies with focus on outcome control like price caps in the market are frequently used as short term measures till more lasting remedies can be implemented. This was seen in the \textit{Drager/Air-Shields} case before the UK Office of Fair Trade. Both supplied warming products meant to support babies in a controlled environment eg. incubators. An inquiry\textsuperscript{34} found that post merger there would be a substantial lessening of the competition (SLC) in the market which would lead to higher prices and a reduction of choice in the affected products. While purchasing reforms like increasing the buying power of the NHS hospitals who were the main customers were part of the solution preferred in this case, the OFT put into place some behavioural remedies namely price caps on such products till the same could be completed. An independent monitor was also put into place to police these remedies.

Therefore, when competition authorities prescribe a package of behavioural remedies, they have to take into consideration not only the scope of the remedies but also need for monitoring and the time period in which such remedies will have effect. The latter is because these remedies may become unsuitable after a period of time given the ever changing market conditions. Therefore, a package of remedies can remain in place for a given number of years, specified at the outset, after which they fall away. Alternatively, they can be subject to review after a specified number of years, with the option that, on the basis of the review, they may be kept, removed or adjusted in some way.

\textsuperscript{33} Ibid.

\textsuperscript{34} Can be accessed at http://www.competitioncommission.org.uk/inquiries/completed/2004/dragair/index.htm
IV. IMPLEMENTATION & ENFORCEMENT OF REMEDIES

4.1 GENERAL:

Merger remedies, especially behavioural ones, require some level of monitoring, not only to make sure that they are followed in letter and spirit but also to ascertain that they have the intended effect of eliminating detriment to competition. Furthermore, there are various methods of implementing these remedies in the first place that accentuates their effectiveness. One can analyse them under the following heads.

4.2 EFFECTIVE IMPLEMENTATION

Effective implementation of merger remedies required a wide range of measures.

a. **Clarity & Continuity:** Clarity with respect of the remedy is extremely important. The scope of the remedy, its operation, how it is binding on the parties, what constitutes compliance and what steps can the authority take to ensure compliance must be laid down clearly. Furthermore, it has to be noted that the more complex the remedy is, the more difficult is its monitoring and implementation. Furthermore, a continuity of human resources between the stages of designing remedies and implementing them is beneficial so that the increased familiarity may help competition officials to anticipate implementation issues with remedies.

b. **Consultation & Periodic Assessment:** In designing a merger remedy it helps if the competition authority consults with all parties not just the two merging firms. One example would be designing access remedies for critical installations which need active consultation with competitors as well. A system of periodic reporting and assessment is extremely helpful because it enables authorities to improve the impact and effectiveness of their remedies.

c. **A Formal Best Practices Doctrine:** One can argue that competition authorities should publish a ‘best practices’ paper which would help the parties to a merger co-operate efficiently with the authorities and gives them an idea of all procedural aspects of the merger remedy process. In India, Section 49(3) of the Competition Act empowers the CCI to take ‘suitable measures for the promotion of competition advocacy, creating awareness and imparting training about competition issues.’ As part of this advocacy process, a ‘Best Practices’ doctrine should be formulated. This is especially useful in
the context of cross border implications. Indian companies have stepped up mergers and acquisitions across the world over the past decade and it wont be long before an international merger is adjudicated upon by the CCI. As part of this Best Practices doctrine, parties contemplating a merger should be asked to identify all affected jurisdictions and keep the channels of communications to them open. The competition authority should also lay down its policies of co-ordinating with foreign antitrust authorities in this regard. Open channels should be maintained between the parties’ counsels in all such jurisdictions such that co-ordinated filings and notifications before national competition authorities can proceed smoothly. Secondly, Parties should be asked (not obligated to) waive confidentiality by giving written permissions under the Act\(^{35}\) so that information may be shared between all reviewing agencies in case of multi-jurisdictional requirements. This leads to more consistent analyses of competition issues and compatible enforcement decisions. Thirdly, parties should understand the variations in the timing among various national competition authorities and make their timing needs known to these agencies. This timing is especially useful if parties decide to suggest modifications\(^{36}\) since this may lead to more time being required to consummate the deal after the necessary clearances have been obtained. Fourthly, there are cases in which the parties know that the CCI and/or other competition authorities would ask for a divestiture. In such cases, if the parties know that an upfront buyer or a monitoring trustee would be required, then they should be aware of all the variations across jurisdictions and the requirements for the same in each. To take an example, on July 5, 2010 the Chinese MOFCOM released its Provisional Rules on divestiture of assets. It has specific requirements that have to be fulfilled before a trustee or buyer can be approved. Parties should look into all this before notifying the merger to the Commission. Fifthly, many jurisdictions like the United States have strict on-going monitoring requirements. These not only raise the overall cost of the deal but also involve stiff penalties in case of non compliance. Parties should look into all these aspects with respect to all the jurisdictions that will be invoked for the deal to get complete clearance.

