

2011

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# Merger Under The Regime of Competition Law: A Comparative Study of Indian Legal Framework With EC and UK

## **Abstract**

*We are living in a free market economy age where business entities are engaged in competitive practices. This sometimes (if not always) leads to the monopolisation of the market by way of anti-competitive agreements, abuse of dominance, mergers and takeovers between business entities which result in distortion of the market. Most countries in the world have enacted competition laws to protect their free market economies and have thereby developed an economic system in which the allocation of resources is determined solely by demand and supply. In the case of India, the earlier Monopolies and Restrictive Trade Practices Act, 1969 was not only found to be inadequate but also obsolete in certain respects, particularly, in the light of such international economic developments relating to competition law. To overcome such difficulty Indian Government has enacted the Competition Act in 2002. This enactment is seen as India's response to the opening up of its economy, removing controls and resorting to liberalization. The Act sought to ensure fair competition in India by prohibiting trade practices which cause appreciable adverse effect on the competition in market within India. The present Indian Act is quite contemporary to the laws presently in force in the European Community as well as in the United Kingdom. In other words, the laws dealing with competition in these jurisdictions have somewhat similar legislative intent and scheme of enforcement. However, these laws are not quite in parimateria with the Indian legislation. This paper is an effort to provide a comparative picture of Indian, EC and UK competition regime on merger.*

## **Keywords**

Competition Law, Comparative Law, Merger, Acquisitions, Joint Venture, Threshold Limits

# MERGER UNDER THE REGIME OF COMPETITION LAW: A COMPARATIVE STUDY OF INDIAN LEGAL FRAMEWORK WITH EC AND UK

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## **Prefatory**

Mergers are a normal activity within the economy and are means for enterprises to expand business activity. A merger is a transaction that brings about change in control of different business entities enabling one business entity effectively to control a significant part of the assets or decision making process of another. Generally speaking, merger involves the coming together of two or more business entities to constitute a single entity and obtaining control over the entity by purchase of its shares or assets. Mergers occur between business entities engaged in activities at the same level of the manufacturing or distribution chain, known as horizontal

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mergers, as well as between business entities engaged in activities at different stages of the manufacturing or distribution chain, known as vertical mergers.<sup>1</sup>

Mergers have numerous advantages. It is a mean to achieve economies of scale and scope<sup>2</sup> to be utilized for more efficient management and other efficiency objectives. They provide business entities opportunity to grow; to enter new markets and diversify without the need to start afresh and face many related risks. But irrespective of their many benefits mergers attract the attention of competition policy makers because they generally have implications for the concentration of, and ability to use, market power, which, in turn can impact negatively upon competition and harm consumer welfare by foreclosing other players from entering the market. As Goldberg said that mergers impact upon the concentration and use of market power because they lead to:

- reduction in the number of business entities operating in a market, and
- increase number in the market share controlled by the merged entity.<sup>3</sup>

The basic principle for exercising merger control is that if a merger is likely to give rise to market power, it is better to prevent this from happening than to control the exercise of market power after the merger has taken place, that is to say prevention is better than cure.<sup>4</sup> Further, enterprises should not be allowed to evade the competition law by using the merger route to achieve an agreement between themselves which would have been found to be anti-competitive by a competition authority. It is for these reasons that competition law concerns itself with mergers and many of the jurisdictions having a competition regime have provisions on merger control.

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<sup>1</sup> See below part II of this paper.

<sup>2</sup> Economy of scale implies the decrease of the average cost per unit of output with increase in the scale of output. Economy of scope is where it is cheaper to produce two products together rather than supply them separately. See *infra* note 22 at 8.

<sup>3</sup> Alan H Goldberg, 'Merger Control' in Vinod Dhall (ed) *Competition Law Today: Concepts, Issues and the Law in Practice* (1<sup>st</sup> ed, Oxford University Press 2007) 93.

<sup>4</sup> The social and economic cost of de merging the firms after the merger is usually very heavy and thus not an easy option for competition authorities. In this regard merger control provisions differ from other provisions of competition law, i.e., on anti-competitive agreements and the abuse of dominance, in that they involve an *ex ante* as oppose to an *ex post* review, basically an account of the fact that 'undoing' a merger that has taken place presents great difficulties and involves high cost. For detail see Vinod Dhall, 'Introduction to Competition Law', in Vinod Dhall (ed) *Competition Law Today: Concepts, Issues and the Law in Practice* (1<sup>st</sup> ed, Oxford University Press 2007) at 15.

As it has been already submitted that provisions on merger control/regulation in most competition laws essentially seek to prevent mergers that would negatively affect competition. This is done either way:

- by reviewing the mergers to determine their effects on competition and undertaking remedial measures to ensure that the anti-competitive impact can be averted, and
- where such remedial measures are not effective enough, the mergers are prevented from taking effect.

But all mergers are not having negative impact on economy. Mergers can also be an effective means of generating efficiencies, achieving public interest type benefits and can also facilitate the achievement of national policy objectives by promoting growth in national markets and exports. Therefore, merger control regime needs to ensure that beneficial mergers are permitted to proceed and are not unduly hampered by regulation. This requires a delicate balancing act of prohibition and permission in merger control.<sup>5</sup>

This paper proposes to study the statutory provisions, relevant regulations and other literature of provisions related to merger regulation in all three jurisdictions *viz.* India, EC and UK. Part one of the paper will discuss briefly the evolution of competition law in each of the jurisdictions. Part two of the paper will focus on the definition and classification of mergers in each of the jurisdiction; the objectives, impacts of mergers and the rationale behind merger control. Part three of the paper proposes to study the requirement of pre-merger notification and substantive assessment of mergers.

## **I Competition Law: historical backdrop**

With liberalizations and the opening of economy in India, since 1990's, there has been a spurt in mergers and acquisitions in the country with participation by both domestic companies and MNCs. There is thus a need for an effective competition law to ensure that the mergers that are likely to adversely affect competition are adequately dealt with. Liberalization in India has also led to a realization of need for a new competition law as it was found that the then existed competition law namely, the *Monopolies and Restrictive Trade Practices Act, 1969* (hereinafter referred to as MRTP Act), has become 'obsolete in certain respects in the light of international economic development relating more particularly to competition laws and there is need to shift our focus from curbing monopolies to promoting competition'.<sup>6</sup> A new competition law, the *Competition Act, 2002* (hereinafter referred as the 'Competition

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<sup>5</sup> Goldberg, above n 3 at 94.

<sup>6</sup> See Statement of Objects and Reasons, *Competition Act, 2002*.

