COMPARATIVE MERGER CONTROL REGULATIONS-
LESSONS FROM EU AND US

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INTRODUCTION

Economic liberalization is the mother of competition law. It was with economic liberalization and globalization, that the need for an effective competition regime was recognised. With liberalization and increased competition among firms to conquer the market, competition law emerged as the solution to such antagonism that has the potential to sow its own destruction. A free market economy can cause a small number of firms to be more successful than the others and thus create a state of monopoly, thereby adversely affecting the competition in the market. Competition law thus, intervenes in such situations to regulate the market and thereby foster healthy competition. Positions of strength could be the result of a number of reasons like technological superiority, decreased costs, absence of substitutable goods etc. Competition authorities usually intervene in situations where anti-competitive agreements have been concluded between two or more entities, where a dominant firm has abused its dominance and in most cases of combinations or concentrations.

Mergers and acquisitions (or combinations) refer to a situation where the ownership of two or more enterprises is joined together. A merger is said to occur when two or more companies combine to form a new company. These companies may merge with an existing company or they may merge to form a new company. The assets and liabilities of the transferor company become the assets and liabilities of the transferee company after the merger. The purpose of a merger is usually to achieve economies of scale, operating economies, diversification of products, synergy.\(^1\)

The first decade of the new millennium heralded an era of global mega-mergers. However, the post 2007 economic turmoil put an end to the mergers and acquisitions frenzy of the 1980s and 1990s.\(^2\) The trend of mergers and acquisitions that followed the economic recession was one that focused on transferring resources to where they are most needed and of removing underperforming managers. Whatever the reason maybe, mergers & acquisitions have been seen

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\(^1\) Aamukthamaalyada, *Competition Regulation of Mergers and Acquisitions*, available at, http://consumer.indlaw.com/search/articles/?c09b7d9c-1477-4cda-b197-be5e695ae25d (Last visited on 12 January 2012)

\(^2\) Arturo Bris *et al*, The Effect of Merger Laws on Merger Activity: International Evidence, p. 1
as the solution by many market players to strengthen their hold over the markets as well as by the
governments to remedy inefficiencies.\textsuperscript{3}

Despite the efficiencies mergers and acquisitions have to offer, they have the potential to cause
unwanted socio-economic implications that are often frowned upon. Mergers or acquisitions by
dominant firms can result in monopolistic conditions by imposing barriers to entry. They can also
result in anti-competitive effects through unilateral or coordinated effects. If the combining
enterprises come to wield substantial market power, they can raise prices or reduce outputs or do
both, harming both consumer interests and competitors.\textsuperscript{4} Sometimes, a combination of enterprises
can transform market structure to facilitate concerted or collusive action. The former results in
unilateral effect and the later in coordinated effect. Any merger or acquisition that causes an
unfavourable impact on the competition in the market and thereby creates a hostile atmosphere is
ill received by competition authorities in most jurisdictions.\textsuperscript{5} Increased anti-competitive tendencies
by market players led to the enactment of competition laws across the globe. Today, there are over
80 countries with competition laws, of which about 45 specifically provide for merger review.\textsuperscript{6}

One of the earliest legislation that provided for regulation of mergers and acquisitions was the
Clayton Act, 1914 in the United States of America. It was enacted as a result of absence of
provisions relating to mergers and acquisitions in the Sherman Act, 1890. The EU merger control
law is young in comparison with the U.S regime, yet the EU regime has evolved very quickly and
has rapidly approached the maturity of its predecessors in terms of legal framework and
conceptual thinking. In India, issues regarding competition were addressed under the Monopolies
and Restrictive Trade Policies Act, 1964. However, the Competition Act, 2002 was enacted and it
took the place of MRTP Act, 1969.

The objective of this paper is to compare various relevant provisions of the EU, US and the Indian
merger control regimes and highlight those provisions or practices that can be imbibed into the
Indian system. The Indian competition regime so far has been exceedingly built on the EU regime,
yet there exist many merger control practices which, if imbibed by the Competition Commission
of India would further strengthen the regime. Part I of this paper seeks to delve into the history and
evolution of merger control regimes in EU, US and India. Part II, of the paper is to compare and
discuss the substantive provisions such as types of mergers that attract regulations, threshold
limits, concept of ‘control’, local nexus, fees and penalty, waiting period and joint ventures. Part
III of the paper will conclude and make suggestions that may prove useful to the Commission.

\textsuperscript{3} Ibid
\textsuperscript{4} Supra n.2, at 3
\textsuperscript{5} Supra. n. 2, at 4
\textsuperscript{6} Ibid
Part I: The Origin and Evolution of EU Merger Control Law

The history of European merger control can be identified in four distinct phases. Phase I is 1950s, where merger rules were included in the 1951 Treaty Establishing the European Coal and Steel Community (henceforth the ECSC Treaty), but not in the Treaty Establishing the European Economic Community (henceforth the EEC Treaty), Phase II, in 1960s and 1970s where attempts to provide the Commission with powers to regulate mergers were made but by and large failed, Phase III in 1980s where the member states, after 16 years of negotiations, reached an agreement on the Merger Control Regulation (MCR) in 1989 and lastly, Phase IV from 1990s onwards where the Commission began regulating large mergers under the MCR, which was revised in 2003-2004 through the Council Regulation (EC) 139/2004 (ECMR).

Phase I
The end of World War II signalled the beginning of a new era where the United States (US) assumed leadership of the capitalist world. The new order that emerged, which is sometimes referred to as the Pax Americana, ‘was brought about through a change in the power relations among the major states, reflecting a decisive shift in their relative economic-productive powers’.

As an occupying power in Germany, the Americans were in a good position to influence the developments in post-war Europe and they did indeed seize this opportunity. One of the policies pursued by the Americans and their allies was to take action against the cartels and significant concentrations in German industry.

In the US, an extensive antitrust regime had evolved since the adoption of the 1890 Sherman Act. From 1914, the year the Clayton Antitrust Act was enacted as a supplement to the Sherman Act, this administration explicitly prohibited M&As that would “substantially lessen competition”. In Europe, on the contrary, many industries had traditionally been shielded from competitive pressures, either through private arrangements or through regulatory interventions. This was evident in key industries such as coal and steel. In the steel sector, cartelization was the rule rather than the exception and had become an international phenomenon in the 1920s and 1930s, where

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7 See generally, Hubert Buch-Hansen, Rethinking the history of European level merger control, A critical political economy perspective, Copenhagen Business School (CBS), (2008), 10
8 Cox, R.W. Production, Power and World Order, COLUMBIA UNIVERSITY PRESS, (1987), 212
9 Supra n. 7, at 80
the International Steel Cartel consisting of members from seven European countries had controlled a significant proportion of world production and exports. In the coal sector, private and state monopolization was widespread in countries like Germany, France, Belgium and the Netherlands. Cartels had traditionally been considered legitimate under German law and had in some cases even been compulsory. It was widely known, however that cartels and monopolies had served as an important factor for the rise of Adolf Hitler and the military power of the Nazis.

Consequently, the US and her allies saw it as a precondition for future peace and democracy in Europe that German companies were downsized considerably. With the Potsdam Agreement, the Allies agreed that measures were required in order to de-concentrate vital sectors of the German economy. Accordingly, the Allies imposed decartelization laws on Germany during the years of occupation, under which companies in sectors such as chemicals, coal, iron and steel, banking and plastics were decartelized and often divided into smaller entities. It is usually in light of these laws, that Germany has been noted to be the first country after the US to impose merger control laws.

France was the other European country that strove towards strengthening its economy post the World War. The state took control over key sectors of the economy: the Bank of France and several private banks were nationalised, as were the coal, gas, railroad and electricity industries along with Air France and the largest insurance companies. France became the European country with the highest rate of mergers since they believed that ‘modernization meant concentration within each sector of industry, larger production units and firms, the adoption of machines and technologies that would make mass production possible, and a rationalization of management and production methods.’

With France and Germany emerging as European powers in production of coal and steel, the ECSC Treaty was formed. The treaty was to form the world’s first anti-cartel agency and included antitrust provisions. However, the weak implementation of the provisions, led to the unpopularity of the treaty. In 1957, the Treaty of Rome created the European Economic Community. The three most significant influences on this treaty were, the German network that demanded a strong

12 Supra n 7, at 82
14 Id, at 84
15 Venturini, GMonopolies and restrictive trade practices in France, Leyden, (1971), Sijthoff.
competition regime, the importance of the strengths and weaknesses of the ECSC treaty and the influence of the US Antitrust model\textsuperscript{16}. However, the kind of merger control that was found in the Treaty was an indirect one. Article 85 and 86 of the treaty speak of the types of anticompetitive effects one associates with mergers. The language contained in each of the provisions is tailored quite narrowly to address observable firm behaviors and not, as would be the case in merger control, to potential or even likely behaviors\textsuperscript{17}. For example, Article 86 prohibits the abuse of dominant position in community markets. Subparagraphs (a) to (d) of Article 86 list actions that constitute abuse. However, nowhere within this list was there any suggestion that simply possessing a dominant position was problematic per se.

The Treaty of Rome also contains no provision for the ex ante appraisal of mergers and acquisitions. Indeed, the Treaty makes no mention at all, implicit or explicit, of the need to address this type of firm activity. There is little doubt that the absence of merger control was intentional\textsuperscript{18}. Mergers in the EEC were few in number and those that occurred were largely confined within states. Further, at the time, few governments themselves had domestic merger rules and among those that had merger regimes no government possessed merger control laws designed to curb the anti-competitive effects of concentrations\textsuperscript{19}. In fact, most member states sought to encourage the oligopolization of strategic industries.

\textbf{Phase II}

Phase II was marked by the slow unfolding of events in merger control. For the first fifteen years after the passage of the Rome Treaty member governments took no formal actions in the area of merger control. However, two events occurred that would profoundly influence later developments. The first was the passage of Council Regulation 17/62. The second was the publication in 1966 of the Commission’s \textit{Memorandum on the Problems of Concentration in the Common Market}.

The regulation set out the administrative framework for competition policy left incomplete in the Rome Treaty. Specifically, the regulation set out the procedural guidelines governing the exercise of authority under Articles 85 and 86. The regulation confirmed the principle set out in the Rome Treaty that the Commission sits at the administrative center of the competition policy regime\textsuperscript{20}.

\textsuperscript{16} Ibid
\textsuperscript{17} Supra n 15
\textsuperscript{18} Supra n 7, at 88
\textsuperscript{19} The Dutch had laws that required firms to notify authorities of pending mergers, but the legal restrictions against concentrations were few and exemptions to these restrictions were granted liberally.
\textsuperscript{20} Thomas J Doleys, \textit{The Origins of EU Merger Control Law: Insights from Agency Theory}, Third Pan-European
The regulation clarifies Commission enforcement and policy-making prerogatives. Commission authorities alone were to interpret and apply the provision contained in Articles 85 and 86 including, inter alia, the right to authorize exemptions under Article 85(3). Moreover, when Commission authorities acted, national authorities were required to discontinue any proceedings of their own. To assist the Commission in the execution of its broad responsibilities, the regulation granted the Commission broad investigatory and enforcement powers. Finally, on finding the undertakings being in violation of their obligations under Article 85 or 86, the Commission possessed the authority to impose fines subject to review by the Court of Justice.

