11. Therefore I feel it is highly desirable that similar amendment which have been made in Section 80 C.P.C. are absolutely necessary in the case of Section 685 of the Municipal Corporations Act 1955 in order to safeguard the interests of the public at large. By the year 1955 when that Act was passed only Hyderabad and Secunderabad were the two cities governed by that Act. Subsequently after formation of the State of Andhra Pradesh from 1.11.1956 the Corporations of Vijayawada, Visakhapatnam, Guntur, Warangal have been formed. Of late several Municipalities like Rajahmundry, Kakinada, Eluru, Nellore, Karimnagar, Nizamabad, and other places have also been changed into Corporations and as such it is all the more necessity for the amendment of the section on the lines of Section 80 C.P.C. Therefore I am of the opinion that as the section stands today, filing of suit against a Corporation without issuing a notice cannot arise. As such both the above decisions in 2009 (2) ALT 652 and 2010 (4) ALT 751, seem to be *per incuriam*, for the reasons submitted above and for the reason that earlier decisions including a Division Bench decision which already laid down the law are not followed. At the same time I request the Honourable High Court of Andhra Pradesh to recommend to the State Government for amending Section 685 of the Corporations Act and I also request the State Government to bestow their thought over the matter in the interest of public and take necessary action at once.

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"UNIVERSAL NATURE OF COMPETITION ISSUES" – DEALING THE CROSS BORDER MERGER PHENOMENON UNDER THE COMPETITION ACT

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"*The history of the world, my sweet, is who gets eaten and who gets to eat.*" – SWEENEY TODD

Introduction

Over the past several years, the mergers-and-acquisitions market in India has been very active. In particular, the percentage of cross-border transactions has risen significantly. Cross-border deals have taken the form of both inbound and outbound transactions[1]. It is evident that the appetite of Indian companies for making global acquisitions has grown bigger with time.

Every merger or acquisition involves one or more methods of obtaining control of a public or private company, and the legal aspects of these transactions include issues relating to due-diligence review, defining the parties' contractual obligations, structuring exit options, and the like. In India, the relevant laws that may be implicated in a cross-border merger or acquisition include the Company Law, the Income Tax Law, the Stamp Duty Act, the Foreign Exchange Laws, Competition Laws, and Securities Regulations, among others.

Mergers and acquisitions are used as a means to achieve crucial growth and are becoming more and more accepted as a tool for implementing business strategy,

1. CROSS-BORDER M&A IN INDIA, Vineet Aneja, **19-SPG Int'l L. Practicum 53)**

whether they involve Indian companies wanting to expand or foreign companies wishing to acquire market share in India. Some of the other motivating factors behind mergers and acquisitions are the desire to acquire a competency or capability, to enter into new markets or product segments, to enter into the Indian market generally, to gain access to funding resources, and to obtain tax benefits.

Government policy[2] in the areas of foreign investment, taxation, and trade are considered important determinants of inward cross-border M&A. Trade policy is another key determinant of cross-border M&A, but its effect has been the subject of academic debate.

Cross-border mergers and acquisitions (M&A's), especially those involving firms in developing countries, have spurred the recent increases in FDI. International Law prescribes that in a cross-border merger, the target firm becomes a national of the country of the acquirer. The value of cross-border mergers and acquisitions (M&A) grew over 700% during the 1990's to a value of $720 billion in 1999.

Applicable Indian Laws

The Companies Act, 1956: At present Sections 391-394 of the Companies Act, 1956, allow only foreign companies to merge with Indian ones. The Bill has introduced Section 205 that also allows the reverse and stipulates that payment to shareholders of listed Indian companies being merged can be in the form of cash, shares or Indian Depository Receipts (IDRs) issued by the overseas companies.

Companies Bill, 2009: CHAPTER XV lays down the provisions for Compromises, Arrangements and Amalgamations. Section 201 to Section 211 deal with various provisions regulating mergers and amalgamations

The Competition Act, 2002

The Income Tax Laws

One of the various reasons as mentioned before for the opting of any merger, amalgamation or any such combination is to enjoy tax concessions and also write-off the tax liabilities against the profits of the acquirer company thereby adding to the income of the two entities.

Provision for tax allowances for mergers or demergers between two business identities is allocated under the Indian Income Tax Act. To qualify the allocation, these mergers or demergers are required to full the requirements related to Section 2(19AA) and Section 2(1B) of the Indian Income Tax Act as per the pertinent state of affairs. Under the "Indian I-T Tax Act", the firm, either Indian or foreign, qualifies for certain tax exemptions from the capital profits during the transfers of shares. In case of "foreign company mergers", a situation where two foreign firms are merged and the new formed identity is owned by an Indian firm, a different set of guidelines are allotted. Hence the share allocation in the targeted foreign business identity would be acknowledged as a transfer and would be chargeable under the Indian Tax Law. As per the clauses mentioned under Section 5(1) of the Indian Income Tax Act, the international earnings by an Indian firm would fall under the category of "scope of income" for the Indian firm[3].

This Act contains elaborate provisions for corporate restructuring so that companies can focus better on core commercial activities. The comprehensive set of amendments to the Act aim at making such commercial reorganizations 'fully tax neutral'. Merger has not been defined under the ITA but has been covered under the term 'amalgamation' as defined in Section 2(1B) of the Act. It states that all the property and liabilities of

2. Aditya, "India's Competition Policy" EPW 23 August, www.wpw.in...last visited on Jan 30, 2010

3. www.mapsofindia.com, last updated 11 February, 2010

the amalgamating company or companies immediately before the amalgamation must become part of the amalgamated company by virtue of the amalgamation. Shareholders holding not less than three-fourths in value of the shares in the amalgamating company or companies must become shareholders of the amalgamated company by virtue of the amalgamation procedure. Under the IT Act, gains arising out of the transfer of capital assets including shares are taxed. However, if the resultant company in the scheme of amalgamation or demerger is an Indian Company, then the company is exempted from paying capital gains tax on the Transfer of Capital Assets[4].