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Act'), has consequently been enacted pursuant to the recommendations of a High Level Committee on Competition Policy and Law, in 2000. The *Competition Act* is more in line with competition laws across the globe and is better suited to the liberalized economy with its focus being on promoting and maintaining competition as well as consumer welfare.<sup>7</sup> The regulation of mergers is an important part of the *Competition Act*, which seeks to prevent 'combinations'<sup>8</sup> that causes or are likely to cause an 'appreciable adverse effect' on competition in India. This includes combinations that have taken place outside the country where the adverse effects of the same occur in India.

The Treaty of Rome established the European Economic Community in 1957. It has been known as the European Community (EC) since the Maastricht treaty of 1992. The Treaty does not contain any specific provisions relating to mergers. Historically, mergers were dealt with by the application of Articles 81 and 82. However, this was considered to be an inadequate way of governing mergers and so, in 1989, the EC Merger Regulation (hereinafter referred to as the ECMR) was introduced. The present rules are contained in Council Regulation (EC) 139/2004.

The United Kingdom (hereinafter referred to as the UK) competition law has undergone a great deal of change in the last one decade. The UK merger regime is set out in the *Enterprise Act 2002* (hereinafter referred to as the EA 2002), which replaced in this respect the regime of the *Fair Trading Act, 1973*. Part 3 of the EA 2002 made several key reforms to the merger control process in the UK.<sup>9</sup> The government policy in recent years has been to take merger decisions primarily on competition grounds. Broadly the UK competition law has witnessed two reforms, firstly, decisions on the vast majority of mergers will be transferred from ministers to the Office of Fair Trade (hereinafter referred to as the OFT) and the Competition Commission (hereinafter referred to as the CC) and secondly, the test against which mergers are assessed have undergone a change from a broad based 'public interest' test to a new 'competition based' test.<sup>10</sup> Now the merger control regime in UK is a two-stage process- one at the

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<sup>7</sup> The objective of the new Act may be gathered from its preamble which states, 'An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto.' available at: <[www.cci.gov.in](http://www.cci.gov.in)>.

<sup>8</sup> The term 'combination' is a composite term that includes merger, amalgamations, acquisitions, and acquiring of control, which meet certain thresholds set out in terms of assets or turn over by the provisions of the *Competition Act*.

<sup>9</sup> See [http://www.opsi.gov.uk/Acts/acts2002/ukpga\\_20020040\\_en\\_1](http://www.opsi.gov.uk/Acts/acts2002/ukpga_20020040_en_1) (visited on 15-10-10).

<sup>10</sup> Mark Furse, (2004) *Competition Law of the EC and UK* (4<sup>th</sup> ed, Oxford University Press) 345.

level of OFT and other at the level of CC. The first hurdle the merger has to clear is that of the OFT (stage one procedure) which may decide to refer a merger to the CC, or to try and negotiate a solution where it considers that there may be a 'substantial lessening of competition' (SLC). The CC (stage two procedure) has the role of evaluating a merger more fully following a reference by the OFT and where it finds that the merger is anti-competitive, it is to be blocked.

A comparative study of the provisions of the *Competition Act* on mergers with similar provisions in other two jurisdictions, namely EC and UK, which are the subject matter of this paper, would thus be useful in understanding the scope of the law in India. Such a comparative study would also be useful in identifying the strengths and weaknesses of the provisions in Indian law on merger. Another advantage would be the identification of successful practices in other jurisdictions that could be adapted in the Indian context in accordance with the prevailing circumstances.<sup>11</sup>

## II.1 Merger: definition

In order to undertake a study of mergers under competition law, the first step would naturally be looking into which transactions fall within the purview of merger control, ie, the definition of mergers. Mergers are ordinarily understood as 'the absorption of one company (especially a corporation) that ceases to exist into another that retains its own name and identity and acquires the assets and liabilities of the former'.<sup>12</sup> Many competition laws/ regulations, including two of those forming the subject of study in the present paper, do not in fact use the term mergers alone; rather they use 'composite' expression such as 'combinations' (India) or 'concentrations' (EC) to describe the transactions that are dealt with or can be dealt with by merger control laws.

The focus of many competition laws is typically on mergers proper, or acquisitions of shares or assets, or acquisition of control, etc.; of entities with turnovers/ assets above a certain prescribed threshold limit as such transactions are considered to be more likely to negatively impact competition. Joint ventures, although at times not mentioned explicitly by merger control provisions of competition laws, may also fall within their ambit.

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<sup>11</sup> Goldberg also suggested that the international comparison of merger laws is of increasing importance as opportunities for business and trade have extended beyond international barriers and merger control must also extend commensurately. See Goldberg above n 3, 94.

<sup>12</sup> Black's Law Dictionary, 7<sup>th</sup> ed, 1002 (1999).

## II.2 Merger: classification

### *Acquisitions*

Acquisitions of the whole or part of the shares or assets or of control of an entity are considered to be 'mergers' for the purpose of merger notification or merger review provisions in competition laws of all the jurisdictions being studied in the present paper.<sup>13</sup>

The ECMR, in its definition of 'concentrations'<sup>14</sup> includes the acquisition of direct or indirect control of the whole or parts of one or more undertakings, whether by the purchase of securities or assets, by contract or any other means, by (i) either one or more persons already controlling at least one undertaking or (ii) one or more undertakings.<sup>15</sup> Thus, in the EC, it is the acquisition of control which is of importance and acquisition of assets or shares would constitute 'combinations' if they lead to acquisition of control.

The ECMR sets out a specific definition of 'control' in article 3(2). It provides that control shall be constituted by rights, contracts or other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on the undertaking, in particular by, (i) the ownership of the right to use all or part of the assets of undertaking or (ii) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

In India, s 5 of the *Competition Act*, which defines 'combinations', includes acquisitions by persons and groups as well as acquiring of control by a person over an enterprise in certain circumstances. 'Acquisition' has been defined by the *Competition Act* as including 'acquiring or agreeing to acquire', directly or indirectly, '(i) shares, voting rights, or assets of an enterprise or (ii) control over management or control over the assets of an enterprise'.<sup>16</sup> The definition thus includes all forms of acquisitions above the prescribed threshold limit. In addition, the definition of

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<sup>13</sup> International Competition Network (ICN) document points out; an acquisition of control presumptively arises whenever the purchaser acquires a majority of the target company's shares such that the purchaser obtains voting rights that permit it to control the target company's board and/or management decisions. ICN, *Defining 'Merger Transactions' for Purposes of Merger Review*, at 2, available at: <[http://www.internationalcompetitionnetwork.org/media/library/conference\\_6th\\_moscow\\_2007/23ReportonDefiningMergerTransactionforPurposesofMergerReview.pdf](http://www.internationalcompetitionnetwork.org/media/library/conference_6th_moscow_2007/23ReportonDefiningMergerTransactionforPurposesofMergerReview.pdf)> (visited on 14-09-10).

<sup>14</sup> Article 3, ECMR.

