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The Competition Commission of India's Attitude Towards Cross Border Mergers

Ahan Gadkari*

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Abstract

Mergers and acquisitions are an unavoidable component of corporate restructuring and consolidation. As globalization continues, mergers have become more cross-border and multi-jurisdictional transactions. Mergers are widely recognized to provide substantial strategic benefits to commercial enterprises. Nonetheless, mergers may affect existing firms in the market, making competition analysis of company combinations necessary and essential. The Competition Commission of India has been regulating mergers, including cross-border mergers, that are combinations that satisfy established threshold limitations with the intent of examining their possible competition impacts in the relevant market. Except for those that qualify for authorized exclusions, such mergers must be disclosed to the Competition Commission of India.

After discussing the fundamentals of merger control, the paper discusses the substantive position of India's cross border merger control under the Competition Act, 2002 in terms of jurisdictional thresholds set in monetary terms concerning the value of assets or turnover, as well as possible exemptions for certain mergers from notification requirements. Following that, the procedural framework for India's cross-border merger control is discussed, including the notice procedure and penalty proceedings, followed by an examination of critical features of the Competition Commission of India merger approvals and a conclusion.

Keywords: *Competition Commission, Cross border mergers, Trade practices, Combinations*

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I. Introduction

Although the merger control regime in India began with the erstwhile Monopolies and Restrictive Trade Practices Act, 1969 (hereinafter "MRTP Act"), mergers were controlled primarily to prevent economic power concentration to the public harm in the private sector. Chapter III of the MRTP Act's merger requirements specifically did not apply to public sector players. With the 1991 amendments to the MRTP Act following India's globalisation policy, critical merger regulatory provisions in Chapter III stood omitted, and after that, merger transactions remained unregulated.[1] It was then that the *newly enacted* Competition Act, 2002 (hereinafter "CA") provided for merger control provisions. At the time, the recently established CA had rules governing merger control. The CA, passed to encourage and defend competition in the Indian market, was immediately unable to become a reality owing to a legal challenge filed in the Supreme Court in October 2003 in the form of a writ petition.[2] Subsequently, in 2007, the Act was amended. Pursuant to Section 1(3), the CA was effectively implemented on 20th May 2009, except for the combination provisions, which took effect on 1st June 2011.[3]

In June 2011, India implemented a new merger control system. Section 5 of the CA defines combination and establishes jurisdictional thresholds based on asset worth or turnover. However, the term 'merger' is used broadly in this article to refer to a variety of merger combinations, including the purchase of shares, voting rights, assets, or control over another firm, as well as the amalgamation or merger itself. Combination can be defined as when two or more previously separate entities combine their operations, when an entity's control changes (resulting in sole or joint control), or when a full-function joint venture is formed. Mergers affect the market in a more permanent and long-lasting way.[4] Mergers, especially horizontal ones, may pose serious competition issues since they result in companies acquiring or maintaining market dominance.[5] Therefore, competition authorities in various nations

1 MRTP (Amendment) Act, 1991; J. C. Sandesara, *Restrictive Trade Practices in India, 1969-91: Experience of Control and Agenda for Further Work*, 29 Economic and Political Weekly 2081–2094 (1994).

2 Brahm Dutt v. Union of India, (2005) 2 SCC 431.

3 Ministry of Corporate Affairs (hereinafter "MCA"), F.No.5/4/2003-IGC/CS (Notified on 4th March 2011); MCA, F. No.5/4/2003-IGC/CS (Notified on 30th May 2011); The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011.

4 ALISON SUFRIN, EU COMPETITION LAW: TEXT, CASES, AND MATERIALS. 855 (Oxford University Press 2019).

5 *Merger Control in* Competition Law Today: Concepts, Issues, and the Law in Practice 99; Prateek Bhattacharya, *Competition commission of India's "control" conundrum – practice, precedent, and proposals*, European Competition Journal 1–33 (2021); Avirup Bose, *Lessons to Be Learned from India's Latest High Profile Merger Review: The Jet-Etihad Deal*, 35 European Competition Law Review (2014).

take mergers seriously and work to prevent anticompetitive mergers. The fundamental goal of merger control is to enable competition authorities to manage changes in the market's competitive environment. Thus, competition law is focused on policing anticompetitive merger transactions based on an *ex-ante* evaluation of the merged entity's post-merger market dominance. However, mergers are believed to provide substantial financial benefits to merger companies since they result in corporate consolidation, in addition to providing synergies in the form of increased cost-efficiency.

There has been a rise in cross-border mergers in recent years.[6] Cross-border mergers in which one of the partners is a foreign corporation are seen as critical for achieving global competitiveness in obtaining modern technology, processes, marketing, and distribution networks and is viewed as the remedy for the local market's suffocating competition.[7] The Companies Act, 2013, as the principal statute enabling cross border mergers, now permits outward (cross border) mergers,[8] in contrast to the preceding Companies Act, 1956, which permitted only incoming (cross border) mergers. Cross border mergers, including outbound mergers, like domestic mergers, must be mandatorily pre-notified to CCI for permission in line with section 6(2) of the CA. Cross border mergers, thus, always result in several notifications across the countries in which the firms operate.

6 Varghese Thekkel, *Cross-Border Mergers: Is India Ready? Lessons from the United States and European Union*, 28 Indiana Journal of Global Legal Studies 231–291 (2021); Avin Tiwari, *Emerging Trends in Cross Border Mergers and their Tax Implications in India: A Critical Appraisal*, 8 BRICS Law Journal (2021); Centre for Development Studies & Beena Saraswathy, Cross-Border Mergers and Acquisitions in India: Extent, Nature and Structure (2010); Ashoka Mody & Shoko Negishi, *Cross-Border Mergers and Acquisitions in East Asia: Trends and Implications*, 38 Finance & Development (2001); Michael A. Hitt & Vincenzo Pisano, *The Cross-Border Merger and Acquisition Strategy: A Research Perspective*, 1 Management Research: Journal of the Iberoamerican Academy of Management 133–144 (2003).