As per the Supreme Court the garb of taxation can only be laid if there is a direct, substantial and foreseeable nexus with the territory of India failing which there should be no levying of taxes by the Indian authorities[5].

The Government should not indiscriminately pierce long-standing global corporate structures and tax transactions that materialize faraway from India's fiscal frontiers[6].

Unfortunately the same was not witnessed in the case of the merger of the Hong Kong listed Hutchison Group with the subsidiary of the Vodafone in the Netherlands, a deal which was completely not within the jurisdiction of the Indian tax territories adding to the embarrassment of the Government due to the fiscal extremism it seemed to indulge in. The legislation is also fraught with a huge amount of incoherence thereby making it incongruous with the object it sets to achieve as far as mergers and other corporate restructuring is concerned.

It has always been held that the taxation policies of an economy should aim at enhancing the same and not be a painstaking process for the taxpayers. The continuous tendencies of the recourse to the retrospective amendments of the legislations add to the woes of the Government agencies. These kinds of retrospective changes lead to a significant amount of confusion to the tedious task of valuation of ongoing transactions having significant revenue implications. Last but not the least the taxation structure of the economy should be such that it becomes very easy to deal with various countries owing to their different economic regimes. One of the significant criteria to maintain due diligence before opting for a corporate restructuring is to look into the taxation policies of the respective nations to which the two or more business entities belong in order to avoid future possibilities of demerger scenarios owing to a weak and contradictory tax system[7].

The Central Bank has recently made an announcement to the effect that even if the Indian company ceases to exist in India, it will continue to operate as a branch or Indian office of the foreign company and will be taxed in the same way as any Indian branch of foreign company gets taxed on the basis of being a permanent establishment. A permanent establishment is a concept that allows Indian tax authorities to derive taxes from local offices of a foreign company on the basis that income is accruing from operations in India. Legal experts said the merger of an Indian company with a foreign one can help structure M&A deals in many ways. For example, if an overseas company has acquired another foreign company that has a subsidiary in India, the new provision will allow the acquirer to merge the Indian

4. M&A Regulations in India, http://www.indialawjournal.com/volume1/issue_1/m_a_regulations.html
5. *June Mendez v. Ishikawajima Harima Heavy Industries Co. Ltd.*, 52 F3d 799
6. http://business.rediff.com/column/2009/jun/22/why-foreign-investors-are-scared.htm, last visited on 22nd April, 2010
7. http://jurisonline.in/2010/08/cross-border-mergers-the-implications-under-the-competition-act-2002/last visited on 28th September, 2010

operations with it, instead of retaining it as a separate entity[8].

The Indian Stamp Act, 1899

Foreign Exchange Laws

Indian economy is becoming a haven and hence becoming more conducive for foreign investment[9]. This concept of cross border mergers can be both inbound and outbound *i.e.* a foreign company may with an Indian company in India or the *vice versa.* As far as an inward cross order merger is concerned, it is treated as any other investment by a foreign resident or a "person" in India and is governed by FEMA. Recently the Apex bank in our country the RBI also announced that Indian companies merging with the foreign companies will be continued as entities resident in the country under the FEMA[10].

Securities Laws of India

In India, takeovers and acquisitions are governed by SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, popularly known as the "Takeover Code." These regulations seek to regulate the whole process of acquisition and takeovers, based on principles of transparency, fairness and equal opportunity for all. The Takeover Code lays down the procedures governing any attempted takeover of a company whose shares are listed on one or more recognized stock exchanges in India.

8. *Anindita Dey*, FEMA TO APPLY TO REVERSE OVERSEAS M&AS, SAYS RBI, Business Standard, 9 October 2009, available at http://www.business-standard.com/india/news/fema-to-apply-to-reverse-overseas-mas-says- rbi/372711/ (last accessed on 10th July, 2010).
9. *Anjali Agarwal*, Inbound Investments into India - Structuring the Deal! (2009) 24 (7) JIBLR 375
10. *Anindita Dey*, FEMA TO APPLY TO REVERSE OVERSEAS M&AS, SAYS RBI, Business Standard, 9 October 2009, available at http://www.business-standard.com/india/news/fema-to-apply-to-reverse-overseas-mas-says- rbi/372711/ (last accessed on 10th February, 2010).

Chapter-I "MRTP to Competition Act, 2002"- 'The Road Less Travelled'

In the case of *Competition Commission of India v. Steel Authority of India Ltd. and another*[11]*: Swatantra Kumar,* J., speaking for the apex Court discussed the development of competition jurisprudence.

The decision of the Government of India to liberalize its economy with the intention of removing controls persuaded the Indian Parliament to enact laws providing for checks and balances in the free economy. The laws were required to be enacted, primarily, for the objective of taking measures to avoid anti-competitive agreements and abuse of dominance as well as to regulate mergers and takeovers which result in distortion of the market.

In the pursuit of globalization, India has opened up its economy, removing controls and resorting to liberalization. The natural corollary to this is that the Indian market needs to face competition from both within and outside the country.

