MERGER AND ACQUISITION: LEGAL ISSUES AND CHALLENGES

Dissertation submitted to National Law University, Assam in partial fulfilment for award of the degree of MASTER OF LAWS

Supervised by
Dr. Thangzakhup Tombing
Assistant Professor of law

Prepared by
Prabhat Singh
UID- SM0220019
Semester- Second
Year- 2021

National Law University, Assam

July/2021

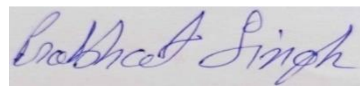
DECLARATION

I, PRABHAT SINGH, do hereby declare that the dissertation titled "Merger and Acquisition: legal Issues and Challenges" submitted by me for the award of the degree of MASTER OF LAWS/ ONE YEAR LL.M. DEGREE PROGRAMME of National Law University and Judicial Academy, Assam is a bonafide work and has not been submitted, either in part or full anywhere else for any purpose, academic or otherwise.

Date:

July 22, 2021

NAME OF THE CANDIDATE



UID- SM0220019

National Law University and Judicial Academy, Assam

CERTIFICATE

This is to certify that Prabhat Singh has completed his/her dissertation titled "Merger and Acquisition: Legal Issues and Challenges" under my supervision for the award of the degree of MASTER OF LAWS/ ONE YEAR LL.M DEGREE PROGRAMME of National Law University and Judicial Academy, Assam.

Date: July 22, 2021

Dr. Thangzakhup Tombing

Assistant professor of law

National Law University and Judicial Academy, Assam

ACKNOWLEDGEMENT

I feel proud to acknowledge the able guidance of our esteemed Dr. Thangzakhup Tombing, Assistant Professor of law, National law University and Judicial Academy, Assam, which supported me through the preparation of this dissertation.

I acknowledge with pleasure unparallel infrastructural support that I have received from National law University and Judicial Academy, Assam. In fact, this work is the outcome of outstanding support that I have received from the faculty members of the college,

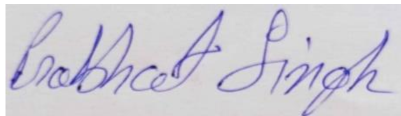
I find this opportunity to thank the library staff of the National Law University and Judicial Academy, Assam.

This research work bears testimony to the active encouragement and guidance of a host of friends and well-wishers.

It would never have been possible to complete this study without an untiring support from my family.

I am greatly indebted to the various writers, jurists and all others from whose writings and work I have taken help to complete this dissertation.

Date- July 22, 2021



Name of the student

UID- SM0220019

Table of Statutes

1890- Sherman Antitrust Act of U.S.

1969- The Monopolies Trade and Restrictive Practices Act.

2002-The Competition Act.

2005- Austrian Federal Cartel Act.

2011- SEBI takeover code.

Table of cases

1. K.K.Modi v. SAT
2. Kishore chhabria v. chairman, SEB.
3. Ashwin K Doshi v Securities and Exchange Board of India
4. Rhodia SA v Securities and Exchange Board of India.
5. Sandip Save v Securities and Exchange Board of India.
6. Subhkam Ventures (I) Private Limited v Securities and Exchange Board of India.
7. Samir Agrawal v. ANI Technologies, 2018.

Table of Abbreviation

1.	AIR	All India Reporter
2.	Anr	Another
3.	Ch	Chapter
4.	Corpn.	Corporation
5.	CCI	Competition Commission of India
6	CG	Corporate Governance
7.	Del	Delhi
8.	DLT	Delhi Law Tribunal
9.	EC	European Commission
10.	IPAB	Intellectual Property Appellate Board
11.	JIPR	Journal of Intellectual Property Rights
12.	Ltd	Limited
13.	Mad.	Madras

14	MBR	Mandatory Bid Rule
15.	M&A	Merger and Acquisition
12.	NCLA T	National Company Law Appellate Tribunal.
	NCLT	National Company Law Tribunal
13.	OA	Original Application
14.	Ors	Others
16	SC	Supreme Court

Contents

Table of Statutes ... 3

Table of cases ... 4

Table of Abbreviation ... 4

Chapter One ... 7

Introduction ... 7

Aims ... 8

Objectives ... 8

Literature Review ... 9

Research Questions ... 10

RESEARCH METHODOLOGY ... 10

Overview of Chapters ... 11

Chapter two ... 12

Merger and Acquisition: Types and Motives ... 12

Merger ... 12

Acquisition ... 13

History of merger and acquisition ... 13

Types of Mergers and Acquisitions ... 15

Motives Behind Merger and Acquisition ... 16

Chapter Three 19
Merger and Acquisition and Corporate Governance 19
LEGAL FRAMEWORK OF M&A AND CG IN INDIA 21
The dichotomy of takeover defenses 22
Other concerns 23
REVAMPING CORPORATE GOVERNANCE IN LIGHT OF CORPORATE RESTRUCTURE 24
INDEPENDENT DIRECTORS 25
Merger Syndrome: Stakeholders 26
Insufficiency of data 27
Takeover defense v. Non-Frustration Rule 27
Cross-Border Issues 30
Role of Media 31
Chapter Four 33
Concept of control concerning merger and acquisition 33
Introduction 33
Different shades of control 34
The Implications of 'Control' for the MBR 36
THE QUANTITATIVE APPROACH TO 'CONTROL 37
THE QUALITATIVE APPROACH TO 'CONTROL' 40
Board Control 40
Management (or Operational) Control 41
Mixed Approach: Indian Experience 43
Single Largest Shareholder 44
Contractual Rights: Active vs Passive Control 44
EVALUATING THE APPROACHES TO CONTROL 47
Exemptions 50
Chapter five 52
Competition law vis-à-vis merger and acquisition 52
The Evolution of Competition Law in India 54
Competition law in India and other jurisdictions 57
The big issue to be discussed 60
Artificial Intelligence — the mischief monger 60
Samir Agarwal v. ANI Technologies 62
Review Committee report on Competition law 65
Wider Economic principle 69
CHAPTER SIX 71

Cross-Border Merger and Acquisition 71
Competition policy 72
CCI's Review of Combination 74
JET-ETIHAD CASE 75
Examining the Mylan-Agila Combination 79
NON-COMPETE CLAUSE 80
CHAPTER SEVEN 83
Conclusion and Suggestions 83
Bibliography 85

Chapter One

Introduction

Source- https://cdn.corporatefinanceinstitute.com/assets/motives-for-mergers1.jpeg

Merger and Acquisition is such a system through which two business entities join hands to run the business most profitably and efficiently. Most M&A transactions are friendly,

some transactions may be hostile. M&A transactions are very common in the corporate world. In India economic reforms started in the 1990s which paved the way for liberal economic policy. This leads to privatization, modernization, and commercialization which further pave the way for efficient and optimal use of resources. In this way, more competition started among companies so companies started to strive for economies of scale, expanding the business into new markets, etc. To achieve these goals companies nowadays go for mergers and acquisitions.

Merger signifies that, two entities often of the same size have decided to form a new business entity. Often mergers happen due to synergies between both entities and with mutual consent. In Acquisition one company buys another company and becomes the owner. An acquisition can be hostile because it often takes place between companies that are not of the same size. An M&A transaction is a very complicated and challenging process in which many lawyers, investment banks, accountants are involved. From the legal point of view, an M&A transaction has to go through various compliances from many regulatory authorities. In India, many laws, rules, and regulations have been made for faster and efficient M&A transactions. However, still, there is scope for reform in the legal framework for an M&A transaction in India.

Aims

This dissertation paper seeks to highlight the corporate governance and other competition law issues in an M&A transaction which arise under statutes like SEBI takeover code, 2011 company act, 2013 competition act 2002, etc. many new challenges have come up in the modern era. These issues are also complex. there are various instances where Regulatory authorities have taken a different position than that of courts which causes delays in the transaction which is not well for ease of doing business. This paper also seeks to understand the position held by regulatory authorities as well as courts in defining many terms under different statutes related to M&A transactions in the digital market as well as the physical market.

Objectives

- To study the relationship between corporate governance and merger and acquisition.
- To study the legal issues in mergers and acquisitions.
- To understand the various terms defined by courts in the dispute related to merger and acquisition.

- To understand the competition law vis-à-vis merger and acquisition in the digital market.

Literature Review

- Merger control in India, law, and practice authored by TARUN MATHUR explain in detail the various concepts and theories of merger and acquisition. This book also highlights the various laws related to mergers and acquisitions in India.
- The report of the Review Committee on Competition Law explains in detail competition law in India. It also recommended various reforms in competition law as well as competition commission.
- Corporate Governance in M&A Transactions Author(s): UMAKANTH VAROTTIL Source: National Law School of India Review, 2013, Vol. 24, No. 2 (2013), pp. 50-61 describe the relationship between corporate governance and merger and acquisition transaction.
- EXPLORING THE INTERFACE BETWEEN CORPORATE GOVERNANCE AND M&A: A QUEST FOR VALUE CREATION by Aarthi Sashi and Akrathi Shetty also highlights some issues of corporate governance and merger and acquisition.
- INDIRECT ACQUISITIONS UNDER THE TAKEOVER CODE: THE FAIRNESS-EFFICIENCY SPECTRUM AND LESSONS FOR REGULATION by Gautham Srinivas, Pranav Agarwal and Sai Saket Rachakonda explains the legal façade of indirect acquisition in India.
- ANTI-ACQUIRER AND PRO-SHAREHOLDER? AN ANALYSIS OF THE SEBI (SUBSTANTIAL ACQUISITION OF SHARES AND TAKEOVERS) REGULATIONS, 2011 by Karan Talwar and Nivedita Saksena analyse the SEBI takeover code 2011 in detail.

- Cross Border Merger Control by the Competition Commission of India: Law and Practice Ajay Kr. Sharma explain how competition commission works in a cross-border merger and acquisition.
- Indian Mergers and Acquisitions: Environmental Analysis in Current Competitive Business Environment by Vikas Bharara and Gopal Singh Latwal examines the emerging trends of various companies based on published data. The paper would also reveal trends, progress, successful implementation, reasons of failure and legal framework relating to mergers and acquisitions.
- LAW AND PRACTICE OF TAKEOVERS IN INDIA - AN ANALYSIS by Stephen Mathias highlights some legal lacuna in the SEBI takeover code and also suggest some reforms.

Research Questions

1. Is there any relation between M&A and corporate governance?
2. What is the meaning of the term 'CONTROL' in SEBI takeover code, competition law and company law?
3. Mergers in the digital market have brought up issues of a probable competition concern of taking over huge datasets. In such a merger, it may so happen that neither of the parties qualifies under the conventional 'asset' and 'turnover' limits, however, they might be in a position to distort competition owing to the possession of a large amount of data. In this situation what are the possible changes we need to bring in our competition law?
4. Can competition law also govern the utilization of comparative algorithms to distort competition without the proof of any unlawful agreement?

RESEARCH METHODOLOGY

This dissertation paper has been prepared with recourse to Legal doctrinal method of research. It rests on the information provided by both primary and secondary sources of data. Case laws, statutes as well as law journals, law reviews have been referred to while preparing the paper. An effective combination of various sources of data has been used by the researcher to bring out the concept of merger and acquisition and thereafter,

trace its various contours. The Bluebook 20th edition of citation has been used by the researcher to provide footnotes throughout the paper.

Overview of Chapters

CHAPTER 1: Introduction

CHAPTER 2: merger and acquisition: types and motives

This chapter seeks to describe the meaning of merger and acquisition and other forms of corporate restructuring and also seeks to understand the reasons behind a M&A transaction.

CHAPTER 3: Role of corporate governance in Mergers and Acquisitions

This chapter talks about corporate governance and M&A.

CHAPTER 4: Concept of control and Mergers and Acquisitions

This chapter seeks to define the term 'control' under various laws. And also seeks to understand that whether meaning of control can be harmonised in various laws.

CHAPTER 5: Competition law vis-à-vis Mergers and Acquisitions

This chapter discuss the competition law and policies regarding merger and acquisition in digital market.

CHAPTER 6: cross-border merger and acquisition in India

This chapter discuss cross-border merger and acquisition and associated legal issues in India.

CHAPTER 7: suggestions and conclusion

This chapter includes conclusion and some suggestion.

Chapter two

Merger and Acquisition: Types and Motives

“The phrase Mergers and Acquisitions refers to the aspect of corporate strategy, corporate finance, and management dealing with the buying and selling and combining of different companies that can aid, finance or help a growing company in a given industry grow rapidly without having to create another business entity”

The above describes the concept of mergers and acquisitions in a very concise way. There are many factors for companies to involve in M&A transactions, like to enter into a new product market or geography, to increase market strength in the existing market, to be competitive, or for various regulatory factors as sometimes governments make it mandatory to tie up to run business in their economy. it is vital to describe that in the existing economic situation M&A has become an important tool for business entities for expansion and growth, as a successful M&A strategy can be a differentiating factor for a successful organization.

Both terms merger and acquisition are mostly used interchangeably in the business world. There is some difference between merger and acquisition which are discussed below[1]:

Merger

A merger is an agreement between two entities through which both entities form a new company by uniting existing companies. In merger assets and liabilities of the seller are transferred to the seller.

Commonly merger is executed as stock swap merger and cash-out merger. Stock swap mergers are often executed between two legally separated entities and almost in the same size entities. Sometimes it is also called merger equals. Mostly merger is voluntary. After the merger, only one entity or firm survives and shareholders of the target company or firm receive the voting share in surviving company or firm.

[1] UKDiss.com, https://ukdiss.com/examples/m-and-a-as-a-growth-strategy.php#:~:text=%E2%80%9CThe%20phrase%20Mergers%20and%20Acquisitions%20refers%20to%20the,rapidly%20without%20having%20to%20create%20another%20business%20entity%E2%80%9D, May 10, 2021

In a cash-out merger, the target firm's shareholders do not want any form or any part of the target firm's share. They receive cash, non-voting preferred or common share, or debt issued by the surviving firm or company in exchange for their share.

Acquisition

An acquisition is the acquisition of shares or voting rights in or control over a target company. So, an acquirer who can be anyone, a natural person or a company, can acquire a company by three modes:

1. the acquiring of the shares, or
2. acquiring of the voting rights, or
3. acquiring of the control.

Acquisitions have the following features:

- The acquisition is the part of firm's development plan
- It is unilateral
- The acquisition takes less time than a merger
- Regulations arising out of the contract are simpler.

History of merger and acquisition

History of merger and acquisition are defined as waves by various authors. Different waves were decided as per the behavior of US business organizations. A prominent author Weston classified merger and acquisition movements into three waves as per his study of US business behavior.

Merger waves are the very basic form of describing the merger movement. These waves were interpreted by different authors differently based on their way to see them. But it would be wrong to consider that every business entity had followed a similar strategy as described in the various waves.

It is said that the first wave of mergers and acquisitions started after the Sherman act in1890. Before this, polypoly market structures were prominent.

The economic history has been classified into merger and acquisition waves as per merger activities in the world as[2]:

Period	Name	Facet
1889 – 1904	First Wave	Horizontal mergers
1916 – 1929	Second Wave	Vertical mergers
1965 – 1989	Third Wave	Diversified conglomerate mergers
1992 – 1998	Fourth Wave	Hostile takeovers; Corporate Raiding
2000 –	Fifth Wave	Cross-border mergers

The Great merger movement that occurred between 1895 to 1905 was held as the US business concept. It was held that during this period 1800 small firms consolidated themselves into giant and powerful companies to dominate the market.

The 2nd wave (1916-1929) witnessed more merger activities and the prime reason for those mergers was vertical integration. Firms wanted to achieve independence for raw materials and to attain technological gain.

Third-wave witnessed the diversification seek by big conglomerates in the '60s. During this merger wave, the process reached to pinnacle.

The fourth wave witnessed an increase in the hostile takeovers by the big companies and firms. Many weak companies were consumed by the larger ones.

[2] Id. at. 5

It is supposed that the fifth wave started from the year 2000 onwards and has witnessed an increase in cross-border mergers and acquisitions. Because of globalization increase in cross-border M&A has been witnessed. This was surprising for even many M&A firms because the cross-border M&A transaction involves many complexities and often got failed.

Types of Mergers and Acquisitions

There are various types of mergers and acquisitions[3] based on the business structure. The types can depend upon the type of merging companies or the way of financing the M&A transaction.

Below are classification of merger depending upon the relationship of the merging entities:

- Horizontal Merger- when merging entities have the same product line and market and directly compete with each other. Such a merger is called a horizontal merger.
- Vertical Merger- when two merging entities operate at various stages of production in the same industry. Where one entity is the manufacturer and the other entity is the supplier of raw material or seller in the same industry.
- Market Extension Merger- when both merging entities sell the same product but in different geographies or markets.
- Product Extension Merger- when both merging entities operate in the same market and sell different but related products.
- Circular Merger- circular merger is almost the same as the product extension merger but here products being sold by both entities are completely different. After this type of merger, the same infrastructure is used to sell those unrelated products and both entities share the dealership.
- Conglomeration- it takes place between the entities who have no common business area.

[3] Supra note 1 at 5

The merger can also be divided based on the financing of merger transaction as described below:

- Purchase Merger- In this one company buys another company through cash or by issuing the debt instrument.
- Consolidation Merger- In this type of merger both companies form a new company and both the companies are purchased by the new company and combined under this.

Classification of Acquisition are discussed below:

- Amalgamation- under this type of acquisition a new entity is formed by uniting the companies. It is voluntary.
- Acquisition/Takeover- In this type one entity acquires another entity with total or controlling interest. The acquired entity may exist as a subsidiary entity or may be liquidated completely.
- Sale of Assets- In this type one entity sells its all assets and wind up.
- Holding Company Acquisition- In this one company acquire the total or major stock of the target firm. The main purpose of this type of acquisition is to gain control of the target company.
- Reverse Merger- In this type private companies acquire public listed shell companies. The purpose behind this type of acquisition is to get listed publicly within a short period.

All mergers have the common aim that is to form synergies between both entities consequently makes the value of the combined entity more than both entities.

Motives Behind Merger and Acquisition

There are various reasons for mergers and acquisitions. Some of the prime motives are given below[4]:

1. Value Creation

   Normally increasing the wealth of the shareholders is the main motive of both companies behind an M&A transaction. The combining of two entities results

[4] Corporatefinanceinstitute.com, https://corporatefinanceinstitute.com/resources/knowledge/deals/motives-for-mergers/, May 12, 2021

in synergies between both entities which increase the value of the new company. Synergy signifies that the value of a new entity surpasses the value of both entities. There are two types of synergies-

- Revenue Synergy

  when revenue-generating capability increases, it is called revenue synergy. Some examples are product diversification, R&D activities, etc.