7 Geeta Rani Duppati & Narendar V. Rao, *Cross-border mergers and acquisitions: Mature markets vs. emerging markets - with special reference to the USA and India*, 2 Cogent Business & Management(2015); Surendranath R. Jory & Thanh N. Ngo, *The wealth effects of acquiring foreign government-owned corporations: evidence from US-listed acquirers in cross-border mergers and acquisitions*, 21 Applied Financial Economics 1859–1872 (2011); Puspita Rani et al., *Motives, governance, and long-term performance of mergers and acquisitions in Asia*, 7 Cogent Business & Management (2020); Sumati Varma et al., *Drivers of emerging market cross border mergers and acquisitions: evidence from the Indian IT industry*, 9 Transnational Corporations Review 360–374 (2017); Samta Jain et al., *Impact of Organizational Learning and Absorptive Capacity on the Abnormal Returns of Acquirers: Evidence from Cross-Border Acquisitions by Indian Companies*, 19 Global Journal of Flexible Systems Management 289–303 (2018); Evren Arık & Ali M. Kutan, *Do Mergers and Acquisitions Create Wealth Effects? Evidence from Twenty Emerging Markets*, 53 Eastern European Economics 529–550 (2015); PengCheng Zhu & Vijay Jog, *Impact on Target Firm Risk-Return Characteristics of Domestic and Cross-Border Mergers and Acquisitions in Emerging Markets*, 48 Emerging Markets Finance and Trade79–101 (2012).

8 MCA, F. No. 1/37/2013-CL.V, (Notified on 13th April 2017).

II. Merger Thresholds Crossing Borders

In the case of mergers, competition law is primarily concerned with determining whether the merged business would compete in the market after the merger.[9] To invoke CCI's merger control examination, the deal must be a combination that satisfies the conditions of section 5 of the CA. Combination is defined in section 5 as the 'acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises.' Subject to jurisdictional (financial) thresholds for No-Group (Individual) and Group transactions, the said definition under section 5 lists three types of combinations in clauses (a), (b), and (c) for 'acquisition of control, shares, voting rights or assets of an enterprise,' or 'acquiring of control by an enterprise when such acquirer has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service' or 'merger or amalgamation' respectively. Not all merger transactions are a combination under section 5 of the CA; only merger transactions involving businesses that exceed certain threshold limitations (subject to specific exclusions) are considered a combination and a mandatory notifiable transaction under section 6. (2).[10] Section 5 prescribes threshold limitations in financial terms by referring to the combined entity's assets or revenue; in other words, the combined entity's assets or revenue triggers the threshold limits jointly with the assets or revenue of both or all of the parties as the case may be. Additionally, the Central Government reviews them every two years in conjunction with the CCI per section 20(3) of the CA. Section 5 establishes jurisdictional criteria for cross-border mergers based on the value of assets or revenue 'in India or beyond India in aggregate', as well as enforceable 'India nexus' financial requirements.[11]

CCI has the authority to examine cross-border mergers under section 6(1) of the CA, which prohibits any person or enterprise from entering into a combination that 'causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India',[12] and declares such a combination void. Thus, not all mergers are illegal; only those with an adverse effect on competition in the relevant market are prohibited. As required by section 6(2), mergers triggering the threshold limitations must be pre-notified to CCI and are subject to scrutiny by CCI in line with the CA's Sections 29, 30, and 31. Following such notice, the merger transaction is suspended and cannot take effect until two hundred and

9 T RAMAPPA, COMPETITION LAW IN INDIA: POLICY, ISSUES, AND DEVELOPMENT 183 (Oxford University Press, 2014).

10 Competition (Amendment) Act, 2007, S. 6(2).

11 MCA, F. No. 5/7/2013-CS (Notified on 4th March 2016).

12 D P MITTAL, TAXMANN'S COMPETITION LAW & PRACTICE 294 (Taxman Publications 2011).

ten days have elapsed from the date of notification to CCI or unless the latter approves it under section 31 of the CA, whichever occurs first.[13]

Section 32 of the CA is an important clause that strengthens the Competition Commission's examination of cross-border mergers. It expressly applies to mergers that occur outside India. Specifically, sections 32(d), (e), and (f) allow for the Act's extraterritorial application to mergers that occur outside of Indian boundaries. While section 32(e) relates to mergers that occur outside India and include at least one foreign entity (and, conversely, at least one Indian company), section 32(d) pertains to mergers that occur outside India and involve both foreign organizations. It becomes clear that section 32(d) authorizes the CCI to examine entirely foreign to foreign merger transactions that 'meet' financial threshold requirements, irrespective of the Act's scope of application under section 1(2) if they would have or are likely to have a material adverse effect on competition in the relevant market in India;[14] while section 32(e) requires CCI to examine significant cross-border mergers. In other words, regardless of whether a merger is contemplated or completed outside India, it must be pre-notified if it fulfils the jurisdictional standards outlined in section 5 and is capable of (significantly) impairing competition in the relevant market in India. Similarly, since many foreign companies operate in India through their subsidiaries, although the entities' primary place of business is outside India, their wholly foreign to foreign mergers are required to be pre-notified to CCI if they trigger section 5 of the CA.