Thus, the regulation defined the manner in which the Commission would subsequently seek to exercise its authority. By filling in the aspects of the delegation contract left underspecified in the Rome Treaty, the regulation clarified both the scope of Commission authority as well as the manner in which that authority was to be used. In so doing, it established the boundaries within which the Commission would have to act. In its Memorandum on the Problems of Concentration in the Common Market, 1966 the Commission made its first clear statement of what it regarded as the place of merger control in Community competition policy. It was a result of the Commission’s concern that excessive concentrations of market power threatened to undermine the viability of smaller firms.

GEMA and Continental Can

Consistent with the position articulated in the abovementioned 1966 Memo, the Commission ruled in its first ever case - The GEMA case (A German music industry trade association), that it is not necessary to prove that there has been abuse of the dominant position, it is sufficient if the concerned entity merely possesses a dominant position. The Commission had exploited the unambiguity of Article 86 while interpreting the meaning of the term “abuse”. Article 86, as mentioned earlier merely provides a list of activities that can be potentially labelled as an abuse, but does not state the requirements for such activities to be considered as an abuse. This decision was strongly criticized as it demonstrated that the Commission was willing to manipulate the pliant language of the Treaty competition articles to advance its policy objectives.

The Continental Can case, is yet another example where the Commission received strong criticism for its decision. The Commission held that Continental Can abused its already dominant
position by seeking to acquire one of its few potential competitors in Community markets. The Commission, in its decision, did not offer evidence that Continental Can had actually “abused” its position in the marketplace. There was, in fact, no clear evidence that consumer welfare had been damaged by Continental Can’s monopolistic behavior. Rather, the case against Continental Can revolved solely around the acquisition of a competitor. The Commission reasoned that Article 86 prohibitions applied not only to company abuses ex post facto, but applied with equal force to the preservation ex ante of competitive market structures. Thus, Continental Can was guilty of abuse by attempting to strengthen its already dominant position by means of a merger—the effect of which would be to reduce further competition in the common market. However, on appeal to the ECJ, the decision of the Commission stood annulled. Continental Can case thus marks an important step towards the evolution of merger control law in the EU.

Phase III
Prior to 1973, development in merger control involved principally questions of legal interpretation. The issue had not yet taken on a political identity. However, beginning in 1973, merger control became politicized. The Commission, spurred in part by the halting progress in expanding its authority de facto through creative interpretation of Treaty articles, began a process whereby it sought to acquire greater de jure authority through legislative action. The 1973 and 1981 draft Merger Regulations were therefore an effort to press for a community level merger control law. The Commission reasoned that as cross border merger activity between European states continued to increase, more potential competitors would be squeezed-out and consumer welfare would begin to suffer. On this basis, the Commission argued that a Merger Regulation would provide the legal tools required to ensure that Community markets remained competitive. However, these proposals faced strong opposition from developed powers such as France, Germany, Italy, which feared that the Commission might render decisions that would harm their vital domestic industries. Therefore, these proposals as well as those put forth in 1984 and 1986 failed due to lack of support.

Philip Morris Case
In 1987, the ECJ handed down a ruling on a long-simmering row in the tobacco sector between the Commission and Philip Morris. The issue in the case was whether Philip Morris’ proposed

26 Europemballage Corporation and Continental Can Company Inc. v. EC Commission 1973 CMLR 199
28 Ibid
acquisition of Rothmans Tobacco would result in a distortion of competition in violation of Article 85(1). Two of Philip Morris’ chief rivals, RJ Reynolds and British American Tobacco (BAT), weighed in on the matter. RJ Reynolds and BAT claimed that to allow Philip Morris a controlling interest in Rothmans would, in effect, allow it to influence conditions in the European tobacco market. The resulting distortion of competition would clearly violate enumerated prohibitions in Article 85(1) without contributing positively to either production/distribution or technological progress, thereby it would fail to qualify for exemption from prohibition under Article 85(3). After consulting with the Commission about these concerns, Philip Morris offered to amend the deal. Satisfied with the changes, the Commission granted Philip Morris an exemption under Article 85(3).

However, as soon as the Commission decided to grant the exemption, RJ Reynolds and BAT lodged a complaint with the ECJ under Article 173 to have the exemption overturned. The firms pushed their claim that the acquisition would allow Philip Morris powerful leverage of Rothmans. They argued that Philip Morris might use its privileged position to seek control of Rothmans in the future, thereby accomplishing by stealth what it could not secure overtly. The Court, unconvinced by the argument presented by RJ Reynolds/BAT, ruled in favor of the Commission/Philip Morris. The Court argued that while acquisitions of equity interest did not constitute prima facie evidence of anticompetitive behavior, such acquisitions might nonetheless serve as an instrument to that end. Henceforth, mere ‘dominance’ would not result in Article 86 violation, it had to be proven that a takeover might be carried out with the intention of reducing effective competition to cause such a violation. The Court thus intimated for the first time that Article 85 could be used to evaluate mergers.

1989 Agreement

The Philip Morris decision changed the politics of merger control considerably. Business interests across the Community increasingly coalesced behind the idea of a single merger regime. Five months after the Philip Morris judgment, the Commission submitted a new draft merger regulation to the Council. Negotiations progressed slowly. Responding to a commitment by the British and Germans to end their objections if thresholds were raised, the Commission once again amended its proposal and agreed to raise the worldwide turnover threshold ECU 1 billion to ECU 5 billion. The Commission further stipulated that merger entities that generated two-thirds of the EC-turnover (down from three-quarters) in a single member state would also be exempt from review.

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29 BAT and RJ Reynolds v. Commission [1988]
30 The 1988 Draft Regulation, OJ C 130, 19.5.88
31 Financial Times, 1 April 1989:1 cited in Hubert Buch-Hansen, Rethinking the history of European level merger control, A critical political economy perspective, Copenhagen Business School (CBS), (2008), 10
With a number of other amendments, the 1989 agreement finally came into play and the Merger Control Regulation (MCR) was enacted.

**Phase IV**
The final phase began in the 1990s throughout which the Commission evaluated large mergers under the 1989 MCR. Pursuant to the provisions embedded within the regulation, any corporate merger or acquisition that met the minimum standard threshold criteria was subject to evaluation and approval by the Commission Competition authorities. The ruling of the Commission was final and neither the firms nor the government could alter them. These regulations however came to be revised in 2004 and the (EC) 139/2004 (ECMR) came into force on 1 May 2004 and replaced the earlier 1989 MCR.

The new ECMR introduced a number of changes, both in terms of the European Commission’s substantive approach to mergers and to procedures. The ECMR is enforced by the Directorate General for Competition of the European Commission (DG Comp) in Brussels. ECMR notifications are reviewed by sector specific units within DG Comp, which have integrated merger control competence.

The Commission has published a series of guidelines and notices to assist in the interpretation of a number of key issues under the ECMR, including guidelines in the assessment of non-horizontal mergers 2008 (the Non-horizontal Guidelines), the Guidelines on the Assessment of Horizontal Mergers 2004 (the Horizontal Guidelines), a notice on remedies 2008 (the Remedies Notice), and a notice on each of case allocation and ancillary restrictions (restrictions directly related to and necessary for concentrations). The ECMR is based on the principle of the one-stop shop whereby, once a transaction has triggered the application of the European Commission’s powers, the national authorities of the member states are precluded from applying their own competition laws to the transaction, with certain exceptions.

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32 Supra n. 7, at 222
33 Id, at 222
Evolution of Antitrust Law in US

Antitrust emerged in the late nineteenth century as a response to the growth of the trusts and their power in the American economy. In that period, the prevailing ideology of government’s role in the economy was laissez faire, but it had been attacked by a variety of progressive social movements that advocated greater governmental intervention. This was because, the giant businesses also known as ‘trusts’ controlled the economy through their monopolistic behaviour. For example, U.S Steel and Standard Oil controlled the markets by controlling the supply of their products as well as the price. The absence of competitors, a consequence of entry barriers caused by such monopolies, resulted in exploitation of smaller market players as well as consumers and was considered as antithetical to democratic institutions. Such widespread hostility towards monopoly led to the enactment of the Sherman Act.

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

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 industries as monopolies. The Act contained two main provisions, Section 1 outlawed all trade combinations or agreements that severely restricted trade between states or with foreign powers. Section 2

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36 Id. at 41
39 Id. at 104-05
outlawed any attempts to monopolize trade within the United States.\textsuperscript{40} Although the Sherman Act’s first two decades featured no whirlwind of antitrust enforcement, the courts began shaping the law’s vague terms. The Act’s categorical ban upon “every” contract in restraint of trade required judges to develop principles for distinguishing between collaboration that suppressed rivalry and cooperation that promoted growth. It outlawed “every contract, combination...or conspiracy, in restraint of trade” or interstate commerce, and it declared every attempt to monopolize any part of trade or commerce to be illegal. One of the first Sherman Act cases that the US Supreme Court was faced with involved a sugar trust.\textsuperscript{41} The \textit{E.C. Knight Company} was one such combination controlling over 98 percent of the sugar-refining business in the United States. The government alleged that the American Sugar Company, violated the Sherman Act by purchasing the stock, machinery, and real estate of its major four competitors and thus “monopolized the manufacture and sale of refined sugar in the United States, and controlled the price of sugar.”

Chief Justice Fuller wrote the majority opinion for the Court. His opinion did not address whether the Sherman Act’s prohibition against “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade. . . .” should be interpreted according to a rule of reason. It simply held that the Sherman Act was intended to apply only so far as the federal government’s commerce powers allowed, that the activities at issue in \textit{E.C. Knight} involved the manufacture of sugar, not commerce, and that regulatory control over the manufacture of a product did not fall within the federal government’s commerce powers. Therefore, the Court adopted a narrow view of what comprised “interstate commerce,” effectively rejecting the government’s argument that acquisition of manufacturing capacity was illegal monopolization. The Court also suggested that an acquisition of stock of one corporation by another to control the second corporation was not interstate commerce. The implication was that the Sherman Act did not apply to any contracts, combinations, or conspiracies involved only in the manufacture of a product.

This view of the Supreme Court was criticized by many scholars to be inconsistent and incoherent with the objectives if the Sherman Act and this decision caused one of the initial setbacks to the development of antitrust law. Such criticism was however short lived. In 1904 the

\textsuperscript{40} United States, The Sherman Act, 1890, sec 1, 2
\textsuperscript{41} \textit{United States v E.C.Knight Co}, 156 US 1 (1985)
Supreme Court in the *Northern Securities case*\(^{42}\), held that the Northern Securities Company had violated the Sherman Act. The Company was formed after two competing railroad companies, the Northern Pacific and the Great Northern, had agreed to merge their interests transferred their stock to the control of Northern Securities. The Court justified its ruling by stating that, since railroad carriers were clearly engaged in interstate commerce, *Northern Securities* clearly fell within the scope of those decisions unless “the special objections . . . to the present case” exempted it\(^{43}\). This case therefore, effectively ended a loophole that allowed corporations to evade the Sherman Act by owning other corporations instead of using trusts.

The Court once again in the *Standard Oil Co. v United States*\(^{44}\) case ruled that combining the ownership of virtually the entire capacity for refining and distributing oil in the United States easily fell within the prohibitions of Section 1 and Section 2 of the Sherman Act. The Court on adopting and applying the *rule of reason* stated that only combinations and contracts *unreasonably* restraining trade are subject to actions under the anti-trust laws, and that possession of monopoly power is not inherently illegal. The Court ordered Standard Oil broken into 34 independent companies. It stated that, the Standard Oil Company’s acquisition of 90 percent of American oil production warranted a “presumption” that it was the result not of “normal methods of industrial development,” but of new exclusionary measures that inhibited the normal functioning of the market\(^{45}\).