- Cost Synergies

  In this cost of the company got reduced and this type of merger led to the economies of scale, the introduction of new technology, etc. which ultimately results into cost reduction and sometimes even eliminate some cost.

2. Diversification-

   Diversification is the common objective for an M&A transaction. The company may diversify its products or services or diversify its area of operation by entering into the new geographic area through an M&A transaction. Sometimes companies also diversify the risks related to the operation of the business. Market-extension, product-extension, and conglomerate mergers are some of the examples of M&A transactions that are guided by the reason of diversification.

3. Acquisition of Assets

   A merger can be driven by the motive of acquiring a particular asset, which can not be acquired by using any other method. It is quite common in M&A transactions that companies go for the merger to obtain any unique asset which can be beneficial for the company and if developed internally it will take a long time like any new technology.

4. Increase in Financial Capacity

   Often companies face financial crises in financing their operations or financing their new business development project. In this situation company goes for mergers and transactions, As a result, the new entity has now more capacity to finance the business operations.

5. Tax purposes

   If a company has substantial taxable income, it can go for a merger with a company that has significant carry forward losses. In this way, tax liability of the combined entity will reduce drastically than the single entity.

6. Incentives for managers

   Sometimes personal interest of top management become the cause for M&A transaction. A bigger company will pay more to its managers and sometimes managers also see it as a matter of pride like building the big company or empire. These reasons sometimes motivate the top management for M&A transactions.

Chapter Three

Merger and Acquisition and Corporate Governance

Since the last two decades significance of corporate governance has increased in India and the world. Similarly, mergers and acquisitions have also attracted the attention of research scholars globally and become a subject matter of interest. This chapter has tried to find out the role that M&A plays in corporate governance and vice-versa.

A symbiotic relationship

Both corporate governance and M&A have the same aim, which is the value creation and growth of the business. This can be possible by making a profit with the end goal of enhancing efficiency. SEBI's Kumar Mangalam committee also observed that value creation for the shareholders by not ignoring the interest of other stakeholders is one of the objectives of corporate governance. Before going ahead, it would be fine to establish corporate governance practices independently.

In the modern business world, corporate governance has become very popular. In India, corporate governance talks have been started after the Satyam scam in 2009. Which raised the serious issues of corporate management in India. About two decades ago, corporate governance was not a much-known subject in the world. It has gained significance in the era of the late '80s and early 90's when the corporate field in many countries was struggling with poor corporate practices and unethical policies. The US Business Round Table on Corporate Governance, 1997 states that: "Corporate governance is not an abstract goal, but exists to serve corporate purposes by providing a structure within which stockholders, directors, and management can pursue most effectively the objectives of the corporation."[5]

Confederation of Indian industry had formed a code on corporate governance for reforming the corporate practices in India[6]. The securities and exchange board of India (SEBI) also form the Kumar Mangalam Birla committee for the reformation of corporate governance in India. On the recommendation of this committee, clause 49

---

[5] Businessroundtable.org, https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans, June 16, 2021

[6] Ecgi.global, https://ecgi.global/sites/default/files//codes/documents/desirable_corporate_governance240902.pdf, June 16, 2021

was introduced in the listing agreement.[7] Some other committees formed in this regard are the Naresh Chandra Committee and N.R. Narayana Murthy committee appointed by SEBI and J.J. Irani committee formed by the ministry of corporate affairs.

Corporate governance is not a final set of rules but is an ever-evolving process. Corporate governance determines and defines the role of various stakeholders in a company or corporation like the board of directors, managers, CEO, etc. corporate governance is beyond the set field of law. It comes mainly from the mindset of the management and culture of the company and it can-not be defined and regulated by legislature alone.[8] Issues like merger and acquisition, fiscal management of the company, relations between owners and managers, organizational structure are studied and analyzed under the ambit of corporate governance.

After an intense period of M&A transactions, a period of fewer M&A transactions came. These highs and lows occurred due to market economies and fiscal shifts.[9] This happens because successful M&A transactions can enhance the business performance of the company which depends on multiple factors. The study of merger effects on the business efficiency of listed companies in India, understanding the trend variations would be good from practical and theoretical aspects.

The culture and environment setup by top management in the company plays an important role. It permeates among the low offices of the company and reflects in every relationship such as investors, employees, suppliers, etc. As a result of poor top management low efficiency in the company occurred subsequently that company becomes susceptible to be acquired or merged. After the merger and acquisition company gets new top management which sets high standards of governance in the company which ultimately serves its purpose.[10]

---

[7] Sebi.gov.in, https://www.sebi.gov.in/sebi_data/commondocs/corpgov1_p.pdf, June 16, 2021

[8] D. GEETA RANI & R.K. MISHRA, CORPORATE GOVERNANCE - THEORY & PRACTISE, Excel Books, 1st ed. 2013.

[9] K. GUGLER, THE ECONOMICS OF CORPORATE GOVERNANCE AND MERGERS, Edward Elgar, 1st ed. 2008.

[10] Yong Liu &Yongqing Wang, Performance of Mergers & Acquisitions under Corporate Governance Perspective, 2013, OPEN J. OF SOC. SCI, 17-25.

LEGAL FRAMEWORK OF M&A AND CG IN INDIA

There are various principles on which the legal structure of corporate governance stands out. These principles are fairness, transparency, accountability, and equal treatment of all stakeholders of the company, etc. The shareholders, board of directors, and managers are the three prominent components of corporate governance.[11]

Corporate governance in India is regulated by various legislation like companies act 2013, SEBI act, 1992, securities contract regulation act, 1956, and various rules and regulations framed under these regulations. There are many authorities to enforce these legislations, registrar of companies, SEBI, serious fraud investigation office, and stock exchanges for listed companies, etc.

The key component of corporate governance concerning merger and acquisition is transparency and fairness. The introduction of clause 40 of the listing agreement was the 1st attempt concerning the regulation of takeovers in India. This class incorporated the requirement of a public offer in case of acquisition of 25% voting rights in a company.[12] The SEBI (substantial acquisition of shares and takeovers) Regulations 2011 or generally known as The SEBI takeover code 2011 has been implemented to increase the transparency and fairness in the transactions related to the substantial acquisition of shares and takeovers to protect the investor's interest in the security market. The Bombay High Court in K.K. Modi v. SAT[13] also held that: "The Regulations have been framed to protect the interests of investors in securities, and to promote the development of and to regulate the securities market and for matters connected therewith or incidental thereto. The regulations deal inter alia with the substantial acquisition of shares in companies by an acquirer. They do not, in any manner, inhibit the right of the owner of shares to sell his shares to a willing purchaser. The law leans in favor of free transferability of shares."

In Kishore Chhabria v. chairmen, SEBI[14], the securities appellate tribunal, Mumbai highlighted the aims and objectives of the SEBI takeover code. The tribunal held that the nature of the code is regulatory and remedial in three aspects:

---

[11] AKIRA TAWMURA, CORPORATE GOVERNANCE: JURISDICTIONAL COMPARISONS, 141, Anderson Mori et. al. eds., European Lawyer 1st ed. 2013.

[12] Barik, Nikhilesh, Takeover Defenses and Corporate Governance.papers.ssrn.com, http://dx.doi.org/10.2139/ssrn.2039844, June 22, 2021,

[13] K.K.Modi v. SAT, (2001) SCC OnLine Bom 969.

[14] Kishore chhabria v. chairman, SEBI, (2003) SCC OnLine SAT 23.

1. To ensure that the management of the target company is informed of the substantial acquisition.
2. To maintain stability in the security market in the process of substantial acquisition.
3. To secure the interest of small investors by ensuring that they have been offered a choice either to remain or exit.

The code also secures the market by ensuring that transactions in the market happen in a fair, equitable, and transparent manner specifically chapter V of the code deals with disclosure requirements in detail. The bove observations establish that takeover as a corporate restructuring tries to create maximum value for the shareholders with minimum collateral effects. Though sufficient laws are in place dealing with the two practices however sometimes implementation falls short of requisite standards.

The dichotomy of takeover defenses

It is said that M&A transaction is a double-edged sword. While it deals with managerial inefficiencies effectively but sometimes increases it also. The dichotomy of corporate governance is a major example of this. This dichotomy defeats the purpose of corporate restructuring which is value creation. Anti-takeover measures are the methods used to safeguard the company and its shareholders from unsolicited takeovers attempts. Unsolicited takeovers attempts are those attempts that are deemed to be not in the good interest of the company by the board of directors. There are various anti-takeover measures. Some of them are following:

1. Poison pills- It is a defensive technique. New shares are issued to the shareholders except to the threatening shareholders which reduces the control of the threatening shareholders.
2. White Knight strategies- under this friendly company buy the target company which prevents the hostile company.
3. Crown Jewels- under this, most attractive assets are sold to the friendly buyer or spin off the assets into third-party subsequently hostile buyer loses interest in the target company.
4. Poison puts- under this bond issued by the target company brought back before the maturity date.
5. Greenmail- under this target company buyback its share when substantial shareholders threaten or attempt a hostile takeover.

6. Defensive recapitalization- under this target company increases its debt capital by repurchasing its share. Subsequently, become unattractive for the hostile bidder.[15]

These anti-takeover measures gave birth to the dichotomy vis-à-vis corporate governance. These defences become an obstacle in the formation of synergies between the companies which raises some issues. Practically these anti-takeover defense dichotomies are put in work to check the hostile takeovers but these hostile takeovers may create the right mechanism for value creation. However, it is also true that in the absence of these anti-takeover measures many companies will expose to hostile takeovers. In both cases, the corporate governance issue came out. If we go for one principle then the other principle of corporate governance is sacrificed.

Other concerns

Consolidated or concentrated ownership is one of the key elements of the corporate world in India. This type of ownership affects M&A transactions. Concentrated ownership gave rise to another anti-takeover measure created by promoters. An empirical study suggested that in the major Indian companies, insider controllers have the major portion of stakes.[16] Even when the value creation can be possible only by corporate restructuring, the concentrated ownership or promoters can set aside the scheme due to fear of losing control.

Another thing that can misdirect the M&A transaction from its aim of value creation is the CEO hubris which creates a variation of takeovers. Unlike the anti-takeover measures, CEO hubris has contributed significantly to the growth of M&A activities. CEO hubris is the overvaluation of the target company due to overconfidence or pride exaggeration. This pride exaggeration can come out from the media hype, recent good performance of target company, etc. Due to overconfidence CEO often miscalculate the possible synergies between target and acquiring companies and falls prey to greater synergies than actual possible synergy. CEO overvalued the target company and due to overconfidence

---

[15] Kavita kumawat, merger and acquisition 314 V1 pdf, 2nd ed.2013, Mergers and Acquisitions 314 v1 PDF | Consolidation (Business) | Mergers And Acquisitions (scribd.com), 15 june 2021

[16] GEIS GEORGE S, 'SHAREHOLDER POWER IN INDIA' IN RESEARCH HANDBOOK ON SHAREHOLDER POWER: CHELTENHAM, UK AND NORTHHAMPTON, MA USA, 592-610 (Jennifer G Hill et. al. eds., Edward Elgar Publishing 1st ed. 2015).

overestimate his ability to enhance value creation after the restructuring. According to the study of ROLL on the total of M&A, the most prominent motive behind the increased M&A activity was CEO hubris.[17]

The stock market overvaluation hypothesis also contributes to the enhancement of M&A activities. If the shares of a company are overvalued in the stock market, top management uses these overvalued stocks as a cheap currency to buy the target company unless the stocks of the target company are not more overvalued. Shareholders of the acquirer company get some benefit but this does not result in synergies necessarily[18].

To reduce internal management issues like CEO hubris, top management incentives, it is better to align the interest of these people with the company. This can be done by putting in place an effective incentive mechanism for the top management. This will surely help in preventing the management from being swayed by the acquirer's offer. For M&A transactions, it is very important to take into consideration both sides of the coin. On one side M&A sought to improve the managerial inefficiencies on the other hand it can also abet the process. Keeping in mind the relationship between corporate governance and corporate restructuring, a well thought and efficiently managed M&A transaction is a must to give ample space for value creation. Bad M&A transactions affect corporate governance in a negative way however solution to this problem is corporate governance itself.

REVAMPING CORPORATE GOVERNANCE IN LIGHT OF CORPORATE RESTRUCTURE

"No rule, no regulation, indeed no law, which deals with dynamically evolving economic situations and circumstances and seeks to resolve constantly varying economic interests and problems in a fast-growing economy, can hope to have a permanent not even along ending life."[19] This is the observation made by the justice P.N. Bhagwati committee on the takeover in 1997. This observation rightly pointed out the legal intricacies between corporate governance and corporate restructuring.

[17]Richard Roll, The Hubris Hypothesis of Corporate Takeovers, 59 J. OF BUS. 197-216 (1986).
[18] A. Shleifer & R. Vishny, Stock market driven acquisitions, 2003, JOURNAL OF FINANCIAL ECONOMICS 295-311.
[19] N.R. SRIDHARAM AND P.H. ARVIND PANDRAN, GUIDE TO TAKEOVERS AND MERGERS, 1039, 1st ed. (LexisNexis Butterworths Wadhwa), 2010.

In the early 2000s, a significant rise can be seen in the M&A activities in India which slowed down from 2010 to 2013 and again gained momentum in 2014. Ernst and young study say that $22.6 billion is the value of aggregate disclosed deals in the M&A market in India in which cross-border deals have a share of $17.8 billion.[20]

From the above-said facts, it can be said that cross-border M&A holds a major portion of M&A activity in India. Growth in the Indian economy has led to greater value creation in Indian companies. In lieu of this, foreign investors started taking interest in Indian companies. Indian companies have also started investing in foreign firms since 2000. From 2006 to 2008, Indian companies have undertaken multi-billion deals in cross-border M&A transactions especially in the US and UK.[21] From this, we can see the expansion of M&A transactions in the Indian corporate world.

India is a developing country so its laws, rules, and regulations. For constant growth, Indian corporate regulations need to be evolved at par with the global scenario. Though many committees have been formed from time to time. there is still room for improvement. This section of the chapter will discuss some prominent issues regarding the same and require attention.

INDEPENDENT DIRECTORS

It is believed that independent directors are a prominent tool in good corporate governance. Some recent issues like TATA-Mistry and INFOSYS with VISHAL SIKKA came to light in this regard. These issues have raised questions about the role of independent directors and their independence. If such an important tool of corporate governance is not efficient, it can also be a cause of value degradation in any M&A transaction. Mr. Nitin Potdar, a famous M&A lawyer in India accurately pointed out that- "if mere compliance served as the litmus test for corporate governance, there exists no problem in the Indian situation. All corporations have a list of corporate governance compliances in place. But the question as to their effective functioning is what causes the problem." To solve this problem, he suggested a two-tier board mechanism- one is

---

[20] Ernst & Young, Indian M&A Transactions on Rise, Reflect Global Trends, E&Y Newsroom http://www.ey.com/in/en/newsroom/news-releases/ey-indian-mand-a-transactions-on-rise-reflect-global-trends, June, 15, 2021.

[21] Rbi.org, competition and consolidation, https://www.rbi.org.in/scripts/PublicationsView.aspx?id=10495, June, 16, 2021.

supervisory board and the other is management board. In the present single system, independent directors and executive directors more often have differences on many issues in the company. If this issue continued and does not get resolved, it then goes to promoters and shareholders, who are often guided by personal interest and ignores the interest of the company as a whole. This also has an impact on the M&A transaction, which restores the company's entirety.

The two-tier board system has a successful history in Germany where the *Vorstand* (the executive board) takes policy decisions and those decisions are reviewed by *Aufsichtsrat* (the supervisory board). These two boards have no overlapping members.[22] If India introduces this system, this will have a huge impact on corporate governance in India. It will increase the effectiveness of the board and consequently will have a positive impact on M&A transactions, which will be beneficial for the company in the long term.

Merger Syndrome: Stakeholders

Corporate restructuring has an impact almost on every stakeholder related to the company but the degree of impact varies. Merger syndrome as the phenomenon was brought to light by Marks and Mirvis.[23] Merger syndrome as a phenomenon explains the behavior changes of the employees and managers by knowing about the M&A deal. Most employees of the target company have more impact of the deal than the other stakeholders.

The most common concern of the employees of the target company is a job security issue, distrust, lowered productivity, etc. which are caused by post-merger uncertainties. Other stakeholders are customers (they are worried about disruption and break in services during the process also have doubts about the post-merger quality of services and products), lenders (when payment of the acquired firm is made by the debt, they worried about the performance of the merged firm and express concern whether firm repays its debt), venders (they have a concern about their payment on time for supplying the goods and services to the company), etc.

---

[22] Nitin Potdar, Why two-tier board structure is suitable for Indian companies, https://www.vccircle.com/why-two-tier-board-structure-is-suitable-for-indian-corporates/, June, 16, 2021.

[23] Mitchell Lee Marks & Philip H Mirvis, Merger Syndrome: Stress and Uncertainty, 1985, 70.

It is pertinent that these stakeholders have an interest in the company.[24] They should be updated accordingly from time to time. The corporate governance mechanism should include the issues of these stakeholders in its framework and should ensure that the company caters to their interests properly.

Insufficiency of data

Ms. Afra Afsharipour pointed out that- "empirical research on Indian M&A agreements and practices, even for public company transactions, does not appear to exist. Most M&A deals in India involve private acquisitions. But private acquisition data is scarce as the implicit assumption is that the scarce data available on public acquisitions will carry over to the private ones, although they are, in fact, vastly different." To create an accurate scheme of arrangement in an evolving M&A market in India, it is very important to decipher the various façade of the Indian market in this regard.[25] Uday Kotak committee has also suggested that something should be done to increase disclosure standards, strengthen independent boards, and enhance fairness and transparency concerning corporate governance.[26] If we implement these suggestions can become a positive step towards getting more accurate data in this field of the Indian market. Which subsequently will lead to a more accurate and wide study in this regard.

Takeover defense v. Non-Frustration Rule

Anti-takeover measures are a hot topic for debate and it is widely debated also. On one hand absence of the anti-takeover measure can leave the companies unguard and unarmed against the threat of hostile takeovers, on the other hand, these measures can also be an obstacle in the path of efficient corporate restructuring.