The Monopolies and Restrictive Trade Practices Act, 1969[12], (the "MRTP Act"), has become obsolete in certain respects in light of international economic developments relating to competition laws, and there is a need for India to shift its focus from curbing monopolies to promoting competition. In furtherance of the foregoing philosophy, the Government of India passed the Competition Act, 2002[13] (the "CA"), which seeks to ensure fair competition in India by prohibiting trade practices that cause an appreciable adverse effect on competition in markets within India. For this purpose, the CA provides for the establishment of a quasi-judicial body called the Competition Commission of India (the "CCI").

11. CIVIL APPEAL NO.7779 OF 2010/[D.No.12247 OF 2010] *Competition Commission of India v. Steel Authority of India Ltd. and another*
12. No.54 of 1969, as amended
13. No.12 of 2003.

The Indian competition law regime, first enacted in 2002 and amended in 2007, has gained momentum in 2009, with the appointment of a new Chairman and other members to the Competition Commission (CCI), amidst speculation that the rules on cartels, abuse of dominance and merger control will come into force later this year[14]. At the heart of the regime is the concept that deals which is likely to adversely affect competition in the market in India will not be permitted[15].

The CA draws upon concepts of competition law found in more liberalized economies, such as those of the United States and the European Union. Of particular relevance to multinational companies operating in India is that the proposed new regulatory body, the CCI, will be empowered to scrutinize all mergers, acquisitions and joint-venture activity in India when the asset value of the parties involved is more than Rs.10 billion within India or US $500 million globally, or when sales are greater than Rs.30 million within India or US $1,500 million globally. The main components of the CA are the prohibition of anticompetitive agreements; the prevention of abuse by enterprises of their dominant positions; the regulation of mergers and acquisitions; the establishment of the CCI; and fixing the scope of the CCI's powers.

Section 5 and Section 6 of the CA, 2002 deal with combinations and regulations of combinations.

Compliance with the enactment:

Compliance with the enactment is very important. Consequences of any non-compliance can be detrimental for any business in terms of significant financial penalties - agreements being declared invalid or void and combinations not taking effect. There can be an adverse impact on M&A deals and significant loss of reputation and goodwill for the business of an enterprise[16].

In the global M&A arena, India was ranked second last in terms of dollar value of M&A in a recent ranking by Bloomberg. But, what is important in the data for regional breakdowns by target countries is that, with a 175% volume change, India's M&A growth is blazing enough to take the country to the third slot, next only to France and Hong Kong. Clearly global M&A is an activity that will become increasingly important in India and for which a considerable amount of back office BPO/KPO and due diligence research work is already outsourced to India[17].

Chapter II- Competition Framework- A Non-Stop Metamorphosis

> "As it is always common to notice that governance at times becomes interference and other times unnecessary"

Wide Entrance, Narrow Path and Gruesome Exit-: Until recently, the rules looked set to create significant administrative burden by way of long clearance periods (210 days) and relatively low turnover/asset thresholds which would have captured deals even where one party did not have a presence in India. Understandably, this was considered to be not viable and after considerable debate, many of these concerns have now been addressed in the CCI's draft regulations.

Draft Regulations: Given that the rules should sieve out many deals which would otherwise have been caught by the Act, this is a signal that the CCI intends to operate a

14. www.economictimes.com....lat visited on 23rd July, 2010
15. Preamble of the Competition Act, 2002
16. *Brakman, S., Garretsen, H. & Van Marrewijk*, C. 2008, "Cross-border Mergers and Acquisitions: On Revealed Comparative Advantage and Merger Waves", *Tinbergen Institute Discussion Paper*, No.013/2
17. Report of the **High Powered Expert Committee on Making Mumbai an International Financial Centre,** Ministry of Finance Government of India, New Delhi, pg.30

workable and effective regime. However, it is unclear whether deals that do not meet these thresholds will still require notification, although it is hoped that this will be clarified at a later stage. The 210-day waiting period —a *deal breaker* for many transactions — has been reduced to 30 days or 60 days for most deals, on par with international standards. Although the 210-days period still remains a possibility for certain deals, the 30-days time frame is a welcome change. Therefore, 85-90% cases would be disposed of at this level. An alternative duration of 120 or 150 days can further be introduced, if the industry is so concerned, where the commission can give an assurance of intention that the M&A will be cleared.

Revised M&A NORMS: Several rounds of discussions with trade and industry led CCI to revise its M&A norms in 2008. These included altering the threshold limit for M&A's that required CCI's approval. Besides, the draft regulation says all such transactions would be cleared in 30 days after which they are deemed approved, unless CCI takes exception.

Exempted Transactions: The Act provides thresholds for various combinations that include foreign transactions with a domestic nexus. The Act also provides that no person or enterprise shall enter into a combination, which causes or is likely to cause an appreciable adverse effect on competition in India. In an attempt to provide some guidance, the regulations seek to carve out 13 transactions from the purview of combinations that are "likely to have an appreciable adverse effect on competition in India"[18]. Strangely, the regulations simply provide that these transactions, amongst others, are not likely to cause an appreciable adverse effect on competition in India[19]. However, the regulations do not exempt such transactions from the mandatory notification requirements under the Amendment Act. Consequently, parties that propose to undertake any of these transactions (which exceed prescribed thresholds) would nonetheless have to approach CCI for its approval, and sit out the waiting period, thereby rendering such exemption of transactions virtually redundant[20].

As an example, under Section 5(2)(i)[21], no notification is required for the acquisition of shares of upto 15%, provided that the acquisition is for investment purposes only and the acquirer does not gain control over either the affairs or the management of the target. It is crucial that industry feedback and concerns be addressed; otherwise the CCI's purpose of promoting competition will be significantly diluted.