In a transaction entirely outside India involving the acquisition of *Pfizer Inc.'s global nutrition business by Nestlé SA, a Swiss public company*,[15] CCI determined that because both parties to the proposed transaction were present in India through their subsidiaries and their assets value and turnover in India exceeded the threshold limits under section 5(a), the transaction qualified as a combination under the said provision. In a cross-border merger of *Wyoming 1 (Mauritius) Private Limited (Wyoming 1) and Tata Chemicals Limited (TCL)*,[16] CCI determined that, despite Wyoming 1 being a wholly-owned subsidiary of TCL, incorporated under the Mauritius Companies Act solely for the purpose of holding TCL's off-shore business interest, and having no assets or revenue in India, the proposed

13 Ajay Sharma, *Cross Border Merger Control by the Competition Commission of India: Law and Practice*, Freiburg Law Students Journal (2015).

14 The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011, Regulation 4.

15 CCI Order under Section 31(1) of the CA, 2002 with regard to *Nestlé/ Pfizer*, Combination Registration No. C-2012/05/57, order dated 1-8-2012 (CCI).

16 CCI Order under Section 31(1) of the CA, 2002 with regard to *Wyoming 1/Tata Chemicals Ltd.*, Combination Registration No. C-2011/12/12, order dated 28-12-2011 (CCI).

transaction qualified as a combination under section 5(c), as it met the required thresholds under Similarly, in a proposed transaction involving the acquisition by *Intel Corporation of certain Motorola Mobility LLC assets*,[17] including non-Indian intellectual property rights, Motorola's tangible assets located in the United States, and the right to hire certain Motorola employees in the United States to develop technologies used in the components of cellular baseband processors, the CCI determined that because the transaction occurred outside India, it had no direct impact on competition in the Indian' market for cellular baseband processors.' CCI found that since Motorola's assets being bought by Intel did not produce income in India at the time of the transaction, the deal was unlikely to pose any negative competition concerns in India. Even if the parties to the transaction are foreign corporations without Indian subsidiaries, Section 5 may draw an indirect acquisition outcome in India. In a wholly foreign to foreign (consummated) transaction involving *Titan International's acquisition of Titan Europe's entire share capital*,[18] where both parties (acquirer and target) were based in the United States of America and the United Kingdom, respectively, and had no presence or operations in India, except for Titan Europe (the target) holding 35.91 per cent equity share capital in Wheels India, CCI determined that the transaction was a combination under section 5, as it resulted in Titan International becoming Titan Europe.

CCI conducts merger investigations under section 5 in two circumstances: first, upon receipt of a notification according to section 6(2); and second, *suo motu* or upon receipt of information on any sort of combination pursuant to section 20(1) of the CA.[19] In either of these circumstances, if the CCI forms a *prima facie* opinion about the instant merger transaction that it is likely to cause or has already caused a material adverse effect on competition in the relevant market in India, it is required to issue a notice to the parties to the transaction requiring them to respond within thirty days of receipt of the notice as to why an investigation into the transaction should not be conducted. Thus, cross-border mergers are subject to CCI examination and any resulting ruling under the CA's sections 29, 30, and 31. Meanwhile, section 20(4) of the CA requires CCI to consider all or any considerations listed in that section when evaluating whether the merger will have

17 CCI Order under Section 31(1) of the CA, 2002 with regard to *Intel/ Motorola Mobility*, Combination Registration No. C-2013/01/104, order dated 22-1-2013 (CCI).

18 CCI Order under Section 31(1) of the CA, 2002 with regard to *Titan International/Titan Europe*, Combination Registration No. C-2013/02/109, order dated 2-4- 2013 (CCI).

19 CCI Order under Section 43-A of the CA, 2002 with regard to *Avago/Broadcom*, Combination Registration No. C-2015/09/312, order dated 7-6-2017 (CCI); CCI Order under Section 31(1) of the CA, 2002 with regard to *Future Consumer Enterprise Ltd./Grasim Industries Ltd.*, Combination Registration No. C-2016/03/384, order dated 11-5-2016 (CCI).

a considerable detrimental impact on competition in the relevant market.[20] This part, which is crucial in 'pre-deciding' the harmful effect of cross-border mergers on competition in the 'relevant market,' also allows CCI to perform an *ex-ante* evaluation of the combined entity's relevant market dominance based on 'post-merger' dominance.

III. Exemptions From Notification for Certain Mergers

Certain mergers are generally not subject to CCI examination under section 6(2) of the CA. Regulation 4 of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (hereinafter "Combination Regulations") clarifies that since the combinations described in Schedule I are 'ordinarily not likely to cause an appreciable adverse effect on competition in India and notice under section 6(2) need not normally be filed.' As mentioned above, Schedule I of the Regulations outlines ten types (items) of combinations for which the parties are excluded from the need to notify CCI in advance. The latter does not typically conduct an examination. A common feature of Schedule I notification exemptions is that they apply to transactions that do not result in the acquirer (or its group) acquiring sole or joint control of the entity,[21] and that no acquisition should result in the acquirer (or its group) acquiring sole or joint control of the entity, and that no merger or amalgamation (even within the same group) should result in the transfer of joint control to sole control. For example, in a proposed merger of two subsidiaries, *Glenmark Access Limited and Glenmark Generics Limited, with (their parent) Glenmark Pharmaceuticals Limited*,[22] where the parent entity held a 100% and 98.14 per cent shareholding in the subsidiaries, respectively, CCI determined that the proposed combination fell under item 9 of Schedule I of the Combination Regulations, while noting that there was 'no change in the ultimate control' as a result of the transaction, and thus that section 6(2) applied.[23]

However, in *acquiring 20.28 per cent and 12.11 per cent of equity shares in Multi Screen*

20 Prateek Bhattacharya, *supra* note 5; Merger Remedies in India: Having an Upper Hand Kluwer Competition Law Blog, http://competitionlawblog.kluwercompetitionlaw.com/2019/04/01/merger-remedies-in-india-having-an-upper-hand/ (last visited Jan 22, 2022).