<sup>15</sup> Ibid at Article 3(1).

<sup>16</sup> Section 2 (a), *Competition Act, 2002*.



combinations includes 'acquiring of control by a person over an enterprise',<sup>17</sup> where such a person has already direct or indirect control over an enterprise engaged in the production, distribution or trading of similar or identical or substitutable goods or provision of a similar or identical or substitutable service.

The *Competition Act* sets out an inclusive definition of 'control' which is stated to include, '(i) one or more enterprises either jointly or singly, over another enterprise or group, or (ii) one or more groups, either jointly or singly, over another group or enterprise'.<sup>18</sup>

The difference lies in this behalf on the issue of control. 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.

### *Mergers proper*

Needless to say that merger proper would be covered by the merger control provisions. A merger can be defined as a transaction whereby 'two or more existing companies combine into one company'<sup>19</sup> or 'the fusion or absorption of one company by another, the later retaining its own name and identity and acquiring all assets and liabilities of the former and the absorbed company ceasing to exist as a separate company'.<sup>20</sup>

The expression 'concentration' used in ECMR encompasses the situation where two or more previously independent undertakings merge.<sup>21</sup> This envisages complete concentration or where there is either the acquisition of 100 per cent shares in another undertaking or where two undertakings combine their activities into a separate undertaking or two undertakings merge into a new one.

The definition of combinations in the *Competition Act*, includes any merger or amalgamation, in the case of which the turnover or assets jointly of the merging entities meets the prescribed threshold limits.

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<sup>17</sup> Ibid at s 5 (b).

<sup>18</sup> See Explanation (a) to s 5, *Competition Act*, 2002.

<sup>19</sup> Naresh Kumar, (2007) 'Corporate Strategy in Emerging Scenario: Acquisitions and Mergers', *Chartered Secretary XXXVII* (4), 464.

<sup>20</sup> Naveen Bhatnagar, (2007) 'Mergers and Acquisitions- Will It Be Effective in the Indian Context', *Chartered Secretary XXXVII* (4), 474.

<sup>21</sup> Article 3(1)(a), ECMR.

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### *Joint ventures*

Joint ventures are not specifically mentioned in the definitions/basic provisions of merger control under competition law of all three jurisdictions.

The ECMR includes within the definition of concentrations, 'full function joint venture'. The UK competition law also does not provide any specific recognition to the concept of a 'joint venture'. Which is of the view that where the parties to an agreement establish a joint venture company to carry out their objectives this may amount to a 'merger' under the EC and UK competition law; it may even be the case that contractual integration without the establishment of a joint venture company will amount to a merger under the EC laws.<sup>22</sup>

The position of joint ventures under the merger provisions in Indian competition law is somewhat unclear. Section 5 does not make specific reference to joint ventures. However, Dhall is of the view that if a joint venture satisfies all the conditions set out in s 5, it would fall in the definition of 'combinations' and would be liable to scrutiny by the Competition Commission of India (CCI).<sup>23</sup> It thus remains to be seen as to whether the enforcement authorities will by interpretation include 'joint ventures' within the ambit of 'combinations'.

### *Exceptions and exemptions*

Certain transactions are exempted by competition laws from being notified to the competition authorities as they are considered to be unlikely to adversely affect competition.

The ECMR, in Article 3 which contains the definition of 'concentrations' enumerates certain transactions that do not constitute concentrations including where 'credit institutions or other financial institutions or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold on a temporary basis securities, which they have acquired in an undertaking with a view to resending them provided that they do not exercise voting rights in respect of those securities with a view to determining competitive behaviour ...', or where control is acquired by an office-holder according to laws relating to insolvency, cessation of payments, liquidations, etc., or where the operations are being carried out by certain financial holding companies as per a certain council directive.<sup>24</sup>

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<sup>22</sup> Richard Whish, *Competition Law* (Oxford University Press 2005) 545-46.

<sup>23</sup> Vinod Dhall, 'The Indian Competition Act, 2002' in Vinod Dhall (ed), *Competition Law Today: Concepts, Issues and the Law in Practice* (1<sup>st</sup> ed, Oxford University Press 2007) 527.

<sup>24</sup> Article 3 (5), ECMR.

The *Competition Act* in India does not set out any exceptions to the definition of 'concentrations' or exemptions from notification. It may be noted however, that in certain cases, such as share subscription or financing facility or any acquisition, by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant of a loan agreement or investment agreement, a notification is required to be made within seven days of the date acquisition unlike in other cases where the time specified is thirty days.<sup>25</sup>

However, the Draft Regulations on Combination exempt certain transactions from the applicability of the provisions of the *Competition Act*. In other words, the regulations declare that such transactions are not likely to cause an appreciable adverse effect on competition in India.<sup>26</sup>

In UK, the EA 2002 contains provisions enabling the Secretary of State to intervene in certain cases in order to protect specified public interest considerations. Except in such circumstances, public interest considerations unrelated to competition are no longer considered as part of the UK merger control process.<sup>27</sup>

### ***Threshold limits and local nexus provisions***

Threshold limits in terms of assets or turnover are set out in merger control provisions of competition statutes to determine which merger, acquisition or joint venture as the case may be, will qualify as a combination or concentration or such transaction which is required to be notified to or which may be reviewed by the competition authority. It may be noted here that while thresholds are essentially set out for the purpose of notification requirements, in India, they form part of the

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<sup>25</sup> Section 6 (4) and (5), *Competition Act, 2002*. Prior to the amendment of the *Competition Act* in 2007, notification of such transactions was mandatory while that for other transactions was voluntary.

<sup>26</sup> Regulation 5 (2) of the Draft Regulations states that the transactions include the acquisition of not more than 15 per cent of the shares or voting rights of a company, acquisitions by parties not directly related to the business activity of the party acquiring the asset, or made solely as an investment or in the ordinary course of business not leading to the control of the enterprise whose assets are being acquired, acquisition or acquiring of control where the assets or turnover of the rupees 1,000 and rupees 3,000 crore threshold specified does not include at least rupees 200 or rupees 600 crore of assets or turnover of at least two of the parties to the combination, acquisitions where the acquirer holds more than 50 per cent of the shares or voting rights prior to the acquisition, acquisitions or control of shares resulting from gift of intestate or testamentary succession or the acquisitions of current assets in the ordinary course of business.

<sup>27</sup> A 'public interest consideration', for these purposes is either one which is specified on the face of the EA 2002 in section 58 or one which, although not specified, ought in the opinion of the Secretary of State to be so specified. For detailed discussion see below n 34, 767-68.