The breadth of Section 5 is so wide that it would require notification of transactions that constitute an increase in shareholding by a promoter of a listed public company (including possible internal reorganizations within a corporate group)[22]. It is important to note that these transactions are exempted under the SEBI Takeover Code. While the objectives addressed by the SEBI Takeover Code and the Competition Act are different, notification and assessment under the Competition Act gives rise to serious cost consequences under the SEBI Takeover Code.

18. For instance, any acquisition of less than 26% of a company's share capital where such acquisition is made solely as an investment or in the ordinary course of business, and which does not lead to control of the company by such acquirer, has been classified as a combination that is not likely to have an appreciable adverse effect on competition in India. Another key transaction that has been exempted is any acquisition of a company where the acquirer already holds more than 50% of such company prior to the acquisition.

19. Vinodh Dhall, **COMPETITION LAW TODAY**, OUP, 2007

20. Nagesh Kumar, 2000, "**M&A'S INDIA**" Implications, presented at UNCTAD, Bangkok

21. Section 5(2)(i) CA, 2007 Amendment Act, "No notification is required for the acquisition of shares of upto 15%, provided that the acquisition is for investment purposes only and the acquirer does not gain control over either the affairs or the management of the target."

22. Comments on Combinations under Sections 5 and 6 of CA, 2002, CCI

Conflict between other Statutes: The time lines prescribed under the Act and the Regulations do not take cognizance of the compliances to be observed under other statutory provisions like the SEBI[23].

For example, Regulation 22(12) of the SEBI Takeover Code provides that "where the acquirer is unable to make the payment to the shareholders who have accepted the offer before the period of fifteen days due to non-receipt of requisite statutory approvals, the Board may, if satisfied that non-receipt of requisite statutory approvals was not due to any wilful default or neglect of the acquirer or failure of the acquirer to diligently pursue the applications for such approvals, grant extension of time for the purpose, subject to the acquirer agreeing to pay interest to the shareholders for delay beyond fifteen days, as may be specified by the Board from time to time[24]."

FILING REQUIREMENTS - COSTS & PROCEDURE The regulations lay down certain forms, through which CCI is to be notified prior to undertaking any combination. These forms are exhaustive and call for various details, however, portions of information requested may be classified as confidential and would thus be difficult to disclose. Furthermore, CCI also has the power to compel parties to publish the details of a proposed combination to enable any member of the public to raise objections to such a combination.

This would allow competitors to keep track of significant M&A transactions that are underway and may jeopardise the closing of such transactions.

23. (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 ('SEBI Takeover Regulations').

24. Furthermore, if the Competition Commission's assessment is delayed because the Commission seeks additional information from the notifying party(ies), will this delay be construed by the Board as "wilful default or neglect" by the notifying party(ies) resulting in forfeiture of the entire amount in escrow account under the SEBI Takeover Code, Regulation 22(13)?

Fees: The fees for filing the prescribed forms with CCI have been set at Rs.20 lakh ($50,000), which may increase to Rs.40 lakh ($100,000) in some cases. Given the firm filing fees, CCI should be made accountable for qualitative and timely action.

The regulations prescribe certain exhaustive forms through which the CCI is to be notified. However, there is no clarity about how pieces of information which may be classified as confidential and difficult to disclose will be addressed. Once privileged information is in the public domain, competitors can keep track of significant M&A transactions that are underway, which may jeopardize successful closure. Moreover, the fees payable are staggering. The notice must be accompanied by a fee of approximately $50,000, which may increase to $100,000 in certain cases. Further, the Competition Commission will issue a show-cause notice if it is of a *prima facie* opinion that the combination is likely to cause an appreciable adverse effect on competition in India. A fee of $40,000 is to be filed along with the response to the show-cause notice. In addition, the Competition Commission has the power to compel parties to publish the details of a proposed combination to enable any person from the public to raise objections to such combination. Such publication burdens parties with an additional sum of $40,000. Clearly, the filing fees involved are exorbitant and need to be revised.

MERGER BENCH: A notable part is that a Special Merger Bench is envisaged which will adjudicate matters related to M&A.

(b) "Bench" means Bench constituted under Section 22 of the Act and includes the Principal Bench, Additional Bench, Mergers Bench and Special Bench. Special Bench means Larger Bench constituted under sub-section (4) of Section 23 of the Act[25].

25. S.2. Definitions THE COMPETITION COMMISSION (GENERAL) REGULATIONS, 2004 In exercise of the powers conferred by Section 64 of the Competition Act, 2002

BHARTI-MTNL MERGER: If the merger would have taken place it would have mandated clearance for dual listing which would imply amendment to the key laws related to the functioning of Corporations in India. Companies Act, Competition Act and also the Foreign Exchange Management Act would have to be amended to bring out the dual listing along with permissions from the Reserve Bank of India to buy shares of foreign company in domestic currency and vice versa[26].

CHAPTER-III "FRAMEWORK post Competition (Amendment) Act, 2007" ...ARE THE WATERS CLEAR?

In 2007 the Competition (Amendment) Act introduced noteworthy changes to the competition law regime. Most noteworthy of these changes was the introduction of a mandatory notification process for persons undertaking combinations above the prescribed threshold limits. In early 2008 the Competition Commission of India also promulgated and circulated a draft of the Competition Commission (Combination) Regulations. Partly in response to public and industry comments, significant changes were made and a new version of the regulations was circulated in 2009. The regulations provide a framework for the regulation of combinations which include M&A transactions or amalgamations of enterprises. The merger provisions are not yet in force. Nonetheless, it is only a matter of time before the relevant provisions will be notified.