21 Jenisha Kirti Parikh, Vinay Shukla and Simone Reis, *India: Merger Control Exemptions Expanded- Better Late Than Never!,* MONDAQ, (April 27, 2017), https://www.mondaq.com/india/maprivate-equity/589256/merger-control-exemptions-expanded-better-late-than-never

22 CCI Order under Section 31(1) of the CA, 2002 regard to *Glenmark Generics Ltd./Glenmark Access Ltd./ Glenmark Pharmaceuticals Ltd.*, Combination Registration No. C-2014/02/156, order dated 5-3-2014 (CCI).

23 Cyril Shroff & Nisha Kaur Uberoi, *A Look Back at The Enforcement of Merger Control in India*, US-India Business Council 2014.

Media Private Limited (MSM India) by Acquires, SPE Mauritius Holdings Limited, and SPE Mauritius Investments Limited, respectively, from Grandway Global Holdings Limited and Atlas Equifin Private Limited,[24] CCI determined that 'joint control over an entity inferred control over strategic commercial operations of the entity by two or more persons, and which control in turn would be sufficient to veto/block the strategic commercial decisions of the entity by each such person.' Additionally, CCI concluded that *controlling* 'right over strategic commercial decisions cannot be considered as mere minority investor protection rights' as the acquirers argued. While the acquirers controlled 62% of equity shares and had the right to appoint three directors before the acquisition, the sellers (*Grandway and Atlas*) had 32.39 per cent of equity shares and the right to nominate two directors in the acquired before the acquisition. Consequently, CCI determined that the acquisition resulted in the acquirers' transfer from joint control to sole control of the acquirers over MSM India,' and hence that an exemption from the Section 6(2) notice requirement could not be obtained.

Concerning item 1 of the Schedule I exemption, CCI concluded in a *proposed acquisition of 22% of New Moon BV by Abbott Laboratories* pursuant to an amendment agreement that even if the acquisition of shares or voting rights between the acquirer and the target engaged in horizontal or vertical business relationships was less than 25%, it could raise competition concerns. Such acquisition need not necessarily be considered an acquisition made solely as an investment or in the ordinary course of trade and required notification under section 6(2) of the Competition Act.[25] In another instance, *Cairnhill CIPEF Limited and Cairnhill CGPE Limited (the investors) acquired 11% of the equity shares of Mankind Pharma Limited (the target), i.e., 10.77% from Monet Limited and 0.231% from Ms. Dinaz Kaul (sellers)*,[26] CCI observed that if the acquirer has no intention of participating in the formulation and determination of the target's business decisions, the transaction could be considered to have been made solely as an investment. In contrast, while CCI denied item 1 to schedule I exemption in the instant case, CCI determined that the Shareholders Agreement entered into between the investors, the target, and the target's promoters empowered the investors to appoint one director to the target's board of directors and conferred upon them certain affirmative rights, including the right to commence a new business. Additionally,

24 CCI Order under Section 31(1) of the CA, 2002 with regard to *MSM India/SPE Holdings/SPE Investments/ Grandway/Atlas*, Combination Registration No. C-2012/06/63, order dated 9-8-2012 (CCI).

25 CCI Order under Section 31(1) of the CA, 2002 with regard to *New Moon BV, In re*, 2014 SCC OnLine CCI 147.

26 CCI Order under Section 31(1) of the CA, 2002 with regard to *Cairnhill CIPEF Ltd./Cairnhill CGPE Ltd.*, Combination Registration No. C-2015/05/276, order dated 25-6-2015 (CCI); CCI Order under Section 43-A of the CA, 2002 with regard to *Cairnhill CIPEF Ltd./Cairnhill CGPE Ltd.*, Combination Registration No. C-2015/05/276, order dated 13-4-2017 (CCI).

CCI noted in another instance[27] that, in denying an exemption from section 6(2) notification pursuant to explanation to item 1, Schedule I of the Combination Regulations, an investor (acquirer) who anticipates influencing management decisions is an 'active' investor, and such acquisition will not be accepted as 'solely as an investment.'

Another notable exemption is the *de minimis* exemption for some mergers from the restrictions of Section 5 of the CA, which exempts such transactions from the Act's merger filing obligation under Section 6(2).[28] The current *de-minimis* exemption Notification [dated 27th March 2017 (SO 988(E))] published on 29th March 2017 by the Ministry of Corporate Affairs (hereinafter "MCA") exempts enterprises involved in (i) any acquisition referred to in section 5(a), (ii) any acquiring of control referred to in section 5(b), and (iii) any merger or amalgamation referred to in section 5(c) of the CA, where the value of assets being acquired, taken control of, merged or amalgamated does not exceed Rs. 350 crores in India or turnover of the acquired does not exceed Rs. 1000 crores from the provisions of section 5 of the Act for five years.[29] Regardless of the acquirer's financial criteria, if the acquisition does not exceed the defined financial *de minimis* restrictions, the advantage of this exemption is available and does not need pre-notification. On 29th March 2017, another Notification [dated 27th March 2017 (SO 989(E))] entered into effect, rescinding the Notification of 4th March 2016, save for acts done or omitted to be done prior to the date of the said rescission Notification's entrance into force.[30] It is worth noting that the 2017 *de-minimis* exemption Notification [SO 988(E)] preserved the acquired entity's higher value of assets or turnover as a result of the 2016 Notification (SO 674 (E)).