According to the Non- frustration rule, the target board can-not act in such a manner that prevents shareholders from deciding the merit of bids. It prevents the board from

---

[24] David King & Richard Taylor, Beyond the Numbers: Seven Stakeholders to Consider in Improving Acquisition Outcome, 2012, GRAZIADIO BUSINESS REVIEW, 1-5.

[25] Aarthi Sashi and Akrathi Shetty, Exploring the Interface Between Corporate Governance and M and A: A Quest for Value Creation, (2018) 2.3 JCLG 28.

[26] K.R. Srivats, SEBI forms committee on corporate governance, Business Line http://www.thehindubusinessline.com/markets/sebi-forms-committee-on-corporate-governance/article9719811.ece, June, 17, 2021.

resisting the hostile takeover except on the merit ground. In the UK there is a provision for the non-frustration rule which is inclined towards shareholders. In the USA takeover defenses are strong which is inclined towards the board.

In the Re savoys hotels ltd.[27] Case in the UK this issue discussed by the chancery Division, a shareholder wants to get control of savoy hotels ltd. via a scheme of arrangement. The shareholders approach the court to get the order from the court for convening the meeting of shareholders. Justice nourse held that- "the court has no jurisdiction to sanction such a scheme. He also concluded that this was the correct approach as the legislation provided for a scheme between a company and its creditors or members. He stated that an arrangement proposed between a sui juris person and his creditors, it is to be assumed that the person would have to be a party to the arrangement and he would have to consent to it." It was emphasized that the company has a separate existence and its right can-not be violated in the absence of any provision for that purpose. Therefore, court said that it cannot approve the scheme that has not been sanctioned by the company (Board of directors). In the Valdius Holdings Ltd. v. IPC Holdings and Max Capital Group Ltd case,[28] a similar view has been given by the court. The petitioner company acquired 100 shares in the IPC holdings and went to the court to convening the meeting to decide on the proposed scheme. Petitioner company wants to pursue a hostile takeover through court. The court observed that- "it was unprecedented to embark on a scheme in the face of opposition of the target board and that there were several practical difficulties in implementing such a scheme. The court accepted that it had the power to order convening of the meeting but decided that it was not appropriate to convene the meeting as there was no evidence that the scheme would not have the support of the company."

The non-Frustration rule is the important rule for the takeover panel. It is also at the center of the openness of the UK's market. The non-frustration rule has been mentioned in rule 21.1 of the UK code 2006.[29] Therefore, it can be observed that role of the board of directors is considered important by English jurisprudence but it is absent in the case of takeover transactions.

David Kershaw in his book observed that our discussion about the benefit and losses of anti-takeover measures is mostly De-contextualised. He further said that the reason for

---

[27] (1981) Ch. 351.

[28] (2009) SC (BDA) 27 Civ.

[29] Supra note 25 at 22

our understanding about takeover defenses comes from only one country- the US. This is often seen that policy debate often revolves around whether non-US jurisdictions should adopt or not these defenses. The US policy-making process is in extricable relation with the US legal system. Any other jurisdiction should measure the advantage and disadvantages of these defenses according to their legal environment.

UK company law is inclined towards the shareholder's rights, if the UK disables the non-frustration rule, then also to use a takeover defense board may not find the proper legal environment and will require shareholder's approval.

India has also on similar lines as highlighted by the UK. In section 230 (1) of the companies act, 2013, there is a provision for a scheme of arrangements between the company and its shareholders or creditors. Though in this scenario board of directors have more powers regarding the drafting of the scheme of arrangements but takeover code gives ample space for hostile takeovers especially after the 2013 amendments which direct the takeover code towards the UK structure.

Merger, acquisition, or takeovers are the different types of corporate restructuring. These corporate restructurings have some corporate governance issues. In acquisition management control of one company goes to another. Company act, 2013, SEBI (Listing obligations and disclosure requirements) regulations, and the takeover code are the main Indian laws that regulate the takeover in India.

Takeover code has some issue in itself. The trigger limit under the takeover code has been increased to 25% from 15%. It is done to make Indian laws in consonance with global best practices. However, the increased limit under the takeover code can expose the firms to hostile takeovers. The companies that have less promoter shareholding and more public issues have more chances to be threatened by hostile takeovers.[30]

In this regard, one pertinent question is that does India need takeover defenses? India has adopted most of the laws from the US legal system concerning M&A laws. But India lags in the adoption and introduction of anti-takeover measures which are available in the developed markets like the US. In the US extensive takeover defenses are present which not only safeguard the interest of minority shareholders but also promote corporate governance. Therefore the absence of any legally recognized

---

[30] Karan Talwar&Nivedita Saksena, Anti-acquirer and Pro-shareholder? An Analysis of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, http://docs.manupatra.in/newsline/articles/Upload/430DB68B-35DF-4E67-8EAF-669EC5B3E10C.pdf, June 17,2021.

takeover defense in India makes the market more inclined towards the acquirer than maintaining the balanced policy.

In India, most companies are promoter-driven due to this fact hostile takeovers are less common. According to the report of the takeover advisory committee, 2010 promoter's share in 584 companies are less than 25% and in 340 companies less than 15% among the 4054 listed companies.[31] This suggests that some companies can be exposed to the threat of hostile takeovers. This increases with the fact that the takeover code allows private investors to acquire 25% shares with the minimum offer of 26% to gain control.[32] From the above-said discussion, it can be concluded that to develop a value-creating corporate restructuring market, it is necessary to develop a balanced policy in which takeover defenses have also their role.

Cross-Border Issues

Cross-border mergers and acquisitions have spill-over on the corporate governance framework of the target company due to changed nationality. There are two theories in the field of cross-border mergers and acquisitions.

1. Positive spill-over theory- According to this corporate governance mechanism gets strengthen due to the restructuring and leads to greater value creation.
2. Negative spill-over theory- According to this standard of corporate governance in the target company is higher than the bidder company. After restructuring bidder's corporate governance affect the target company and subsequent deterioration of corporate governance in the target company follows and deters value creation.[33]

Previously in this chapter, we have seen that cross-border mergers and acquisitions have the major portion of the M&A market in India. It is important to develop a corporate governance mechanism as per the global standards to use spill-over effects in the best possible manner.

Technological advancement has converted the whole world into a small market. Corporate world witnessing many major economic and business

---

[31] C. Achuthan, Report of the Takeover Regulatory Advisory Committee Report, 2010, SEBI http://www.sebi.gov.in/sebi_data/attachdocs/1287826537018.pdf, June 18,2021.

[32] Srinivas Raman, Takeover Defences in India, Corporate Lae ReporterTakeover Defenses in India | Corporate Law Reporter, June 18, 2021.

[33]Marina Martynova& Luc Renneboog, Spillover of Corporate Governance Standards in Cross-Border Mergers and Acquisitions, Journal of Corporate Finance, Tilburg Univeristy 1, 1-2 (2008).

fields all over the world due to which it is also facing many difficulties. The Board of directors in the cross-border merger and acquisition plays a major role specifically in the risk assessment and management. In the cross-border transaction not only two different legal systems interact with each other but also two culture comes into contact. Companies involved in cross-border face unique and complex issues and unknown compliance problems. If the target's governance principles are very complex and sophisticated then the international acquirer can turn back himself. Therefore, corporate governance principles should be developed because of international corporate restructuring.

Role of Media

Mark Twain said- "Do not fear the enemy, for your enemy can only take your life. It is far better that you fear the media, for they will steal your Honor."

Media coverage has an important role to play in the decision-making of mergers and acquisitions. Financial media avail information to the investors and managers by reporting important issues and analysis of given situations. Media can affect the reputation of a company by way of collecting, analyzing, and amplifying the relevant information in the market. It can be said that media play a major role in the corporate and financial market.

Media also encourage companies to be transparent in the internal governance framework as well as in the financial perspective. For example, if one company proposed the made acquisition of another company. On the announcement of the same ("value reducing acquisition attempt"), it is accompanied by a negative market reaction. In this scenario, media coverage will lead the managers to back out from value-reducing acquisition attempts. In this way, it encourages good corporate governance in the companies. The government should recognize the importance of their role and should ensure that free media continued.

After the Satyam event confederation of Indian Industries (CII) has formed Naresh Chandra committee suggested that financial media are the watchdog and create awareness and educate the people about corporate governance. Managers took serious note of the opinion expressed by third parties such as the media. Managers always want to be away from the negative image and that's why always try to be at par with the

business environment. Media coverage of the negative events fosters strict discipline among top managers and sometimes they have to leave the office due to reputational costs.[34]

It is also important to note that the manager's chances to be out of the value decreasing acquisition attempt is proportionately related to the reaction of the media coverage in this regard. The manager of the acquirer firms takes note of stock market reaction in the decision-making process.

Though media is seen as a watchdog and fosters good corporate governance among the companies. But we should also keep in mind that influential and big corporate houses can affect the media coverage and can use it for their image building. In this regard, it is pertinent that government should ensure transparency in the media through appropriate rules and regulations.

[34] Shantanu Dutta, Kose John, Samir Saadi&Pengcheng Zhu, Fear, Feedback and Disclosure: Different Shades of Media's Governance Role in M&A Decisions, http://www.efmaefm.org/0EFMAMEETINGS/EFMA%20ANNUAL%20MEETINGS/2014-Rome/papers/EFMA2014_0598_fullpaper.pdf, June 19, 2021.

Chapter Four

Concept of control concerning merger and acquisition

Indian regulatory framework concerning mergers and acquisitions is very complex. Many regulatory bodies implement the parallel regulatory framework. The concept of control is the main center of any M&A transaction in listed companies. It has been a very important topic in corporate restructuring but remained a weak topic concerning Indian corporate jurisprudence. There are various definitions of the term control in different statutes. SEBI takeover code requires the acquirer to fulfill open offer obligations if the acquirer has gained control in the target company. Due to the unsettled definition of the term control, it is interpreted according to the case-to-case basis and subjects to different interpretations. This chapter tries to understand the concept of control and also will throw some light in this grey area.

Introduction

In simple words control means to have the power to affect the managers and policy decisions according to his will. The control over a company can be two types: direct control and indirect control which are as follows:

Direct control- it is such control that has control over pricing, manufacturing, etc. it can be obtained by acquisition of shares and voting rights in the company.

Indirect control- it does not dictate the affairs of the company directly but has some influence over the company through a mediatory. It can be obtained via control of shareholder's agreements or trust etc.[35]

The topic of Corporate control has got the attention of researchers for some time. This discourse has begun with the relationship of ownership and control has gone to the area of corporate governance (as agency problem) as well as to the world of corporate control. The philosophical and theoretical ideas of corporate control hold significance in corporate jurisprudence. The concept of control has been applied by takeover regulations through which one company acquires another company. Under takeover regulations, specifically mandatory bid rule is common which exist in most jurisdictions. According to the mandatory bid rule acquirer has to make an offer to the

---

[35] Lawinsider.com, Corporate Control Definition | Law Insider, June 19, 2021.

shareholders to acquire the sufficient share to gain control. MBR is triggered by acquiring control in the target company. Its trigger can be based on various things which vary from jurisdiction to jurisdiction. The limit of triggering the MBR can be founded either (1) on any specific shareholding limit such as 25% which is quantitative. (2) subjective approach which is based on shareholders' pattern, rights available in a shareholder's agreement, or other relevant factors (qualitative approach).[36]

A quantitative approach works on the principle of *de jure* control whereas the qualitative approach works on the principle of *de facto* control. Many jurisdictions (European Union, Singapore, Hong kong) have chosen the quantitative approach over the qualitative approach because it has more clarity and it is easy for regulators and market players both to interpret and implement. Some other jurisdictions (Brazil, Spain, India, and Indonesia) have chosen the qualitative approach over the quantitative approach. In this approach, it is hard to ignore the MBR by circumventing the threshold through some escaping method. It gives power to the hands of the court and regulatory bodies to decide the meaning of the control based on the facts of the case.

Different shades of control

Despite being a complex topic, control has diversified in the realm of corporate law. It is believed that the board of directors is the immediate decision-making body. Due to this belief, control has been regarded as the influence on the board of directors.[37] Shareholders are not the immediate decision-makers. they are associated with the decisions which have effects on the ownership rights. But this is not the whole picture control may present in various forms.[38]

Table 1

Shades of control

Type of Control	**Controller's Shareholding**	**Rights of Controller**
Absolute or total	100% voting rights	Company management flexibility for the controller

[36] Henry G Manne, "Mergers and the Market for Corporate Control" (1965) 73 Journal of Political Economy 110.

[37] Adolf A Berle, Jr, Control' in Corporate Law (1958) 58 Colum L Rev 1212, 1213.

[38] Wan Wai Yee & Umakanth Varottil, Mergers & Acquisitions in Singapore: Law & Practice, Singapore: LexisNexis, 2013, paras 2.61-2.67.

Special or super-majority	75% or two-thirds voting rights	Play significant role in passing decisions that requires special resolutions
Legal or statutory	More than 50% voting rights	Power to appoint and remove the directors-de jure control
De facto	Less than 50% voting rights	The capacity to manage the Board's composition owing to its spread nature, leading to indifference and collective action issues among minority shareholders
Negative	More than 25% or one-third voting rights	The ability to restrict specific resolutions put forth by the controller
Management	No controlling shareholding	Control lies in the management in the absence of any major shareholder

Along with De facto control, other means can also be added with it. One can obtain the rights in the constitutional documents or the shareholders' agreement. Under which one cam has the right to appoint the directors. In addition to this one can also have the right to appoint significant managerial personals or to initiate key proposals.

The same thing can happen with the negative rights. This right is normally exercised by voting rights but there are some other ways also. For example, corporate law provisioned that veto rights can be exercised if one has a minimum of 25% voting rights. If one has the possession of 20% voting rights then he can exercise the veto rights contractually in case those veto rights are mentioned in the constitutional document or the shareholder agreement.

The Implications of 'Control' for the MBR

Even before it was accepted from a legal or regulatory perspective, the basis for MBR was illustrated in company law literature.[39] This principle has also been recognized in early US courts' decisions imposed on the sale of controlling shareholders certain obligations. However, in the context of the US where the MBR has never truly found its way, these exhortations found little weight. [40]

But the situation is slightly different elsewhere. The MBR has instead become the pillar of the legislation on takeovers. It originally came into being in the UK in 1972 with the City Code 14.[41] In takeover regulation, the MBR has since become prevalent both in the common law and civil law realms in most prominent jurisdictions. In Asia, particularly Singapore, India Malaysia, Hong Kong, the norm has been widely established.[42]

Its solid reasoning supports the popularity of the mandatory offer rule.[43]

First, it proposes that shareholders who sell their shares to acquirers that enable them to breach the stipulated limits must share their private control gains with all other shareholders in the context of the equal opportunities rule.

Second, in the case of a change in control of the company the compulsory offer rule provides a way for minority shareholders to depart. This is required because the bidder can gain defacto control over the company and hence can determine the management and policies of the target without having legal control.

In other words, the acquirer can gain control of the target, without the financial expenditures involved in the purchase of all the shares.

The exit opportunities of minority shareholders are strongly justified particularly because there is no certainty that they may achieve an exit after the acquisition, on favorable terms if the new company controller policy is assessed to be against their interests by minority shareholders.[44]

---

[39] William D Andrews, The Stockholder's Right to Equal Opportunity in the Sale of Shares, (1965) 78 Harv L Rev, 505, 515-56.

[40] Ronald J Gilson & Jeffrey N Gordon, Controlling Shareholders, (2003) 152 U Pa L Rev, 785, 793-794.

[41] The Panel on Takeovers and Mergers, The City Code on Takeovers and Mergers, London: The Panel on Takeovers and Mergers, 2013 [City Code].

[42] Umakanth Varottil, 'Comparative Takeover Regulation and the Concept of Control' (2015) 2015 Sing J Legal Stud 208.

[43] Guido Ferrarini & Geoffrey P Miller, A Simple Theory of Takeover Regulation in the United States and Europe, (2009) 42 Cornell Int'l LJ 301, 312.

[44] Edmund-Philipp Schuster, The Mandatory Bid Rule: Efficient, After All?, (2013) 76 Mod L Rev, 529

There is also considerable criticism on the solid justification for the MBR. This regulation can operate as an obstacle to economically effective takeovers that otherwise serve the general interests of the economy. The MBR may unintentionally assist the incumbents by acting effectively and continuously as a defense against takeovers which can lead to the continuation of concentration of shareholding. The higher expense the MBR imposes on takeovers, the lower the likelihood of bidders attacking targets via hostile offers.

THE QUANTITATIVE APPROACH TO 'CONTROL

The quantitative approach uses a certain numerical voting right threshold in a target to determine if an acquirer gains control of the target. The quantitative approach was certainly not the desired method in the Beginning as the regulatory strategy. The MBR was initially implemented in the UK as a larger control design without a numerical percentage being specified.[45] When a target was de facto controlled by the acquirer as determined by the takeover panel, an obligatory offer was necessary. however, In the first several years, The implementation of the MBR utilizing this concept of control has shown its cons.

The Panel had to make decisions based on its particular facts, which gave it considerable freedom. Because of the grave concerns about the vagueness of the subjective control definition, the UK City Code was modified to provide for a numerical formulation that remains valid to date. Several other nations have had comparable experiences in the common law and civil law realms. They (Hong Kong, Austria, Belgium, and Italy) all began with a qualitative description of the MBR control trigger, and later transformed their acquisition regimens that are now based on the quantitative methodology.[46]

In the EU Takeover Directive, the appeal of the quantitative approach is obvious, suggesting a number percentage threshold. While the EU sticks to its quantitative approach, it leaves its Member States considerable leeway to set the actual shareholding

---

[45] Chidambaram Chandrasegar, Take-overs and Mergers, 2nd ed (Singapore: LexisNexis, 2010), 180.

[46] Supra note 3 at 31

threshold, based on company equity structures and other local circumstances.[47] In this sense, this is a matter of incomplete harmonization.

Although a broad variety of percentages of shareholdings in the MBR threshold seem to be regarded worldwide at the first blush, there is also considerable harmonization. The majority of jurisdictions have the 30% to 33.33% mark.[48] Instead of absolute consideration, it would be important to assess thresholds in the context of taking into account the ownership pattern in each jurisdiction and the link between the MBR threshold and the shareholder holding pattern. The natural assumption is that when the shareholding is scattered, the threshold must be lower and where the shareholding is concentrated, it must be higher, When setting the quantitative threshold for the MBRs.[49] This is because the acquisition of a lesser number of shareholdings is required by an acquirer than a company with a concentrated shareholder to obtain some control element of that company.