Despite the progressive attitude of the Court, there was much dissatisfaction due the ambiguity and uncertainty associated with the provisions of the Sherman Act. In response to such criticism, two new federal laws were put in place in 1914. The first piece of legislation was the Clayton Act. This Act was introduced in an effort to strengthen antitrust enforcement powers. It prohibited mergers and acquisitions that were likely to substantially lessen competition or tend to create a monopoly\(^{46}\). This Act was further strengthened in 1950 through the *Celler-Kefauver Amendments* strengthening Section 7 by making it applicable to asset acquisitions in addition to acquisitions of stock and to acquisitions likely to substantially lessen competition in any line of commerce in any section of the country\(^{47}\). That meant that Section 7 of the Clayton Act could be

\(^{42}\) 193 U.S. 197, 320-21 (1904)

\(^{43}\) *Ibid*

\(^{44}\) 221 U.S. 1 (1911)

\(^{45}\) *Id.*, at 75

\(^{46}\) 15 U.S.C. § 18; Importantly introduced to settle the ‘rule of reason’ debate initiated by the Supreme Court in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

applied against vertical mergers, as well as mergers between competitors. The second law introduced in 1914 was the Federal Trade Commission Act. This Act provided that “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce” were illegal. Additionally, the FTC Act established the Federal Trade Commission as a regulatory agency that would enforce and decipher the law.

Following the 1950 amendments to Section 7 of the Clayton Act, the Supreme Court in the case of Brown Shoe Co. v United States, created the test to determine the “market” relevant for purposes of applying the antitrust law. The relevant market has a geographic scope (section of the country) and may include a range of close substitute products or services (line of commerce). In defining the relevant geographic market and the relevant product market, the Court stated that the view of consumers and the alternatives available to them in the marketplace should be a key consideration. Thus the relevant product market includes not only the products or services offered by the company in question, but also any other products or services offered by other companies that could be reasonably substituted for those products or services. Similarly, the geographic market includes areas to which the consumer may reasonably turn for alternatives.

This definition of ‘relevant market’ came to be useful in merger and acquisition cases where determination of the existence of a monopoly was dependant on the determination of the relevant geographic or product market.

Realizing the need for more clarity in the enforcement of laws, the Department of Justice issued its first Merger Guidelines in 1968 to clarify enforcement policy and provide guidance on how to enforce laws. Subsequently, the Congress passed the Hart-Scott-Rodino Antitrust Improvements Act (the HSR Act) to govern the procedural aspects of mergers and acquisitions. This Act is analogous to the EC Administrative Regulation. It gives the two federal agencies which review the competitive implications of transactions, the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC), the opportunity to assess the antitrust issues presented by certain acquisition of assets or voting securities before those transactions are consummated. While the Antitrust Division and the FTC have parallel jurisdiction to review transactions, the agencies have developed a procedure, which allocates (or “clears”) transactions

48 United States, Clayton Act, 1914, sec 7
49 United States, Federal Trade Commission Act, 1914, sec 45
50 United States, Federal Trade Commission Act, 1914, sec 46
51 370 U.S 294 (1962)
52 Ibid
53 Supra n. 51
54 Ibid
55 Global Competition Review (‘GCR’), Merger Control, 2012, 415
to one agency or the other\textsuperscript{56}.

The antitrust agencies also have jurisdiction to investigate and challenge transactions under the US antitrust laws, whether or not they have been notified under the HSR Act and whether or not they have been consummated. The antitrust division has exclusive federal responsibility for enforcing the Sherman Act. The FTC is an independent administrative agency and has exclusive responsibility for enforcing the FTC Act and joint authority with the Antitrust Division over enforcement of the Clayton Act\textsuperscript{57}. Although both agencies have jurisdiction to enforce the antitrust laws, any given merger or acquisition will be dealt with by only one of the two bodies. Mergers and acquisitions also can be reviewed by the competition agencies of one or more of the 50 states, typically in conjunction with the review being conducted by the Antitrust Division or the FTC.

The enactment of the HSR Act made merger enforcement more sensible and efficient. Before the HSR Act, the federal agencies charged with merger enforcement (the FTC and DOJ) would not learn of proposed mergers, acquisitions or joint ventures until the transactions were publicly announced and often on their way to completion or already complete. Most merger enforcement thus involved either hasty races to enjoin imminent closings or attempts by agencies to undo completed transactions\textsuperscript{58}. Such a process was inefficient and highly adversarial and did not serve the interests of the enforcement agencies, the target market players as well as the public. The HSR Act thus made the working of the enforcement agencies clear, uniform and effective.

\textbf{Merger Control under Indian Competition Law}

\textsuperscript{56} Id, at 415
\textsuperscript{57} Id, at 415; \textit{See also}, Hart-Scott-Rodino Antitrust Improvements Act,1976, sec 18 explanation by Legal Information Institute, Cornell University Law School available at http://www.law.cornell.edu/uscode/15/usc_sec_15_00000018----000.html (last visited on January 16\textsuperscript{th}, 2012)
\textsuperscript{58} Douglas F Broder, \textit{A GUIDE TO US ANTITRUST LAW}, Sweet and Maxwell, (2005), 134
Article 38 of the Constitution provides for the Directive Principles of State Policy. These Directive Principles mandate upon the States to secure a social order for the promotion of welfare of the people. This provision recognised the need to eliminate and minimise the inequalities in income, which applied not only to the individuals but also to the groups in different areas\textsuperscript{59}. Article 39 takes a step further and states that, the States shall strive to secure that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment\textsuperscript{60}. The preamble to the Monopolies and Restrictive Trade Practices Act (MRTP Act) resounds this very principle of the Constitution of India.

The MRTP Act came into existence on 27\textsuperscript{th} December 1969. The preamble to this enactment provided it to be An Act to provide that the operation of the economic system does not result in the concentration of the economic power to the common detriment, for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices and for matters connected therewith or incidental thereto. Therefore, the MRTP Act, 1969 aimed at preventing economic power concentration in a few hands, with the intention of ushering economic equality to reduce the colossal disparities within the Indian economic setup. This Act came to be enacted after the Monopolies Inquiry Committee formed in 1964, reported that there was high concentration of economic power in over 85\% of industries in India at that point in time.

While the MRTP Act was useful in many ways, a view was that the Act had become obsolete in certain respects and there was a need to shift the focus from curbing monopolies to promoting competition. A high level committee (Raghavan Committee) was appointed in 1999 to suggest a modern competition law in line with international developments to suit Indian conditions. The committee recommended enactment of a new competition law, called the Competition Act, and the establishment of a competition authority, the Competition Commission of India, along with the repealing of the MRTP Act and the winding up of the MRTP Commission. It also recommended further reforms in government policies as the foundation over which the edifice of the competition policy and law would be built.

After a long and troubled gestation, India’s competition law and Competition Commission came into existence\textsuperscript{61}. The Competition Act, 2002 came into existence in January 2003 and the

\textsuperscript{59} Constitution of India, Article 38
\textsuperscript{60} Constitution of India, Article 39
\textsuperscript{61} The Competition related provisions of the Competition Act, 2002 were barred by a write petition filed in the Supreme Court of India. It was argued in the case of \textit{CCI v Union of India} that the CCI would exercise judicial
Competition Commission of India was established in October 2003. The Act prohibits anticompetitive agreements (section 3), abuse of dominant position (section 4) and regulates mergers, amalgamations and acquisitions (sections 5 & 6). The law regulating mergers can be found under Sections 5 and 6 of the Competition Act. Mergers have been grouped along with Amalgamations and Acquisitions under the wider category of combinations. The provisions relating to combinations however, came into force only on 1st June 2011.

The Commission also notified the implementing regulation titled “The Competition Commission of India (procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (Merger Regulations) and as per the notification issued on 11th May 2011, the Commission can now scrutinize large mergers and acquisitions above a certain threshold and approve or reject them after its assessment.

These much-awaited regulations, which encompass within them every large merger and acquisition deal regulate all acquisition of shares, voting rights, control, merger or amalgamation, which cause or are likely to cause an appreciable adverse effect on competition in the relevant market in India. Therefore, all the big-ticket mergers above a certain threshold provided in section 5 of the Competition Act will require prior approval of the CCI.

The gradual succession from the MRTP Act of 1969 to the Competition Act of 2002 is one of the most important milestones as far as economic reforms in the field of competition laws in the country are concerned. By shifting the focus from the stage of merely ‘curbing monopolies’ in the domestic market to ‘promoting competition’, the competition regime in India has attained recognition for its progressive ways. Since June 2011, the Commission has scrutinized and approved fifteen combinations. Competition law in India, can thus be successfully classified as a ‘means to achieve the end’, rather than just an end in itself.

Part II: Merger Control Regimes in EU, US and India- A Substantive Comparison

functions and hence would violate the doctrine of ‘Separation of Powers’. Thus the Competition Commission and the Competition Act became fully functional only in 2007.
In order to undertake a study of mergers under competition law, the first step is to look at those transactions which fall within the purview of merger control, i.e., the definition of mergers. Mergers are ordinarily understood as ‘the absorption of one company that ceases to exist into another that retains its own name and identity and acquires the assets and liabilities of the former’\(^{62}\). Many competition laws/regulations, do not in fact use the term mergers, rather they prefer to use expressions such as ‘combinations’ (India) or ‘concentrations’ (EC) to describe the transactions that are dealt with or can be dealt with by merger control laws. This Part seeks to provide a useful insight into the substantive comparison between various significant provisions of the EU, US and Indian Competition laws. This would facilitate a better understanding of crucial issues that have been debated on regularly and would also bring to light those issues that call for further dialogue.

**JURISDICTION**

This section identifies which transactions fall under the ECMR, what can happen to those that do not and the threshold limits. With respect to US Antitrust law, the section discusses the kinds of mergers that are caught under the HSR Act and the Clayton Act, the applicable thresholds and exemptions. The Section also looks into the various related provisions under the Indian Competition Act, 2002.

**Kinds of Transactions Caught**

Within the European Community, all concentrations that have a ‘community dimension’ are required to be reviewed by the Commission under the ECMR\(^{63}\). Article 3 (1) of the Regulation defines that ‘a concentration shall be deemed to arise where a change of control on a lasting basis results from, a merger of two or more previously independent undertakings or parts of undertakings, or the acquisition of direct or indirect control of the whole or parts of one or more other undertakings.

Therefore, a concentration is said to arise under two circumstances, i.e.

a. When there is a merger of *previously independent undertakings*, or

b. When there is an acquisition of control of an undertaking.

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\(^{63}\) ECMR, Art. 1(1)
Such a merger or acquisition of control of an undertaking will be deemed to be a concentration that attracts the regulation under ECMR only if the change of control is on a lasting basis. Therefore, in the EC, it is the acquisition of control, which is of importance and acquisition of assets or shares would constitute ‘concentrations’ if they lead to acquisition of control.