\(^{35}\) Competition Act 2002, Section 57… ‘no information relating to any enterprise, being an information which has been obtained by or on behalf of the Commission or the Appellate Tribunal for the purposes of this Act, shall, without the previous permission in writing of the enterprise, be disclosed otherwise than in compliance with or for the purposes of this Act or any other law for the time being in force.’

\(^{36}\) In India, this is governed by Section 31(6) of the Competition Act 2002.
4.3 TRUSTEES AND THEIR FUNCTIONS:

The monitoring and implementation of both structural remedies like divestitures and behavioural ones may sometimes require the appointment of a trustee. The trustee is not only a way to get an expert’s assistance in creating a feasible merger remedy but also to reduce wastage of the taxpayer’s money by outsourcing the process to the parties themselves. This is because, though the trustee is managed by the competition authority and acts on its behalf, he is remunerated by the merging parties. However, there are certain precautions that must be taken when appointing a trustee and the CCI regulations on the issue are of extremely high standards and comparable to those in mature competition law jurisdictions like the European Union. The Competition Commission of India (Procedure In Regard to the Transaction of Business Relating to Combinations) Regulations, 2011 terms trustees as ‘independent agencies’.\footnote{Regulation 27: The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011.} These independent agencies have the following salient points:

- Trustees should be independent of the merging firms and should not be subject to conflicts of interests.

- Even though their remuneration comes from the merging parties, the authority should approve the sum and make sure that this does not compromise the trustee’s impartiality. In fact, CCI regulations on the point state that this regulation comes directly to the Commission or as directed by the Commission.

- The trustee should have the appropriate qualifications for the task. Regulation 27 also lays down a non-exclusive list of agencies that can be accounting firms, management consultancies, law firms or other professional organizations.

- The trustee is appointed by the CCI. An alternative practise could be to allow parties themselves to select the trustees. In cases where it is clear a trustee would be appointed, this would spend much time. Of course, the trustee appointed by the parties would also be subject to all the parameters of Regulation 27.

4.4 MONITORING & THE USE OF THIRD PARTIES

The incentive of a firm to comply with a remedy increases when there is an effective monitoring system. Furthermore, the remedy should make it clear at what points would the authority assess the remedy’s effectiveness and what reports would the merged entity have to
submit then. Effective monitoring during the entire lifetime of the remedy is the best way to go forward. However, even though a competition authority should be proactive and not depend on complaints for monitoring, if the responsibility for this is solely on the authority itself, this process will get too expensive and cumbersome. Thus, it would be wise for competition authorities to involve third parties like competitors, customers and other interested third parties in judging the efficacy of any proposed remedy. Recourse can be had to the practice of the Spanish competition authority, Comision Nacional de la Competencia (CNC) is empowered\(^\text{38}\) to market test its commitments with third parties including both competitors and customers. This practice is especially used when the parties suggest amendments to the modifications proposed by the commission.\(^\text{39}\) Since many of these third parties are the intended beneficiaries of such remedies, their opinions might prove helpful. However, two things have to be kept in mind here. Firstly, the competition authority has to ensure that clear information about the scope and duration of the remedy is communicated to the third parties and secondly, their advice has to be carefully assessed since there is a possibility that they might be seeking to advance their individual interests and thirdly, the third parties must be given full information about the procedure for making a complaint.

Another very important and cost-effective method of monitoring with the help of third parties is the use of alternate dispute resolution methods like arbitration.