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definition of the term 'combinations' and in the ECMR of 'concentration with a community dimension'. Goldberg observes that the application of thresholds for notification lessens the administrative burden for competition authorities, compared with mandatory notification for all mergers, also enabling competition authorities to focus on mergers most likely to cause concern.<sup>28</sup> The ICN's recommended practices for merger notification provide that thresholds should be clear, understandable, based on objectively quantifiable criteria and on information that is readily assessable to the merging parties.<sup>29</sup>

Threshold limits have been set out in various jurisdictions in terms of assets of the undertakings involved, turnover and net sales. While assets are a criterion on which net sales have been set out in India, turnover is a criterion in the ECMR and India. The threshold limits vary in different jurisdictions though the laws/regulations in all the jurisdictions provide for periodic revision of the limits on account of inflation. In addition the laws/regulations also set out what is known as a local nexus provision which requires a certain minimum part of the assets of the acquiring or target company to be within the territorial limits of the country, the authority of which is reviewing the transaction.<sup>30</sup>

In the ECMR, an important requirement for any transaction to constitute a concentration to be notified to the competition authority is that it must have what is called a 'community dimension', which requires that the entities should have:

- a) a combined aggregate worldwide turnover of EUR 5000 million and
- b) the aggregate community-wide turnover of at least two of the undertakings concerned of more than EUR 250; unless
- c) each of the undertakings concerned achieves at least two thirds of the aggregate community turnover in one and the same member state.

A concentration would also be said to have a community dimension when the undertakings have:

- (i) a combined aggregate turnover of EUR 2.5 billion (including a community wide turnover of EUR 100 million spread between at least three states)

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<sup>28</sup> Goldberg, above n 3, 96.

<sup>29</sup> ICN Recommended Practices on Merger Notification Procedures, (2002) at 3-4, *available at*: <http://www.internationalcompetitionnetwork.org> (visited on 12-10-10).

<sup>30</sup> *Ibid* at 1. Such a provision is also in line with the recommended practices of the ICN, which provides that the jurisdiction must be exercised only on those transactions that have appropriate nexus with the jurisdiction concerned.

- (ii) each of at least two undertakings must generate EUR 25 million in not fewer than three states
- (iii) the aggregate community turnover of at least two of the undertakings concerned is more than EUR 100 million

unless each of the undertakings concerned achieves at least two-thirds of its aggregate community-wide turnover in once and the same member state.

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. 1000 crore or turnover of or more than the value of Rs. 3000 crore in India or outside India, in aggregate, assets of or more than USD 500 million or a turnover of or more than USD 1500 million, with a local nexus provision requiring at least Rs. 500 crore of assets or 1500 crore of turnover in India. In the case of group, the corresponding thresholds are in India, assets of or more than Rs. 4000 crore or a turnover of Rs. 12,000 crore in India or outside India, an aggregate value of assets of or more than USD 2 billion or turnover of Rs. 6 billion of which assets of Rs. 500 crore or turnover of Rs. 1500 crore must be in India.

| Operations                | No Group  | Group  |
|---------------------------|---|--|
| In India                  | Total value of assets more than Rs. 1000 crores or turnover of Rs. 3000 crore.  | Total value of assets of more than Rs. 4000 crores or turnover more than Rs. 12000 crores.   |
| In India or Outside India | Aggregate value of assets more than USD 500 million (including at least Rs. 500 crore in India) or turnover more than USD 1500 million (including at least Rs. 1500 crores in India). | Aggregate value of assets more than USD 2 billion (including at least Rs. 500 crore in India) or turnover more than USD 6 billion (including at least Rs. 1500 crores in India). |

**Source: Competition Commission of India available at [www.cci.gov.org](http://www.cci.gov.org).**

In order to qualify as a merger within the terms of EA 2002 in UK the requirements are:

- (i) two or more enterprises<sup>31</sup> cease to be distinct; and
- (ii) the value of the turnover in the UK of the enterprise being taken over exceeds £ 70 million<sup>32</sup>, or

<sup>31</sup> In guidance on the new merger control regime, the OFT describes an enterprise as 'broadly speaking, business activities of any kind'.

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- (iii) in relation to supply of goods or services of any description, at least one-quarter of all the goods or services of that description which are supplied in the UK are supplied by or to one and the same person.

Enterprises 'cease to be distinct' where they are brought under common ownership or common control, whether or not the business to which either of them formerly belonged continues to be carried on under the same or different ownership or control.<sup>33</sup> Charles Bankes is of the view that the concept of common ownership or common control is capable of applying in circumstances in which the level of influence enjoyed by one enterprise over another is significantly less than that which defines the full control normally enjoyed by the single owner of a business. He opined that the concept of common control under the UK law is a complex one which is separate from and bears no relation to the concepts of control under the EC merger control regime.<sup>34</sup>

### *Notification or review*

Many merger control regime impose mandatory pre-merger notification for mergers of a certain size. Insofar as the ECMR and India are concerned, it is concentrations and combinations that are to be notified to the respective competition authorities and which may be substantively reviewed irrespective of notification provisions.

The UK merger control regime does not impose mandatory notification requirements for any type of merger. Instead, merging parties may voluntarily opt to notify competition authorities. The availability of merger clearance, which gives merging parties certainty that the competition authority will not seek to prevent the merger if it proceeds, can make voluntary pre-merger notification attractive option despite the various costs involved.<sup>35</sup>

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<sup>32</sup> The £ 70 million turnover threshold in the EA 2002 was increased from the original proposal of £ 30 million in the Enterprise Bill. The value of the turnover, which must be turnover in the UK, of the enterprise being taken over is to be determined in accordance with rules made by the Secretary of State.

<sup>33</sup> Section 26, EA 2002. Where an enterprise is brought under the control of a person in the course of two or more transactions those transactions may, if appropriate, be treated for the purpose of UK merger control as having occurred simultaneously on the date that the latest of them occurred. However, this can apply only to transactions that occur within two years of each other (See section 29, EA 2002).

<sup>34</sup> Charles Bankes, 'UK Merger Control' in Gary Eaborn, *Takeovers: Law and Practice* (Lexis Nexis Butterworths 2005) 756-57.

<sup>35</sup> Goldberg favours the 'mandatory notification for mergers valued above certain monetary thresholds' as such criteria for notification lessens the administrative burden for competition authorities, compared with mandatory notification of all mergers. It also

The ECMR does not provide for separate avenues by which merging parties can specifically seek clearance of a merger (on the basis that it is not of a type specifically prohibited by legislation because of its anti-competitive effects) or authorization (on the grounds of the benefits likely to result from the merger).

### II.3 Types of mergers

Mergers can be classified on the basis of the position of the merging parties in the economic chain prior to the merger, acquisition or the joint venture, as the case may be. On this basis, mergers may be classified as horizontal, vertical and conglomerate mergers. Vertical and conglomerate mergers are referred to as non-horizontal mergers. The guidelines issued by various competition authorities for the evaluation of mergers are based on the classification into horizontal and non-horizontal mergers. This classification may become important when assessing the effects on competition of the proposed transactions as the factors taken into account to assess such impacts may vary with the type of merger.