In the setting of thresholds, anecdotal evidence shows inconsistency. For example, it may be argued that a 30% barrier in the UK seems to be excessively high, as shareholdings in one jurisdiction are substantially distributed across most others. In contrast, there are lower limits for many jurisdictions with focused shares. For example, considering the far larger concentration of ownership in India, the 25% criterion appears anti-intuitive. India is all the more puzzled because it takes a mixed strategy for determining control by incorporating a qualitative method that may activate if an acquirer owns even under 25%.

There is criticism of the quantitative method also. It might be inaccurate to use shareholding percentages as proxies to determine de facto controls, and in that way, an element of arbitrariness is inducted. It disconnects MBR from defacto control. The broader the disconnection, the more the MBR distracts the minority shareholders from its equal opportunity principle. In addition, the major drawback is the predictability of

---

[47]Commission Directive 2004/25/ECof2l April2004 on takeoverbids, [2004] OJ, L 142/12 [EU Takeover Directive].

[48] Marc Goergen, Marina Martynova & Luc Renneboog, Corporate Governance Convergence: Evidence from Takeover Regulation Reforms, (Working Paper No 33/2005, European Corporate Governance Institute, 2005), 23.

[49] Albert Birkner & Clement Hasenauer, A new takeover law in Austria, (2007) 69 European Lawyer 62.

the quantitative method. The bright-line rule allows parties to arrange their businesses such that the regulations may be avoided (considerably assisted by attorneys and investment bankers).[50]

Empirical research and case studies support this. Extensive literature argues that acquirers in the UK tend to be under the 30 percent threshold for MBR to enable them to hold defacto control without triggering the rule.[51] This suggests (at least partially) that in the UK block holdings are less than 30%. The MBR's power elsewhere in Europe depends on its execution by the regulatory authorities and a wide range of exemptions from required offerings being available.[52]

China, like the UK, has a 30 percent vote threshold that activates the MBR.[53] Besides problems in the rigorous implementation of the MBR, the Chinese Securities Regulatory Commission (CSRC), is undermining its value through its widespread exemption powers.[54] A case study examining certain Chinese takeovers finds that the granting of CSRC waivers is not the exception but the rule. The operation of the MBR in China raises certain doubts, found that it "exists only for the name in China."[55]

This discussion shows that while the quantitative method is useful since it brings certainty and predictability, its separation from defacto control weakens the MBR justification. Moreover, it was not easy to operate in various jurisdictions, given the possibility of the acquirer dodging its bite. Finally, success depends on certain exemptions in various jurisdictions and the way they are exercised by the authorities. Not only can the experience vary considerably, but the effects also are not desired. As described above.

---

[50] Luca Enriques, The Mandatory Bid Rule in the Takeover Directive: Harmonization Without Foundation?, (2004) 1 European Company and Financial Law Review 440, 452.

[51] Paul L Davies & Sarah Worthington, Gower and Davies'Principles of Modern Company Law, 9th ed (London: Sweet & Maxwell, 2012), 1061

[52] Fabrizio Barca & Marco Becht, The Control of Corporate Europe (Oxford: Oxford University Press, 2001) at 12, 36

[53] Hui Huang, China's Takeover Law: A Comparative Analysis and Proposals for Reform, (2005) 30 Del J Corp L 145, 171

[54] John Armour, Jack B Jacobs & Curtis J Milhaupt, The Evolution of Hostile Takeover Regimes in Developed and Emerging Markets: An Analytical Framework, (2011) 52 Harv Int'l LJ 219, 275.

[55] Wei Cai, The Mandatory Bid Rule in China, (2011) 12 European Business Organization Law Review, 653, 665.

THE QUALITATIVE APPROACH TO 'CONTROL'

The qualitative method has been implemented by a few countries either separately or in conjunction with a numerical test. This technique intentionally eliminates any link with the voting rights threshold and so makes it far less probable to evade. A subjective control definition enables judges and regulators to determine the facts and circumstances in each instance. Although it is an anti-abuse measure, it lacks popularity not only because acquirers have unknown and unpredictable conditions, but also because the courts and regulators have wide discretion. It is evident, however, that regulators want to keep the discretion to guarantee that the MBR's goals are more effectively achieved in jurisdictions where a qualitative approach has been maintained.

In comparison with countries that follow the quantitative method, where the main difference concerns the actual threshold levels for MBR trigger, there are a multiplicity of approaches to the notion of control following the qualitative approach. Based on different models of regulations that have been seen in these countries, two main models might be classified: (I) board control, and (ii) management (or operational).[56]

Board Control

The question here is whether an acquirer may nominate or dismiss a majority of the board of directors to control it. The notion of control is not new to the regulation of takeover and is widely utilized in corporate law.

---

[56] Robert Couzin, Some Reflections on Corporate Control, (2005) 53 Can Tax J, 305

The right to determine the composition of the board may be obtained by the acquirer. This privilege can be acquired in 2 ways. The first and most evident is that the majority of voting shares are held that correspond to the quantitative method.[57] The test is both de-jure and visible, which are uncontroversial. Secondly, if a buyer with fewer than the majority of voting rights enters into a shareholder agreement with other shareholders or has special rights under constitutional papers.

Secondly, an acquirer may be able to dominate the board even if it moves away from shareholdings or contractual rights. Although this terminology has been employed in takeovers and control rules, the degree of assertiveness is probably less than the degree of a right. For example, a shareholder with less than a majority of shares may not be entitled to nominate and dismiss directors but may be entitled to do so if he has enough shares, given the remaining shares of the business and other aspects, to have a de facto control.[58]

Thirdly, if a buyer designates and removes directors, he may have board control. It is merely a test of facts that can be established by past behavior and may not necessarily be linked to voting rights or legal control of the Board. However, a board controlled by an acquirer that does not have a minimum share in the firm as a 'toe holding' cannot be contemplated.[59]

While the Board Control Tests vary, the main subjectivity is the second test concerning the acquirer's power to nominate directors and dismiss them. The other exams seem very simple. However, the same does not apply to the following kind of control, which still causes fair differences.

Management (or Operational) Control

Regulators might understandably worry about manipulation and misuse of the board control test. What stops the acquirer from naming a half board (a clear majority short) and from pulling other ways in terms of management and the policy of the target?? The subjective definition of control was further broadened by various jurisdictions to seal

---

[57] Pedro Testa, The Mandatory Bid Rule in the European Community and in Brazil: A Critical View, London School of Economics and Political Science, 2006, 6.

[58] Yozua Makes, Challenges and Opportunities for the Indonesian Securities Takeover Regulations: A Comparative Legal Analysis, (2013) 8 University of Pennsylvania East Asia Law Review, 83, 97, 98.

[59] CMS Legal Services EEIG, CMS Guide to Mandatory Offers and Squeeze-Outs, (April 2011), 80.

the door to such possible abuses by acquirers which can establish operational control over the Company.
For example, the Indonesian rules enable control to an acquirer who "has the capacity, directly or indirectly, to influence managerial and/or policy of a public company in any form."[60] Similarly, in India, if the acquirer has the right of "managerial control or policy decisions" that can be exercised by a target, the acquirer may exercise this right "by shareholder or management rights or shareholder agreement or voting agreement, or in any other manner,"[61] it may be said that the acquirer has controls of the target.
This requirement is not aimed at board control but things beyond it. In many jurisdictions, while the control of the Board would enable the acquirer to decide the overall planning of the target, the takeover rules will also see if an acquirer may influence the management and policy choices of the target without having the board control necessarily. It is difficult with this method to evaluate, on a case-by-case basis, whether a transfer of control has happened or not because of its inherent subjectivity and unpredictability.

Due to the dynamic nature of the definition of control in the abovementioned jurisdictions, the nature of the investment might be transposed into a control position, even if such an investor may not intend, in the first place, to seek control. As such, there might be a dissonance with the business objective of the parties in the regulative process of the investment transaction.
It is no wonder that many nations have either choose to move away from this technique into the quantitative approach or to not first embrace it, because of the several factors involved in the qualitative approach. Whilst the rigidity of the quantitative approach often leads to it falling short of its captures within its scope of acquisitions of de-facto control, the corresponding downside of the qualitative approach is that it might include several transactions within its wide range which do not necessitate itself.
If acquirers failed to deal with the problem of the quantitative approach, the qualitative approach is its central protagonist. Matters such as board control (or even board control capability) as well as the effect on a company's management and policy decisions are too subjective. Substantial minority stakes in targets that could otherwise benefit all its

[60] Supra note 58 at 36.
[61] SEBI takeover code, 2011.

shareholders may be refused by acquirers such as private equity companies as well as other strategic and financial investors. In addition, it creates enormous ambiguity as to when the MBR is activated, which in the equities and financial markets is unwanted.

Mixed Approach: Indian Experience

India is a big player with its firms operating both as acquirers and as targets in the cross-border M&A markets. Given the frequency of takeovers in the Indian marketplaces, their rules were constantly tested. In particular, India is using a mixed strategy from the standpoint of the MBR trigger. It contains both a 25% number limit and a subjective definition of the control: if the acquirer meets any of the two requirements, they will activate the MBR. The relatively low quantitative barrier and wide subjective definition put the Indian acquisition system among other jurisdictions as one of the farthest outliers.

According to the regulation 2(c) of the SEBI takeover code, the control means- “to include the right to appoint the majority of the directors or to control the management and policy decisions exercisable by a person or persons acting individually or in concert directly or indirectly, including by the virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner:

Provided that a director or officer of a target company shall not be considered to be in control over such target company, merely by holding such position.”[62]

This definition covers both management and board control. The MBR might be activated in two scenarios under this description. The first comes when a buyer receives a significant shareholder interest in the target that is below the quantitative threshold yet the buyer is the largest shareholder. Secondly, when the purchaser acquires a substantial stake in the firm but faces another shareholder or group owning a major interest. In such situations, it will probably be necessary for the acquirer to share the existing major shareholder's control.

In the following sections, this paper seeks to make the analysis of case laws in India under two headings.

---

[62] Supra note 61 at 36.

Single Largest Shareholder

The Securities Appellate Tribunal (SAT) was able to examine the case of an acquisition that, without any extra-contractual rights, gained large ownership which marginally below the MBR level. In the first case, 14.45 percent of the Tata Group's Ambuja Group purchased ACC Cement shares (the objective) (seller). SEBI was complained by one of the shareholders of the target that this was a change of control as Ambuja Group came into the shoes of the Tata Group, which already controlled the target.[63]
It was evident from the authority of the board that none existed. Only two of total of 16 directors were appointed by the Ambuja Group. The question, though, was as if there was a change in control through other ways. The SAT clarified the logic behind the subjective meaning of control and underlined that the unresolved definition of control of India's objects and schemes of takeovers in the SEBI Takeover Regulations is comprehensible because it is a "term of wide connotation and amplitude".

Although the SAT made these remarks and referred back to the SEBI without resolving the facts of the issue, the width of its interpretation implies that it was prepared, based on the facts of each instance, to acknowledge significant discretion by the regulator.
SEBI is quite free to call upon the MBR against buyers who have obtained voting rights that are not as large as the quantitative threshold, under the philosophy of the SEBI Takeover Regulations interpreted by SAT. If acquirers can skip the MBR by falling below the threshold in quantitative-appropriate jurisdictions, there is no option in India since regulators can nonetheless reverse the deal based on a factual examination of de facto control.

Contractual Rights: Active vs Passive Control

The more contentious scenario in India has been shown to have one where an investor takes a stake in the target below the threshold. In contrast to acquiring existing shares from another shareholder, such an investor generally invests in the target against the issuing of new shares. The transaction is intended to finance the firm for the growth of capital or other commercial objectives. Due to the concentrated stock structure in India,

[63]Ashwin K Doshi v Securities and Exchange Board of India, 2002, Appeal No 44 of 2001,

a controlling shareholder that dominates boards of directors and managers would likely have least as many or much more voting rights than the investor itself. It is, therefore, apparent that the investor would seek extra protection rights through a contract, including board participation, quorum rights, and veto rights because of the large financial commitment that it has been aiming at.
In this regard, the investor obtains at most a common control of the target, which the promoter must share. More significantly, the investor (particularly one whose investment is financial) hardly ever intends to gain control over the business. Indeed, the investor usually rejects all control. Anyway, as its position and rights are shadowed by the largest shareholder's control, the investor cannot have any unilateral influence over the board or the management of the target.

Therefore, the rights that the investor is seeking are merely to safeguard his economic interest in the firm instead of having a good effect. This means that the contract agreements and the legal structure so formed are designed to equalize the interests of two major owners – the new investor and the existing major shareholder – in a manner that could not undermine the other's business interest.
Although the global practice of major investors obtaining protection rights is well established, SEBI was firm in its demand that these rights bestow "control" on investors. This can be done because of the subjective meaning of the Indian takeover law idea. Although the investment community and its advisors resisted and protested strongly, SEBI was hesitant to take this position. Consequently, investors requested legal recourse before appeal fora. While the problem was thoroughly discussed and handled before the authorities, a final settlement was elusive, as discussed below.

SAT concluded in one of its early rulings[64] that a contractual need for the acquirer's preliminary consent to some key issues relating to its operations (e.g. structural and strategic modification) granted the acquirer control rights, which attracts the MBR. This was perhaps too broad a construction to the idea of "control," and the reality of the connection between an acquirer and the target or promoter has not been taken into consideration. However, progressively, with commercial reality in mind, the SAT's attitude has grown somewhat more permissive for investors. As an example, a lending

[64] Rhodia SA v Securities and Exchange Board of India, 2001, Appeal No 36 of 2001.

bank that was also a financial investor has rights of approval for important choices such as appointing and removing directors, project modifications, and other major issues in Sandip Save v Securities and Exchange Board of India.[65] As the firm has promoters that are responsible for the business of the company and the defensive character of the investors' rights, SAT concluded that the investor cannot be claimed to have control. Much later, the most detailed explanation of the principles of such investments and their effects on the control of the target is revealed. The SAT was concerned with the typical situation of "control" under the Takeover Regulation in Subhkam Ventures (I) Private Limited v Securities and Exchange Board of India.[66] In this respect, a financial investor has taken up a 19.91% interest. The SAT carefully analyzed the parties' contractual agreements. It concluded that the power of an investor to appoint one of many directors to the Target Board did not give it control.

Similarly, it was insufficient to manage the fact that a buyer has affirmative or veto rights, which require an investor's consent to perform several acts. These rights are protected by the investment and so place no controls on investors. The investment is protected by these rights. More than the judgment of SAT which favored the investor, its argument is enlightening: “Control, according to the definition, is a proactive and not a reactive power. It is a power by which an acquirer can command the target company to do what he wants it to do. Control means creating or controlling a situation by taking the initiative. Power by which an acquirer can only prevent a company from doing what the latter wants to do is by itself not control. In that event, the acquirer is only reacting rather than taking the initiative. It is a positive power and not a negative power”.

This judgment has given some positive vibes to the investment community in India, whose position in search for a limited definition of control was effectively advocated. However, the joy was brief, because SEBI chose an appeal to the Indian Supreme Court. Although the Supreme Court judgment was predicted with more anticipation, it was not as the parties decided throughout the appeal. An additional disappointment was created

[65] Sandip Save v Securities and Exchange Board of India, [2003141 SCL 47 (SAT).

[66] Subhkam Ventures (I) Private Limited v Securities and Exchange Board of India, 2010, Appeal No 8 of 2009.

by the clarification of the Supreme Court that the SAT order is not considered to be a precedent and that the issue of law was retained. The Supreme Court thus did not use the apparent method of SAT to address the matter.[67]

SEBI has not been prevented from continuing acquisitions of shares through a jurisprudential vacuum if it is unsure whether or not the acquirer has passed the quantitative threshold. It continued to analyze investors' unique contractual arrangements and to make a declaration on the question of control based on individual cases' facts and circumstances. It has also established a tight position that precludes major shareholders from gaining meaningful protection provisions by investing in the targets specified. To reach its determination, the Commission did not hesitate to perform a clause-by-clause microscopical study of contract documents. Thus, SEBI is still capable of exercising a subjective control judgment that it exercises fairly frequently. From an investor's point of view, the uncertainties might chill the financial equity investment market in the targets which are listed.[68]

The idea of 'control' continues to aggravate issues under Indian law, especially with the takeover regulation and the MBR. What follows is a mix of factors in play: a subjective definition of control, not resolved by the courts or by the appeals authority, is being executed by a regulator which tries to preserve the freedom to split open transactions to examine the aspect of monitoring based on the facts and circumstances in each case.

EVALUATING THE APPROACHES TO CONTROL

As the debate so far shows, the quantitative method and the qualitative approach are not optimum. Both philosophically and practically, each one suffers from shortcomings. This raises the question as to how the results of this survey might be assimilated with other techniques to develop the optimum regulatory strategy to activate MBR.

One technique could be preferable to the other. It would be possible. For example, the quantitative method may be preferable as the large majority of countries that have stamped their approval adopt it. Moreover, after trying and proving the qualitative

[67] Securities and Exchange Board of India v Subhkam Ventures (I) Private Limited, MANU/SC/1587/2011 (SC), 4.

[68] John D Hogboom, Private Investment in Public Equity: An Overview, New Jersey Law Journal, 2004.

method that was not successful, some nations were switched to this. This essay does not, however, promote such a binary method. Harmonization cannot lead to a single generally applicable choice. Consequently, jurisdictions must continue to choose the strategy according to their unique business background, circumstances and variables. However, certain general concepts can be taken into account in the pursuit of harmonization, which is stated below.

A. Quantitative Approach

The MBR threshold should be properly established in countries following the quantitative method given the general shareholder patterns of listed firms in those jurisdictions. In the event of scattered shareholdings, the limit must be quite low since the buyer can be placed in the driver's seat by acquiring a tiny proportion of voting power. On the contrary, a higher threshold is needed for concentrating shareholdings, as a consequence of the existing controlling owners which tend to have a substantial proportion of shareholdings, to indicate changes in control. The proportion threshold must be reviewed regularly according to equity structures in a specific market over some time. A permanent threshold limit may become obsolete over some time.