Criteria under Section 5

The most important section - Section 5[27] of the Competition Act, which defines "combination" by providing threshold limits in terms of assets and turnover - has yet to be notified.

- transactions among Indian companies with combined assets of $250 million or $750 million in turnover of the merged entity;
- cross-border transactions involving both Indian and foreign companies with combined assets of $500 million or $1.5 billion in turnover
- Transactions that have a territorial nexus with India, where the acquirer has $125 million in assets or $375 million in turnover in India.

At present, any acquisition, merger[28] or amalgamation falling within the ambit of the thresholds constitutes a combination. Essentially, a transaction must satisfy two conditions before Section 6 is triggered: (i) it must involve total assets or turnover, with separate criteria for domestic and international entities; and (ii) it must have a territorial nexus with India[29]. The following transactions will constitute a combination:

- $1 billion in assets and $3 billion in turnover in India respectively;
- assets in excess of $2 billion; or
- turnover of more than $6 billion outside India

FOR ACQUIRING GROUPS, the threshold figures are much higher:

The Competition Act takes a threshold of assets and turnover as the judging criterion for a combination to be covered under the Act.

26. http://business.rediff.com/report/2009/sep/30/tech-bharti-mtn-deal-called-off.htm as visited on 25th August, 2010

27. S.5 deals with essentials threshold requirements that enterprises (Companies) need to fulfil to trigger Competition Act, 2002 during Mergers/Combinations-

28. Bris, A. & Cabolis, C. 2008, "The value of investor protection: Firm evidence from cross-border mergers", Review of Financial Studies, vol. 21, No.2, pp. 605.

29. Advocacy Booklet, COMBINATIONS, under the Competition Act, 2002, available at **cci.gov.in**

This will be troublesome in capital intensive industries such as oil and gas, where even an inconsequential merger may be covered by the Act. The threshold criterion could create a deadlock because once an entity or group grows to a size of the prescribed limits; all combinations - however small - will be covered by the regulations.

Developmental or Degenerative Norms?

The Competition Act intends to establish merger review and control procedures designed to prevent anti-competitive combinations. The recent amendments have significantly changed the review process and stirred up global controversy. Much has been articulated about the negative impact on M&A activity in India. It is pertinent to examine and evaluate the obstacles[30].

Mandatory notification- Implications

Many merger control regimes impose mandatory pre-merger notification for mergers of a certain size. This lessens the administrative burden for competition authorities, compared with mandatory notification of all mergers and helps to focus on the mergers that are most likely to be of concern[31].

Under the originally enacted Competition Act 2002[32], the reporting of a combination was optional. However, the Act now mandates notification within 30 days of the decision of the parties' Boards of Directors or of execution of any agreement or other document for effecting the combination. *The terms 'agreement' and 'other document' are not defined.*

The general industry perception is that a Memorandum of Understanding or a Letter of Intent will qualify as an 'agreement'[33]. However, these are generally executed to spell out a basic understanding among the transacting parties and to enable the acquirer to conduct due diligence, based on which further negotiations are carried out. Going forward, execution of such a document shall trigger merger filings. This will escalate compliance costs at a premature stage when it is unsure whether the transaction will close[34]. It will also add to the bulk of notification applications submitted to the Competition Commission. It remains to be seen whether the Competition Commission will have adequate internal capacity to handle and dispose of such applications efficiently. If it does not have the resources, the delay will potentially have a cascading effect and affect the ability of parties to close on time.

Therefore, it would be prudent to insert a clause in all future transaction documents stating that closing will be subject to any prior regulatory clearance that may be required from the Competition Commission.

Comparison Between Merger Notification Procedures of US, Canada& EU:

Each jurisdiction has a mandatory merger notification based on targeting parties to "larger transaction" and supply required information for the review of competition issues and then to wait for the period to lapse[35].

Voluntary v/s mandatory notification process: The majority of competition law jurisdictions have adopted a mandatory pre-merger notification system as against a mandatory post-merger or voluntary notification system. In the former, merging parties are required

30. T.RAMAPPA, **Competition Law in India**, OUP, 2006
31. *ibid.* , pp. 193
32. In U.S. (S. 7-A of the Clayton Act 15 USC 18 [1988]; In Canada it is required for mergers under Competition Act RS [1985]
33. Choe, C & Shekhar, C 2009, 'Compulsory or voluntary pre-merger notification? Theory and some evidence', International Journal of Industrial Organization, vol. in press, pp. 1-11.38
34. Holbrook, "International Merger Control Convergence: Mulijurisdictional Review" 7 UCLA J. Intn'l & Foreign Aff. 345 (2002-03)
35. See, ANNEXURE III, for the comparative details as to the differences between US, CANADA & EU w.r.t. above.

to notify their proposed transaction to the competition authority concerned if it meets certain criteria1 and to await the authority's review before completing those transactions. Pre-merger notification systems are preferred by competition authorities because it enables them to identify and remedy potentially problematic transactions before their consummation. They also help in avoiding the costly and complicated process of unscrambling a completed transaction[36]. This has resulted in an expansion of governmental oversight of cross-border M&A. This policy trend is in contrast to the efforts made by Governments to attract foreign investors[37].

National regulatory policies towards cross-border M&A are likely to have become more stringent as compared to the FDI liberalization policies. Mandatory pre-merger notification system is found to have a significant negative effect, and Evenett observes "mandatory pre-merger notification systems are a substantial impediment on the international trade[38], in corporate assets". Therefore the above knob needs to be operated very carefully[39].