In the US, section 7 of the Clayton Act forbids any merger or acquisition which may *substantially lessen competition* or which tends to create a *monopoly* \(^{64}\). The HSR Act, covers pre-merger notification and is applicable to every transaction that involves merger, acquisition of ‘assets’ or ‘voting securities’ and certain kinds of non-corporate interests that meet the minimum threshold levels and joint ventures \(^{65}\). Every transaction involving acquisition of tangible or intangible assets is to be reviewed under the HSR Act \(^{66}\). Therefore, acquisition of exclusive patent rights will require review. The HSR Act can apply to any kind of transaction, be it an acquisition of a majority or minority interest, a joint venture, a merger or any other transaction that *involves an acquisition of assets or voting securities*. The HSR Rules define ‘voting securities’ broadly to include, any security in a corporate entity that either currently entitles the holder to vote for the election of directors, or is convertible into such a security \(^{67}\). The acquisition of securities that do not possess, or are not convertible into securities that will possess any voting power is exempt from the HSR Act \(^{68}\). The Rules also exempt the acquisition of convertible securities, options and warrants at anytime before they have been converted or exercised \(^{69}\). Further, these HSR Rules were revised to include the acquisition of *non-corporate interests*, which are deemed to be “assets” \(^{70}\). A “*non-corporate interest*” is defined as “an interest in any unincorporated entity which gives the holder the right to any profits of the entity or, in the event of dissolution of that entity, the right to any of its assets after payment of its debts” \(^{71}\). The HSR filing requirement will apply in an acquisition that confers control over an existing or newly created unincorporated entity where the sum of the acquisition price of the non-corporate interest and the value of the non-corporate interest already held by the acquiring person meets the jurisdictional thresholds \(^{72}\).

Therefore, under the US Antitrust law, for any transaction to attract the regulation of antitrust

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\(^{64}\) 15 U.S.C § 18; the original Section 7 applied only to stock acquisitions. The Cellar- Kefauver Amendments of 1950 extended the application of the Act to asset acquisitions.

\(^{65}\) Clayton Act § 7A (a) (15 U.S.C § 18 a (a))

\(^{66}\) Supra n. 47, at 415; the term ‘assets’ is not defined in the HSR Act, the agencies have taken the position that it should be given a broad interpretation similar to that which it has been given by the courts in interpreting section 7 of the Clayton Act. Under these principles, it is clear that acquisitions of assets – within the meaning of the HSR Act will include acquisitions of both tangible and intangible assets.

\(^{67}\) 16 C.F.R § 801

\(^{68}\) 16 C.F.R § 802.31

\(^{69}\) Id, 1-71

\(^{70}\) 16 C.F.R § 801.10

\(^{71}\) 16 C.F.R § 801.1 (f) (1) (ii)

\(^{72}\) 16 C.F.R § 801.13 (c)
authorities, it must essentially be an acquisition of assets or voting securities or in certain cases, non-corporate interests. Unlike the ECMR, the HSR Act is not limited to acquisitions in which actual voting control changes hands or when control changes hands by way of acquisition of assets. Simply put, HSR Act is not limited only to instances of lasting change of control. Merger Regulation and premerger notification under the HSR Act becomes necessary when an acquisition of assets or voting securities meets the minimum threshold level even in instances where there is no lasting change of control. Such an acquisition should not be subject to any exemptions under the Rules. Hence, if a transaction involves only the formation of a partnership, there is no need to scrutinize the same. Therefore, the initial determination of reportability requires each party to answer whether the transaction involves an acquisition of assets or voting rights and not merely acquisition of control as required under the ECMR.

In India, the Competition Act, 2002 regulates 
*combinations* that consist of mergers, amalgamations and acquisitions with a view to ensure that there is no adverse effect on competition in India. An acquisition where the acquirer is acquiring control, shares, voting rights or assets of the enterprise will be considered as a combination. If such a combination meets the specified threshold levels under section 5 (a), it is subject to regulation by the Competition Commission of India. An acquisition of control by a person over an enterprise when such a person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or substitutable goods or service is also considered to be a combination if the same meets the requisite threshold level under section 5 (b). Further, every enterprise created by way of merger or amalgamation that meets the requisite threshold level stipulated under section 5 (c), shall also be considered to be a combination that shall be regulated by the Commission.

Therefore in India, for the merger regulation to be attracted, the transaction firstly has to be considered to be a combination as stated under section 5 of the Act. To be considered as a combination, the transaction can either be a *Type A Acquisition*, as stated in section 5 (a) or a *Type B Acquisition*, as stated in section 5 (b) or a merger or amalgamation. Such an acquisition, merger or amalgamation has to further meet the stipulated threshold limits. An *‘acquisition’* is defined

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74 The Competition Act, 2002, sec. 5
75 The Competition Act, 2002, sec. 5 (a) (i)
76 The Competition Act, 2002, sec. 5 (b) (i)
under section 2 (a) as a means to directly or indirectly acquire shares, voting rights or assets of any enterprise or control over management or control over assets of any enterprise\textsuperscript{77}.

The Competition Act, 2002 has envisaged a more inclusive list of transactions to be caught by regulatory authorities in comparison to the ECMR or the HSR Act. A ‘combination’ such as Type A Acquisition under the Competition Act, 2002 is analogous to a ‘concentration’ under Article 3 (1) (b) ECMR which is an acquisition by securities or assets of the direct or indirect control of the other undertaking. The Type A Acquisition is also an acquisition of control, shares, voting rights or assets\textsuperscript{78}. Further, the definition of ‘acquisition’ under section 2 (a) includes control over management and the meaning of ‘control’ under the explanation to section 5 includes controlling the affairs or management of the acquired enterprise. This therefore, is similar to the understanding accorded to the term ‘control’ under the ECMR. ‘Control’ as per Article 3 (2) of the ECMR means the possibility of exercising decisive influence on an undertaking. A commonsensical understanding of ‘controlling the affairs or management of an enterprise’ would mean ‘the ability to exercise decisive influence on an undertaking’. Therefore, Type A Acquisition under section 5 (a) (i) of the Competition Act, 2002 is similar to a Concentration under Article 3 (1) (b) of the ECMR.

Apart from regulating acquisitions of control, shares, voting rights or assets in general, the Competition Act, 2002 also provides for regulation of horizontal arrangements under section 5 (b). The ECMR and the HSR Act merely state the conditions that would cause a transaction to be caught by merger regulations and the threshold limits beyond which such transactions are subject to scrutiny by regulatory authorities. Therefore every transaction, be it a horizontal or vertical merger or an acquisition is to be notified if they meet the threshold limits. There exist no specific regulation of horizontal arrangements in both the regimes. However, both the regimes provide for Horizontal Merger Control Guidelines, which assist the regulatory authorities in examining horizontal mergers.

The Competition Act, under section 5 has embraced all kinds of arrangements in an extensive manner. The difference between ECMR and Competition Act lies in this behalf. While in ECMR, the acquisition of control (direct or indirect), is a primary requirement for an acquisition to be a ‘concentration’, in Indian law, control is only one criterion for determining whether an acquisition is a concentration. Despite its comprehensiveness, it can be said that certain aspects of the Competition Act are can be deemed redundant and can be dispensed with. Acquisition under the HSR Act is limited to acquisition of assets or voting securities. Acquisitions of securities that do

\textsuperscript{77} The Competition Act, 2002, sec. 2 (a)

\textsuperscript{78} Supra n. 62
not have voting rights are exempted from being notified. A similar practice should be imbibed into the Competition Act, 2002 whereby an acquisition is considered to be a combination only when the acquisition is of assets or voting securities/rights.

Notifying acquisition of shares (where ‘shares’ as per Explanation (v) to section 2 includes shares/securities with voting rights as well as stock) that do not have voting rights or those securities that cannot be converted into voting securities i.e. non-convertible securities implies that Merger Regulation in India is based upon quantitative rather than qualitative criteria. This is because acquisition of shares that do not have voting rights does not result in change of control. Focusing on control to determine the existence of a combination will result in qualitative Merger Regulation.\(^{79}\) Further, omitting the words- control in section 5 (b) will render more clarity to the said section. This is in view of the fact that, the term ‘acquisition’ itself is defined to include control over the management and assets of an enterprise.

The definition of the term ‘shares’ as per Explanation (v) to section 2 means shares in share capital of a company carrying voting rights and includes,

i) any security which entitles the holder to receive shares with voting rights;

ii) stock except where there is a distinction between stock and share expressed or implied.

Therefore, shares under section 5 (a) mean shares with voting rights. However, section 5 (a) also mentions acquisition of voting rights as a distinct criterion. Further, since notifying of acquisition of stock is exempted under Schedule 1 to Regulation 4, an acquisition of shares that needs to be notified would merely entail acquisition of shares with voting rights. This would mean that, section 5 (a) distinctly provides for acquisition of voting rights to be notified in addition to acquisition of shares with voting rights to be notified. Hence, there exists unnecessary repetition in the wording of section 5 which causes uncertainty and ambiguity to the said section.

**Jurisdictional Thresholds**

**Community Dimension under ECMR**

The ECMR will only apply if certain specified threshold limits are met which give the merger a community dimension. Under the amended regulation\(^{80}\), the original community dimension threshold limits remain in force. The original threshold limits are based on the assumption that only concentrations involving large companies are likely to have effect on a community scale.

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\(^{80}\) ECMR 139/2004
However, where those threshold limits are not met with, the Commission’s competence has also been extended to smaller concentrations with a significant cross-border effect in at least three EU states. These concentrations are to be notified even when they fall below the normal threshold limits but are above the new, lower threshold limits\(^{81}\). These alternative threshold limits are designed to limit the need for multi-jurisdiction merger control procedures and to enforce the ‘one stop shop’ principle effectively. As a result, the Merger Regulation now contains two sets of threshold limits, which must be looked into to establish whether a transaction has a Community dimension.

A concentration is said to have a ‘community dimension’ as per Art. 1 (2) of the ECMR where the merging parties’,

(i) Combined world-wide turnover is more than € 5 billion and each of at least two of the merging parties realized more than € 250 million turnover in the EU\(^{82}\), unless each of the merging parties obtains more 2/3 of its EU turnover in one Member State, or

(ii) Combined world-wide turnover is more than € 2.5 billion; their combined turnover is more than € 100 million in each of at least 3 Member States; in each of those 3 Member States, the turnover of each of at least two of the merging parties is more than € 25 million; the Community-wide turnover of each of at least two of the merging parties is more than € 100 million\(^{83}\), unless each of the merging parties obtains more 2/3 of its EU turnover in one Member State.

The Commission thus has merger control jurisdiction if a concentration satisfies any of the above sets of criteria. It has also issued specific guidelines on how to calculate the turnover of undertakings concerned. This calculation includes the turnover of the merging parties and all of the undertakings controlled by or controlling them. However, with respect to an acquisition, only the turnover of the business sold is taken into account and not the seller’s turnover. The calculation is based on all revenue in the preceding financial year from the sale of goods and services falling within the ordinary activities after deduction of sales rebates, VAT and turnover based taxes\(^{84}\). They also call for deduction of internal turnover generated through business between different entities of a group of companies\(^{85}\). Special rules for the calculation of turnover apply to financial institutions and insurance companies\(^{86}\).

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\(^{81}\) ECMR, Art. 1 (3)  
\(^{82}\) ECMR Art. 1 (2)  
\(^{83}\) Supra n. 80  
\(^{84}\) See generally, ECMR, Art. 5  
\(^{85}\) ECMR, Art. 5 (4)  
\(^{86}\) ECMR, Art. 5 (3) (b)
If the transaction is notifiable under the ECMR, no other filings under individual Member States’ merger control regimes are required as the ‘one stop shop’ principle applies. However, if the ECMR thresholds are not met, the parties may need to notify the concentration under the nation Member States’ merger control regimes if the relevant national thresholds are met.