Additionally, the 2017 Notification exemption included mergers and acquisitions, in contrast to the earlier Notifications (from 2011 and 2016), which only allowed for a partial *de minimis* exemption for acquisitions. Prior to the 2017 *de-minimis* exemption Notification, however, CCI's practice was to consider the entire acquired entity when calculating financial thresholds, such as asset value or revenue, as opposed to the claim previously advanced by acquirers that only the business division/unit of the acquired enterprise must qualify as an enterprise. Along the same lines, in *Eli Lilly's acquisition of Novartis AG's*

27 CCI Order under Section 43-A of the Competition Act, 2002 with regard to *Piramal Enterprises Ltd., In re*, 2016 SCC OnLine CCI 95.

28 MCA, F. No. 5/4/2003-IGC/CS, (Notified on 4th March 2011); MCA, F. No. 5/33/2007-CS (Part), (Notified on 4th March 2016); Vikas Kathuria, *Vertical restraints under Indian Competition Law: whither law and economics*, Journal of Antitrust Enforcement 1–22 (2021).

29 MCA, F. No. 5/33/2007-CS, (Notified on 29th March 2017).

30 *Ibid*.

global veterinary pharmaceutical business (Novartis Animal Health),[31] CCI observed that the *de minimis* exemption would apply to either Novartis or Novartis India, but not to Novartis Animal Health, because the exemption applied only to the 'enterprise' 'whose control, shares, assets, or voting rights were acquired, but not to a business division or the assets acquired'. However, in the immediate transaction, it was determined that Novartis AG's assets and revenue (including Novartis India) exceeded the de-minimis levels, so disqualifying the transaction from the exemption mentioned above. CCI's practice indicates that it previously relied on a literal reading of the exemption discussed above. However, the most recent 2017 Notification (SO 988(E)) included two more exemptions: I it distinguishes the division/unit of an enterprise (the target) that is being acquired from the enterprise (the target) itself for purposes of the said exemption; and (ii) it requires the calculation of assets value or turnover derived solely from the given division/unit for purposes of calculating *de minimis* thresholds under Section 5 of the CA.[32]

Section 5 of the CA is also subject to the 'Group' exemption, which was renewed and extended in March 2016 by MCA Notification of 4th March 2016. In the public interest, the Central Government, according to section 54(a) of the CA, exempted the 'Group' exercising voting rights of less than fifty per cent in other enterprises from the provisions of section 5 of the said Act for a five-year term (ending 3rd March 2021).[33] Section 6(4) of the CA provides an exemption (a non-application) from section 6(2) merger filing requirements for a share subscription, financing facility, or acquisition made by a public financial institution, foreign institutional investor, bank, or venture capital fund in compliance with a loan or investment agreement's covenants. However, under section 6(5) of the CA and regulation 6(1) of the Combination Regulations 2011, these four exempted institutions are required to file a 'post-completion' Form-III detailing the acquisition, including the details and circumstances surrounding the exercise of control and the consequences of default arising from such loan or investment agreement, within seven days of the acquisition. This exemption has been granted to encourage foreign institutional investment in India. It is widely accepted that such transactions would have no discernible detrimental impact on competition in the relevant Indian market. If the investment is not made as part of a loan or

31 CCI Order under Section 43-A of the CA, 2002 with regard to *Eli Lilly/ Novartis*, Combination Registration No. C-2015/07/289, order dated 14-7-2016 (CCI).

32 *Excel Crop Care Ltd. v. Competition Commission of India*, (2017) 8 SCC 47; CCI in Section 43-A order in relation to Section 20(1) inquiry of 2016 in *acquisition of consumer products division (CPD) business of Grasim Industries Ltd. by Future Consumer Enterprise Ltd.*, Combination Registration No. C-2016/03/384, order dated 9-6-2017 (CCI); MCA, F. No. 5/33/2007-CS, (Notified on 27th March 2017).

33 MCA, F. No. 5/33/2007-CS (Part), (Notified on 28th November 2017); MCA, F. No. 5/4/2003-IGC/CS, (Notified on 28th November 2017).

investment arrangement, it is not subject to the section 6(4) exemption.[34]

IV. Filing Of Notices and Penalty Proceedings

According to Section 6(2) of the CA, the acquirer in the case of acquisition or both (or all) of the parties in the case of merger (or amalgamation) must file a pre-merger notice in the form specified and with the fees specified in the CCI Combination Regulations, 2011, as amended from time to time. Section 6(2) notices are typically submitted with CCI in Form I, as stated in Schedule II of these Regulations, accompanied with proof of payment of the appropriate charge, in line with rule 5(2) of the said Regulations. However, regulation 6(3) gives parties to mergers the option of filing the said notice in Form II, as (also) specified in said Schedule II, preferably in the case of horizontal or vertical mergers, as the case may be, where the parties' combined market share in the relevant market exceeds 15% or 25%, respectively. According to rule 5(5) of the Regulations mentioned above, if CCI is unable to prove *prima facie* that the merger is likely to create or has had a material adverse impact on competition in the Indian relevant market via Form I, it requires the parties to submit a comprehensive Form II notice. The parties must submit a comprehensive and accurate notification in line with the Combination Regulations; otherwise, CCI has the authority to nullify the notice and accompanying grounds, albeit the parties may be given a chance to be heard.[35] If the notification contains insufficient information, CCI may request that the parties correct the errors and provide the relevant information, and the parties are obligated to do so.[36] Following 'international best practices,' CCI has established an 'informal and verbal' pre-notification consultation procedure with its employees to help merger parties identify necessary information for completing a full and accurate Form.[37]

Until recently, merger notices under Section 6(2) were required to be filed within 30 calendar days of the 'trigger event,' which was defined as the date on which either (a) the board of directors of the entities concerned approved the merger or amalgamation proposal, or (b) the parties to the acquisition executed any agreement or 'other document'.[38] Consequently, any merger deal that was not pre-notified within the specified time after the trigger event was liable to a penalty of up to 1% of the parties' combined revenue or assets, whichever was greater, under section 43A of the CA. CCI's practice demonstrates

34 *GS Mace Holdings/Max*, Combination Form III Registration No. C-L/2011/12/03, order dated 20-3-2012 (CCI).