Horizontal mergers like horizontal agreements are said to take place where the two merging entities or the entities between which a merger, amalgamation, or acquisition takes place are at the same level of the economic chain, or mergers between competitors. For instance a merger between two manufacturers of product 'A' would be a horizontal merger. Practical instances of such a merger include the acquisition of Arcelor by Mittal Steel or of Corus by Tata Steel.

Horizontal mergers are viewed as presenting a greater danger to competition than other types of mergers. There can be two possible consequences of horizontal mergers- reduction of the number of firms active on the relevant market and increase in market concentration. These do not arise in the case of vertical or conglomerate mergers. Such increases in market power may result in turn in increased prices, restricted output, diminished innovation, etc., which is damaging to the competitive process.<sup>36</sup> The possible anti-competitive effects of horizontal mergers are thus similar to what may occur in case of horizontal agreements.

Vertical mergers are mergers between entities at different levels of the economic chain, for instance, the acquisition of a distributor by a manufacturer. Vertical merger

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enables competition authorities to identify and focus upon the mergers which are most likely to be of concern. See above n 3 at 96. But some commentators argue that merger pre-notification thresholds do not have to limit the competition authority's jurisdiction to review any combination that it feels might harm competition in India as in some markets competition can be harmed by the combination of even relatively smaller firms. See Subhadip Ghosh and Thomas Ross, (2008) 'The Competition Amendment Bill, 2007: A Review and Critique', *EPW*43:51, 35 at 39.

<sup>36</sup> Goldberg, above n 3, 93.

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may involve forward integration, eg, where a manufacturer acquires a retailer, backward integration, eg, where a manufacturer acquires a supplier of raw materials.

Vertical mergers do not pose as much of a danger to competition as horizontal mergers. In fact, they have been found to be beneficial to both firms and consumers including by facilitating long term investment, enhancing the quality of the product, etc.<sup>37</sup> The purpose and effect of vertical integration including through mergers may be cost reduction and where transaction costs of buying and selling between two vertical levels are relatively high, greater efficiency can be achieved by such integration, which can also be resorted to so as to avoid being a price victim of a monopolist or dependence upon an already vertically integrated competitor. However, they may have certain harmful effects as such transactions may lead to foreclosing rivals from previously independent firms at the vertical level, thereby making entry more difficult which reduce opportunities available to potential new entrants.

The third type of merger is conglomerate merger, which generally refers to mergers between entities, which are not linked. These can be further classified into product line extension, market extension and pure conglomerate mergers. Pure conglomerate mergers are said to occur where there is absolutely no functional link between the merging entities. On the other hand, in product line extension mergers, the merging entity/entities seek(s) to add new products to their existing product line. In a product extension merger, the products of the acquiring company are complementary to the products of the acquirer. In market extension mergers, entities enter into newer markets through the merger, amalgamation, or acquisition as the case may be rather than doing so by internal growth.

These mergers can also pose certain threats to competition including in the case of market extension mergers, which have been noted to have an affinity with horizontal mergers. Other impacts include increase in opportunities for reciprocal dealing, increases in overall industrial concentration and a danger of dilution of functioning of capital markets. Conglomerate mergers may enhance the likelihood of mutual forbearance, the development of a 'live and let live policy' that is comfortable for firms but harms consumers.

### III.1 Pre-merger notifications

The system of pre-merger notifications contemplates a notification being given to competition authorities of a proposed merger in order that its probable effects on

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<sup>37</sup> OECD/World Bank, A Framework for the Design and Implementation of Competition Policy and law, 43 (1991), available at: <<http://www.oecd.org/dataoecd/10/30/27122278.pdf>> (visited on 10-10-10).



competition in the relevant market may be assessed prior to the close of the merger. Most countries with a competition law have some form of pre-merger notification, either mandatory or voluntary, including the three jurisdictions in this paper, two of which (ECMR and India) having systems of mandatory notification whereas one (UK) is having voluntary notification system. Pre-merger notifications ensure that the competition authority is able to obtain all the requisite information to determine its effects on competition. The Report of the International Competition Policy Advisory Committee of the United States Department of Justice (USDOJ) takes note of certain reasons behind a pre-merger notification system. It notes, 'reliance on pre-merger notification systems to provide advance notice of proposed transactions is based in large part on the recognition that competition authorities have neither the time nor the resources to monitor all business transactions in an attempt to identify those that pose a threat to competition. Nor do they have the ability to detect those 'midnight mergers' that are consummated without prior notice. Moreover, it is not practical to place the burden of notification on concerned competitors and consumers', due to lack of knowledge or on account of costs incurred.<sup>38</sup>

Pre-merger notifications are particularly important as mergers review is conducted *ex ante*, in view of the problems and costs involved in 'undo' a merger that has already taken place.

#### *Mandatory and voluntary systems*

A voluntary system of pre-merger notification implies that the merging parties have the option whether or not to submit a merger for review to the competition authority while the competition authority may scrutinize the mergers notified as well as those which in its opinion are likely to have anti-competitive effects. Some of the noted advantages of this system include lesser expenditure of resources, both on part of the merging entities and the competition authority, and lesser burden upon the competition authorities. Moreover, it has been noted that the voluntary nature of the process minimizes the possibility of unduly delaying mergers that are likely to be in breach of law. Such a system to be successful requires a strong competition authority and the availability of sufficiently clear and comprehensive guidelines on the application of competition law.

On the other hand, a mandatory system of notification imposes an obligation on all merging parties, where certain prescribed thresholds are met to notify the same to the competition authorities, which, in turn must carry out a process of review. One benefit of this system is that the obligation to notify is determined by well-defined

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<sup>38</sup> International Competition Policy Advisory Committee, *Final Report*, 89 (2000), available at: <<http://www.usdoj.gov/atr/icpac/chapter3.pdf>> (visited on 13-10-10).

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and identifiable parameters,<sup>39</sup> and above the threshold prescribed, there is little chance that anti-competitive mergers would escape the authorities. This system is the one followed in most countries providing for merger control under competition law.

In the ECMR a mandatory notification system has been provided. A simplified procedure has been set out in the ECMR for the low risk cases. This mechanism was introduced to reduce the workload of the EC. On receipt of a notification, the EC is to publish in the official journal, the eligibility of a concentration for the simplified procedure and a 'short form' decision will issued to declare compatibility within one month.