36. As part of ex-ante review, merger provisions are included in competition laws as a preventive tool to enable competition authorities to redress potentially problematic deals much before their effects are observed. Ex-post review does not allow for this preventive measure. Action is taken only after anti-competitive effects are observed by applying cartel provisions or abuse of dominance provisions in a competition law

37. As per the World Investment Report (2008), published by the UNCTAD, many countries adopted new measures to attract FDI, such as offering various incentives or the establishment of special economic zones.

38. *Anderson, R.D. & Evenett*, S. 2006, "Incorporating Competition Elements into Regional Trade Agreements: Characterization and Empirical Analysis", http://www.evenett.com/working/CompPrincInRTAs.pdf...last visited on 23rd February 2010

39. *Chongwoo, C. & Shekhar*, C. 2009, "Compulsory or Voluntary Pre-merger Notification? Theory and Some Evidence", Munich Personal RePEc Archive, Paper No.13450, http://mpra.ub.uni-muenchen.de/13450/1/MPRA_paper_13450.pdf...30th Jan 2010

CASES:

South African Banks/Compcorp[40] : Four SA's banks sought approval for the establishment of an industry —wide switch for electronic submission of mortgage bond through a compswitch company—Compcrop. All mortgage applications by the banks would have to be submitted via a single channel — the switch. The banks also intended to acquire the Bond Trak Software used by mortgage originators acquired in managing their processes. The Commission found joint control of Compcrop would create a platform for coordinate Joint coordinated conduct likely to lessen inter-conduct interbank competition. The banks would be able to jointly fix a transaction fee.

Parties pleaded efficiencies, but the Commission found the same could be attained outside the merger and these efficiencies did not outweigh the high anti-competitive effects arising from the competitive mergers. It prohibited the merger notification.

Implications of 210-day waiting period and thresholds

The Competition Act now provides for a post-filing review period of 210 days, during which the merger cannot be consummated and within which the CCI is required to pass its order with respect to the notice received. If the Commission fails to pass an order within the time limit, the proposed combination will be deemed to be approved. While the philosophy behind the review process is similar to those applied in many other countries,[41] reservations abound about both the length and scope of the process. The interval is longer than that established in most countries and may prove burdensome. Clearly, timing is critical in any M&A transaction. Factoring this in, the draft

40. South African Banks/Compcorp (2004)

41. (The *Hart-Scott-Rodino* pre-merger filing and review process in the United States),

regulations envisage that the Competition Commission may form an initial opinion within 30 to 60 days of receipt of notice and not necessarily wait for the expiry of 210 days, particularly when it is of the *prima facie* opinion that the combination will not have an appreciable effect on competition.

The 210-day period applies in case of cross-border transactions outside India where one of the contracting parties has a substantial presence in India. Regardless of the size of the transaction, notification is required where the combined asset value or turnover in India exceeds a certain value. This means that it is mandatory for a foreign company with assets of more than $500 million that has a subsidiary or joint venture in India with a substantial investment (above $125 million) to notify the CCI before acquiring a company outside India. Basing the threshold on turnover in India exceeds a certain value. This means that it is mandatory for a foreign company with assets of more than $500 million that has a subsidiary or joint venture in India with a substantial investment (above $125 million) to notify the CCI before acquiring a company outside India. Basing the threshold on combined value only where there is no economic consequence in India seems rather restrictive for the transacting parties, because there is no rationale behind subjecting the parties to the merger review and making them incur substantial costs triggered by the notification.

ILLUSTRATION: A US manufacturer with large operations in India would have to notify the CCI of the acquisition of a small domestic operation within the US despite the fact that the transaction would have zero economic effect on its Indian operations. Not only this, the company would have to wait for the CCI's approval for a period that could extend to 210 days before the deal could become effective. This waiting period may dissuade foreign investors from investing in India and force them to seek other destinations. The threshold limits are unrealistic. Many transactions not affecting competition in India will require Competition Commission's approval for the sole reason that one of the parties involved is big enough to satisfy the thresholds[42]. Large Indian conglomerates will have to wait for the mandatory 210 days in order to be able to acquire a small company that has no significant presence in the market where the acquirer alone meets the minimum combined size that requires Competition Commission's approval.

Changes to the Framework- Rationale, Reason and Cliché Governance:

The issue is whether India in fact needs a mandatory merger notification regime. What was the rationale behind eliminating voluntary disclosures? At present, several types of combination are brought within the mandatory notification process. The regulators and the CCI need to ensure that the regulations are implemented only after all the gaps are filled. Critics of the merger control provisions have been urging the CCI to implement the new law in two stages - a volitional notification for a predetermined time period should precede the second mandatory notification process. The existing legal regime will subject a large number of mergers, with minute or no connection to India, to CCI review. In this situation, it is imperative and critical for the CCI to be sensitive to the apprehensions of interested parties and ensure that combinations are regulated in a mode that is encouraging to national growth, while remembering that competition law is a necessity in free market economies to safeguard the interests of consumers and ensure freedom of trade. Undoubtedly, the Competition Act will play a significant role in the development of the Indian economy.

42. For instance, the Competition Act provides that prior Competition Commission approval is required to give effect to an acquisition where the combined assets of the acquirer and the target are more than $250 million or where the turnover of the parties exceeds $750 million.

Indian markets cannot function in isolation; they need to align themselves with their investors in an increasingly flat world.

Suggestions:

"Expeditious decision taking": The concept of "reasonable time" thus has to be construed meaningfully, keeping in view the object of the Act and the larger interest of the domestic and international trade[43].