In addition, a quantitative threshold applies to jurisdiction or its markets as a whole rather than to specific goals that may show structures of shareholdings that are not per the large majority of the general pattern. A collection of supplementary processes can diminish the rigidity of the quantitative threshold. For example, if the threshold is considered in the context of a concentrated shareholder target, the regulator might be given the discretion to allow an exemption from the acquisition threshold that surpasses but does not exceed the shareholding of existing shareholders.

If the threshold is deemed to be quite excessive for a spread target, the regulators may need to be given residual discretion to review the transaction but only in the most unusual instances. Given that this method is subjective, the granting of powers and execution by the regulator must be handled with significant caution.

B. Qualitative Approach

It is here to remain, as for the qualitative approach. In its adoption, jurisdictions like Brazil, India, and Indonesia were dogmatic. They do not appear to be part of this

strategy or the accompanying regulatory discretion. These jurisdictions will not probably change towards the quantitative method. As the qualitative approach has certain benefits (particularly concerning catering for minority shareholders' interests), such a philosophy must be followed in the future.

Defining 'control strictly

To reduce and limit the notion, the primary objective is to define control with greater clarity and certainty. While the regulators need some discretion in ensuring the protection of minority shareholder interests through the MBR, it needs to be evenly balanced with the need to offer acquirers comfort (especially for those seeking to achieve minority stakes without much influence in this area).

This requires an increased focus on board management, such as the acquirer's right or capacity to alter the configuration of the board of directors. The idea of management control (via its effect on policy and management of the target), as this may be a rather broad term, must be employed very carefully. Management control can only take place when the acquirer has a say in everyday activities or the normal business of the target (either through stock or contracts). It should not be called if the purchaser has any voice in key topics such as major company transactions (e.g. merger, restructuring, modifications to constitutional papers, dissolution of the target, etc.) that can have an impact as a substantive shareholder on the interest of the acquirer. A difference needs to be made between day-to-day administration (where the purchaser has no influence) and vital business transactions that are similar to investment choices (in which the acquirer must have a say). Although influence is an indicator of control in day-to-day management, it is not in other situations.

Positive vs negative control

In general, it is important to say that control exists when it is active rather than passive, which provides the holder with initiating capabilities than vetoes or blocks. If negative rights are stated to have existed, it typically is assumed that the acquirer wanted this authority to safeguard his interest by preventing another controller from performing acts that may affect the interests of the acquirer. Negative control must thus, as a

general, be maintained away from the 'check' function that triggers the MBR. Jurisdictions following the qualitative method must make this specific in their definition of control explicit, since negative control scenarios happen all too often, especially when the acquirer is taking a significant, but a minority, investment in the target. The increase in capital for the benefit of the firm (and its shareholders in turn) must not be confused with an acquisition or take-over that could cause the minority to depart. There must be a clear separation.

Exemptions

In addition, the qualitative method should be supplemented by certain other processes that limit its reach. There may be some presumptions that show the lack of qualitative de facto control in conditions. For example, when the acquirer is not the major stakeholder in the target, it should be assumed that he is not in charge. Nevertheless, based on facts and circumstances of specific situations, the regulator might relinquish its duty of rebutting the assumption. A broader range of exceptions for buyers, be they automated or discretionary, must be used to mitigate the harshness of the qualitative approach. A "whitewash" mechanism, in which change in control may be adopted by a vote of the independent shareholders, would be one of the most important automatic exemptions. The shareholders might thus be asked to decide whether or not the change in control is in their interest. Of course, it must also be emphasized that shareholders must be well informed before asking their views. This is an essential balancing role, which does not currently exist under a qualitative approach in all jurisdictions. Other exclusions may be based on obtaining the securities regulator's particular clearance which can be given on the facts of each instance. In these situations, it is difficult to limit the discretion of the regulator, but this must be done given MBR's reasoning, the balance of interests of minority shareholders and acquirers, and the acquisitions of minority stakes.

The above-mentioned steps are not prescriptive. In the takeover regulation of each jurisdiction, an appropriate combination of these measures may be adopted that reflects different variables including the shareholder structure, the local institutional and economic concerns as well as a securities regulator's expertise and skills. More significantly, in a dynamic takeover market in the future, actions or techniques that are suitable at the same time must be reviewed and modified from time to time.

Finally, this study does not seek to remain in the domain of abstract theory with the concept of harmonization. There is an outlet for the development into visible action of these harmonization steps. One of its tasks is to ensure uniformity in regulatory standards on the securities markets, as is the International Organization of the Securities Commissions (IOSCO). This body is well-positioned to create the harmonized view of control since it is represented by a considerable number of the world's major securities regulators. Comparative studies on takeover regulation in member jurisdictions have previously been conducted by IOSCO.

The SEBI has done an excellent job in supporting both the capital market and the interests of investors. It is envisaged that SEBI would in the future modify the takeover code by including liberalized 'control' measures that remove the onerous open bid processes and various regulatory clearances. The ownership limit for exemption from multiple regulatory submissions is suggested to be increased. If the multi-approval procedure is abolished and a single-window clearance system for mergers and acquisitions is used, investors' feelings and trust will be promoted.

Chapter five

Competition law vis-à-vis merger and acquisition

The laws which regulate the world should evolve to avoid chaos as the world develops. With the exponential growth of technology and the overlapping of various worlds that follow a multitude of permutations and combinations, legality must be ensured. Competition law and anti-trust legislation in previous years primarily concerned cigar-filled rooms populated by moguls who plot to do hideous things. In the past, antitrust offenses were mostly a matter of human design and conduct, but computers and algorithms are increasingly engaged.

The writers in this study will be examining firstly the intersection between antitrust and technology laws and the growth in crimes against non-humanity anti-trust crimes. Second, we will analyze and compare the world's key competitive regimes with the situation of India. Next, in the present Indian Competition Act, we will analyze the gaps and lacunes. Implementing that guarantees 'merit competition' in the first stage and anticipates exclusionary leadership in the next step will assist ensure that market participants decide freely among competing platforms and that private rental-based enterprise and innovation are not hindered.

"There is no established jurisprudence on most substantive issues. Any competitive legal regime so young must be considered a work in progress that requires more work to complete."[69]

The American popular Sci-Fi "Hitchhikers" Universe Guide posed a query regarding life and the universe on the hyper genius 'Deep Thought' computer, and it took years for the supercomputer to discover an answer. Computers cannot yet comprehend cosmic complexities, but can really be used to perpetrate crimes of white-collar. The continual decline in human participation has made artificial intelligence important to competitive law, due to our ever-developing technology and our persistent dependency on them.

[69] VIIINLSIR Symposium on Competition Law, 27 Nlsiu L. Rev. 197 (2015).

People nowadays have formed a symbiotic connection almost [hereinafter "AI"] to artificial intelligence. "Hey Google, what's the weather today?" "Alexa, update my list," "Siri call 100," these excerpts illustrate how technologically engrossed we are. In addition, we aspire for a society where individuals from all walks of life are interrelated via a worldwide data network with governments encouraging the digital economy and online commerce.

From purchasing an airplane ticket to organizing an internet trip, computers rather than human beings set pricing more and more. In comparison to its rivals algorithms define the need of the consumers and the offer is best suited for an organization. Obviously, because of large data analysis, algorithms are more accurate and can better adjust to market changes. Radio taxi services such as Ola and Uber, for example, utilize customized algorithms for pricing determination based on user travel distance.

With a decline in human participation more transparency is available, seller despotism is reduced, consumer discount and transaction speeds are exponentially enhanced. Brick and mortar businesses have often claimed that predatory pricing and distortion of the market are being carried out through the internet portals via large discounts. Although these expansions promote market transparency and cause competition pressures for customers, the result might be an increased danger of market distortion due to interdependent pricing algorithms.[70]

Take the example of the new technologies that are being released. The latest smartphone, tablet, wristwatch, and smart car models represent over 40% of our country's total sales and are mostly offered on e-commerce sites. In contrast, the online platform serves as an additional channel and shopping is a more convenient mode of the sale in connection with electronic/electrical equipment and associated items, including clothes and shoes.[71]

However, for a better understanding of the modern antitrust issues, a dichotomy has to be formed before going forward. Be it through the use of algorithms, or the AI itself, humans engage and participate in anti-competitive actions, with no human interference. Through these pictures, this is understandable:

---

[70]Inge Graef, Algorithmic price fixing under EU competition law : how to crack robot cartels?, Citip Blog (May 10, 2016), https://www.law.kuleuven.be/citip/blog/algorithmic—price—fixing—under—eu—competition— law—how—to—crack—robot—cartels/, June, 25, 2021.

[71] Competition Commission of India, Market Study on E-Commerce In India: Key Findings And Observations (2020).

A few years ago for infamous reasons, a book entitled 'Making a fly' came to the fore. The $23 book was placed upon the market by two vendors on the Amazon market, one of them had adjusted the price algorithm to 27% more than the other seller for the book. Finally, the price soared up to 23 million dollars when someone finally saw and lowered it manually to its suitable price.[72]

The European Union (hereafter "EU") has penalized the Google Shopping super-platform for allowing anti-competitive actions by influencing internet traffic on the platform and encouraging sellers for identical or similar items against other merchants.[73] The algorithm operates based on customer queries and hits and changes appropriately. Google defended itself (unstintingly) Given the absence of human activity, the platform could not be held responsible. Yet the EU judged Google to have abused its dominating position guilty.

The first scenario demonstrates how technology itself may be violated, while a standard example of people exploiting algorithms to benefit their businesses leads to anti-trust issues.

The first form of crime may readily be found and punished since the "meeting of minds" is accessible; it is the second type that we must take care of.

Machines can be superior to human oligopolies. They have better accuracy and less time to respond. Machines can research and maintain better tabs on changes in prices and market circumstances and therefore act accordingly. The machines can surely be better oligopolies with higher capacity and be as good at antitrust problems.

The Evolution of Competition Law in India

The Monopolies Trade and Restrictive Practices Act, 1969 was the first competition law legislation in India.[74] The MRTP law was founded largely on socio-economic theory, as enshrined in DPSPs. In 1974, 1980, 1982, 1984, 1988, and 1991 many changes were made to the MRTP Act. Since then, there has been a change in India like

---

[72] Olivia Solon, How A Book About Flies Came To Be Priced $24 Million on Amazon, (Apr. 24, 2011), https://www.wired.com/2011/04/amazon—flies—24—million/, June 25, 2021.

[73] European Commission Press Release IP/17/1784, Antitrust Commission fines Google€2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service, (June 27, 2017), http://europa.eu/rapid/press—releaseIP—17—1784en.htm, June 25, 2021.

[74] The Monopolies Trade and Restrictive Practices Act, 1969, No.54, Acts of Parliament, 1969 (India)

the business, economic, and market chain and thus contemporary law to supersede the old act has been required. There was a need to reduce monopolies and increase market competition. The Indian market was exposed to the world and demanded that its economic policies be changed.

The competition law of 2002[75] came into existence following the Raghavan Committee's report which established the interface between the IPR and competition policy and established provisions that would allow the regulator to analyze and settle anticompetitive practices arising from IPR grant agreements.

No new concept is the idea of managing artificial intelligence using competition law. Competition rules are necessary to regulate data collecting and processing methods for mergers such as Yahoo-Verizon and Microsoft-LinkedIn. The European court has underlined the importance of combining databases on competition, ruling that data is an important matter for a company to gain a dominating position through the merger in the context of merger control.

It would thus not be wrong to state that following the brick-and-mortar approach of merchants to safeguard their lives from the emergence of online marketplaces like Flipkart and Amazon, the largest change has occurred in competition law.

When online retail made its debut in India in 2000, because of the old marketing tendencies there were not many takers. although it had a sluggish beginning have now made online marketing vital because of the profound discount strategy of e-commerce giants like Flipkart and Amazon. It is difficult to escape the charms of the digital economy because it's easy to buy products at home, enticing discounts, appealing cashback, the security of online transactions, and more.

The digital economy's main actors, such as the customers, contractors, logistics firms, retail, manufacturers, and other stakeholders, have been on the prosperity wave, but the brick-and-mortar sellers have one group to face the brunt of this shift.

After the launch of the Indian Government's press release in 2000, e-commerce saw considerable growth in India, allowing 100% FDI to take place in e-commerce operations of B2B (business to business). However, the authorities received numerous complaints about some marketplace platforms that violated laws, affected pricing, and indulged indirectly in the banned inventory model. Another press release (26 December

[75]The Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India).

2018) was published by the government to implement certain modifications to the E-commerce FDI policy. This in turn shaped our rules in a new digitally-oriented economy and had a huge influence on e-commerce networks operating in India.[76]

The study implies that the business is changing rapidly from the physical to the digital form. A few other proprietors of small industries were happy that the digital platform allowed them to expand their firm.

The problem emerges, however, when the internet platform serves as a sweet poison, i.e. as a marketplace and as competitors in that market. Thus, they can use ownership of the platform to the detriment of other rivals or service providers on the platform in "the favor of their own/favored suppliers or private label items." The platforms can employ a host of procedures to satisfy their purpose, such as obtaining transaction data, search results ranking, etc. The computerized interface captures data about each item, seller, and location such as price, sold quantities, demand, etc. cleverly. Consumers gain from digital product suggestions.[77]

After the global behemoth, Walmart acquired 77 percent Flipkart stake in a 16 trillion-dollar agreement, the transformation of FDI standards came into force.[78] The purchase brought Walmart to the Indian market and alarmed numerous local merchants, who already had trouble making their presence felt. Consequently, a lobby organization representing several of these trader companies, the All India Online Vendors association sought out the Competition Commission of India, which claimed that Flipkart and Amazon were breaching Article 4 of the Law (abuse of dominant position).[79] The CCI ruled, however, that the Competition Act has not been in a contravention by the e-commerce firms. However, Walmart's mega-acquisition and the

---

[76] Department Of Industrial Policy And Promotion, Ministry Of Commerce And Industry, Review Of The Policy On Foreign Direct Invesment (Fdi) In E-Commerce (2018), https://dipp.gov.in/sites/default/files/pn2_2018.pdf, June 27, 2021.

[77] COMPETITION COMMISSION OF INDIA, MARKET STUDY ON E-COMMERCE IN INDIA : KEY FINDINGS AND OBSERVATIONS (2020).

[78] Walmart-Flipkart Group Investor Presentation, WALMART, https://cdn.corporate.walmart.com/5d/11/4968b4d745159149c8e8b0295a3f/walmart-flipkart—ir—presentation.pdf, June 27, 2021.

[79] The Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India).

worry that the small dealers would be expelled from the market drove the government to enact the new rule through DIPP news release Note 2.[80]
The new e-commerce strategy proposal focuses on data location, enhanced security procedures, and action to prevent the sale of fraudulent products. The new e-commerce arena strategy is also intended to create a "legal and creative framework" capable of reducing cross-border information flows produced by users; movements that may affect both internet businesses and online network companies, like Google Alphabet Inc's and Facebook Inc's.

The new legislation allows 100% FDI under automated routing only for e-commerce businesses' marketplace model while no FDI is permissible for inventory-based companies or companies with stock-based models. The new legislation has also prohibited the sale of products only on the websites of these companies and the provision of the ban on substantial discounts. All big online companies, therefore, have to restructure their business models to accommodate all external retailers where they are not interested. . The cost and additional shipping charges may potentially result in a large reduction in discounts. Platforms will also not have exclusive marketing rights, therefore allowing manufacturers to offer their products across all business platforms.
Any application of antitrust or competition laws to limit data operation must meet the threshold of building a company's market capacity to draw on its capacity to maintain data sets that are unavailable to its rivals. Therefore, more debate is needed about data as a source of market power in digital as well as non-digital markets, and how data monopolies, particularly government-backing identity checks and transactions in India, may be resisted. There is a need for more dialogue.

Competition law in India and other jurisdictions

Competition laws differ considerably between distinct jurisdictions and their scope, application, and execution. “Even within a particular national system, the goals of competition law may evolve and transmogrify, often depending upon the state of

[80] DEPARTMENT OF INDUSTRIAL POLICY AND PROMOTION, MINISTRY OF COMMERCE AND INDUSTRY, REVIEW OF THE POLICY ON FOREIGN DIRECT INVESMENT (FDI) IN E-COMMERCE (2018), https://dipp.gov.in/sites/default/files/pn22018.pdf, June 27, 2021.

industrialization of the economy, the strength of the political democracy, the power of the judiciary, and the bureaucrats, and the exposure of the domestic firms to global competition."[81]

In 2003, after the 1969 Monopolies Restrictive Trade Practices Act, the Competition Act entered into legislative books. Various provisions and ideas such as predatory pricing that was in force in the preceding act were borrowed after a make-up. In addition, the new Act included some new ideas but neglected to clarify the realm and extent of these regulations. Cumulatively, numerous uncertainties had to be addressed by the courts.

In 1870, the Sherman Act was passed.[82] The United States has proven its effectiveness in creating and enforcing competition legislation by hiring financial professionals into the FTC Competition and Antitrust Division (DOJ). The basis for EU competition was derived from the Treaty on the Functioning of the Union.[83] The Treaty covers a wide range of issues, but the rules relating to competition law are covered under Articles 101 and 102. To execute anti-trust law, the Treaty does not establish an international organization. The same was true of the European Council which, at the request of the EU Member States, guarantees conformity with the Treaty requirements.

The framework of competition law in India is comparable to both the Sherman Act and the Treaty, in that the functioning of the CCI is founded on the relevant sections of the Treaty and the EC competencies. The Indian black letter and competition system, however, vary in level and execution standards.

§3(1) of the Act bans in Indian agreements that have a significant adverse competitive impact (AAEC).[84] §5(1) Sherman Act[85] and Article 101 of the Treaty[86] include similar requirements. Section 19(3)[87] offers a clear indication of what might be deemed to be

---

[81] Eleanor M. Fox, Anti-Trust Law on Global Scale: Race up, down and sideways, 2000, 75 N.Y.U. L. Rev. 1781, 1783.

[82]Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1-7 (2020).

[83]Consolidated Version of the Treaty on the Functioning of the European Union, 2008, 2008 O.J. (C 115), 47

[84]The Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India).

[85] Sherman Antitrust Act of 1890, 15 U.S.C. §5(1) (2020).

[8686]Consolidated Version of the Treaty on the Functioning of the European Union, 2008, 2008 O.J. (C 115), 47 .

[87] The Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India), §19(3).