**Threshold limits under HSR Act**

The initial determination of whether the notification requirements of the HSR Act may be applicable to a particular acquisition of assets or voting securities focuses upon the following jurisdictional issues:

- whether either the acquiring or acquired persons are engaged in US commerce or in any activity affecting US commerce (*the commerce test*);
- The amount of voting securities or assets which will be held as a result of the acquisition (*the size-of-the-transaction test*); the dollar thresholds are adjusted annually to reflect changes in the GNP;
- where the size of the transaction is $263.8 million (as adjusted annually) or less but greater than $66 million (as adjusted annually), the magnitude of the worldwide sales and assets of the acquiring and acquired persons (*the size-of-the-parties test*) (as noted, the dollar thresholds are adjusted annually); and
- whether any exemptions apply to the transaction.

**The commerce test**

This requires that either the acquiring or acquired party be engaged in US commerce or in any activity affecting US commerce.

**The size-of-the-transaction test**

The size-of-transaction test looks at the assets or voting securities that will be held by the acquiring person as a result of a proposed acquisition. In other words, any voting securities or, in some cases, assets held by the acquiring person prior to the transaction, together with those assets or voting securities to be acquired in the acquisition in question, must be considered. Likewise, the acquisition of non-corporate interests of an entity must be aggregated with any interests currently held by the acquiring person in that same entity to determine whether or not the acquiring person holds 50 per cent or more of the entity, thus potentially requiring HSR notification\(^8\).

An HSR filing is not required in connection with any particular acquisition unless it will result in

\(^8\) Global Competition Review (‘GCR’), *Merger Control*, 2012, 416
the acquiring person holding assets or voting securities having an aggregate total value in excess of $66 million. In most cases, this threshold is cumulative. For example, if an acquirer already owns $50 million of voting securities of an issuer, and seeks to acquire $20 million in voting securities of that same issuer, the $20 million acquisition will result in the acquirer ‘holding’ voting securities of $70 million. However, while the acquisition of a 50 per cent or more interest in a non-corporate entity is considered an acquisition of the assets of the entity, the value of the interest is not the value of 100 per cent of the underlying assets, but rather only of the percentage interest held as a result of the acquisition.88

**The size-of-the-parties test**

The size-of-the-parties test does not apply to transactions resulting in holdings valued in excess of $263.8 million. For all smaller transactions, the test remains in effect. The size-of-the-parties test looks at the size of both the acquiring and acquired person and, is satisfied if one party (including all entities in its corporate family) has worldwide sales or assets of $13.2 million or more and the other has worldwide sales or assets of $131.9 million or more. Sales and assets, as a general rule, are defined as those set forth in an entity’s last regularly prepared income statement and balance sheet.89

An entity includes not only the entity making the acquisition and the entity being acquired, but also the entire corporate family of which each is a part. Thus, assuming that an entity’s assets or sales, or both, are $131.9 million or more, a purchase or sale of assets or voting securities by any subsidiary of that entity would satisfy the size-of-the-parties requirement under the HSR Act if the other party to the transaction was part of a corporate family that had assets or sales of $13.2 million or more.

Thus in the US, the threshold limits are based on value of assets, voting securities, non-corporate interests apart the value of sales/turnover. Since the parties have an obligation to notify the regulating authorities only if they have met the criteria laid down by all the three tests, only those transactions that have a substantial impact on the markets will be notified. Unlike the ECMR, the HSR Act lays down further conditions in addition to value of turnover such as value of voting securities or assets and non-corporate interests that have to be met by parties to an acquisition to require them to notify the regulatory authorities. Therefore, only those parties whose transactions cause a substantial change in control of the affairs or management of the

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88 *Id.*, at 416
89 Supra n. 86, at 416
entity by way of acquisition of voting securities or assets and non-corporate interests are required to notify the authorities. This further reduces the administrative burden on the competition authorities, enabling them to focus on those mergers that are most likely to cause concern, transactions where a case of dominant position or a likely case of abuse of a dominant position is already established. Establishing and eliminating such cases at the preliminary stage itself will not be possible where an obligation to notify arises merely on the value of turnover as a threshold.

**Threshold limits under the Competition Act, 2002**

In India, the threshold limits prescribed in the context of any merger, amalgamation, acquisition or control by any party (not being a group) is the parties jointly having in India assets of or more than the value of Rs. 1500 crore or turnover of or more than the value of Rs. 4500 crore in India or outside India, in aggregate, assets of or more than USD 750 million or a turnover of or more than USD 2250 million, with a local nexus provision requiring at least Rs. 750 crore of assets or 2250 crore of turnover in India.

In the case of group, the corresponding thresholds are in India, assets of or more than Rs. 6000 crore or a turnover of Rs. 18,000 crore in India or outside India, an aggregate value of assets of or more than USD 3000 million or turnover of USD 9000 million of which assets of Rs. 750 crore or turnover of Rs. 2250 crore must be in India.
<table>
<thead>
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<th>In India</th>
<th>Total value of assets more than Rs. 1500 crores or turnover of Rs. 4000 crore.</th>
<th>Total value of assets of more than Rs. 6000 crores or turnover more than Rs. 18000 crores</th>
</tr>
</thead>
<tbody>
<tr>
<td>In India or Outside India</td>
<td>Aggregate value of assets more than USD 750 million (including at least Rs. 750 crore in India) or turnover more than USD 2250 million (including at least Rs. 2250 crores in India).</td>
<td>Aggregate value of assets more than USD 3000 million (including at least Rs. 750 crore in India) or turnover more than USD 9 million (including at least Rs. 2250 crores in India).</td>
</tr>
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Threshold limits have been set out in India in terms of assets of the undertakings involved and turnover. While assets are a criterion on which net sales have been set out in India, turnover is a criterion in the ECMR and India. Voting securities however, are a criterion only under the HSR Act. Based on reasons stated earlier, the need to adopt voting securities as a criterion under the Competition Act is imperative. This would enable the competition authorities in India to focus on transactions that would most likely raise a concern because of substantial change in control. An increase in the share of control in the affairs and management of an enterprise is one of the most likely causes of an appreciable adverse effect on competition. The competition provisions under the Competition Act should be strengthened and should meet the ICN’s recommended practices for merger notification which provide that thresholds should be clear, understandable, based on objectively quantifiable criteria and on information that is readily assessable to the merging parties.\(^90\).

Additionally, the threshold levels set under the Competition Act are one of the highest in the world. Therefore, many smaller combinations that may have a potential adverse effect on competition are not caught. Hence, lowering the threshold limits will enable the Commission achieve its objectives.

**Exemptions from Filing Notification**

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Certain transactions are exempted by competition laws in most jurisdictions from being notified to the competition authorities as they are considered to be unlikely to adversely affect competition. To save the competition authorities from the burden of reviewing every merger, these exemptions are provided to enable them to scrutinize those transactions that are more likely to negatively impact the competition in the market.

Under the ECMR, concentrations that do not have a community dimension and do not meet the conditions stated under Article 1 (3) i.e. do not have a cross-border effect in at least three EC states, need not notify the transaction to the Competition Authorities of the European Commission. Under National Merger Regulations, concentrations having community dimension need not notify to the national competition authorities. Further, Paragraph 18 of the Commission’s Horizontal Merger Guidelines and Recital 32 to the Merger Regulation provide that, where the market share of the parties does not exceed 25 per cent either in the common market or a substantial part of it, it is an indication that the concentration is not liable to impede the effective competition and there is a presumption that the merger is compatible with the common market. Paragraph 19 of the Commission’s Horizontal Merger guidelines provides that the Commission is unlikely to identify horizontal competition concerns in a market with a post-merger HHI below 1,000. Other exemptions under the ECMR include non-full-function joint ventures, temporary holding of securities for the purpose of resale which are not deemed to have merged with the undertaking whose securities they hold, shareholdings acquired in the event of liquidation, insolvency, cessation of payments etc.

Under the HSR Act, once it is determined that a proposed transaction meets the jurisdictional tests, the next step in determining if a pre-merger notification filing is required is examining whether the transaction qualifies for any of the exemptions set forth in the HSR Act or the Rules. There are a variety of such exemptions, each of which excuses certain categories of transactions from the notification and waiting requirements of the HSR Act. For example, the notification requirements do not apply to:

The acquisition of non-voting securities, certain acquisitions of voting securities ‘solely for the purpose of investment’, the acquisition of goods or realty in the ordinary course of business,

91 A commonly accepted measure of market concentration. It is calculated by squaring the market share of each firm competing in a market, and then summing the resulting numbers. The HHI number can range from close to zero to 10,000. The HHI is expressed as: HHI = s1^2 + s2^2 + s3^2 + ... + sn^2 (where sn is the market share of the ith firm). The U.S. Department of Justice considers a market with a result of less than 1,000 to be a competitive marketplace; a result of 1,000-1,800 to be a moderately concentrated marketplace; and a result of 1,800 or greater to be a highly concentrated marketplace. As a general rule, mergers that increase the HHI by more than 100 points in concentrated markets raise antitrust concerns.
certain acquisitions that require the prior approval of another federal agency, stock dividends and splits, certain acquisitions by securities underwriters, creditors, insurers and institutional investors, and certain financing transactions where the acquiring person contributes only cash to a non-corporate entity and will no longer control the entity after it realises its preferred return. However, transactions that fall below the HSR thresholds or are otherwise exempt from HSR reporting can still be investigated and challenged, even after they are consummated.

As per the Implementing regulation to Competition Act, 2002, certain kinds of transactions are exempt from notification. The Schedule 1 to Regulation 4 lays down the list of all such transactions. This list however is not an exhaustive one, since Section 54 of the Competition Act, gives the central government the authority for granting exemptions for “any class of enterprises”. By not granting such a power to the Competition Commission of India, which is the relevant administrative body for regulation of combinations, the said section has attracted much criticism from scholars and experts in the field of law and economics. It has been stated that, exemptions should be granted on the basis of sound criteria, rather than political favoritism. This therefore, makes it impossible to devise EC-style block exemptions with de minimis provisos for certain kinds of agreements among small firms and U.S.-style “safe harbors” for mergers based on the Hirschman-Herfindahl concentration index, or thresholds for defining dominance.

The transactions that are considered as not likely to have an appreciable adverse effect on competition and hence exempted from notification as per Schedule 1 to Regulation 4 are:

- Acquisition of shares or voting rights solely as an investment or in the ordinary course of business provided it doesn’t exceed 15% of total shares or voting rights
- Acquisition of shares or voting rights where acquirer already has 50% or more shares provided no transfer from joint control to sole control. [The first two exemptions not available in case of Horizontal merger u/s 5(b)]
- Acquisition of assets not directly related to the business of the acquirer or made solely as an investment or in the ordinary course of business not leading to the control of enterprise whose assets are being acquired excluding strategic assets.
- Acquisition of stock in trade, raw materials, stores and spares in the ordinary course of business.
- Acquisition of shares or voting rights pursuant to bonus issue or stock splits providing not leading to acquisition of control.

93 Id, at 634
• Acquisition of shares or voting rights by person acting as securities underwriter or registered stock broker or stock exchange for its clients in normal course of business.
• Acquisition of control or shares or voting rights or assets within the same group.
• Acquisition of Current Assets in ordinary course of business.
• Combinations outside India with insignificant local nexus.

Further, Central Government has, on 4 March, 2011, also notified certain specific exemptions, in public interest, from the definition of combination under the Act, for a period of 5 years, as under;
• An enterprise, whose control, shares, voting rights or assets are being acquired (“target enterprise”) having assets of the value of not more than Rupees 250 Crores (INR 2.50 billion) in India or turnover of not more than Rupees 750 crores (INR 7.50 billion);
• A ‘Group’ exercising less than 50% of voting rights in other enterprise.