4.5 Arbitration & Dispute Resolution

Arbitration is increasingly being recognised as the most viable method for dispute resolution. In today’s global economy, especially seeing the large number of international disputes, parties usually choose arbitration by inserting an appropriate dispute resolution clause in their contract. Since the process is mostly private, confidential and flexible as opposed to litigation, many agreements raising competition law issues also have arbitration clauses. Furthermore, the resultant award is final and binding as well as enforceable in over 140 countries under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

\(^{38}\) Section 59(3) of the Spanish Competition Act establishes that “the commitments proposed by the notifying parties can be communicated to the interested parties or to third parties with the aim of assessing their suitability for removing their competition problems resulting from the concentration and its effects on the markets.”

\(^{39}\) The Competition Act of 2002 allows this in India vide Section 31(6)
Access to arbitration may be an appropriate means of providing flexibility in a proposed package of remedies. Arbitration may, for instance, be used to settle matters that are not appropriately determined when the remedies are initially decided on, eg access pricing. A dispute resolution procedure may also be needed to resolve disputes between parties under the terms of a remedy.

Historically, competition disputes were thought of as not being arbitrable. Rules maintaining competition in a given market were thought to be a part of public policy and thus the preserve of national and supra-national competition and antitrust authorities. Two dangers were seen by competition lawyers, firstly that competition law issues if submitted to arbitration would be interpreted in a non uniform way. Thus the orthodox argument against arbitrability was that the main objective of antitrust was the maintenance of a competitive market environment in pursuit of the public interest (which is a public policy objective to be achieved through litigation in the public courts), and not the protection of the individual commercial interest of private parties. Secondly, the very privacy and confidentiality that make arbitration so attractive created a perceived danger that competition policy would not be applied openly. Thirdly, there is even a concern expressed by arbitrators themselves that with respect to arbitrability of competition issues, there was a risk that the parties may find their ability to reach private resolutions of their own affairs somewhat curtailed seeing that in certain jurisdictions of continental Europe, the tribunal is under a positive obligation to encourage settlement.

However, conceptually, the arbitrability of competition issues is no longer a point of conflict. In fact, it has become more in the nature of a fait accompli. In both the United States and the European Union, the most mature of all the competition jurisdictions, this question has been answered in the affirmative by the courts.

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42 A. Mourre, “Arbitrability of Antitrust Law from the European and US Perspectives” in G. Blanke and P. Landolt
43 In the US, The US Supreme Court in Mitsubishi Motor Corp v. Soler Chrysler Plymouth Inc. in formulating what came to be called the ‘Second Look Doctrine’ held by a majority that antitrust issues arising out of international contracts are arbitrable. In the EU, the definitive case has been that of Eco Swiss China Time Ltd. v. Benetton International NV where the European Court of Justice laid down that a national court must annul an arbitration award if it considers the award in question to be contrary to Article 81 of the EC Treaty. This has
competition disputes lies with the Commission and then the Competition Appellate Tribunal. A final appeal lies to the Supreme Court. Since there is a specific tribunal which has exclusionary powers with respect to competition issues, fundamental competition law problems cannot be addressed to by a civil court or an arbitral tribunal. However, the implementation of merger remedies can be termed a contractual matter, especially behavioural ones. Therefore, by inserting an arbitration clause into a merger remedy, the enforcement can be entrusted to third parties via the medium of arbitration.

a. The Essence of Arbitration Commitments

Arbitration commitments are in essence _erga omnes_ obligations undertaken by the parties to a merger that any claim of a third party beneficiary against the competition authority’s decision on the clearance of the merger with respect to the fact that the merger commitments have not been honoured, shall be subject to arbitral proceedings as the method of adjudication. An example would be where the commitment was regarding access to some essential facility. The third party can enforce its rights by way of arbitration and, after notifying the parties subject to the merger clearance decision, claim damages under civil law by non performance / incorrect performance of the commitments made by the merging parties as well as specific performance of the relevant agreement underlying the particular remedy.

Interestingly, the third party derives this right from the commitments made to the competition authority by the merging parties. Thus, this is essentially an ‘arbitration without privity’, similar to arbitration procedures with respect to bilateral investment treaties. Furthermore, there is no contractual relationship between the merging parties (now the merged entity) and the third party therefore the latter is under no obligation to submit to arbitration proceedings. It has the option of referring the issue to the competition authority so that the authority may start its own investigation.