In India, the *Competition Act 2002* as initially enacted provided for a voluntary notification mechanism. This was the case as the view of the Raghavan Committee (pursuant to the recommendations of which the *Competition Act* was enacted), appears to have been that some practical difficulties may arise in prior approval on account of 'delays and unjustified bureaucratic interventions'.<sup>40</sup> In 2007, however, by an amendment, pre-merger notification was made mandatory. Upon the amendment being proposed, the International Bar Associations put forth a submission on the Ministry of Company Affairs contending that a voluntary system would be more appropriate owing to the benefits of cost saving, lesser burden on the competition authority and the fact that other voluntary regimes function well with similar frameworks, suggesting at the same time that mandatory notification may be prescribe for certain crucial sectors.<sup>41</sup> However, mandatory notification was approved and has been incorporated into the *Competition Act*. Although this system does have benefits as noted above, the CCI would have to cope with an enhanced work load as it would now be obliged to notify all notified mergers.

The UK merger control regime does not impose mandatory notification requirements for any type of merger.<sup>42</sup>

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<sup>39</sup> Aldo Gonzalez and Daniel Benitz, 'Pre-merger notification Mechanisms: Incentives and Efficiency of Mandatory and Voluntary Schemes', *available at*: [http://escueladegobierno.uai.cl/actividades/talleres\\_academicos/Paper%20Aldo%20Gonz%C3%Allez.pdf](http://escueladegobierno.uai.cl/actividades/talleres_academicos/Paper%20Aldo%20Gonz%C3%Allez.pdf) at 12 (visited on 11-10-10).

<sup>40</sup> Report of the High Level Committee on Competition Law and Policy, para 4.7.5 (2000).

<sup>41</sup> International Bar Association, 'IBA Antitrust Working Group on India's Mandatory Notification Regime Submission to the Ministry of Company Affairs', *available at*: [http://www.ibanet.org/LPD/Antitrust\\_Trade\\_Law\\_Section/Antitrust/Antitrust\\_WkGp\\_Indian\\_Comp.aspx](http://www.ibanet.org/LPD/Antitrust_Trade_Law_Section/Antitrust/Antitrust_WkGp_Indian_Comp.aspx), at para 4.17 (visited on 09-10-10).

<sup>42</sup> Goldberg, above n 35.

### III.2 Substantive assessment of mergers

The core component of any merger control regime is the assessment of proposed mergers to determine their possible effects on competition. Every system of merger control sets out a substantive test to determine whether or not a merger ought to be blocked and must decide upon a standard of proof required before a competition authority can block a merger.<sup>43</sup> A substantive test usually involves the examination of various factors such as pre and post merger market shares, market concentration, barriers to entry, extent of effective competition, etc., among others to assess whether the proposed merger will negatively impact competition.

One of the commentators Hadden points out that there are two main 'defences' that may be raised in the context of the prohibition of mergers namely the efficiencies defence and the failing firm defence. The efficiencies that result from a merger may be taken into account to offset the negative impacts where the benefits are shown to flow to the ultimate consumers.<sup>44</sup> Also where the undertakings being acquired are in a condition that without the takeover, it would be forced to exit the market, the 'merger' may be permitted irrespective of its negative impacts.

However, prior to looking into the impacts of a merger, the primary step is defining the relevant market. This is so as competition law seeks to look into the conduct of enterprises that yield a certain influence within the market and as the market definition is a tool to identify and define the boundaries of competition between firms. It has been noted that the definition of market frequently determines whether a particular merger is judged anti-competitive and unlawful.<sup>45</sup>

In the UK, mergers which meet certain turnover or share of supply thresholds are prohibited if they result, or may be expected to result, in a 'substantial lessening of competition' within a national market for goods and services.<sup>46</sup>

#### *Relevant market*

Generally it is in the interest of a defendant undertaking to describe the product market as broadly as possible, and for the Commission to define it narrowly. The more narrowly market is defined the greater the market share of any one undertaking will be.

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<sup>43</sup> Whish, above n 22, 788.

<sup>44</sup> Morven Hadden, 'EC Merger Control Regime' in Gary Eaborn, *Takeovers: Law and Practice* (Lexis Nexis Butterworths 2005) 714.

<sup>45</sup> OECD/ World Bank, A Framework for the Design and Implementation of Competition Policy and Law, 46 (1999), available at: <http://www.oecd.org/dataoecd/10/30/27122278.pdf> (visited on 11-09-10).

<sup>46</sup> Section 22, 33, 35 and 36, EA 2002.

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'Relevant Market' has been defined as 'a market that is capable of being monopolized, that is, a market in which a firm can raise prices above the competitive level without losing so many sales that the price increase would be profitable'.<sup>47</sup> The relevant market is ordinarily understood to comprise of two components, the geographic market and the product market. Product market refers to 'the part of the relevant market that applies to a firm's particular product by identifying all reasonable substitutes for the product and by determining whether the substitutes limit the firm's ability to affect prices'.<sup>48</sup> On the other hand, a geographic market is that part of the relevant market that identifies the regions in which a firm might compete.<sup>49</sup>

The EU following a 'sequential procedure for product and geographic market definition' which often resulting in extremely narrow definitions of the relevant market. Though there are contrary view also on this point is that in the EU, the analysis consists in a single inquiry of effective competition rather than the product and geographic markets being determined in isolation. The EC's Notice on the Definition of Relevant Market for the purpose of Community Competition Law sets out the various aspects to be taken into account in defining the relevant product and geographic markets. The product market comprises of products that are interchangeable or substitutable by reason of their characteristics, price and intended use. On the other hand, the 'geographic market' comprises the areas in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.<sup>50</sup>

The *Competition Act* in India sets out explicitly the definition of the terms relevant market, product market and geographic market.<sup>51</sup> The definitions of the product

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<sup>47</sup> Blacks Law Dictionary, 7<sup>th</sup> ed, 983-984 (1999).

<sup>48</sup> Ibid at 983.

<sup>49</sup> Ibid.

<sup>50</sup> EC's Notice on the Definition of Relevant Market for the Purpose of Community Competition Law at Para 8. *available at*: <[http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997Y1209\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997Y1209(01):EN:HTML)> (visited on 22-10-10).

<sup>51</sup> Section 2 (r) of the *Competition Act* defines the relevant market as 'the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both markets'. Relevant product market is defined by s 2 (t) as 'a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use'. Section 2 (s) defines relevant geographic market as 'a market comprising the area in which conditions of competition for supply of goods or provision of services or demand of

market and geographic market in Indian law are almost identical to those set out in the EU. In addition, the *Competition Act* lists specific factors, all or any of which are to be taken into account by the CCI in demarcating the product or geographic market. In the context of the 'product market', the CCI must look into the physical characteristics or end use of the goods, price, customer, preferences, exclusion of in house production, existence of specialised products and classification of industrial products.<sup>52</sup> As far as the geographic market is concerned, the factors include regulatory trade barriers, local specification requirements, national procurement policies, adequate distribution facilities, transport costs, language, customer preferences and need for secure or regular supplies or rapid after sales service.<sup>53</sup>

*Substantive analysis of mergers: test and criteria for merger control*

The substantive analysis of a proposed merger transaction involves the assessment of various quantitative and qualitative factors so as to determine the effects of the proposed transaction on competition. While the terminology used in the context of the substantive test in each of the three jurisdictions differs, what is essentially examined is whether and to what extent the proposed merger negatively impacts competition. Many jurisdictions require the impact to be substantial if any action is to be taken by the competition authority.