With respect to provisions regarding exemptions to transactions, there are a number of issues that the Commission must look into, inorder to strengthen the Merger Regulations. Firstly, all types of intra-group combinations, mergers, demergers, reorganizations and other similar transactions should be specifically exempted from the notification procedure and appropriate clauses should be incorporated in sub-regulation 5(2) of the Regulations. They should be treated at par with acquisitions within the group or Inter-group mergers under Item 8 of Schedule 1 Exemptions since these transactions do not have any competitive impact on the market for assessment under Section 6 of the Competition Act.

Secondly, Conglomerate acquisitions or acquisition of assets by parties not in the same line of business should be exempted, as they are not likely to have an appreciable adverse effect on competition within the relevant market in India. Since acquisition of ‘control’ is the crucial factor from competition law perspective, conglomerate acquisitions must be seen in light of section 5(b) of the Act which covers acquisition of control in similar, identical or substitutable goods or services.

Thirdly, the HSR Act exempts certain acquisitions that require the prior approval of another federal agency from notification. A similar practice should be imbibed into the Indian Competition Act to avoid discrepancies that arise due to clash with other regulatory authorities such as SEBI. The commission can necessitate the filing of notification once the other regulatory authority has granted approval.
Local Effects Test/ Local Nexus
The ICN’s Recommended Practices for Merger Notification Procedures state that jurisdiction should be asserted only over those transactions that have an appropriate nexus with the jurisdiction concerned\(^{94}\). It further recommends that merger notification thresholds should incorporate appropriate standards of materiality as to the level of "local nexus" required for merger notification\(^{95}\). Hence, while establishing merger notification thresholds, each jurisdiction should seek to screen out transactions that are unlikely to result in appreciable competitive effects within its territory\(^{96}\). Requiring merger notification as to such transactions imposes unnecessary transaction costs and commitment of competition agency resources without any corresponding enforcement benefit. Merger notification thresholds should therefore incorporate appropriate standards of materiality as to the level of "local nexus" required, such as material sales or assets levels within the territory of the jurisdiction concerned\(^{97}\). Such determination of a transaction's nexus to the jurisdiction should be based on activity within that jurisdiction, as measured by reference to the activities of at least two parties to the transaction in the local territory and/or by reference to the activities of the acquired business in the local territory\(^{98}\).

The ECMR applies to all concentrations that have a Community dimension (ie, that meet the turnover thresholds). Because the turnover thresholds are based on geographic turnover and not on the location or registered office of the parties, even foreign-to-foreign transactions essentially involving non-EU groups are caught if the financial thresholds are met\(^{99}\), thus effectively satisfying the ICN recommended practices standards.

The HSR Rules state that despite affecting the competition in the US, certain foreign acquisitions may be exempt from pre-merger notification obligation if there is insufficient nexus with US commerce. The Rules provide that acquisitions of foreign assets by US and non-US companies shall be exempt from the HSR Act unless the foreign assets that would be held as a result of the acquisition generated sales in or into the US exceeding $66 million during the acquired person’s most recent fiscal year. Even if the acquisition exceeds this threshold (as adjusted annually), the acquisition will nonetheless be exempt if:

* both the acquiring and acquired persons are foreign;

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\(^{95}\) Id, Recommendation I B

\(^{96}\) Supra n. 86, Comment 1

\(^{97}\) Ibid

\(^{98}\) Supra n. 86, Recommendation I C

\(^{99}\) Global Competition Review (‘GCR’), Merger Control, 2011, 131
• the aggregate sales in or into the US in the most recent completed fiscal year and the aggregate total assets in the US of the acquiring person and the acquired person are both less than $145.1 million; and
• the assets that will be held as a result of the transaction are valued at $263.8 million or less.\(^{100}\)

With respect to acquisition of voting securities of a foreign issuer by a US person, the Rules provide that such an acquisition shall be exempt from the HSR Act unless the foreign issuer (together with any entities it controls) either holds assets in the US valued over $66 million, or made aggregate sales in or into the US of over $66 million in the most recent fiscal year.\(^{101}\) The Rules also make clear that if interests in several foreign issuers are being acquired from a common parent company, the assets and sales of all of the target companies must be aggregated in order to determine whether either of the $66 million thresholds described above (as adjusted annually) is exceeded.\(^{102}\)

With respect to acquisitions of voting securities of a foreign issuer by a foreign person, the Rules provide that such an acquisition shall be exempt unless it confers on the acquiring person control of the target issuer (ie, it is an acquisition that will give the acquiring person 50 per cent or more of the voting stock of the target) and the target, again, either holds assets in the US valued at more than $66 million, or made aggregate sales in or into the US of more than $66 million in the most recent fiscal year.\(^{103}\) As with acquisitions by US persons, if controlling interests in multiple foreign companies are being acquired from the same parent company, the US assets and sales of all of the target companies must be aggregated to determine whether either of the $66 million thresholds (as adjusted annually) is exceeded. Even if either of the $66 million thresholds described above (as adjusted annually) is exceeded, the transaction will nonetheless be exempt where:

• both the acquiring and the acquired persons are foreign;
• the aggregate sales in or into the US in the most recent completed fiscal year and the aggregate total assets in the US of the acquiring person and the acquired person are both less than $145.1 million; and
• the value of the voting securities that will be held as a result of the transaction is $263.8 million or less.\(^{104}\)

Finally, if both foreign assets and foreign voting securities are being acquired from the same acquired person, the US sales attributed to both the assets and to the foreign issuer must be

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\(^{100}\) Clayton Act, Section 7A, 16 CFR § 802.50
\(^{101}\) Clayton Act, Section 7A, 16 CFR § 802.51 (a)
\(^{102}\) Ibid
\(^{103}\) Clayton Act, Section 7A, 16 CFR § 802.51 (b)
\(^{104}\) Clayton Act, Section 7A, 16 CFR § 802.51 (b) (2)
aggregated to determine whether the $66 million threshold (as adjusted annually) is exceeded. The Rules also provide an exemption from the requirements of the HSR Act for acquisitions of foreign assets or voting securities where the parent of the buyer or seller is the government of that same foreign jurisdiction.

Under the Competition Act in India, Section 5 imposes the obligation to notify only under circumstances where the acquisitions, acquiring of control and merger or amalgamation have a nexus with markets in India. Further, Exemption 10 under Schedule 1 to the Merger Regulations categorize combinations referred to in section 5 of the Act taking place entirely outside India with insignificant local nexus and effect on markets in India as transactions not likely to have appreciable adverse effect on competition in India.

Both non-group and group entities carrying out transactions outside India, will have to notify the Competition Commission if both the acquirer and the acquired entity jointly have the assets of value of atleast INR 750 crores in India and a turnover of INR 2250 crores in India. The potential drawback with a provision that requires both the entities to have a combined value of assets and turnover was that in a case where entity A which has presence in India (for example, has assets of more than 750 crores in India and a turnover of more than 2250 crores in India) is acquiring entity B which had minimal or no presence in India (for example, has nil assets and turnover in India), both the entities had to notify the Commission even though entity B has no presence in the Indian market. This results in unnecessary administrative burden on the Commission since it has to look into transactions that would not have any adverse effect on competition.

This situation was however changed by the 4th March notification issued by the Ministry of Corporate Affairs which exempted an enterprise, whose control, shares, voting rights or assets are being acquired (“target enterprise”) having assets of the value of not more than Rupees 250 Crores (INR 2.50 billion) in India or turnover of not more than Rupees 750 crores (INR 7.50 billion) from the definition of ‘combination’. Therefore, even though the combined value of assets and turnover of the acquirer and the acquired have to be atleast of a value of 750 crores or more and 2250 crores or more, the target enterprise must have a minimum value of assets of Rupees 250 crores in India and a turnover of Rupees 750 crores in India to be obliged to notify the commission of the acquisition. Hence, the notification has set a de minimis limit exempting enterprises that have less than the stated value of assets and turnover from notifying the

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105 Clayton Act, Section 7A, 16 CFR § 802.51 (c)
106 Clayton Act, Section 7A, 16 CFR § 802.52
107 See generally, Competition Act, 2002, Section 5
108 See, Competition Act, 2002, Section 5 (a) (i) (B)
109 See, Competition Act, 2002, Section 5 (a) (ii) (B)
Commission even if the combined value of assets is 750 crores or more in India and the turnover is 2250 crores or more in India. Nevertheless, there is no de minimis limit for the acquirer entities in an acquisition. In the absence of such limits for the acquiring enterprises, the Commission would still be faced with the nonessential administrative burden of scrutinizing acquisitions that may not have an adverse appreciable effect on competition. Furthermore, it is necessary to introduce similar provisions while reviewing mergers and amalgamations as well.

**CONCEPT OF CONTROL - DETERMINED**

Control is defined under the ECMR as the possibility of exercising decisive influence on an undertaking on the basis of rights, contracts or any other means, either separately or in combination, and having regard to the considerations of fact and law involved. Since the mere possibility of exercising decisive influence is sufficient, it is not necessary to show that the acquirer will actually exercise control. However, it has been held in the France Telecom/Orange case that, if an acquirer is not in a position to exercise his rights normally conferring control, control will not be conferred. Control can be acquired by one undertaking alone (sole control) or by several undertakings (joint control).

In cases where outright legal control is not acquired, rights attaching to shares, or contained in shareholder agreements, board representation, ownership and use of assets and related commercial issues will be considered. In the case of the acquisition of minority shareholdings, the Commission will look at the reality of the situation by assessing the strength of voting rights and other factors. In the case of Ryanair/Aer Lingus (2008), a holding of over 25 per cent was deemed not to amount to de jure or de facto control. For example, a minority holding may well confer decisive influence where the remaining shareholdings are widely dispersed or where the holding is coupled with special voting or veto rights on key issues such as the appointment of management, annual budgets, business plans and substantial investments.

Much importance has not been attached to the concept of control under the HSR Act in comparison to the ECMR. The requirement to comply with the HSR Act is not limited to transactions that involve a change of control. Any acquisition that results in the acquiring person

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110 ECMR Art. 3 (2)
111 See France Telecom/Orange (2000), M. 2016, where the stake in France Telecom acquired by Vodafone/Mannesmann, as the seller of Orange, was put in a voting trust and, consequently, Vodafone/Mannesmann did not obtain any influence over France Telecom.
112 Global Competition Review ("GCR"), Merger Control, 2011, 131
113 Ibid
holding more than $66 million worth of the voting securities of another company may require a filing, even if that amount represents a very small percentage of the total outstanding stock of the target. (However, acquisitions of less than 50 per cent of a non-corporate entity are not reportable.)

The HSR Rules do include a definition of ‘control’. However, this definition is used primarily to determine which companies should be included within the ‘acquiring’ or ‘acquired’ persons. The basic principles used in determining if control exists are as follows:

• controlling a corporate entity means either holding 50 per cent or more of its outstanding voting securities, or having the contractual power presently to designate 50 per cent or more of its directors;

• controlling a partnership, LLC, or other non-corporate entity means having the right to either 50 per cent or more of its profits or, in the event of its dissolution, 50 per cent or more of its assets;

• a natural person will never be deemed to be controlled by any other entity or person; and

• controlling a trust means having the contractual power to appoint 50 per cent or more of the trustees.