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44 Section 61, Competition Act, 2002.
Through the medium of these commitments, the authority puts into place a system of private enforcement to ensure that medium to long term monitoring of the relevant behavioural commitments can take place without using public resources. An important element of these commitments is that they require ‘notification procedures’ which lay down that the merged entity to inform all identifiable third party beneficiaries about the arbitration mechanism available to them to enforce the commitment.

To trigger an arbitration commitment, the third party has to rely on both the commitment letter which was submitted to the competition authority by the merging parties and the conditions (if any) laid down by the authority in its decision clearing the merger. If however, the third party has a contractual relationship with the merged entity with respect to the commitments, the arbitration mechanism can be triggered by means of the arbitration clause in the contract itself. Therefore, if the merged entity refuses to submit to the arbitration as per the commitment, then the competition authority has the power to revoke the merger clearance decision and / or impose fines. The authority also may go so far as to initiate its own investigation into the matter.

The scope of such an arbitration is quite narrow. Most arbitration clauses are drafted keeping in mind a narrow set of circumstances that may lead to a dispute eg) issues of access to essential facilities or services, specific commercial agreement / agreements. This narrow focus on the range of disputes has a positive outcome in the short amount of time required for rendering an award. Since merger clearance by the competition authorities itself runs on a tight time-frame, the process of arbitration with respect to merger remedies is also extremely expedient. In fact, in many cases, such proceedings in jurisdictions like the European Commission take only about a month to render an award.

The mandate of the arbitrator himself is quite narrow. Though the regulatory function of the competition authority is independent of the adjudicatory function of the arbitrator, the arbitrator is impliedly ‘obliged’ to take into consideration the fundamental reason behind the

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48 As seen in Case COMP/M. 3680, Alcatel/Finmeccanica/Alcatel Alenia Space & Telespazio, April 28, 2005 [2005] O.J C139/37
49 In India, this being 210 days with an additional 60 days if required as per the proceedings.
50 An example would be Case COMP/M.3680, Alcatel/Finmeccanica/Alcatel Alenia Space & Telespazio, April 28, 2005, [2005] O.J. C139/37
51 The arbitration clauses in the context of EC merger remedies establish a monitoring regime with respect to the commitments given by the merging parties. Therefore, the task of the arbitral tribunal is of an adjudicatory nature whereby its actions indirectly enforce the commitments made by the merging parties. This can be contrasted with the regulatory function of the Commission which nevertheless lies parallel to the tribunal’s.
fact that the commitment was included in the authority’s decision in the first place and make a conscious effort to prevent any parallel proceedings by the authority with respect to monitoring the commitments undertaken by the merging parties.\(^{52}\) This is because though the arbitrator independently renders a final award on his own judgement, he still has the obligation to make sure that the award is enforceable under the New York Convention. This is not a certainty, on public policy grounds\(^{53}\), if he does not take into account the line of thought behind the authority’s clearance decision.

It can be argued that the arbitrator has a dual mandate upon himself. Undertaking a behavioural commitment usually entails the party entering into a contract (called the matrix agreement) with the third party beneficiary to allay the fears of the competition authority. This contract may involve issues such as access to key facilities etc and incorporate an arbitration clause wherein the parties stipulate to submit to the jurisdiction of an arbitration panel should a dispute arise and arbitration called for. In such a scenario, the arbitrator is called upon to address two different sets of issues\(^ {54} \):

- Issues that arise purely out of the contract between the merging parties and the third party beneficiary; governed by ordinary principles of international arbitration.

- Issues that arise out of the merged entity’s non-performance or defective performance of the commitments it gave to the Commission; governed by the substantive and procedural law provisions of the given arbitration commitment.

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\(^{53}\) In Case C-126/97, *Eco-Swiss China Time Ltd v. Benetton International NV*, [1999] ECR I-3055, the European Court of Justice laid down at Para 41 of the judgment that national courts must set aside the award on grounds of public policy where it considered the said award to be contrary to Art 85 of the Treaty. Thus the ECJ in essence proposed a ‘second look doctrine’ on the lines of the US law in this regard whereby courts are to look into the merits of the award itself and not confine themselves to a procedural overview.