AAEC. The AAEC term is not defined in the Competition Act. The legislative purpose may be interpreted as per Article 19, i.e. the CCI needs to conduct a thorough examination of both anti-competitive and pro-competent grounds for an agreement. This broad approach corresponds to the rule of reason analyses found in the US and EU competition law.[88] §4(1), Article 102 and Article 2 of the Competition Act, of the Treaty, and the Sherman Law correspondingly refer to the prevention of domination abuse. Similar to their predecessors, determining the appropriate product and geographical market is a prerequisite and the basis of inquiry under Indian law.

The current establishment of digital markets among globalized regimes involves interpretive notions in the field of conventional competition law, such as 'relevant market' or 'market power' and 'abuse of dominant position' and 'predating price.' For instance, conventional market determination and market dominance misuse devices may be unrelated to digital marketplaces, especially in scenarios in which organizations provide buyers with zero-value services in return for data.[89] However, such behemoths are emerging as 'data monopolies' by market traders.

In addition, in comparison with other jurisdictions, the Indian competition regime is a green area of competition law and is notably short of several characteristics.

In addition, the factors involved in the functioning of an internet domain enable these firms to act in an anti-competitional way. One may in these respects refer to the EC's continued choice to punish Google EUR 2,42 billion in the abuse of its dominance as a search engine in violation of EU antitrust regulations. In addition, similar accusations about the misuse of Google domination have been brought by Google in favor of its organizations, such as YouTube, Google Maps, and so on, through participation in activities like search inclination, search control, site crawling, etc.[90]

---

[88] Payel Chatterjee & Shashank Gautam, Competition In India v. USA And EU, LegalEra, http://www.nishithdesai.com/fileadmin/user/upload/pdfs/New/Competition/Law/in/India/vs/USA/and/EU.pdf, July 2, 2021.

[89] Vedika Mittal Kumar, Shehnaz Ahmed, Param Pandya, Joyjayanti Chatterjee & Ritwika Sharma, SYSTEMATIZING FAIRPLAY : KEY ISSUES IN THE INDIAN COMPETITION LAW REGIME, VIDHI CENTRE FOR LEGAL POLICY, https://vidhilegalpolicy.in/wp-content/uploads/2019/05/SystematizingFairplay-KeyIssuesintheIndianCompetitionLawRegimeNovember2017.pdf,

[90] European Commission Press Release IP/17/1784, Antitrust : Commission fines Google€2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service (June 27, 2017), http://europa.eu/rapid/press—releaseIP—17—1784en.htm, July 2, 2021.

This is only the tip of the iceberg. Is the Indian Competition Law system ready for these questions? Although the developed countries such as the US, the EU, and Canada have recognized the digital economy's antitrust problems earlier, India seems to have struggled. However, all expectation is not lost, since CCI has begun evaluating instances in the form of algorithmic collusion and robot cartels in India, with cases such as Samir Agrawal v. ANI Technology.[91] While there may still be a lag in Indian law, it might rally with its contemporaries. Indeed, other nations like the United Kingdom and Germany update and adjust their laws to meet the digital market.

The big issue to be discussed

Enhancements in technology allow companies in digital marketplaces to collect and use data. While such information is collected and ready for business purposes, privacy law and/or consumer protection law have traditionally been the subject, prominent merger and acquisitions (the valid example of the Facebook / WhatsApp merger), on the digital market have raised the issue of likely competitive problem because of control over large data sets. In such a combination, neither party may qualify under classic 'assets' and 'turnover' restrictions, yet, due to the ownership of a huge volume of data, they may be able to influence competition.

Artificial Intelligence — the mischief monger

The increased computers' ability to handle enormous quantities of information at other global speeds surely contributed to Hercules' achievements, but this can't circumvent the reality that they enable tacit cooperation to grow and grow. AI will acquire more complicated calculations and algorithms with time and expertise. This offers us a perfect image of digital virtual competition.[92]

---

[91] Samir Agrawal v. ANI Technologies, 2018 SCC OnLine CCI 86

[92] Ariel Ezrachi & Maurice E. Stucke, Virtual Competition, 2016, 7 J. Eur. Comp. L. Prac. 585.

As AI and Huge Data becoming mainstream, the big weapons are used by companies, industries, and competitors in the market. These developments raise problems concerning the degree to which the application of competition law is regulated. Even with new business approaches, new kinds of customer participation, and a pile of huge data the main question, "Whether this is a competition issue?" turned out often. Certainly, the problems with the perfect use of competition legislation, its suitability, and its aims, as well as with new market substances and company strategies, arise[93].

The most relevant question, therefore, is "Can competition law also regulate the use of algorithms, without the proof of an illegal agreement, to distort competition?" Indian competition legislation needs to have a human aspect but does not refer to AI, data analytics, and similar factors. So how can the weight of liabilities be released if there is no person at the other end of the legal system?

These incidents are labeled as 'unfair trading practices.' In that connection, 'anti-competitive purpose' is a major basis for the setup of development like a cartel. If rivals in the market misuse such transparency, an enactment to fight excessive transparency can do its best. Therefore, it is important to incorporate technologists in his field before India's specialists, who build devices that particularly strengthen tacit collusion. The Indian Competition Law authorities need to apply such procedures.

Another problem is the cartels powered by algorithms (e.g., a hub and spokes model or a messenger model). Because companies must agree with the actual acceptance by one, they can engage in tacit collusion and other anti-competitive activity with the help of an algorithm.

It is difficult to construct any type of human knowledge through conscious parallelism and AI. Competition regulators are therefore suitable in such instances to examine anti-competitive intent. It is nevertheless troublesome if the human component with algorithms is finished separating; in which even critical choices are taken by algorithms. Can there be any implications for AI by competition law without an anti-competitive agreement or human interference?

---

[93]Ariel Ezrachi & Agustin Reyna, Enforcing European Competition Law in a Global Digital Economy, Business Law Blog, (May 1, 2019), https://www.law.ox.ac.uk/business—law—blog/blog/2019/05/enforcing-european-competition—law—global—digital-economy, July 5, 2021.

Someone once claimed huge data is not something and liked it with a theological cheese blow while rejecting the prospect of rivalry between algorithms and technology as a whole[94]. But the growth in algorithms, as obvious as possible, is no more simple conjectures.

Samir Agarwal v. ANI Technologies

The CCI issued a decree under article 26(2) of the Act stating in Samir Agarwal vs ANI Technologies that the taxi aggregators Ola and Uber did not accept collusion or cartelization, by utilizing the identical cab fare algorithm.[95] One of the main concerns was that the taxi aggregators and cab drivers included a situation of cartelization. The contact between the drivers and the application was said to be a collaboration arranged by Ola and Uber under § 3(3)(a) reading § 3(1) of the law, which was within the sphere of the "concerted practices."[96]

The CCI noted that the hub and spoke scheme concerned the facilitation, by a third party for cartelistic conduct, of the sharing of commercially sensitive information between rivals. Thus, it is important to prove that a third-parties platform exists to act as a hub for drivers who were the spoke in establishing a hub-and-spoke conspiracy.

Since Ola and Uber did not negotiate with drivers to coordinate their taxi rates, the algorithmically generated pricing, the CCI concluded that Ola and Uber had not breached the law. The rate estimate was based on several variables and huge sets of data, which makes it impossible to reconcile this scenario with the traditional meaning of the arrangement of the hub and spoke.

However, it can't be the most accurate to comprehend algorithms and algorithmic collusion. The use of algorithms to limit competition by way of subtle techniques has

---

[94] Thibault Schrepel, Here's why algorithms are NOT (really) a thing, CONCURRENTIALISTE, 2017, https://leconcurrentialiste.com/2017/05/15/algorithms—based—practices—antitrust/, July 5, 2021.
[95]Samir Agrawal v. ANI Technologies, 2018 SCC OnLine CCI 86 (India).
[96] The Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India).

been increasingly recognized.[97] Algorithms used to maximize profit and enhance efficiency may also lead very nicely to anti-competitive behavior.

A conventional hub and spoke cartel structure comprise an interchange of strategic information between horizontal rivals (spokes) by a common contractor (hub), who acts as a stabilizing agent in the cartel at another level of the distribution chain. But a cartel would develop in an online arrangement if different rivals use the same algorithm to decide the pricing.[98]

While there is no competitive risk in a single vertical agreement, several contracts can create a typical hub and spokes structure, in which the developer, i.e. the hub, can create a cartel in the industry which can lead to higher pricing. The employment of a common middleman to decide the costs makes a hub and spoke system more likely to occur.[99] To be able to exist in this structure, the data and pricing authority of the hub must be supplied by each spoke as his opponents will do the same. Using competing data to calculate the price, the practical collaboration between the competitors is evident and a cartel is established.

Ola and Uber regard themselves as aggregators of technologies that link clients and taxi drivers. Even the CCI refused to recognize these components as middlemen or as the hub connecting the drivers. Because the drivers are individual entities who agree with a common intermediary for the same reason, i.e. the fixing of cab prices, the structure of the hub, and the spoke does certainly arise.[100]

The word 'agreement covers a broad scope under the Act and covers both comprehension and concert action. The drivers that use a common agent to determine the rates since the rest of the drivers agree to this can be regarded as anti-competitive concerning §3(3) (a).[101] The CCI has given free rein to the algorithmic antitrust

---

[97]Ariel Ezrachi & Maurice E. Stucke, Artificial Intelligence & Collusion: When Computers Inhibit Competition, 2017 U. Ill. L. Rev., 1775 (2017), https://www.illinoislawreview.org/wp-content/uploads/2017/10/Ezrachi-Stucke.pdf, July 7, 2021.

[98] Iga Malobecka, Hub-and-spoke cartel - how to assess horizontal collusion in disguise, 8 The Critique Of L. 64 (2016), http://www.krytykaprawa.pl/api/files/view/571208.pdf, July 7, 2021.

[99] Peter Picht & Benedikt Freund, Competition (Law) in the Era of Algorithms, 2018, 39 Eur. Comp. L. Rev. 403.

[100]Julian Nowag, The UBER-Cartel? UBER between Labour and Competition Law, 2016, 3 Lund Stud. E.U. L. Rev. 13, 14.

[101] The Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India), §3(3)(a).

activities by refusing to recognize and by failing to apply the principles of competition legislation to those disruptive innovators. Existing research adequately describes that the Digital Economy model may be used to calculate pricing using algorithms. Literature ignorance and the application of archaic notions to issues of the new age of the neo-economy is a terrible precedent.[102]

NCLT also observed[103] that the concept of hub and spoke cartel stated to apply to the business model of Ola and Uber as a hub with their platforms acting as a hub for collusion inter se the spokes i.e. drivers resting upon US Class Action Suit titled "Spencer Meyer v. Travis Kalanick" has no application as the business model of Ola and Uber (as it operates in India) does not manifest in restricting price competition among drivers to the detriment of its riders. The matter relates to foreign antitrust jurisdiction with different connotations and cannot be imported to operate within the ambit and scope of the mechanism dealing with redressal of competition concerns under the Act. It is significant to note that the Informant in the instant case has alleged collusion on the part of drivers through the platform of the Cab Aggregators who are stated to be using their algorithms to fix prices that are imposed on the drivers. Given the allegation of collusion inter se the drivers through the platform of Ola and Uber, it is ridiculous on the part of Informant to harp on the tune of the hub and spoke raised based on law operating in a foreign jurisdiction which cannot be countenanced.

The court has also said that there is no sharing of information between the drivers and Ola under the business model of Ola. The taxi drivers linked to the Ola platform do not have interconnections and do not have the opportunity to share information about the drivers or the revenues from the given trips. This excludes the likelihood of cooperation between drivers via the Ola platform.

The law of competition and its interpretation is founded in ideology and dependent on the pathway. It forms an inherent element of the legal, political and social structure of a government and cannot be pursued as an aim alone. What can address one society's issues cannot be as beneficial for another. Analysis and comparison of the legislation

---

[102]Basu Chandola, Algorithms and Collusion: Has the CCI got it wrong?, KLUWER COMPETITION LAW BLOG (Feb. 28, 2019), http://competitionlawblog.kluwercompetitionlaw.com/2019/02/28/algorithms—and—collusion—has—the—cci—got—it—wrong/, July 9, 2021.

[103] ANI technology v Samir aggrawal, Appeal (AT) No.11 OF 2019 (NCLAT).

of one nation with those of another is straightforward, and the gaps are noted.[104] The imminent objective here though is to see how the "elephant in the room" should be dealt with.

Review Committee report on Competition law

The Committee highlighted that most digital market acquisitions gain value from data or business innovation that is present in the target. In such purchases, the target may not include an important asset base and offer free or small turnover-generating products/services. This is possible because of the business model of digital marketplaces, businesses are typically so large that, initially with an emphasis on user growth, they will have no substantial income for several years. The value of the sales target in these cases is a fairly poor predictor of the importance of the transaction for competition.

The Committee stated that CCI cannot examine transactions even if their potential competitor damage is obvious in India, unlike many other countries, without meeting the notification criteria. This is due to the lack of the residual capacity to evaluate non-notifiable transactions under the Competition Act.

The Committee observed that certain competing regulators such as the EC which have no residual authority can use different procedures for the evaluation of non-notifiable combinations. The Facebook/WhatsApp combination, for example, failed to fulfill EC turnover requirements and was thus not initially eligible to receive EC notification. The EC finally reviewed the merger under its case referral system, however, given that the proposed transaction had met the notification thresholds in three European member states. The Committee noted that CCI had no such options available for the review of non-notifiable combinations that could have an anti-competitive effect.

The Committee examined whether CCI may rely on section 20(1) of the Act to examine transactions that do not satisfy the criteria of assets and turnover. Section 20(1) was worded to permit the CCI to evaluate the transactions which qualified under Section 5, i.e. the transactions which fulfill the asset and turnover criteria of section 5. It has thus

[104] Ariel Ezrachi & Agustin Reyna, Enforcing European Competition Law in a Global Digital Economy, BUSINESS LAW BLOG (May 1, 2019), https://www.law.ox.ac.uk/business-law-blog/blog/2019/05/enforcing-european-competition-law-global-digital-economy, July, 9, 2021.

been decided that at present the CCI has no residual authority to evaluate transactions that are un-notifiable. Concurrence regulators have utilized such residual power, on the other hand, in some other nations in the past to examine transactions when thresholds have not been satisfied. In Ireland and Brazil, for instance, such rights were exercised. The competition authority also has jurisdiction to evaluate deals that fall within such limits even in the US where the merger report requirement is based on the amount of the transaction test.[105]

Some other nations opted not to rely on residual capacities and, by introducing a transaction value limit for merger notice, they tackled the problem more directly. Such an extra subsidiary threshold for notice has been explicitly included in competition law in Germany and Austria.[106] The German Competition Limitations Act was updated to cover Section 35(1a)[107] after extensive consultation with the relevant parties. This clause provides for a EUR 400 million deal value criterion for the notice of merger. Such a deal is subject to a merger control assessment by the German competition authorities subject to specific sales-based threshold criteria when the purchase is worth more than €400 million and the target enterprise has "significant control" in Germany. Section 9(4) of the Austrian Federal Cartel Act 2005[108] provides, also, for a merger notification, for a deal worth EUR 200 million. If the deal is valued at above EUR 200 million, and the enterprise to be purchased "is largely domestically engaged," it is subject to a merger notice obligation, following specific turnover-based threshold criteria.

The Committee reviewed how Germany and Austria have overcome some operational problems resulting from the establishment of a Deal Value threshold by issuing a guideline on the calculation of Deal Value.[109] However, the Guidance cautions that all

---

[105] Ministry of corporate affairs, Report of the Review Committee on Competition Law, [26th July, 2019].

[106] Germany & Austria, Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35 (la) GWB and Section 9(4) KartG), (2018), https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktio_nsschwelle.pdf?blob=p, July 10, 2021.

[107] German Act against Restraints of Competition, http://www.gesetze-im-internet.de/englisch_gwb/, July 10, 2021.

[108] Austrian Federal Cartel Act, 2005, https://www.bwb.gv.at/fileadmin/user_upload/PDFs/PDFs3/2-_Federal_Cartel_Act_final.pdf, July 10, 2021.

[109] Germany & Austria, Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35 (la) GWB and Section 9(4) KartG), (2018),

applicable questions cannot be considered and that this should be seen as preliminary, in the lack of adequate case practice.

The Committee also noted efforts by other jurisdictions such as the European Union, the United Kingdom, the United States, and Italy in carrying out extensive consultations to analyze issues related to merger control on the digital market and in particular, to establish a deal value threshold for transactions driving data. For example, in a report drawn up by the UK Government's Digital Competition Expert Panel ('UK Expert Panel Report')[110], the reasons behind the absence of a comprehensive CMA review for mergers in the digital market were addressed at length. One of the possible reasons why the Panel considered this question was the fact that CMA "is restricted to its reach and comprises the completion of either of two legal threshold tests: the turnover test and the supplied test proportion." Finally, based on claims by CMA that the "supply share" test offered sufficient flexibility for the examination of the merger on digital markets, the Panel determined that there would be no compelling justification for legislative changes to the jurisdiction of CMA. However, the UK Expert Panel Report noted as follows for countries that do not have a similar share of supply test:

"The business model of digital companies often means that they fail to generate any significant revenue for several years, focusing initially on user growth. For countries relying solely on turnover thresholds to apply jurisdiction, this is a significant issue that must be addressed."

The Report also contemplates that if needed in the future "it may be appropriate for government to introduce a transaction value threshold alongside the existing turnover and share of supply thresholds for jurisdiction."

With this in mind, the Committee considered that the thresholds for CCI to examine the transactions under the competition act should be amended. There was worry that any legislative modification can be premature. In this respect, it was pointed out that the control of a merger is an anticipatory regulation about its intention and shape. Forcing an empirical validation on the basis (a) of the number of transactions that have

---

https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktio_nsschwelle.pdf?_blob=p%20ublicationFile&v=2, July 11, 2021.

[110] Digital Competition Expert Panel (UK), 'Unlocking digital competition' (March 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf, July 11, 2021.

escaped from the scrutiny of CCI due to a turnover/asset below the thresholds and (b) its anti-competitive effects on the markets means waiting for a significant number of such transactions and their anticompetitive effects on the market and plugging only afterward in the legislative gap that constitutes one. It was pointed out that digital marketplaces in India saw several transactions that were utilized as a strategy for strengthening market positions, reducing possible threats, or expanding into new business areas. Examples include the acquisition of Flipkart's Myntra, Ola's TaxiforSure, Facebook's Whatsapp, and Snapdeal's Freecharge. This opinion was consistent with the findings of the UK Expert Panel report on under-enforcement on digital marketplaces, The Committee observed this. In this respect, a realistic and forward-looking strategy was considered by the Committee.