In India too, the Competition Act does not restrict its jurisdiction to transactions involving only acquisition of control. Complying with the Act is not a requirement for transaction involving acquisition of control only. However, an acquisition of merely control without acquisition of shares or voting rights by a party that has met the requisite threshold limits will also have to be notified to the Commission. Combinations have been defined in a comprehensive manner to include acquisition of control, shares, voting rights or assets. Therefore, acquisition of control is independent of acquisition of shares, voting rights or assets under the Competition Act, 2002.

The Act further explains the meaning of control as including controlling the affairs or management by-

i) one or more enterprises, either jointly or singly, over another enterprise or group;

ii) one or more groups, wither jointly or singly, over another group or enterprise.\(^{114}\)

A merger involving minority interests and other interests less than control may also be caught if they relate to acquisition of shares, voting rights or assets.

Thus, control under the Competition Act differs from both the ECMR and the HSR Act. Unlike ECMR, importance is not attached solely to change of control and unlike the HSR Act, control is not merely a tool to determine the ‘acquirer’ or the ‘acquired person’. Acquisition of control by itself is a criterion among others to attract the obligation to notify the competition authorities.

\(^{114}\) Competition Act, 2002, Section 5, Explanation (a)
The ICN recommends that the merger review should be completed within a reasonable period of time. It states that delay in the completion of such reviews may give rise to a number of risks. Delay may jeopardize the consummation of the transaction itself due to intervening developments and/or other time-sensitive contingencies such as financing arrangements. Delay may also have an adverse impact on the merging parties’ individual transition planning efforts and on their ongoing business operations due to work force attrition and marketplace uncertainty. In addition, it defers the realization of any efficiencies arising from the transaction. It also recommends that in ‘suspensive jurisdictions’, initial waiting periods should expire within a specified period following notification and any extended waiting periods should expire within a determinable time frame.

Notification under the ECMR has a suspensory effect meaning that a transaction that is subject to notification may not be implemented until clearance is obtained. However, The Commission can and will investigate any mergers that have closed without prior notification, and could order the unwinding of any notifiable merger that has been implemented prior to clearance. In exceptional circumstances the Commission may grant a derogation from this suspension obligation if it is satisfied that the detriment to the notifying parties or to a third party resulting from the suspension exceeds the threats to competition posed by the transaction. For example, in the 2008 Santander/Bradford & Bingley case, in the context of the global economic downturn, the Commission recognised that undue delay could potentially be fatal to a proposed emergency rescue package and unusually granted six such derogations.

The ECMR ‘s procedure for clearance of notified concentrations, conform to the ICN recommendations and have a two-phase course of action under the normal procedure. The Commission must reach a phase I decision within 25 working days from the effective date of notification. A very large percentage of cases are cleared at this stage. Where the parties submit commitments (remedies) to resolve competition issues this period will be extended by 10

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115 Supra n. 86, Recommendation IV A
116 Jurisdictions that prohibit the consummation of notified transactions pending the expiration or early termination of specified “waiting periods.”
117 Id, Recommendation IV C
118 ECMR, Article 7
119 ECMR, Article 8 (4)
120 ECMR, Article 7 (3)
121 Global Competition Review (‘GCR’), Merger Control, 2011, 132
working days\textsuperscript{122}. During the course of the investigation, the Commission will often demand further information at short notice. Meetings may be held during the phase I period and the parties may be given limited access to the Commission’s file. If the Commission decides, after a phase I review, that the transaction raises ‘serious doubts’ as to whether it may give rise to a significant impediment to effective competition, it will open an in-depth phase II investigation\textsuperscript{123}.

The basic period for a phase II investigation is up to 90 working days, which may be extended to 105 working days if remedies are offered after the 55th day. The parties may seek a one-off extension of 20 working days no later than 15 working days after the initiation of phase II proceedings, or by the Commission at any point, with the consent of the parties. For the notifying parties a phase II inquiry will involve responding to many requests for information and, more often than not, to a statement of objections, access to the Commission’s file as well as an oral hearing if the parties agree (often involving complainants)\textsuperscript{124}.

The oral hearing is organised and conducted by one of the two hearing officers. The hearing officers are independent of DG Comp and report directly to the competition commissioner. The Commission showed some flexibility in issuing ‘accelerated’ clearance decisions during the economic crisis even in cases that raised significant competition concerns requiring remedies, for example, in the case of \textit{BNP Paribas/Fortis} (2008)\textsuperscript{125}.

For straightforward cases raising no competition issues, the Commission will use the \textit{simplified procedure} where it will normally issue a short-form decision after a limited investigation. The review period for simplified procedure cases is the same as for other mergers, that is to say, 25 working days from the date of effective notification for a clearance decision\textsuperscript{126}. Parties should be aware, however, that in the period leading up to the 25 working days deadline, the option of reverting to a normal phase I merger procedure and thus launching an investigation or adopting a full decision (or both) remains open to the Commission\textsuperscript{127}.

A practice that is highly essential and which has made the merger review process under the ECMR effective is pre-notification consultations with the Commission even for simplified cases. The Best Practice Guidelines also provide that the Commission may now undertake informal fact-finding exercises in the pre-notification period, so long as the transaction is in the public

\textsuperscript{122} ECMR, Article 10 (1)
\textsuperscript{123} Ibid
\textsuperscript{124} ECMR, Article 10 (3)
\textsuperscript{125} Global Competition Review (‘GCR’), \textit{Merger Control}, 2011, 132
\textsuperscript{126} See generally, ECMR Article 10
\textsuperscript{127} Ibid
domain and the merging parties have been consulted\textsuperscript{128}. Following notification, the Commission will contact relevant third parties such as customers, suppliers and competitors for their views on the transaction and may require them to complete detailed questionnaires on the relevant markets\textsuperscript{129}. The Commission will often demand further information at short notice and meetings may be held with the case team. As explained in the Best Practice Guidelines, ‘state-of-play meetings’ may be held with the parties at various key stages of the investigation and the Commission may also instigate tripartite or ‘triangular meetings’ with the merging parties and interested third parties to allow points of concern to be discussed\textsuperscript{130}.

Under the HSR Act, the merger review process does not have a distinct two-phase bifurcation like the ECMR regime. If a transaction is subject to the HSR Act, and a filing is thus required, the acquisition must be delayed for a 30-day period while the agencies review it\textsuperscript{131}. If the agencies take no action, the transaction may be consummated when the waiting period has expired\textsuperscript{132}. The agencies do not issue a formal decision clearing a transaction. If any deadline for governmental action falls on a weekend or a legal public holiday, the deadline is automatically extended to the next business day\textsuperscript{133}.

Under certain circumstances, the parties may request that the antitrust agencies terminate the waiting period before it has run its full course, and the agencies may, at their discretion, grant such requests\textsuperscript{134}. The agency responsible for reviewing a particular transaction may, before the end of the initial 30-day waiting period, issue what is generally referred to as a ‘second request’ seeking additional information from the parties to a transaction. The issuance of a second request extends the waiting period to the 30th day after the date of substantial compliance with the request for additional information\textsuperscript{135}. If the agency in question takes no action, the parties are free to consummate the transaction at the end of the second 30-day waiting period\textsuperscript{136}. However, the HSR Act does not lay down a strict deadline within which the second phase transactions have to be decided upon. Unlike the competition authorities under the ECMR, the antitrust agencies in the US, have not taken a public position on expediting requests for early termination as a result of economic circumstances. However, the antitrust agencies have been sensitive to the need to

\textsuperscript{128} European Competition Commission, \textit{Best Practice Guidelines, EU Competition Law, Rules Applicable to Merger Control}, Competition Handbooks, (2010), 290
\textsuperscript{129} \textit{Id}, at 294
\textsuperscript{130} Supra n. 129, at 295
\textsuperscript{131} Clayton Act, Section 7A, 16 CFR § 803. 10
\textsuperscript{132} \textit{Ibid}
\textsuperscript{133} Supra n. 132
\textsuperscript{134} Clayton Act, Section 7A, 16 CFR § 803.11
\textsuperscript{135} Clayton Act, Section 7A, 16 CFR § 803.20
\textsuperscript{136} Clayton Act, Section 7A, 16 CFR § 803.20
complete investigations of mergers involving distressed firms promptly\textsuperscript{137}.

The Competition Commission, under the Competition Act, 2002 authorizes any person or enterprise, to notify the Commission about any proposed combination within thirty days of approval of the proposal relating to merger or amalgamation by the board of directors of the enterprises concerned with such merger or amalgamation, as the case may be; execution of any agreement or other document for acquisition or acquiring of control\textsuperscript{138}. The Act further states that, no combination shall come into effect until \textit{two hundred and ten days} have passed from the day on which the notice has been given to the Commission, or until the Commission has passed orders\textsuperscript{139}. The computation of the waiting period of two hundred and ten days begins from the date of receipt of notice by the Commission\textsuperscript{140}. The Commission additionally has the power to take \textit{suo moto action}, if it is of the opinion that a combination is likely to cause, or has caused an appreciable adverse effect on competition within the relevant market in India. It shall issue a notice to show cause the parties to combination calling upon them to respond within thirty days of the receipt of the notice, as to why investigation in respect of such combination should not be conducted\textsuperscript{141}. The Commission shall form its prima facie opinion on the notice filed in Form I or Form II, as to whether the combination is likely to cause or has caused an appreciable adverse effect on competition within the relevant market in India, within thirty days of receipt of the said notice\textsuperscript{142}. If it is prima facie of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition, the Commission shall, within seven working days from the date of receipt of the response of the parties to the combination direct the parties to the said combination to publish details of the combination within ten working days of such direction\textsuperscript{143}. The Merger Regulations further provide that, the time taken by the parties to the combination, in furnishing the additional information or for offering modification shall be excluded from the thirty days period provided in sub-regulation (1) of regulation 19 and the two hundred and ten day period provided in sub-section (11) of section 31 of the Act\textsuperscript{144}.

Since, the Regulations provide that the Commission is to give a prima facie opinion within thirty days of receipt of notification of the proposed combination, it has been usually considered to be

\textsuperscript{137} Global Competition Review, \textit{Merger Control}, 2012, 419
\textsuperscript{138} Competition Act, 2002, Section 6 (2)
\textsuperscript{139} \textit{Id}, Section 6 2A
\textsuperscript{140} The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011, Regulation 15
\textsuperscript{141} Supra n. 131, Section 29 (1)
\textsuperscript{142} Supra n. 133, Regulation 19 (1)
\textsuperscript{143} Supra n, 131, Section 29 (2)
\textsuperscript{144} \textit{Ibid}
the phase I under the merger review process in India. Further, since not has not been specifically stated that these thirty days will be excluded from the two hundred and ten days, the phase II is usually considered to be of the remaining one hundred and eighty days.

The Indian merger control regime being a nascent one has much to learn form the EC and US regimes. In context of waiting periods, the Indian regime has to be strengthened so as to bring about balance between the objectives of the Commission and the overall objectives of a nation towards economic development. The merger control law should also imbibe provisions that would make the merger review process simpler, but at the same time meet the interests of the stakeholders as well as the Commission.

Firstly, the Commission should encourage pre-notification consultations like the ECMR. This reduces the burden on the Commission to look into a larger number of irrelevant or simple cases. This also saves the time for stakeholders who do not have the luxury of time. Secondly, the merger control regime in India, should adopt a merger review process based on a ‘working day system’ like in the ECMR. Both the phase I and phase II periods consist of thirty days and one hundred and eighty days inclusive of non-working days. This further becomes a problem since the combinations are deemed to be approved on the expiry of the two hundred and ten day limit. A regime similar to the EC regime will give the Commission the much-needed time to efficiently scrutinize the combinations. Thirdly, phase II of the merger review process should not be limited by time since this would deter the efficient working of the merger review process. The Indian regime should imbibe the provision from the HSR Act and not restrict the process to a mere two hundred and ten days.