A typical arbitration commitment showing this dual mandate is given below.

b. **Relevant Parameters of an Arbitration Clause.**

Most of the arbitration clauses woven into the Commission’s decisions clearing mergers take into account business expediency and commercial realities; beginning with the fact that enforcement model is a private one with a short time frame of dispute resolution. In the context of merger control, particularly, this is emphasised. The majority of the merger related arbitration clauses mandate the parties agree to try and negotiate a settlement before resorting to arbitration. In fact, the current practice shows the adoption of tiered dispute resolution clauses encompassing mediation and amicable settlement of issues before choosing arbitration. Such a *modus operandi* not only reduces expenses but also helps in maintaining the business relations between the parties to the prospective dispute notwithstanding the dispute itself. Furthermore, most behavioural remedies tend to deal with access issues where continuation of the business relationship is paramount. However, to make this welcome procedural aspect an effective one, arbitration clauses have to be drafted in such a way as to give the parties ample directions for the conduct of such preliminary negotiations. It can be argued that if arbitration clauses put into practice by the CCI were to have such directions, it may forestall the need to get into arbitration proceedings at all.

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Furthermore, like all standard arbitration clauses, the place, language and procedural grounding of the arbitration clauses have to be looked into as well. Though these are usually decided by the parties themselves, as a matter of public policy, it is argued that in the case of merger commitments, they be decided by the competition authority. In case of the CCI, it would be optimum if the *situs arbitri* be New Delhi and the *lingua arbitri* be English. The procedural grounding may be ad hoc as well as institutional arbitration. However, institutional arbitration should be the preferred mode for two reasons. Since the arbitrator needs to have knowledge of competition law, an institutional process is preferable since institutions have lists of qualified arbitrators. Furthermore, India has many arbitration institutes like the FICCI Arbitration & Conciliation Tribunal and the Indian Institute of Arbitration & Mediation which provide quality services in this regard. FACT even has a expedited process for speedy adjudication which might be of use in such cases.

c. Powers & Duties of the Arbitrators

The arbitrators appointed in a merger remedies related arbitration must have a strict agreement of confidentiality in the matter. The arbitrators cannot, under his terms, divulge any information considered by the parties to be confidential and / or a business secret. The principle of confidentiality that Section 57 of the Act imposes on the CCI must also be incorporated into any arbitration commitment that the arbitrators would be bound by similar duties of confidentiality.

The arbitrator in arbitration proceeding has been given many powers. In merger remedies related arbitration, some of them are especially noteworthy. In such proceedings, the range of complex issues being raised frequently means that unless the arbitrator is given access to crucial information, he will not be able to adequately assess the merged entity’s performance with respect to the commitment. The issue of culmination of proceedings within a short period of time keeping in mind commercial realities is also important. Thus, arbitration clauses drafted by the CCI should give the arbitrator the right to request relevant information from the parties. They also impose an obligation on the said parties to provide this information at the earliest.

Though the terms of the commitment should be self-explanatory, competition authorities sometimes provides for an interpretation clause in the arbitration clause. This mechanism allows the arbitrator to seek the authority’s interpretation of the arbitration commitment in the event that any doubts over its scope and / or meaning arise. This allows the authority to put in
its own perspectives regarding any market conditions that may have arisen since the commitment was first accepted. Furthermore, it gives the arbitrator what is arguably a very crucial power to revert back to the authority in case of complex behavioural remedies. It can be argued that given the nascent stage of competition law enforcement in India, the CCI should incorporate such clauses in any arbitration commitment it drafts.

In many instances, the arbitration clause in this context may contain the power to make interim orders to fulfil his mandate completely. This is commendable for two reasons. Firstly, it makes commercial sense as the third party can request interim measures (like continued access to critical facilities) and thus allow the commercial relationship to continue inspite of the dispute and proceedings thereof, and secondly, it allows the arbitrator to speed up the proceedings and resolve issues like un-cooperative behaviour on the part of any of the parties to the proceeding.

d. Role of the Competition Commission

Assessing mergers and monitoring the commitments given with respect to granting the clearance decision is under the exclusive competence of the Competition Commission of India. The arbitrator is part of the monitoring mechanism for such commitments but this does not in any way delegate the Commission’s powers with respect to the Competition Act to the arbitrator. The Commission has a role that is a mix of parens patriae and amicus curiae. On one hand, the Commission takes a public policy decision to leave the enforcement to third parties yet it also provides a source of reference should any discord, difficulty or dispute arise in the course of this enforcement. Due to its expertise, it can provide suggestions and inputs without institutionalising or marginalising the arbitration process. Of course, any award given by the arbitrator would have to be vetted by the Commission to make sure it is in line with the thinking of the Commission when it formulated the remedy in the first place.