The substantive test applied for the examination of mergers in the EU underwent a major change in 2004 with the dominance test being discarded for the significant impediment to effective competition (hereinafter SIEC) test. Prior to 2004, the Merger Regulation laid down as the assessment criteria, the determination of whether the concentration created or strengthened a dominant position as a consequence of which effective competition would be significantly impeded. The merger control law could thus be used to check the creation or strengthening of a dominant position. The ECMR requires that the concentrations within the scope of that regulation be appraised with a view to establishing 'whether or not they are compatible with the common market'.<sup>54</sup> In a Green paper, the EC considered the adoption of the SLC test which focuses on how much competition is lost on the grounds that it was less rigid, closer to economics based analysis undertaken in

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goods or services are distinctly homogeneous and can be distinguished from the conditions prevailing in neighborhood areas'.

<sup>52</sup> Section 19 (7), *Competition Act*, 2002.

<sup>53</sup> *Ibid* s 19 (6).

<sup>54</sup> Article 2 (1), ECMR. Article 2 (3) of the ECMR clarifies that 'a concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.'

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merger control and would allow an alignment of the appraisal criteria with those applied in major jurisdictions.<sup>55</sup>

The 2004 amendment of the ECMR led to the adoption of the SIEC test. The SIEC test allows greater flexibility and gives more powers to the Commission: while it is still based on the concept of dominance, it is only by example and is no longer the primary criterion for assessing a concentration. It has been observed that the SIEC test is a much more powerful economic tool to analyse the costs and benefits of a proposed merger in terms of balancing its pro-competitive and anti-competitive effects.

The *Competition Act* in India prohibits mergers which cause or are likely to cause an appreciable adverse effect on competition in the relevant market in India.<sup>56</sup> The Act however does not define or elucidate the meaning of the expression 'appreciable adverse effect', merely enumerating various factors, all or any of which are to be taken into account to determine whether a combination has such an effect. It would be up to the CCI, the CAT and the Supreme Court to define how large an effect would qualify as an appreciable adverse effect and whether this term would include any term above the *de minimis*.

### *Criteria for assessment*

Competition authorities employ numerous criteria for the analysis of the impacts of proposed mergers on competition, and what factors are considered may depend upon the type of merger involved in the case. The effects of a particular transaction may not be restricted to a particular category and thus the transaction would have to be analysed for its various impacts. Following are some of the important criteria taken into account in assessing mergers.

#### *(a) Market shares and market concentration*

Market shares of firms are an important factor taken into account in the context of impacts on competition as they can indicate the market power of the firm. Market shares, prior and subsequent to the merger, are also used to determine the level of concentration in the market which in turn indicates the level of competition in the market.<sup>57</sup> Market concentration was initially calculated by

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<sup>55</sup> Sylvie Madhuit and Trevor Soames, 'Changes in EU Merger Control: Part 2' (2005) 26:2 *ECLR* 75, 76.

<sup>56</sup> Section 6 (1), *Competition Act, 2002*.

<sup>57</sup> Goldberg points out that many competition authorities place considerable emphasis on market share and market concentration even where the prohibition test may not be in

means of a 'four firm test' or CR4, which entailed the calculation of the market shares of the four largest firms in the market. Many jurisdictions today however employ the *Herfindahl-Hirshman Index* (HHI) to determine market concentration. This method involves the calculation of the sums of squares of individual market shares of all competitors in the market. A total less than 1000 indicates low concentration and one greater than 1800 indicates high concentration.

All three jurisdictions in the present study rely on market shares and market concentration as factors to determine the effects of a transaction on competition, particularly in the case of horizontal transactions.

In EU the Competition Commission would consider accretion of market power on the buying as well as selling sides. In determining whether a concentration might have adverse horizontal effects, the Commission will look predominantly at the increase in the combined entity's market share though other factors would also be taken into account as this alone would not provide any insight into the loss of potential competition that the concentration might entail.<sup>58</sup> An instance in which market shares were looked into by the commission is that of *Syngenta CP/Advanta*<sup>59</sup>, in which the parties which were engaged in crop protection, breeding, production and processing, etc. of seeds respectively. The Commission took into account the facts that the merged entity would have 15-80 per cent market share in various types of seeds to come to the finding that the operation would give rise to serious concerns of being likely to significantly impede effective competition.

In India the *Competition Act, 2002* specifically lists among the factors to be taken into account in analysing a combination, the market shares of the persons and enterprises in a combination, both individually and as a combination.

In this regard it may be noted that all jurisdiction in their merger regulations have specified *de minimis* market shares, and combinations falling below the specified shares are not usually considered threats to competition.

*(b) Barriers to entry*

Barriers to entry, as the expression indicates, refers to a situation that makes the costs of a new entrant to the market higher than the cost of firms already in the market which creates a range within which firms in the market can raise their prices above the competitive level without attracting new entry.

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terms of market power, as market share and market concentration are simple to measure and provide a 'low cost screening method' which is easy to administer. Above n 3, 100-1.

<sup>58</sup> Whish, above n 22, 838-39.

<sup>59</sup> COMP/M.346 [2004] EC Comm 53.

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In the EU the EC considers whether the vertical effects of the concentration could foreclose access to markets. In *Skanska/Scancem*<sup>60</sup> where the merged entity would have a very powerful presence in the market for raw materials (cement), construction materials (concrete) and the construction industry, the EC directed Skanska to divest Scancem's cement business as well as its entire shareholding in Scancem.<sup>61</sup> Article 2 of the ECMR, which deals with the appraisal of / concentrations and sets out the factors to be taken into account by the Commission in this process mentions, access to supplies and 'any legal or other barriers to entry'.

'Barriers to entry' finds place among the various factors to be taken into account by the CCI in determining whether a proposed combination has or is likely to have an appreciable adverse effect on competition.<sup>62</sup> The nature and extent of vertical integration in the relevant market is also to be considered by the CCI.<sup>63</sup>

### (c) Actual and potential competition

The determination of the effects of proposed mergers on competition involves the examination not only of the actual levels of competition in the relevant market and the likely consequences of the transaction but also the impacts of the transaction on potential competition.