35 Combination Regulations, 2011, Regulation 1, 2A.

36 *Ibid.*, Regulation 3, 5.

37 CA, 2002, Section 6(2).

38 *Ibid.*; Combination Regulations, 2011, Regulation 5(8).

that CCI was lenient during the first year of the Combination Regulations 2011 and did not impose penalties on parties that filed belated section 6(2) submissions. While taking serious note of the acquirer's late notice filed after the transaction was completed and emphasizing that any entity proposing to enter into a combination must give a section 6(2) notice before doing so,[39] CCI decided not to initiate section 43A penalty proceedings, as that was the first year of implementation of the statutory combination provisions. Similarly, in a belated section 6(2) notification involving the combination of Siemens Power Engineering Private Limited and Siemens Limited,[40] CCI ruled that no penalty should be imposed on the parties to the amalgamation, despite initiating section 43A proceedings. However, in the third year of enforcement of the combination provisions, the CCI did not impose a penalty on the parties in an instance of section 43A proceedings for an overdue notice filed under section 6(2) about the *amalgamation of Shree Uttam Steel and Power Limited with Uttam Galva Steels Limited*,[41] as it believed that the notice filing delay was less than a week and was inadvertent.

After the first year of implementing the combination rules, CCI has enforced penalties ranging from the maximum to the minimum in practically all instances of belated notification in line with section 43A. For example, CCI said in *Baxalta's acquisition of Baxter's bioscience company and associated assets*,[42] that it previously regarded it permissible to apply a penalty only where the delay was considerable, defined as at least seventy days with or without the merger having been completed by the parties. Even in cases where mergers were determined to have occurred, CCI took a liberal position and levied a modest penalty due to the parties' cooperation in disclosing essential data and cooperating with merger investigation. However, in one of its previous decisions, in an entirely foreign to foreign transaction involving the formation of a greenfield joint venture (JV) between Johnson and Johnson Innovation, Inc., Ethicon Endo-surgery, Inc., and Google Inc.,[43] CCI imposed a nominal penalty of Rs. Five lakhs on the parties for a 43-day delay in filing a section 6(2)

39 CCI Order under Section 31(1) of the CA with regard to *Tetra Laval BV/ Alfa Laval AB*, Combination Registration No. C-2012/02/40, order dated 12-4-2012 (CCI).

40 CCI Order under Section 43-A of the CA with regard to *Siemens Power Engg. (P) Ltd./ Siemens Ltd.*, Combination Registration No. C-2012/03/43, order dated 19-4- 2012 (CCI).

41 CCI Order under Section 43-A of the CA with regard to *Shree Uttam Steel and Power Ltd./Uttam Galva Steels Ltd.*, Combination Registration No. C-2013/11/140, order dated 31-12-2013 (CCI).

42 CCI Order under Section 43-A of the CA with regard to *Baxter/Baxalta*, Combination Registration No. C-2015/07/297, order dated 8-3-2016 (CCI). In the instant global transaction CCI imposed on the acquirer a penalty of Rs one crore.

43 CCI Order under Section 43-A of the CA with regard to *Johnson and Johnson Innovation Inc./Ethicon Endo-surgery Inc./Google Inc.*, Combination Registration No. C-2015/06/283, order dated 30-12-2015 (CCI).

notice for the unconsummated transaction.

Interestingly, in a previous uncompleted and 'abandoned' foreign to foreign transaction involving the acquisition of 439 million new ordinary shares in DBS Group Holdings by the acquirers, namely Zulia Investments Pte. Ltd. and Kinder Investments Pte. Ltd.,[44] both of which were indirect wholly-owned subsidiaries of Temasek Holdings (Private) Ltd., the CCI imposed a penalty of Rs. Fifty lakhs on the acquire in the instant case, acquirers argued that they received incomplete and incorrect legal advice from their first Indian counsel regarding Indian competition law requirements and that upon receiving confirmation of the requirement to file a section 6(2) notice from a second set of Indian counsel, they immediately took steps to prepare and file the necessary information. Further, they informed CCI that they wished to withdraw the section 6(2) notice, as the Share Purchase Agencies had withdrawn it. On the other hand, CCI rejected acquirers' argument, stating that timely filing and the eventual destiny of the transaction were two distinct concerns.[45] However, in accordance with *Uttam Galva*, in one of the recent foreign-to-foreign transactions involving the acquisition of (remaining) 55.50 per cent of the outstanding shares of Guardian Industries Corporation by KGIC Merger Corporation, a wholly-owned subsidiary of Koch Industries Inc.,[46] CCI decided not to initiate section 43A proceedings after receiving a section 6(2) notice.