4. 6 POST IMPLEMENTATION MODIFICATION

It is desirable for a competition authority as well as parties to have some means of seeking modification of a remedy either to reflect changes in circumstances or problems in the initial

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design of the remedy. An example would be the Hungarian case of the merger between Tirlemontoise SAS and Roosevelt SA. The merger would have created a large concentration of sugar production facilities in Hungary. The Hungarian competition authority case ordered a divestiture of certain sugar mills to Tate & Lyle. However, due to legal issues, it became necessary to change the nominated purchaser for the divestiture. The importance of such a mechanism increases with the duration of the remedy. Seeing that the CCI prefers behavioural remedies which do run over a period of time, it would be advisable for the CCI to lay down Regulations under Section 64 (2)(h) of the Act as to how exactly the CCI would proceed with a post implementation modification. This can also be a fallback position in case the arbitral proceedings are unsuccessful since the remedy itself has become obsolete over a period of time.
V. THE MERGER REMEDIES REVIEW PROCESS

Designing a remedy necessarily means that the competition authority has to take into account many factors like type, scope, effectiveness, monitoring and implementation. Usually, it is the authority that proposes a remedy to make sure that the forthcoming merger would not leave any impediment to competition in the market. If these remedies are not entirely acceptable to the merging parties, it has the option to submitting suggested changes to them. The final decision lies with the authority. In the course of this generalised process, depending on the jurisdictions, there would be a series of negotiations between the authority and the parties to the merger.

One could argue that the Competition Commission of India should lay down a clear set of procedures for the choosing of such remedies. Failure to do so may lead to arm-twisting allegations by the merging parties if the CCI doesn’t agree to their proposed amendments to the modification. This would lead to more grounds of appeal and delays in implementing any sort of remedy. It can be argued that much like a full fledged merger review process, a merger remedy review process also needs to have phases –

a. **Phase I** – The cases here would be those where the remedy is obvious and acceptable by both parties. These would be the cases where the parties unconditionally accept the modification proposed by the CCI under Section 31(4) as well as those where the parties have proposed amendments under the modification based on which the Commission comes to its final decision under Section 31(7) & (8). These would basically deal with those remedies which are straight cut ( both behavioural and structural ) and do not require extensive monitoring or the use of third parties.

b. **Phase II** – This phase includes those cases where merger remedy formulation is a more complex endeavour. It would include cases where the merger remedies are complex or where there is a mixed bag of remedies, both structural and behavioural to be used. This phase would also include those cases where both the formulation as well as effective implementation of merger remedies needs the involvements of third parties. An example could be of access remedies which might require inputs from competitors and customers to formulate. Where there would be arbitration clauses embedded in the CCI’s conditional clearance decision, these cases would also fall under phase II since they require a higher level of analysis.
VI. CONCLUSION

The Competition Act of 2002 lays down a legal paradigm that is comparable with even the most advanced jurisdictions in the world. However, it is to be admitted that the Competition Commission of India has not had enough cases come up before it to evolve a comprehensive doctrine of merger control. This is especially true in the case of merger remedies. There has been no case before the CCI as yet where the Commission has felt a need to lay down any remedies. However, given that India is becoming one of the hubs of mergers and acquisitions with multinationals acquiring Indian companies and Indian companies aggressively targeting foreign companies who have a foothold in the Indian market, it is to be expected that the Competition Commission of India will have to play a vastly increased role as the years go by. An example could be the merger of Virgin Mobiles with Tata Indicom.

In this envisaged role, the issue of merger policing with remedies becomes all the more important. Jurisdictions such as the European Union have evolved their doctrine over a long period of trial and error. To take an example, the use of arbitration clauses in merger control has been standard operating practice by the European Commission for over 2 decades. Since business now is global and global competition regimes need to work in a state of mutual harmonization\(^57\), it would do well for Indian authorities to adopt practises well in advance of the coming flood. Having a system already in place would be perceived as quite an industry-friendly gesture and would fit into India’s economic ambitions quite well indeed.

\(^{57}\) All the more important for countries like India whose growth rate and global aspirations mandate that it integrate fully into the global market.
VII. BIBLIOGRAPHY

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