The Court further opined that "…In our considered view the scheme and essence of the Act and the Regulations are clearly suggestive of speedy and expeditious disposal of the matters. Thus, it will be desirable that the Competent Authority frames Regulations providing definite time frame for completion of investigation, inquiry and final disposal of the matters pending before the Commission."

Shorter clearance periods and increased thresholds will reduce the burden on the CCI and on business

Merger evaluation process: It consists of the following process:

Identification of the relevant market consisting of the relevant product and relevant geographic market[44].

Whether the merger has appreciable adverse effect on competition in the relevant market[45]

Approval, rejection or approval with modification of the merger

Thus, the "Rule of Reason" test will be applied while assuring combinations under the provisions of the Act.

International experience shows that less than 10% of mergers evaluated by competition authorities have been found to have adverse effect[46].

Void combination: Regulation 11

The regime created by the amended Act and sub-regulation 11 provides for a 210 days waiting period after notification. This period is very long and will lead to significant transaction costs for the parties concerned[47].

It is crucial that the Commission establish the 30 days self-imposed time limit for a *prima facie* assessment and determination for a wide variety of transactions to facilitate efficiency. Suggestions have been made to the Commission[48], clearly state that acquisitions or mergers that do not give rise to an increase in market power in the relevant market in India (such as the case with conglomerate mergers and acquisitions) or that give rise to market shares in the relevant market in India not exceeding 25% be either exempt from the notification requirement or benefit from the 30 days review period.

Regulation 44 Modification proposed by the Commission

Comment:

Appropriate guidelines must be enacted in order to understand the scope and impact of the modifications that could be proposed by the Commission.

The Regulation must in this regard, provide for the adjustments in the modifications proposed by the Commission in the event of changes in the structure/ details of the combination or upon the occurrence of other unexpected changes[49].

43. *CCI v. SAIL*, pp.67
44. Section 2(r) of Competition Act, 2002
45. See ANNEXURE-II, page No.
46. *Khemani, R. Shyam* and *M.A. Dutz*, 1996. *The Instruments of Competition Policy and Their Relevance for Economic Development*, PSD Occasional Paper No.26 (Washington, World Bank).
47. Notably, the Raghavan Committee Report had suggested a 90 days waiting period for a reasoned order from the Commission.
48. Ibid
49. Comments on Combinations, p.10, CCI,

Regulation 55 Request for confidential treatment

Comment: The confidentiality provision should be reviewed and elaborated with regard to possible public disclosure if any to be made and the manner in which this is to be made. Any rejection to afford confidentiality treatment upon a party involved in such a transaction must be followed up with reasoning in writing by the Commission, setting out reasons for the same. Appropriate amendments in this regard must follow in relation to Regulation 38 of the Draft CCI (General) Regulations. Any information coming forth from third parties must also be subjected to confidentiality norms and provisions in this regard must be included in the draft Regulations.

IBM/SBCS[50]: The Irish CA blocked the deal. The Authority found that the merging parties were the two closest competitors and that the elimination of the competitive constraint provided by SBCS would have harmed customers in a significant way. It was found through analysis that —barriers to entry were high; market was such that only the merging parties were able to provide high reliability of service and quality and switching costs were high since moving to other suppliers would have undermined the relationship with their current supplier.

Position in (EC):

Volvo/Scania[51] : It was a case of an acquisition of truck producer Scania by Volvo. EC found that the merger would have led to very high combined market shares (over 50%) in a number of Northern European countries. Investigation on market also showed that in these countries Volvo and Scania were each other's closest competitors, pursuing similar strategies and with a very similar brand image. EC found that the proposed merger would have led to increased prices in the market for heavy trucks.

For the development of an effective competition policy, therefore, the Act's provisions regulating mergers and acquisitions must be modified.

EXTRA-TERRITORIALITY IN COMPETITION LAW: LESSONS FROM MAJOR JURISDICTIONS :

One of the controversial areas of competition law has been its extra-territorial reach[52]. In most countries the legal view taken is that the domestic competition law captures such acts even if guilty enterprise is not located in the country, provided that the anti-competitive act has an effect in the country. This is known as '*effects doctrine*' or the principle of extra-territoriality. First used by the US Courts[53]. This was seen by many authorities as invasion of sovereignty. Increasingly competition cases involve more than one more competition law jurisdiction such as global cartels, mergers and abuse of dominance. Clayton Act applies to M&A in US. The 1995 International Guidelines also describe a "carrot and stick" approach by the agencies to antitrust enforcement.

EU: Articles 81 and 82 EC are silent as to whether they apply extraterritoriality as a result of which their extraterritorial has been developed[54]. The EC too has asserted the doctrine in several cases. This was held in the merger between *Boeing* and *Mc. Douglass*[55] and *GE Honeywell*[56]

Before the enactment of Competition Act, 2002 in India there was no provision recognizing the extraterritorial jurisdiction of MRTP the issue has come up in case of

50. IBM/SBCS, (2004)
51. *Volvo/Scania*. 2005
52. Consumer Unity and Trust Society, 2002, *Challenges in Implementing a Competition Policy and Law: an Agenda for Action* (Jaipur, CUTS) available at www.cuts.com
53. *US v. Aluminium Co. of America* [148 F.2d 416, 444 (A495)]
54. EC Treaty.
55. 1997 OJ L 336/16
56. Case COMP/M 2220, CD2004, EC Case T-210/546

ANSAC case[57]. Court in this case held that MRTP Act did not have any provisions for the above *i.e.* it did not have any power of extraterritorial jurisdiction.