The EC in *Telia/Telenor*<sup>64</sup> expressed concern over the fact that the merged entity would have an increased ability and incentive to eliminate actual and potential competition from third parties. The Commission must, in making its assessment, look into actual and potential competition from both inside and outside the communities.<sup>65</sup>

Indian Competition law requires the consideration of 'actual or potential competition' but this is qualified by the words 'through imports'.<sup>66</sup> At the same time, another listed factor is the 'extent of effective competition likely to sustain in the market'.<sup>67</sup>

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<sup>60</sup> Case No. IV/ 1157, [2000] 5 CMLR 686.

<sup>61</sup> Whish, above n 22, 840.

<sup>62</sup> Section 20 (4) (b), *Competition Act, 2002*.

<sup>63</sup> Ibid at section 20 (4) (j).

<sup>64</sup> COMP/M. 1439[2001] 4 CMLR 1226.

<sup>65</sup> Article 2 (1) (a), ECMR.

<sup>66</sup> Section 20 (4) (a), *Competition Act, 2002*.

<sup>67</sup> Rammappa describes this as the core issue. It the effect of a combination would be to substantially reduce/ eliminate competition in the market, the combination would be prohibited. See T Ramappa, *Competition Law in India: Policy, Issues and Developments* (Oxford University Press 2006) 209.



*(d) Welfare objectives and benefits to consumers*

While competition law is essentially concerned with economic objectives, social welfare objectives and consumer benefit also constitute an important part thereof. The regulation of mergers may also involve the consideration of such objectives.

The ECMR gives importance to consumer welfare in the process of merger analysis, requiring the Commission to look into the interests of the intermediate and ultimate consumers as well as the development of technical and economic progress, provided that it is to consumers' advantage and does not form an obstacle to competition.

The Indian *Competition Act* includes the nature and extent of innovation among the factors to be assessed in merger regulation and also mentions the benefits of the combination in general. Although as such consumer interest does not find a mention<sup>68</sup> in the law, it is likely that in examining the benefits of the combination or its impact, the effects on consumers would also be taken into account.

**In lieu of conclusion**

The competition laws on the regulation of mergers in India, EC and UK have a similar scheme and have several common features in terms of various stages of merger review and steps taken by the competition authorities in this behalf. However, as discussed in the preceding lines, there are also numerous differences in the provisions in the context of definitions, notification, time limits for review of notifications by the competition authorities, the substantive test applied for determination of impacts on competition as well as in the manner in which the relevant market is determined.

Merger in all three jurisdictions includes acquisition of shares/stock, acquisition of assets, merger proper and amalgamation. While in Indian law and UK law the very definition of combination/merger is based on threshold levels in terms of assets and turnover respectively, in EC law, the relevant thresholds in terms essentially of turnover are relied upon to determine concentrations with a 'community dimension'. Another difference in the context of definitions in the three jurisdictions arises with regard to joint ventures. As noted above, in India, it is unclear whether joint ventures

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<sup>68</sup> 'Benefits to consumers' is a factor to be considered in the context of anti-competitive agreements, where the question for determination is whether an agreement has an appreciable adverse effect on competition. The issue also involves the assessment of promotion of technical, scientific and economic development by means of production or distribution of goods or services, if any, through the agreement in question. See, section 19 (3), *Competition Act, 2002*.

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would be included within the definition of combinations. In EC and UK joint venture is very much included in the definition of concentration and merger respectively.

All three jurisdictions have different systems of pre-merger notification requirement. Insofar as the ECMR and India are concerned the pre-merger notification is mandatory and the concentrations/combinations to be notified to the respective competition authorities and which may be substantively reviewed irrespective of notification provisions. In the EC and India, notification can be made even prior to the conclusion of agreement if a good faith intention to conclude such agreement can be shown to the competition authority concerned. The UK merger control regime does not impose mandatory notification requirements for any type of merger. Instead, merging parties may voluntarily opt to notify competition authorities.

One point of difference in the Indian context is that the *Competition Act* prescribes a time limit of thirty days for the filing of such notification by the parties concerned from the agreement. Such a limit had been prescribed in the EC as well but was done away with by the amendment of the ECMR in 2004.

The substantive assessment of mergers in all three jurisdictions involves the same basic steps, namely the identification of the relevant market (including both the relevant product and relevant geographic market), the assessment of the merger as per the substantive test set out in the respective laws, and in this process, the consideration of various factors including market shares, concentration, possibility of foreclosure and also welfare objectives.

The basic substantive test for the analysis of mergers differs in all three jurisdictions. EC law requires the determination of whether the merger causes significant impediments to the effective competition, which although it implies the distortion of competition, may not require the impediments caused to be 'substantial'. The test in Indian law requires the assessment of whether the merger is likely to cause 'appreciable adverse effects on competition'. The UK law provides for test of 'substantial lessening of competition' within a national market for goods or services.

### **The Indian Competition Act and mergers**

The *Competition Act, 2002* is largely in line with the provisions of other jurisdictions insofar as merger regulation provisions are concerned. It provides for pre-merger notification, review and remedies in the form of modifications which if applied effectively can play a crucial role in regulating mergers. The *Competition Act* aims at protecting and promoting competition and not at curbing monopolies. The merger control provisions are thus accordingly designed to prevent mergers that are likely to have an appreciable adverse effect on competition.

Mandatory pre-merger notification has been provided for which can help in ensuring that the CCI would have relevant information in the context of all proposed mergers above the threshold limit and would be able to avert the competition problems that may arise in case of certain mergers.

The Act has also conferred the CCI with extra territorial jurisdiction over combinations taking place outside the country and over parties to combinations who are outside the country to ensure that such mergers do not adversely affect competition in India.

However, there are certain issues that must be addressed in order that the law can effectively deal with mergers.

First, the threshold limits set out in the *Competition Act* have remained unchanged till date. This issue must be addressed prior to making operative the provisions on merger regulation so that the threshold limits are set according to prevalent conditions.

Second, threshold limits have been set on the basis of assets or turnover (ie size of the undertakings) and thresholds form a part of the definition of 'combinations' with the result that smaller mergers, may not be able to be dealt with by the CCI even if they impact competition. Also, mergers involving a large company, even if it has no business in the country would have to be notified to and evaluated by the CCI.

Third, the definition of combinations is unclear whether joint ventures, if they meet the conditions set out in s 5 would constitute combinations within the meaning of the Act.

Forth, the biggest concern about the *Competition Act* in reference to merger regulation is the time limits set out with regard to the evaluation of merger notifications. The prescribed time period of 210 days for making final decision is considerably longer than the corresponding provisions in other jurisdictions.

Fifth, the newly added mandatory pre-notification procedure would considerably increase the workload of CCI in this behalf. Prompt steps are required to take to ensure that the notifications are examined and cleared without undue delay.

For a smooth and effective functioning of CCI the abovementioned issues should be resolved at an early stage.