In a significant move, the Central Government, in the public interest, exempted all parties to a merger falling under section 5 from filing notice within the thirty calendar days required by section 6(2), subject to the requirements of section 6(2A) and section 43A of the said Act, for five years via MCA Notification dated 29th June 2017.[47] Due to this 'trigger event' exemption, merger parties are now immune from the section 43A penalty provision for derogating from the trigger event-related pre-notification obligation. While pre-notification under section 6(2) remains necessary, the current relaxation will assist parties in providing notice under the abovementioned provision with final documentation reflecting a firm decision on the transaction before its execution. This exemption will provide significant relief to entities engaged in cross-border merger transactions, including foreign-to-foreign merger transactions, particularly those involving multi-jurisdictional

44 CCI Order under Section 43-A of the CA with regard to *Zulia Investments Pte. Ltd./Kinder Investments Pte. Ltd.*, Combination Registration No. C-2013/06/124, order dated 1-8-2013 (CCI).

45 CCI Order under Section 43-A of the CA with regard to *First Blue Home Finance Ltd./DHFL Holdings (P) Ltd./ Dewan Housing Finance Corpn. Ltd.,* Combination Registration No. C-2012/11/92, order dated 3-1-2013 (CCI).

46 CCI Order under Section 43-A of the CA with regard to *Guardian Industries Corpn./KGIC Merger Corpn.*, Combination Registration No. C-2016/11/461, order dated 4-1-2017 (CCI).

47 MCA, F. No. 5/9/2017-CS, (Notified on 12th December 2017).

merger filings, as it will avoid 'imminent' belated filing penalty actions and will instead contribute to 'ease of doing business. This puts India's merger control system in line with most mature competition law regimes, which do not impose a deadline for filing a merger notification with the competition authority.

However, the 'trigger event' exemption does not exclude the prospect of a transaction being partially consummated. Section 6(2) read with section 6(2A) of the CA requires merger parties to wait for CCI clearance in the event of notifiable transactions. As a result, any portion of consummation during the pre-approval stage is susceptible to section 43A penalty procedures. For example, in *Acquisition by Baxalta of the bioscience businessand related assets of Baxter,*[48] according to a Global Separation and Distribution Agreement (GSDA) entered into between the parent (Baxter) and its wholly own subsidiary (Baxalta), CCI, on receipt of section 6(2) notice, observed the global implementation of the transaction, except in certain 'deferred' jurisdictions, including India, upon target business was effectively transferred to Baxalta. It was believed that it would be moved to India after completing the India leg of the deal ('India Separation'). CCI noted that in the case of a global transaction, if the parties notify it only after the execution of the local agreement but not before the (prior) execution of the GSDA, there is a risk that the transaction will be consummated at the global level even before it (CCI) examines it, defeating the very purpose of the suspensory regime of Indian merger control provided under Section 6(2A) of the CA.

V. CCI Approval for the Merger

Once a Section 6(2) notice is received from merger parties, either in Form I or Form II, as the case may be, the CCI is required to reach a *prima facie* opinion under section 29(1) of the CA within thirty working days as to whether the proposed transaction is likely to cause or has already caused an appreciable adverse effect on competition in the relevant market in India.[49] This step marks the start of CCI's phase I inquiry. Additionally, during the phase I examination to form a *prima facie* conclusion, CCI may compel the parties to provide additional material and may even accept the parties' suggested modification(s) (remedies).[50] The phase I inquiry is subject to 'clock stops,' which means that the time necessary by CCI for the parties to provide any material requested by CCI after the filing of a section 6(2) notice will not be considered for thirty working days. Additionally, CCI may request an

48 CCI Order under Section 43-A of the CA with regard to *Baxter/Baxalta*, Combination Registration No. C-2015/07/297, order dated 8-3-2016 (CCI).

49 Combination Regulations, 2011, Regulation 19(1).

50 Ibid., Regulation 19(2).

extra time period of up to fifteen days for evaluating the parties' proposed modification;[51] this additional time period is not included in the *prima facie* opinion timeframe. CCI may accept a proposed transaction during phase I if it determines that the transaction would not have a material detrimental impact on competition or is unlikely to have such an effect. Otherwise, the inquiry progresses to a comprehensive phase II investigation,[52] during which, following receipt of a response to a show-cause notice sent on the parties according to section 29(1), CCI may request a report from CCI's Director-General addressing the transaction's competition concerns. This whole phase II inquiry period is limited to 210 days from the date of receipt of the section 6(2) notification, subject to 'clock stops' and authorized (time) exclusions.[53]

After concluding that the transaction has no present or potential appreciable adverse effect on competition,[54] CCI may approve it,[55] or if CCI determines that the transaction has caused or is likely to cause an adverse effect on competition, the transaction will not take effect,[56] unless CCI is satisfied that the adverse impact can be eliminated through appropriate modification (remedy) and proposes appropriate modification.[57] If the parties do not agree to the change within thirty working days after CCI's recommendation, they may revise the modification.[58] If CCI accepts the submitted revisions, the transaction is approved;[59] if not, the parties will have additional thirty working days to accept the proposed alteration.[60] However, even after that, if the parties do not agree to the adjustment, the merger is judged to have a significant detrimental impact on competition in the relevant market in India and will not be implemented by CCI.[61]

A possible source of significant unfavorable impact on competition in mergers is the inclusion of non-compete provisions in the acquisition agreement. Non-compete agreements

51 Ibid.

52 *Sun Pharmaceutical Industries Ltd./Ranbaxy Laboratories Ltd.*, 2014 SCC OnLine CCI 148; *Holcim Ltd./ Lafarge SA*, 2015 SCC OnLine CCI 51; *PVR Ltd./ DLF Utilities Ltd*., 2016 SCC OnLine CCI 97; *Dow/ DuPont*, 2017 SCC OnLine CCI 66; *Agrium/PotashCorpn*., Combination Registration No. C-2016/10/443, order dated 27-10-2017 (CCI); Allen & Glendhill et al., Merger Regulation in Asia and the EU (2017).

53 CA, 2002, Section 31(11).

54 *Ibid.*, Section 20(4).