Based on this, the Committee assessed that an enforcement vacuum exists in terms of the CCI's capacity to evaluate digital market transactions to verify their anti-competitiveness under the current system of merger control. The CCI had no residual review power as in Brazil or the United States, a referral mechanism as in the EU, a supply test share such as the UK, and a deal value threshold such as Germany and Austria[111].

The Committee highlighted the need of preparing the laws for the challenges ahead as one of the major objectives of the present revision of the competition law. The Committee thought that ensuring competitiveness in this sector would be important, given the growing importance of digital marketplaces in the economy. While it was widely agreed to set a deal value limitation, it was debated that alternative appropriate thresholds may arise from a greater global understanding of CCI and Competition regulators about new generation markets.

Competition laws were always sharp, is a powerful instrument. Competition law It can successfully handle one of the characteristics of online dystopia – stealth and data theft – a feature that refers to the growth of methods to focus, collect, and targeted users of unaware data. For example, the business model of Facebook has allowed data collectors globally to acquire and exploit data from thousands of Facebook members. This activity might also take broader dimensions such as fairness, pluralism, democratic ideals, and

---

[111] International Competition Network, Recommended Practices for Merger Notification and Review Procedures, (2017), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWGNPRecPractices2018.pdf, July 11, 2021.

liberties - the significant elements of the current digital landscape include commercial manipulation of ideas and threats to individuality.

The attention automatically turns towards the measure of intervention, the chilling competition, leading to optimum outcomes with such a flexible tool. The implementation should be measured, appropriate and efficient. Competition legislation, likewise, cannot be an excuse for every matter of policy. There may be valuable insights into the limits which preserve the competition environment and narrower economic prospects, which overlook the distribution of wealth and overlook the regulatory aspects of Indian law. However, these principles cannot be confused about the end upon which Indian competition legislation can depend.

However, the EU regime and US competition jurisprudence can take some significant and innovative inputs, because they are the basis of Indian competition machines.

Wider Economic principle

The price-centered tools must be removed. In particular, the limited economic approach does not include consumer dynamics and their interplay with the digital economy. Digitization's influence on a large number of elements of our societies and its nature indicates that customers should not always be considered as economical units or digital companies as efficient players, exempt from enforcement surveillance. There is potential for increased focus on protecting the customer, privacy, and behavioral science by the expanding implications of the digital economy.

The next issue concerns the increasing power of the market. Market properties, network effects, gatekeepers, and data monopolies might lead to market power in the digital economy below the traditional domination level.[112] Until conventional antitrust examination is initiated, businesses can profit from considerable leverage from direct or third-party data tracking and harvesting. This can make it possible for critical data holders, behind the 'antitrust radar,' to participate in exploitation. As adopted by the Government in response to the DIPP news release, the consequences of the rejection of the supplier, potential obligatory data sharing orders assist avoid concentration.

---

[112] Supra note 108 at 63.

It is necessary to establish the proper type and scope of consumer-facing remedies. A new tendency is to establish an exciting method, which complements the case-by-case approach in the form of erga-omnes duties. In our existing system, our legislative approach is the greatest way to deal with detrimental behavior in several companies, where industry objectives are not matched with customer interests. Nobel Prize-winning Professor Jean Tirole's perspective, i.e. new difficulties for the digital industry regulators, would be worth mentioning that the combination of antitrust enforcement and regulation means "public and government engagement in the first place is inescapable."[113]

Of course, competition policy cannot give all the answers instantly effectively, it requires time to develop. But it can surely address or at least assist to describe some of the challenges that we confront today gradually and fully. The legislature can build on the cyber and economic laws of India itself or be inspired by the mature data protection and privacy legislation rules from across the world. Taking the advice of experts' publications and competition jurisprudence, we can enhance current legislation to incorporate ideas such as algorithmic collusion, tacit collusion, and robot cartels.

[113] Id at 67.

CHAPTER SIX

Cross-Border Merger and Acquisition

This chapter carefully examines relevant legislation and criticizes several recent key judgments, notably the extremely controversial combinations of Jet-Ethiyad and Mylan-Agila made by the Competition Committee of India (CCI). At the beginning of the chapter, the competition policy aspect of merger control is explored. Policies of the CCI have also been discussed in depth with the assistance of decided situations the incorrect method in which it has imposed the penalty for failure to provide information on combinations is applied under section 43A of the Competition Act.

Concerning its equivalents in various other countries, such as the over one century-old United States Federal Trade Commission (FTC), the Indian competition body, the Competition Commission of India is comparatively nascent. CCI's practice has grown thrilling, yet it is rather fascinating. This chapter discusses modern topics relating to the authority of the CCI granted by the Competition Act 2002 (ICA) under the Indian Competition Act (or combinations).

This chapter examines some of the key sections of the 2002 Indian Competition Act and the 2011 Combination Regulations after considering 'merge control' in terms of competition policy and evaluates the Commission's determinations in cases relating to cross-border combinations. One is the aviation business, the Jet-Etihad combination,[114] while the other is related to the pharmaceutical industry, the Mylan Inc. case,[115] which was the largest pharmacological merger in India until recently, based on the Mylan Agila transaction. The key contention in the Mylan-Agila agreement was the inclusion of the "non-compete clause." in the relevant transaction documents. The transaction costs for companies are increased by a factor of uncertainty that is contained in existing Indian competition law and policy regime concerning merger control. The

[114] CCI Order, http://www.cci.gov.in/May2011/OrderOfCommission/CombinationOrders/C-2013-05-122%200rder%20121113.pdf, July 12, 2021.

[115] CCI Order, http://www.cci.gov.in/May2011/OrderOfCommission/CombinationOrders/C-2013-04-116.pdf, July 12, 2021.

'inexperience' of the regulator can be linked to this ambiguity. with the increasing number of decisions, the interpretation of legal requirements will become clearer.

The CCI's extraterritorial jurisdiction can be used for cross-border mergers and so a pertinent clause is addressed One further element is the criticism that CCI can impose a penalty for failure to provide information on the necessary combinations, according to Section 43-A of the aforementioned Law of 2002.[116] The inappropriate and arbitrary exercise by the CCI of this statutory power will be highlighted in several examples mentioned.

Competition policy

The best policy for the evaluation of merger controls is disputed. The Competition Authorities must take into account two broad warnings offered by a well-known author[117]:

“Competition policy is not concerned with maximizing the number of firms, and Competition policy is concerned with defending market competition to increase welfare, not defending competitors.”

"Competition policy" is defined as the "collection of policies and regulations ensuring that competition in the market is not so constrained that economic welfare is reduced." The objective for competition authorities and courts, namely economic welfare which also provides a criterion for determining the competitor impacts of a merger, should be read in conjunction with that. 'The economic welfare of the industry constitutes a sum of the consumer (or consumer welfare) surplus and producer surplus.

It is commonly recognized that the competition/anti-trust authorities should examine two elements of a merger[118]:

- Can the combination grant the power to the merged entity to exercise market power independently? (Single firm dominance)

---

[116] the Competition Act, 2002, act no. 12, § 43-a.
[117] MASSIMO MOTTA, COMPETITION POLICY: THEORY AND PRACTICE, 2004, 39.
[118] Id.

- Whereas the combined entity is unable to unilaterally increase prices, whether or not the merger will lead to circumstances in the industry where the scope of collusion between the rest of the companies in the market increases (i.e. leading to joint/collective control) (the so-called coordinated effects in the US merger policy) (the pro-collusive effects).

Even in combinations, though, efficiencies gains can outperform the greater market power and benefit consumers by leading to reduced prices leading to better welfare. Though the merger is usually categorized as horizontal or vertical. This chapter focuses on horizontal mergers since they generate anti-competitive problems in particular. In the merger evaluation, the idea of dominance plays an important role. The definition and identification of the 'relevant market' are essential for the evaluation of market power and its possible expansion.

The conventional method to unilateral analysis was to identify the 'relevant market' and then to evaluate the market strength of the merging companies.

The SSNIP (small but substantial non-transitory) test a.k.a the Hypothetical Monopolist Test is used to establish the extent of the 'relevant market and also is a guide for analyzing is the adequacy of the respective market definition used in one specific scenario.[119]

The next key step in defining the market in question is to evaluate the unilateral market power. Although the theoretical measurement of market power is that of Lerner index 9,[120] which can be applied directly to practical matters, competition authorities have historically given priority to market share, the crossing of which leads to a deduction about the dominance of the company. In this context, however, several other elements like the convenience and probability of entrance and the power of purchasers are of fundamental importance than the market shares. In terms of price decisions, the capacity of merging entities to use improved market power in the future primarily hänges from the number of opponents in the relevant market therefore density in the market matters.

[119] Ajay Kr Sharma, 'Cross Border Merger Control by the Competition Commission of India: Law and Practice' (2015) 2015 Freilaw: Freiburg L Students J 11.
[120] Supra note 117 at 70.

Thus, ceteris paribus is going to create greater worry in a highly concentrated sector than in a diversified industry. The Herfindahl-Hirschman Indicator[121] is the most often used concentration index to filter unilateral effects of amalgamation (HHI)

Even in the lack of clear information on the adverse unilateral effects that may be required to stop a merger by unilateral revision of effects, the element related to the determination of the pro-collusive (or coordinated) consequences of a merger may exist. In this case, the notion of joint domination is applicable since the combination will likely provide structural terms for companies that cannot concentrate pre-merger to achieve collusion results either overtly or covertly.

Because the efficiency gain goal in mergers is important, it can be permitted to defend efficiency even if single business domination is near, as prices might decline.

The last part of the policy on merger evaluation covers "merger remedies." It is argued that despite some fears about the consequences of the merger on competition, the certain merger may be approved by the competition authorities when the regulators in question find the solutions given by parties to be appropriate. Much of this is expressly included in the Merger Review Guidelines by American and European Competition authorities.[122]

CCI's Review of Combination

The S.F.S. Raghavan Committee has appropriately highlighted its suggestions on the competition Policy for merger assessment in India in its report according to the 2002 Competition Act. The Raghavan Committee did properly express a view on competition policy, which focused on horizontal mergers, albeit Indian Competition law applies to all forms of mergers. To comprehend in short the scheme and method of a merger evaluation in India, that Paper analyzes the most

[121] Supra note 119 at 71.
[122] Alan Goldberg, Merger Control, in COMPETITION LAW TODAY, 2007, Vinod Dhall ed, 93.

important legislative sections of the 2002 Competition Act and the CCI (Combination Transaction Procedure) Regulation 2011[123].

The CCI may, under Section 20 of the Law, undertake its initiative of the investigation into whether the 'combination,' as referred to in Section 5, has caused or is likely to have caused a considerable adverse effect on competition in India, and can only initiate this investigation within one year of the date the combination takes effect.[124]

Moreover, Section 20, sub-section (2), following receipt of communication under paragraph 6(2), provides the normal manner of the aforementioned CCI investigation. In the aforesaid determination, section 20, sub-section (4) states many criteria which the CCI will be 'considered' in the stated investigation.

JET-ETIHAD CASE

Now let go on to the Jet-Etihad combination evaluation by the CCI. This 'combination' has suggested that the sale of Eithad Airways (USD) sell 379 million [Indial Rupee Price (INR) 754.74], with certain other rights, to Abu-Dhabi-based Eithad Airways PJSC in 24 percent. The parties to the CCI issued the notice under section 6(2) on 1 April 2013, following entry into three transaction documents, i.e. the Investment Agreement, the Shareholder Agreement (SHA), and the Commercial Cooperation Agreement, on behalf of the parties to the CCI on May 1, 2013.

Two orders emerged from the examination of this combination. The majority decision approved the deal under Article 31(1). whereas minority order given by the sole member of the Committee under Article 29(1) prima facie concluded that the combination proposed would have an appreciable adverse effect on competition (AAEC) and thus requested a further inquiry.[125]

---

[123]Avinash Sharma, Revisiting Competition Law in India: Challenging Dimensions in the Era of Globalized Economy, 2008, World Competition 31, no. 4, 607.
[124] the Competition Act, 2002, act no. 12, § 20.
[125] CCI order, http://cci.gov.in/May201, July 13, 2021.

Etihad, the UAE domestic carrier is an Abu Dhabi government-owned business and its hub in Abu Dhabi, the capital of the United Arab Emirates. In contrast, in 1992, the listed Indian firm Jet mainly engaged in low-cost and full-service scheduled air passenger transportation to and from India. The CCI order began by underlining nation sovereignty over their airspace, then discussing the relevance of two countries' BASAs in that regard.

In a particular circumstance, the significance of defining the relevant market in an industry such as the 'airline industry' is strongly underlined. The majority utilized the common pair Origin & Destination method in the aviation sector to define the relevant market in line with the demand-based approach to the market definition. This includes, for the most part[126]: (a) the relevant international passenger market for the O&D couple beginning in or finishing with nine specific locations in India, and (b) O&D pairs originating in or terminating in India on the overlapping routes of the parties to the combination. However, it goes beyond the O&D method and in its study covers the possible network impacts The CCI (i.e. the majority) believed that both techniques stated above did not lead the AAEC on the relevant Indian market. The minority order outlines the market of international passenger transport from and to India and evaluates the influence on macro and micro levels which is as follows:

a) Macro-level impact on the different sectors of international air passenger traffic from and to India; and

b) Analysis of the extent of overlaps of flights of the two airlines between specific points of origin and destination (O&D pairs or routes).

In 2008, the Administrative Staff College of India (ASCI), called 'Competition Issues of the domestic sector of the air traffic sector in India,' carried out one of the major studies commissioned by the CCI and the HAS of the World Bank Group in this field. The study was based on the OECD Report on 1997 "The Competition Policy and International Airport services "needs two complementary inputs: aircraft services and airport services for providing air services between any two particular locations. Efficient competition in these two sectors should thus occur if

126 Id. At 73

we desire efficient competition in the field of air transport."[127] The relevant market was defined in this study as "the route between city pairs at a particular time on a particular date".

The core approach of CCI was to analyze each O&D couple under two conditions: the inclusion of indirect vols in an analysis of the presumption of Indian price-sensitive clients and the substitution of airports, especially in the same area, considering Abu Dhabi, Sharjah, and Dubai as being replaceable primarily due to the free shuttle service offered by Emirates and Etihad. This fact, without any study, was taken simply in favor of the proposed merger wherever existing competitors had genuine market shares.

The above ASCI study has included the analysis of the slotting policies in airports and slot hegemony, and the hurdles to new competitors in the already-oligopolistic market. The analysis of the HHI on several O&D pairs to assess the concentrations on the market, as mentioned above. If the ASCI report discusses these criteria extensively, it could seem so especially because of the adverse ruling under Section 29(1), the remaining members of the CCI could have done a more elaborate investigation before forming its prima facie opinion resulting in the passage of Section 31(1) order.

To the credit of the minority, pessimism over Air India (AI)'s ability to create major competitive restrictions after mixing became more reasonable. At least one slot deal was considered between the parties at one of London Heathrow Airport ('LHR Airport') the busiest airport. However, the minority did not carry out a comprehensive study of the speed and duration of each important airport in O&D analysis, while it pointed out that the availability of slots is relevant in its analysis. The minority was not persuaded to rely on the data provided from the parties to CCI and seemed to underestimate other competitors and slightly overrate the market power of the parties after merging, notably by increasing the allocation of seats between India and the UAE (Abu-Dhabi) under the then-recent MoU by

[127] " ADMINISTRATIVE STAFF COLLEGE OF INDIA (ASCI) RESEARCH & CONSULTANCY, COMPETITION ISSUES IN THE DOMESTIC SEGMENT OF THE AIR TRANSPORT SECTOR IN INDIA (2008), http://www.cci.gov.in/images/media/completed/transport_20090421133744.pdf, July 15, 2021.

50,000 of 13,33061. A few other salient aspects from the minority order which reveals some chinks in the CCI Order are as follows[128]:

"It rubbished the parties claim regarding substitutability of Abu Dhabi with Dubai based on the analysis of data of the overlapping routes provided by the parties, which showed that "passengers traveling to Dubai are not using Abu Dhabi as a substitutable option. Furthermore, it was also pointed out that website of none of the Indian carriers including, Jet showed Dubai as substitutable to Abu Dhabi or vice versa."

Furthermore, the inclusion of indirect flights in its analysis by the majority based on the price sensitivity of the Indian consumer was effectively challenged in the minority order which said that:

"[A] premium customer who travels business/executive class is time-sensitive and will therefore prefer a direct point-to-point connection over a connecting one-stop or two-stop flight. For the remaining passengers who are not time-sensitive but may be fare-sensitive, again the direct point-to-point flight may be the preferred option over connecting flights for the routes Mumbai-Abu Dhabi and Delhi-Abu Dhabi, as the direct flights are found to be cheaper on average as compared to connecting flights. (Emphasis supplied)"

Another significant component is the CCA clause which prohibits Jet to not to share code in specific O&D pairings with other airlines. While the majority expected the anti-competitive implications that such cancellations of agreements on code sharing may have, the opinion was that a combined force would be restricted to the competition facing the parties from the 'competent' airlines specified therein.

But this clause leads to a prima-facie the minority order about its AAEC, among other things owing to the resulting weakening of inter-hub competition that may limit the option of passengers in their travels from/to specific locations. Lastly, while the majority view this combination as leading to increased efficiency and reduced prices for customers, sometimes including failed corporate defense, it appreciates the benefits for Jet, which had a big debt. By contrast, the minority was

---

[128] Supra note 125 at 73.

not persuaded, as they were not substantiated, of these efficiency claims. This ends the examination in the Jet-Etihad Combination Review of both majority and minority orders.

Examining the Mylan-Agila Combination

Agila India has purchased 94.8 billion INR of cash and contingent purchases in the Mylan-Agila agreement from a US corporation, Mylan Inc.[129] The primary issue with this merger was the non-competitive duty of both the SPA and RCA with their promoters, as well as the purchaser, Mylan Inc. and Strides Arcolab Limited (SAL). The agreement on the RCA was signed with the developed companies. The 'Target Enterprises' were Agila India, a wholly held subsidiary (WoS) of SAL, and Onco Therapies Ltd. (OTL) a WoS of Agila India in the agreement. We shall look first to some of the issues considered by the CCI, culminating in its approval decision, under Section 31(1).