Therefore under Section 32 of Competition Act, 2002 says that the Commission shall, notwithstanding that, an agreement referred in Section 3 has been entered outside India or any part to such agreement is abusing the dominant position outside India. This is known as effects doctrine. It allows the CCI to examine a combination already in effect outside India and pass orders against it provided that it has an "appreciable adverse effect" on competition in India.

Even under Section 18 to enter into a memorandum or arrangement, it needs to be done with the approval of CG. This is in support of extraterritorial jurisdiction of the Commission. Therefore all over the world in all the developed economies like US, UK and EC the effects doctrine is very widely applicable and accepted. But, according to OECD guidelines[58], the competition law of the countries in which the acts are likely to cause effect also needs to be considered.

An "adverse effect" on competition means anything that reduces or diminishes competition in the market. When determining whether a combination has an adverse effect on competition in India, the Competition Commission may consider the likelihood of the combination to:

- create barriers to new entrants in the relevant market
- drive existing competitors out of the market
- create a monopoly that hampers improvements in production or distribution of goods or provision of services
- affects the interests of consumers in any other way.

Conclusion

To conclude this has been the greatest challenge as CCI has not yet dealt with any Cross Border Merger Deal though CCI has passed orders under Section 26 of the Act in cases of Anti-Competitive Agreements. While the regulations layout the framework to provide for the manner in which combinations are sought to be regulated by CCI, there are several issues that need to be resolved prior to bringing the regulations into force.

In outline: the domain of combinations that are brought within the mandatory notification process remains too vast. It is hoped that the regulations are brought into full force and effect only after all ambiguities and concerns are addressed, and that *combinations are regulated in a manner that is not a hindrance to the economic growth of India*. Consequently, such restrictive provisions are likely to limit the continued growth of combinations.

The threshold limits which trigger the notification requirements continue to remain industry agnostic, and thereby do not correspond to the disparate needs of various sectors of the Indian economy. While CCI has been conferred with the power to render any combination void if it believes that such a combination has an adverse effect on competition in India, the procedure to be followed in this respect and the ensuing consequences of undoing any merger or acquisition (including tax implications) continues to be neglected. It is hoped that the regulations are brought into full force and effect only after all ambiguities and

57. *Alkali Manufacturer's Association of India v. American Natural Soda Ash Corporation*, 1997 (5) CTJ 288 (MRTPC).

58. Cross-Border Mergers and Acquisitions: The facts as a Guide for International Economics Steven Brakman Harry Garretsen Charles Van Marrewijk Cesifo Working Paper No.1823; October 2006

concerns are adequately addressed, and that combinations are regulated in a manner that is not a hindrance to the economic growth and development of India.

Normally, an open offer process takes around 90 days after the public announcement of any M&A. If there is a delay, it takes a maximum of 110-120 days. The Competition Act requires prior approval of CCI and then the approval may take 210 days, which is very high. Therefore it is better that the upper limit is reduced[59]. As such, the CCI may focus resources on problematic mergers and allow others to be cleared quickly. Overtime, the CCI may seek to increase the thresholds if it finds itself inundated with mergers that do not raise issues. Despite the questions that remain, the new rules provide a real opportunity for the CCI to create an effective and efficient merger control regime in India which, ultimately, will benefit consumers and businesses alike. CCI must be in a position to explain how to identify those situations where a merger will not pass the relevant competition test.– Most mergers do not harm competition– Some may be pro-competitive and benefit consumers by lowering costs and/or increasing innovation–Many other are competitively neutral, Hence the path needs to be treaded carefully.

Keeping in view the nature of the controversies arising under the provisions of the Act and larger public interest, the matters should be dealt with and taken to the logical end of pronouncement of final orders without any undue delay. In the event of delay, the very purpose and object of the Act is likely to be frustrated and the possibility of great damage to the open market and resultantly, country's economy cannot be ruled out.

59. *Evenett, S.J.* 2002, "How Much Have Merger Review Laws Reduced Cross Border Mergers and Acquisitions?" in International Merger Control: Prescriptions for Convergence, ed. *W.K. Rowley*, International Bar Association, London.

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MODEL FAIR COMMENT

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Whether Fair Comment Amounts to Contempt

The Hon'ble Supreme Court held *In Perspective Publications v. State of Maharashtra*, AIR 1971 SC 222, and many subsequent judgements, (recent judgement pertaining to *Kapil Sibal*)

"It is open to any one to express fair, reasonable and legitimate criticism of any act or conduct of a judge in his judicial capacity or even to make a proper and fair comment on any decision given by him because justice is not a cloistered virtue and she must be allowed to suffer the scrutiny and respectful, even though out spoken comments by ordinary men".

Necessity of Fair Comment

When the remedy of an appeal or revision is available where is the need for a fair comment?

The answer is, appeals are intended to take care of bona fide errors of judgement. More over, about four decades ago appeals and revisions were decided by Superior Courts in six months or one year and when the judgements of the lower courts were found to be demonstrably wrong, the appellate courts, while reversing them, used to mark copies of such judgements to the lower courts so that judges in the lower courts could get opportunities to learn from their mistakes. Nowadays, the lower courts are deprived of such opportunities on account of inordinate delays in the appellate courts. **Moreover, if parties choose not to file appeals, either due to their financial incapacity or on account of their disillusionment with the judicial system, the judge in the lower court will never get the chance to correct himself and will repeat the same wrong in future, causing injustice to the parties and the aggrieved advocates also will continue to suffer from loss of professional satisfaction, self esteem and credibility with the litigant public, though they are not at fault.**