Another suggestion is to adopt the EC practice of allowing derogations from the suspension of combination obligation, if it is satisfied that the detriment to the notifying parties or to a third party resulting from the suspension exceeds the threats to competition posed by the transaction. Additionally, in times of economic regress, the Commission should show some flexibility and issue ‘accelerated’ clearance decisions even in cases that raised significant competition concerns requiring remedies.

**Fees and Penalty**

Under the ECMR, no filing fees are required to be paid by the parties notifying a concentration to the authorities. However, the authorities can interfere and prohibit a transaction under certain circumstances. Implementing a notifiable merger before clearance has been obtained or after a
prohibition decision has been issued would expose the companies concerned to fines of up to 10 per cent of their aggregate annual worldwide group turnover\textsuperscript{145}. The Commission may also impose periodic penalty payments of up to 5 per cent of average daily worldwide group turnover for each day that an infringement persists and fines of up to 1 per cent of aggregate worldwide group turnover may also be imposed in certain circumstances, for example, where misleading or incorrect information is supplied\textsuperscript{146}.

Under the HSR Act, all acquiring persons that are required to file must pay a filing fee that is calculated according to the total value of the securities or assets to be held as a result of the transaction. The parties may agree to split the fee or even have the acquired person pay the fee. Transactions valued at less than $131.9 million are subject to a filing fee of $45,000. Transactions valued at $131.9 million or more but less than $659.5 million are subject to a filing fee of $125,000. Transactions valued at $659.5 million or more are subject to a filing fee of $280,000. This fee must be submitted at the time the notification form is filed, or the waiting period will not begin\textsuperscript{147}.

Penalties or sanctions under the HSR Act are heavier in comparison to the ECMR. A transaction subject to the HSR Act may not close prior to the expiry or early termination of the applicable waiting period or periods. Failure to comply can result in a fine of up to $16,000 per day and the agencies may seek to unwind a transaction that has been consummated in violation of the Act. Most recently, in June 2009, an individual was fined $1.4 million for closing two successive reportable transactions, in 2005 and 2008, without first filing HSR Act notification and observing the required waiting period. The agencies have also imposed very substantial fines (up to $5 million) on parties for completing transactions without observing the requirements of the HSR Act. The agencies may also seek injunctive relief to prevent a violation of the HSR Act\textsuperscript{148}.

Under the Competition Act, the filing fee for where notice is filed in Form I is Rupees 50,000 and for notices filed in Form II, the fee is Rupees 10,00,000. The amount of fee is thus substantially less in comparison with the HSR Act. Further, even the penalties imposed by the Commission are considerably lesser and hence it does not compel the parties to comply with the provisions of the Act. For non-furnishing of information on combinations, the Commission imposes a mere one percent of the total turnover or the assets, while the European counterparts impose a fine of 10 per cent of the total turnover. Further, for furnishing wrong information or for suppressing material facts the maximum fine imposed is one crore, while under the ECMR

\textsuperscript{145} ECMR, Article 14 (2)
\textsuperscript{146} ECMR, Article 14 (1)
\textsuperscript{147} Clayton Act, Section 7A, 16 CFR § 803.9
\textsuperscript{148} Global Competition Review, Merger Control, (2012), 418
the fine imposed is one percent of the total world turnover. In order to ensure stricter compliance and deter parties from providing wrong or misleading information, the Commission must increase the amount of fines imposed.

**JOINT VENTURES**

The European Commission’s treatment of joint ventures varies according to the kind of joint venture in question. All full-function joint ventures are caught by the ECMR, provided they meet the turnover thresholds. To qualify as ‘full function’, the joint venture must be an autonomous economic entity resulting in a permanent structural market change, regardless of any resulting coordination of the competitive behaviour of the parents.\(^{149}\) Those joint ventures that are not full-function, such as strategic alliances and cooperative joint ventures, are not governed by the ECMR but by rules on restrictive practices in article 101 of the Treaty on the Functioning of the European Union (TFEU) (formerly article 81 of the EC Treaty). The assessment of full-function joint ventures under the ECMR concerns the structural arrangements affecting the joint control of a single enterprise while the assessment of joint ventures that are non-full-function under Article 101 of TFEU concerns the objects and effects of behavioral relationships between independent parties.\(^ {150}\)

Article 101(1) prohibits agreements between undertakings that may affect trade between member states and that have as their object or effect the prevention, restriction or distortion of competition. A non-full function joint venture agreement that contains restrictive provisions falling within the article 101(1) prohibition (but outside the legal exception contained in article 101(3)) can incur potentially serious consequences. Any relevant restrictive provisions are void and unenforceable and the parties can risk considerable fines depending on the nature of the restriction.\(^ {151}\) There is no one-stop shop for article 101 agreements at EU-level: non-full function joint ventures may be reviewed either by the Commission or by national competition authorities. In addition, non-full function joint ventures can also trigger merger control in a number of member states (eg, Germany, the UK and, in some circumstances, Austria) simply by the acquisition of a minority interest.\(^ {152}\)

In the US, Section 1 of the **Sherman Act**, 1890 applies to the formation and operation of a joint venture. Section 2 of the Act also applies if the joint venture is used to monopolise, attempt to

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\(^{151}\) Supra n. 142, 130

\(^{152}\) *Ibid*
monopolise or engage in conspiracy to monopolise a relevant market. Additionally, if the joint ventures substantially lessen competition, or tend to create a monopoly, Section 7 of the Clayton Act, 1914 becomes applicable. If it involves an acquisition of non-corporate interests or voting securities, the formation of a for-profit joint venture may be subject to the HSR Act. In the case of *United States v. Penn- Olin Chemical Co*¹⁵³, held that Section 7 of the Clayton Act is applicable to joint ventures, including situations where two companies form a Joint venture to engage in an entirely new business.

A joint venture is reportable under the HSR Act¹⁵⁴. If the collaborators form a corporation or unincorporated entity such as a partnership or LLC; each collaborator will be an “acquiring person” and the joint venture company will be the “acquired person”¹⁵⁵. The Rules contain a special provision governing the formation of new corporations and corporate joint ventures. Additionally, if the acquisition is of interests in a joint venture that is formed as a non-corporate entity, only the acquiring person that holds 50 per cent or more of the interests in the entity will be subject to HSR reporting obligations. If no acquiring person holds 50 per cent or more following the acquisition, the non-corporate joint venture is not reportable¹⁵⁶. Further, Section 5 of the Federal Trade Commission Act, 1914 which prohibits unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce also applies to the formation and operation of joint ventures.

Apart from the abovementioned laws, the primary set of rules that govern joint ventures is the Antitrust Guidelines for Collaborations among Competitors which were issued by the Federal Trade Commission and the Antitrust Division of the Department of Justice in April, 2000. They provide an outline of the analytical framework for evaluating collaborations among competitors, unless there is a high degree of integration among the parent companies leading to analysis under the Merger Guidelines¹⁵⁷. The Guidelines provide that a collaborative venture will be analysed as a merger under the 1992 Merger Guidelines if:

- The participants are competitors in a relevant market
- The formation of the collaboration involves an efficiency-enhancing integration of economic activity in the relevant market.
- The integration eliminates all competition between the participants in the relevant market and
- The collaboration does not terminate with in sufficiently limited period by its own specific and express terms.

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¹⁵³ 378 U.S.158 (1964)
¹⁵⁴ Clayton Act, Section 7A, 15 U.S.C. § 18a
¹⁵⁵ Clayton Act, Section 7A, 16 C.F.R. § 801.40
¹⁵⁶ Ibid
If the collaborative activity between the joint ventures is of the type that they have an harmful effect on the competition on one hand and there emanates no benefit from such a collaboration on the other, they are condemned per se. But, if participants enter into an efficiency enhancing agreement that is reasonably necessary to achieve its pro-competitive benefits, then the authorities apply the rule of reason.

A perpetual problem faced by the Competition Commission in India is in the area of joint ventures. This is because joint ventures include a broad set of arrangements and it has not been possible to perceive every such set while framing the provisions under the Competition Act. The Act is thus not equipped fully to scrutinize every kind of joint venture. Section 5 of the Act is applicable to joint ventures, which can be treated as combinations, such as the traditional 50/50 equity/corporate joint ventures. Section 3 of the Act is applicable to joint ventures in the form of a contractual agreement.

Notwithstanding that joint ventures are not expressly mentioned under the Section 5 of the Act, every joint venture that constitutes a combination under section 5 of the Act will be subject to filing under Section 6(2) of the Act, if they meet the threshold limits under Section 5. Joint venture agreements that are anti-competitive are covered under the provisions of Section 3(3) of the Act. However, nothing contained in sub-section (3) of Section 3 of the Act shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services. Therefore, joint ventures agreements that are anti-competitive but increase efficiency, will be governed by Rule of reason to determine appreciable adverse effect on competition.

Since, joint ventures have not been defined under the Act, there is much confusion regarding their treatment. There exists ambiguity as to the mandatory nature of the notification under Section 5 of the Act if the joint venture is established by way of subscription to the shares of a newly incorporated company. This is because Section 5 of the Act concerns the acquisition of an enterprise and the definition of “an enterprise” appears to capture an existing business, not a newly created business. Thus, there is scope for argument that a newly incorporated joint venture would not fall within the definition of a combination as it would not be an enterprise “which is or

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158 Competition Act, 2002, Section 2 (h) [“a person or a department of the Government, who or which is, or has been, engaged in any activity relating to the production, storage, supply, distribution acquisition of control of articles or goods.....”]
has been engaged in any activity”\textsuperscript{159}. Therefore, there exists a necessity to develop guidelines on the treatment of joint ventures inorder to eliminate such confusion. However, since the Commission is still at such a nascent stage, it has insufficient experience in decision-making and issuance of guidance. However, it can look at EU and US jurisdictions to gain some clarity in treatment of joint ventures.

Conclusion
The merger control law in India has all the elements of a progressive law and has imbibed several practices from the EU and US regimes. Despite its nascent existence, it has achieved tremendous success. However, there are a number of lessons that it still has to learn from the EU and US regimes. As suggested at various junctures, the merger control regime in India has to develop a stronger set of provisions relating to waiting periods, filing fees and penalties. It should further observe the ICN guidelines while applying the local effects test and determine

\textsuperscript{159} Khaitan & Co, Joint Ventures under India’s Competition Act, available at, http://www.mayerbrown.com/publications/article.asp?id=10438 (last visited on 23\textsuperscript{rd} January 2012)
local nexus with respect to both acquirer enterprises along with target enterprises. This would avoid scrutinization of acquisitions that may not have an adverse impact on the competition. Further, there is a need to apply the same principles to mergers as well as amalgamations. The Competition Act, 2002 causes much confusion with respect to the terminology of acquisition. The repetitiveness caused by a combined reading of section 5 with the relevant definition causes must be eliminated. Further, there is a need for reconsidering the provisions relating to waiting periods. Introducing the ‘working days’ concept as opposed to an all-inclusive 210 days, would increase the possibility of quality output by the Commission. The need for qualitative determination of control as opposed to mere quantitative assessment based on shares, voting rights, securities or assets is imminent. A shift from a lenient regime that imposes insignificant amount of fees and penalty is also the need of the hour. Lastly, the grey area of joint ventures must be looked into by the Commission and all the existing loopholes are to be plugged.

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