The research and manufacture of several injectable products were carried out by Agila India. OTL's primary business was R&D and the production of, especially injectable, oncology-related drug products. Mylan's companies are active in generic and specialty medicines in around 140 countries (including respiratory, allergy, mental, and antiretroviral treatments). Active Pharmaceutical Ingredients were produced by its Indian subsidies (APIs).

CCI noted that both acquirers and target firms had minimal domestic sales presence in India, and local domestic sales for Targets accounted for less than 5 percent of their consolidated sales in 2012. It stated that other than a few items which were also completely distinct in their features and intended use, products supplied by the acquirer and the target entities for Indian customers came under separate therapeutic categories in the Indian market. Another noteworthy finding was that the majority of domestic sales of the buyer in India were injected into APIs and of the target companies. Moreover, the majority of the non-sterile APIs could not be

[129] Scribd.com, https://www.scribd.com/document/365089004/An-Report-Pharma-India, July 15, 2021.

utilized for the formulation of injectable products. These facts favored the combination that was proposed.[130]

NON-COMPETE CLAUSE

Despite the approval of the CCI, issues arose first from non-competition obligations in SPA and RCA, as CCI observed:[131]

“SPA and the RCA provide that for six years from the date of closing of the proposed combination, each of Arun Kumar, Pronomz Ventures LLP, SAL and any of SAL's group companies (collectively known as the "Promoters") shall not (whether alone or jointly with another and whether directly or indirectly) carry on or be engaged, concerned or interested economically or otherwise in any manner in the business of developing, manufacturing, distributing, marketing or selling any injectable, parenteral, ophthalmic or oncology pharmaceutical products for human use, anywhere in the world.”

The buyer justified the provisions imposed on promoters of target companies and selling shareholders non-compete requirements at the time of departure, to safeguard the acquirer's and target parties' commercial interests. CCI cited its perspective on its previous order's non-concurrent responsibilities in the field of the Hospira-Orchid combination. Which is as follows:

"non-compete obligations, if deemed necessary to be incorporated, should be reasonable particularly in respect of (a) the duration over which such restraint is enforceable; and (b) the business activities, geographical areas and person(s) subject to such restraint, to ensure that such obligations do not result in an appreciable adverse effect on competition."[132]

The Hospira Orchid agreement, in its non-compete clause, stipulates that, for eight and five years respectively, Orchid Chemical and Pharmaceutical Ltd. (OCPL) and their promoter are unable to carry out specific business and R&D activities related

[130] Id. at 76
[131] Supra note 119 at 71.
[132] CCI order, http://www.cci.gov.in/May2011/OrderOfCommission/CombinationOrders/C-2012-09-79.pdf, July 17, 2021.

to the transferred company The parties to the Hospira-Orchid combined review argued as a rationale of the same that the incorporation of these non-compete clauses is a standard industry practice, which has generally been deemed essential to execute the envisaged combination effectively and allows the acquirer to obtain full value from the acquired assets.

The CCI questioned them, the parties suggested some changes in the hospira-orchid deal. consequently, decrease the time to four years regarding the domestic market in India and removing some R&D limitations which were agreed by CCI.

In Mylan-Agila the CCI observed that although the Target Enterprises are engaged in the business of injectable products belonging to a few therapeutic categories, the non-compete covenant sought to impose a blanket restriction covering injectable products across all the therapeutic categories. It went on to say, that 'the scope of the non-compete covenant covered all products under the oncology and ophthalmic categories even though there are products under these categories which are not being currently manufactured by the Target Enterprises.[133]

In the light of the CCI, only those goods that have been currently developed, produced, or marketed by target companies should be covered by this non-competition agreement, and the acquirer has thus been given a notification to explain reasons for the aforementioned non-compete provisions. In reply, the Parties proposed: amending the non-compete clause by reducing the period to four years (as in Hospira-Orchid cases); limiting the scope of the obligation of non-competitiveness on the Indian market and only on products produced by or in the pipeline or development phases that the CCI agreed upon before its favorable Section 31(1) was passed. In the US, however, this agreement raised questions with the FTC, which opened an inquiry into this proposed acquisition which led to the conclusion of an agreement of consent with the FTC between respondents Mylan and Agila in respect of which the Mylan-Agila transaction was also conditionally approved. In fact, in these 11 markets, Agila India was supposed to provide its 11 generic medicines injection systems to its competitors.

[133] Supra note 125 at 73.

The CCI is of the view that non-compete provisions in Brownfield pharmaceutical industry combines are suspicious, while in other sectors combinations with non-competitive clauses the CCI was cleared up without objection. For instance, the SunCoke-VISACoke combo authorized by CCI in January 2013 is mentioned by attorneys.[134] Therefore, the CCI practices in this field may become subjective and arbitrary as time passes by in the lack of a defined policy on such auxiliary restrictions. The CCI can provide broad non-competitive clause rules in combinations, such as those in the "combination Directly linked and necessary for concentrations" notice of the European Commission, giving the parties concerned a more objective and predictable examination.

The government probably established the following two new restrictive requirements as a reaction to the backdrop concerns after Mylan-Agila, while continuing to allow 100% FDIs for the Brownfield Pharmaceuticals sector[135]:

(i) Non-compete' clause would not be allowed except in special circumstances with the approval of the Foreign Investment Promotion Board.

(ii) The prospective investor and the prospective investee are required to provide a certificate along with the FIPB application as per Annex-11.

They are self-contradicting, interesting yet regrettably. This 'certificate' in 'Annex-11' clearly states in one of the provisions: 'The intersection agreement concluded between foreign investors and investment company Brownfield should also not include any non-competition restriction whatsoever, including a shareholder contract.' It is also certified.' Since, in the transaction documents, the aforementioned condition, ii) requiring a certificate to be submitted in Annex-11, excludes non-compete provisions, the exemption to the foregoing condition, I become nugatory and otiose.

[134]CCI's Non-Compete Concerns!, THE FIRM (2013), CCI's Non-Compete Concerns! (moneycontrol.com) , July 17, 2021.

[135]Consolidated FDI Policy, 2014 (DIPP, Government of India), 6.2.18.3.

CHAPTER SEVEN

Conclusion and Suggestions

The link between corporate governance and corporate restructuring is as previously established. Corporate restructuring must be successfully simplified and vice versa to meet the real spirit of corporate governance. The present structure and methods, however, do not meet the search for this generation of value. The final aim of value creation and the practice as it exists today are widely divided. Effective modifications similar to those described in chapter three will assist to overcome this gap if executed effectively. Some of the highlights include:

- guaranteeing the independence of the managers;
- strengthening the safeguards and disclosures linked to parties' transactions;
- enhancing the efficiency of the management board assessment processes.

Although the research produced varied answers, many believe this is a step in the right direction. However, so far few attempts have been taken to address the problems emerging from the difference between value creation and corporate restructuring appropriately.

The question of "control," albeit of a certain technical aspect, has, in the context of its application as an MBR trigger, confused regulators, buyers, targets, and minority shareholders worldwide. Although the quantitative method is homogenous across jurisdictions, the numerical criteria differ considerably. The usage of the qualitative method implies that the varied approaches taken in the jurisdictions employing them are more disparate. It is not only unreasonable, as the debate in this paper argues, to harmonize the notion of 'control completely, but also undesired, as numerous domestic variables shape this concept. This paper nevertheless tried to identify experience in the implementation of the idea of control for the MBR in many jurisdictions and has distilled a common set of principles that may be used by them by their unique conditions.

In developing the capital markets and protecting the interests of investors, the SEBI has done an excellent job. It is expected that SEBI would alter in the future the takeover code to remove the onerous open offer procedures or numerous regulatory clearances by introducing free provisions for 'control.' To get exemptions from numerous regulatory submissions, the ownership limit should be increased. If the multi-approval procedure were to be abolished and a single-window clearing system for mergers and acquisitions had been implemented, investors might appreciate and trust. With due monitoring and up-to-date rules, together with a welcoming approach to enterprise, India would become both a domestic and international investment destination. It will strengthen the economy in the long term, help to create jobs, and make the nation prosperous on the world stage, placing India among the world's most advanced and prominent countries.

As mentioned, the major elements of a digital economy include social networking, search engines, and electronic business, with very few companies in charge in these sectors. The major companies will try many strategies to preserve their dominant market position. At times when anti-competitive or unfair actions develop, authorities have difficulty properly analyzing them to determine their anti-competitive nature. Therefore new tests and procedures should be found and implemented to assess such anti-competitive behaviors for the interests of customers and the economy as a whole.

This paper looked at Indian competition legislation concerning the examination of "combination," focusing on merging with an international component, and criticized the practice in this respect of the CCI's merger control. The article examined the "combinations" examination method, as outlined in the applicable parts of the 2002 Indian Competition Act and the 2011 Combinations Regulations, after analyzing competition policy matters. The pros and demerits of the Jet-Etihad Combination Review orders of the majority and minority of the CCI were debated. Curiously, the penultimate question indicated that CCI's penalties under Section 43A in 2002 were inconsistent and rather arbitrary, as seen in Section 43a of the

Competition Act. Overall, the article indicates the CCI's relative inexperience in a joint review although it does appear to have demonstrated its determination to comply with the appropriate legislative rules. If there is also an issue of competence, this must, ideally via a comparative law study, be extensively investigated by investigating the legislation and practice on the names of CCI members, but it also falls outside the purview of this piece of research.

Bibliography

D. GEETA RANI & R.K. MISHRA, CORPORATE GOVERNANCE - THEORY & PRACTISE, Excel Books, 1st ed. 2013.

K. GUGLER, THE ECONOMICS OF CORPORATE GOVERNANCE AND MERGERS, Edward Elgar, 1st ed. 2008.
AKIRA TAWMURA, CORPORATE GOVERNANCE: JURISDICTIONAL COMPARISONS, 141, Anderson Mori et. al. eds., European Lawyer 1st ed. 2013.

GEIS GEORGE S, 'SHAREHOLDER POWER IN INDIA' IN RESEARCH HANDBOOK ON SHAREHOLDER POWER: CHELTENHAM, UK AND NORTHHAMPTON, MA USA, 592-610 (Edward Elgar Publishing 1st ed. 2015).

N.R. SRIDHARAM AND P.H. ARVIND PANDRAN, GUIDE TO TAKEOVERS AND MERGERS, 1039, 1st ed. (LexisNexis Butterworths Wadhwa), 2010.

Wan Wai Yee & Umakanth Varottil, Mergers & Acquisitions in Singapore: Law & Practice, Singapore: LexisNexis, 2013.

Chidambaram Chandrasegar, Take-overs and Mergers, 2nd ed (Singapore: LexisNexis, 2010).

Paul L Davies & Sarah Worthington, Gower and Davies'Principles of Modern Company Law, 9th ed (London: Sweet & Maxwell, 2012).

Yong Liu &Yongqing Wang, Performance of Mergers & Acquisitions under Corporate Governance Perspective, 2013, OPEN J. OF SOC.

Kavita kumawat, merger and acquisition 314 V1 pdf, 2nd ed.2013.

Richard Roll, The Hubris Hypothesis of Corporate Takeovers, 59 J. OF BUS.1986.

Shleifer & R. Vishny, Stock market driven acquisitions, JOURNAL OF FINANCIAL ECONOMICS, 2003.

Ernst & Young, Indian M&A Transactions on Rise, Reflect Global Trends, E&Y Newsroom.

Mitchell Lee Marks & Philip H Mirvis, Merger Syndrome: Stress and Uncertainty, 1985.

David King & Richard Taylor, Beyond the Numbers: Seven Stakeholders to Consider in Improving Acquisition Outcome, GRAZIADIO BUSINESS REVIEW, 2012.

Aarthi Sashi and Akrathi Shetty, Exploring the Interface Between Corporate Governance and M and A: A Quest for Value Creation, 2.3 JCLG, 2018.

Marina Martynova& Luc Renneboog, Spillover of Corporate Governance Standards in Cross-Border Mergers and Acquisitions, Journal of Corporate Finance, Tilburg Univeristy, (2008).

Henry G Manne, "Mergers and the Market for Corporate Control", 73 Journal of Political Economy 1965.

Adolf A Berle, Jr, Control' in Corporate Law, 58 Colum L Rev 1958.

William D Andrews, The Stockholder's Right to Equal Opportunity in the Sale of Shares, 78 Harv L Rev, 1965.

Ronald J Gilson & Jeffrey N Gordon, Controlling Shareholders, 152 U Pa L Rev, 2003.

The Panel on Takeovers and Mergers, The City Code on Takeovers and Mergers, London: The Panel on Takeovers and Mergers, 2013.

Umakanth Varottil, 'Comparative Takeover Regulation and the Concept of Control', Sing J Legal Stud, 2015.

Guido Ferrarini & Geoffrey P Miller, A Simple Theory of Takeover Regulation in the United States and Europe, 42 Cornell Int'l LJ, 2009.

Edmund-Philipp Schuster, The Mandatory Bid Rule: Efficient, After All?, 76 Mod L Rev, 2013.

Marc Goergen, Marina Martynova & Luc Renneboog, Corporate Governance Convergence: Evidence from Takeover Regulation Reforms, (Working Paper No 33/2005, European Corporate Governance Institute, 2005).

Albert Birkner & Clement Hasenauer, A new takeover law in Austria, 69 European Lawyer, 2007.

Luca Enriques, The Mandatory Bid Rule in the Takeover Directive: Harmonization Without Foundation?, 1 European Company and Financial Law Review, 2004.

Fabrizio Barca & Marco Becht, The Control of Corporate Europe, Oxford: Oxford University Press, 2001.

Hui Huang, China's Takeover Law: A Comparative Analysis and Proposals for Reform, 30 Del J Corp L, (2005).

John Armour, Jack B Jacobs & Curtis J Milhaupt, The Evolution of Hostile Takeover Regimes in Developed and Emerging Markets: An Analytical Framework, 52 Harv Int'l LJ, 2011.

Wei Cai, The Mandatory Bid Rule in China, 12 European Business Organization Law Review, 2011.

Robert Couzin, Some Reflections on Corporate Control, 53, Can Tax J, 2005.

Pedro Testa, The Mandatory Bid Rule in the European Community and in Brazil: A Critical View, London School of Economics and Political Science, 2006.

Yozua Makes, Challenges and Opportunities for the Indonesian Securities Takeover Regulations: A Comparative Legal Analysis, 8 University of Pennsylvania East Asia Law Review, 2013.

CMS Legal Services EEIG, CMS Guide to Mandatory Offers and Squeeze-Outs, (April 2011).

John D Hogboom, Private Investment in Public Equity: An Overview, New Jersey Law Journal, 2004.

VIIINLSIR Symposium on Competition Law, 27 Nlsiu L. Rev. (2015).

Inge Graef, Algorithmic price fixing under EU competition law : how to crack robot cartels?, Citip Blog (2016).

Competition Commission of India, Market Study on E-Commerce In India: Key Findings And Observations (2020).

European Commission Press Release IP/17/1784, Antitrust Commission fines Google€2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service, (2017).

Department Of Industrial Policy And Promotion, Ministry Of Commerce And Industry, Review Of The Policy On Foreign Direct Invesment (Fdi) In E-Commerce (2018).

COMPETITION COMMISSION OF INDIA, MARKET STUDY ON E-COMMERCE IN INDIA : KEY FINDINGS AND OBSERVATIONS (2020).

DEPARTMENT OF INDUSTRIAL POLICY AND PROMOTION, MINISTRY OF COMMERCE AND INDUSTRY, REVIEW OF THE POLICY ON FOREIGN DIRECT INVESMENT (FDI) IN E-COMMERCE (2018).

Eleanor M. Fox, Anti-Trust Law on Global Scale: Race up, down and sideways, 75 N.Y.U. L. Rev. 2000.

Consolidated Version of the Treaty on the Functioning of the European Union, O.J. (C 115),2008.

Vedika Mittal Kumar, Shehnaz Ahmed, Param Pandya, Joyjayanti Chatterjee & Ritwika Sharma, SYSTEMATIZING FAIRPLAY: KEY ISSUES IN THE INDIAN COMPETITION LAW REGIME, VIDHI CENTRE FOR LEGAL POLICY.

Ariel Ezrachi & Maurice E. Stucke, Virtual Competition, 7 J. Eur. Comp. L. Prac. 2016.

Ariel Ezrachi & Agustin Reyna, Enforcing European Competition Law in a Global Digital Economy, Business Law Blog, (2019).

Ariel Ezrachi & Maurice E. Stucke, Artificial Intelligence & Collusion: When Computers Inhibit Competition, 2017 U. Ill. L. Rev. (2017).

Iga Malobecka, Hub-and-spoke cartel - how to assess horizontal collusion in disguise, 8 The Critique Of L. (2016).

Peter Picht & Benedikt Freund, Competition (Law) in the Era of Algorithms, 39 Eur. Comp. L. Rev. 2018.

Julian Nowag, The UBER-Cartel? UBER between Labour and Competition Law, 3 Lund Stud. E.U. L. Rev. 2016.

Basu Chandola, Algorithms and Collusion: Has the CCI got it wrong? KLUWER COMPETITION LAW BLOG, 2019.

Ministry of corporate affairs, Report of the Review Committee on Competition Law, 2019.

Germany & Austria, Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification, (2018).

Digital Competition Expert Panel (UK), ‘Unlocking digital competition’ 2019.

International Competition Network, Recommended Practices for Merger Notification and Review Procedures, (2017).

MASSIMO MOTTA, COMPETITION POLICY: THEORY AND PRACTICE, 2004.

Ajay Kr Sharma, 'Cross Border Merger Control by the Competition Commission of India: Law and Practice' Freilaw: Freiburg L Students J 11, 2015.

Alan Goldberg, Merger Control, in COMPETITION LAW TODAY, Vinod Dhall ed, 2007.

Avinash Sharma, Revisiting Competition Law in India: Challenging Dimensions in the Era of Globalized Economy, World Competition 31, 2008.

Consolidated FDI Policy, 2014 (DIPP, Government of India).

UKDiss.com

Corporatefinanceinstitute.com

Businessroundtable.org

Ecgi.global

Sebi.gov.in

manupatra.in

corporatelawreporter.com

Barik, Nikhilesh, Takeover Defenses and Corporate Governance.papers.ssrn.com.

Rbi.org, competition and consolidation.

thehindubusinessline.com

www.vccircle.com