55 *Ibid.*, Section 31(1).

56 *Ibid.*, Section 31(2).

57 *Ibid.*, Section 31(3).

58 *Ibid.*, Section 31(6).

59 *Ibid.*, Section 31(7).

60 *Ibid.*, Section 31(8).

61 *Ibid.*, Section 31(9).

are restrictive covenants that CCI may encounter during its review of a potential deal placed by the acquirer on the seller from whom the buyer acquires the firm (acquirer). Non-compete covenants or provisions are often included in corporate company transfers to aid in the first stages of settling into the new firm. However, suppose the acquirer's conditions are too restrictive, preventing the seller (transferor) of the firm from participating in the market for an extended length of time or with an infinite geographical scope. In that case, they are deemed to create serious competition issues. In corporate commercial transactions, such limiting duties might take various forms. When approving mergers, CCI has been cautious about such clauses; and has offered suitable adjustments in such circumstances.[62]

Concerning the compatibility of such restrictive covenants with merger control provisions, CCI determined in a proposed transaction involving the *acquisition of the transferred business by Hospira Healthcare India Private Limited from Orchid Chemicals and Pharmaceuticals Limited*,[63] that such covenants must be reasonable, particularly in terms of the duration of the restraint and the business activities, geography, and geology. In addition, in one of the recent transactions involving *HP Inc.'s acquisition of Samsung Electronics Co. Ltd.'s global printer business*,[64] CCI required the acquirer (HP) to justify non-compete obligations imposed on the seller (Samsung) for five years concerning the target business (Samsung's global printer business) and seven years with respect to printer-related consumables. In this respect, according to Regulation 19(2) of the Combination Regulations, the acquirer voluntarily suggested and accepted a change that would limit the length of both the seller's non-compete duties, notably in reference to India, to three years. Furthermore, as indicated in CCI's recently issued 'guidance notes on non-compete restrictions' for purposes of approving mergers under section 31 of the CA, non-compete restrictions must be 'deemed to be directly related and necessary to the implementation of the transaction'; they cannot be 'ancillary' to the transaction's execution.[65]

VI. Conclusion

While India's *new* merger control system is still in its infancy, it looks to be rapidly

62 Merger Control Comparative Guide - Anti-trust/Competition Law-India www.mondaq.com, https://www.mondaq.com/india/anti-trustcompetition-law/843858/merger-control-comparative-guide (last visited Jan 22, 2022).

63 CCI Order under Section 31(1) of the CA with regard to *Orchid Chemicals and Pharmaceuticals Ltd./ Hospira Healthcare India (P) Ltd.*, 2012 SCC OnLine CCI 67.

64 CCI Order under Section 31(1) of the CA with regard to *HP Inc./ Samsung Electronics Co. Ltd.*, Combination Registration No. C-2016/10/444, order dated 27- 4-2017 (CCI).

65 CCI, Guidance on Non-compete Restrictions, (Issued on 16th December 2017).

strengthening its implementation mechanism. Due to the fact that the contemporary Indian market is inextricably linked to the global market, cross-border merger control, in addition to domestic, is becoming more necessary. Except for a few section 43A penalty appellate cases, India's merger control system seems to 'predominantly' rely on CCI. Interestingly, CCI does not seem to have rejected any merger transactions so far, with just a handful of transactions proceeding to phase II review. If the parties determine that remedies are required to address competition concerns in the transaction, CCI has approved such notified transactions without undue delay by accepting or providing revisions. In general, it is worth noting that CCI resolves merger notifications as quickly as possible while adhering to the time restriction.

CCI penalty processes have been determined to be thorough and relentless in their approach, and penalty imposition was virtually immediate and inescapable for late files. CCI may have avoided imposing a penalty on the parties in one of the almost 'abandoned' transactions, Zulia and Kinder Investments, since the penalty cannot be imposed for the sake of punishment in bona fide conditions. Apart from the text, execution of the law's spirit becomes magnanimous in such instances. While the maximum penalty under section 43A proceedings is one per cent of the total value of worldwide assets or turnover, whichever is greater, in the case of cross-border and entirely foreign-to-foreign mergers that meet financial thresholds and include a mandatory India leg, there appeared to be no clarity regarding the quantum of the penalty to be imposed on the parties. CCI does, however, rely on mitigating circumstances such as inadvertence and inaccurate legal counsel, trustworthy information, complete cooperation and openness, and so forth. They cannot, however, be used in place of explicit guidelines. At the moment, owing to the recent 'trigger event' exemption, section 43A penalty procedures would be significantly reduced. This exemption will allow a substantial number of cross-border and totally foreign-to-foreign mergers to proceed without delay and in a logical manner.

Additionally, it will benefit transactions involving multi-jurisdictional filings; transacting parties will be able to adapt their filings across the countries in which they do business in terms of time and cost-efficiency. However, the 'trigger event' exemption may sometimes persuade merger parties to avoid providing notice before the transaction's completion. Nonetheless, section 43A penalty procedures for 'gun leaping' may be launched correctly. CCI's discretion must be utilized consistently and prudently in determining the size of the punishment in this respect.

Another significant development favoring cross-border and entirely foreign-to-foreign

transactions is the most recent 'target exemption,' which requires a 'suitable' understanding of an entity's division/unit and related assets value and turnover when determining the *de minimis* thresholds for the exemption. Furthermore, CCI's recent publication of 'guidance on non-compete restrictions will significantly assist merger parties in deciding whether restrictions are 'directly related and necessary' to the transaction's execution. Additionally, the CCI must continue to cooperate and interact with different national competition authorities to ensure the effective execution of cross-border merger control.