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Indian Experience with the Merger Control Remedies

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ABSTRACT

Competition policies are implemented to forbid abuse of market power. Prevention of collusive practices, abuse of dominant position by enterprises and merger control come into the purview of competition laws. Merger control is an important tool for competition authorities across the globe for preventing appreciable adverse effects of competition (AAEC) emanating from a combination. It is a well-established fact that the system of merger control has a greater impact on firms as well as market because of corporate transactions being subject to mandatory pre-notification rules and guidelines. Consequently, continual activity in merger control is being witnessed world-wide as a result of which, there is also significant growth in the remedial measures that are ordered and implemented by the competition authorities, for the transactions probable to pose AAEC in the relevant markets. Mostly, rather than prohibiting a merger in its entirety, subject to certain modifications or commitments by the firms, the transaction is allowed to proceed. These modifications are essentially 'remedies'. This paper discusses in detail the nature, purpose and various types of remedies applied for merger control with special emphasis on the decisional practice of the Competition Commission of India (CCI or the Commission).

Keywords: *Competition Law, Mergers, Merger Control, Remedies.*

I. INTRODUCTION

Market based economy boasts of production of goods and services at best feasible prices resulting in maximum consumer surplus. Adam Smith gave the metaphor *invisible hand* as the unseen forces that move the free market economy, and through individual self-interest and freedom of production and consumption, the best interest of society as a whole is served.[3] These concepts assumed the markets to be perfectly competitive in nature which is rarely the

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[Both authors have contributed equally and none of the opinions expressed by the authors represent the view of the Competition Commission of India]
[3] ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Oxford University Press, London, 2008).

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case in real world. There are abundant economic literatures suggesting that the markets are prone to distortion.[4] In order to curb these market distortions, governments across the globe have established various institutions to keep an eye on the activities of different market players. Competition/ Antitrust authorities are one of those watchdogs which intend to prevent market distortions in the form of collusions, abuse of dominance and mergers and acquisitions.

The phenomenon of separate undertakings combining to form a new entity is called merger. However, in case of competition assessment of the corporate transactions, this definition has a broader ambit. An acquisition of shares (whether majority or minority) where one entity gains control over the strategic business decisions of other entity(ies), or a Joint Venture (JV) resulting from combining certain assets of two or more entities are all treated as merger.

There are several incentives for the firms to merge. For instance, the merging entities are able to achieve higher degree of economies of scale and scope, industry consolidation, better managerial efficiency and corporate control, exit a loss-making business or enter more attractive business pastures, acquire know-how and intellectual property rights while signaling threat to new entrants by attaining more market power, *etc.*[5] Nonetheless, the interests of individual firms, markets and the consumers may not be aligned always and one's incentive may potentially be a harm for the other. In such cases, an interventionist approach towards mergers becomes imperative.[6]

The purpose of regulated merger control is intended to prevent the formation of combined entities from using their market power, either unilaterally or jointly with other firms in an anti-competitive manner.[7] Accordingly in India, the laws relating to merger control require corporate transactions breaching a certain predefined threshold, to be mandatorily notified to the competition authorities.[8] The role of competition authority is to maintain the process of

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[4] JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY (Macmillan London, 1973); WUYTS W., MARKET DISTORTIONS ENCOURAGING WASTEFUL CONSUMPTION in: LEAL FILHO W., AZUL A.M. *ET.AL* (EDS) RESPONSIBLE CONSUMPTION AND PRODUCTION. Encyclopedia of the UN Sustainable Development Goals. Springer, Cham. Available at https://doi.org/10.1007/978-3-319-95726-5_45.

[5] T. RAMAPPA, COMPETITION LAW IN INDIA: POLICY, ISSUES AND DEVELOPMENTS (Oxford University Press London, 3rd ed. 2014); RICHARD WHISH & DAVID BAILEY, COMPETITION LAW (Oxford University Press London, 9th ed. 2018).

[6] SCHERER AND ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 159-167 (Houghton Mifflin, US, 3rd ed. 1990); Mitchell Andrade & Stafford, *New Evidence and Perspectives on Mergers* 15(2) JEP 103, 103 (2001).

[7] D. DANIEL SOKOL & WILLIAM BLUMENTHAL, "MERGER CONTROL: KEY INTERNATIONAL NORMS AND DIFFERENCES" in ARIEL EZRACHI (ED.), RESEARCH HANDBOOK ON INTERNATIONAL COMPETITION LAW (Edward Elgar 2012).

[8] Section 5 of the Competition Act 2002 specifies the threshold beyond which enterprises are supposed to notify to the Commission. On the contrary, in countries such as the UK and Australia, merger can be implemented

competition in the market in a manner that it maximizes the consumer welfare. Most of the transactions may not pose threat of AAEC in the relevant market and rather may benefit consumers. Whenever a transaction is reported, it may either be unconditionally approved, approved with certain remedies or even blocked by these authorities. In all these cases, the primary motive of competition authorities is to assess and remedy the disproportional harm (if any) caused to the consumers while allowing the merger. In other words, merger assessment under the competition law aims to take such measures in order to pre-empt the market from such harm that result either from a firm's acquisition of market power or increase in likelihood of anticompetitive coordination.

In situations where the combination is likely to result in AAEC, the first option is to suggest a modification in the transaction that is necessary to address competition concern(s) and ensure that the competition in the market is maintained or restored. The modifications / remedies are ordered by the competition authorities and/ or negotiated / mutually agreed upon between the parties and the regulators. Through these remedies, the competition authorities and the parties reach a common solution to ensure consummation of the transaction. The universal goal of modifications / remedies is to preserve competition that would otherwise be lost due to the transaction, while permitting (if possible) the realization of efficiencies and other benefits[9]. If the parties and authorities fail to device an effective and implementable remedy, the transaction may be blocked altogether. This paper deals with the interventions applied to the distortions arising due to mergers and acquisitions with focus on Indian experience.

II. PRINCIPLE OF REMEDIAL ACTION AND ITS TYPES

Remedies modify the outcome of merger transactions in such a way that the resulting market, post the transaction remains competitive and at the same time permit relevant merger benefits. This has been aptly captured in the US Department of Justice's Merger Remedies Guide as:

"In all cases, the key is finding a remedy that works, thereby effectively preserving competition in order to promote innovation and consumer welfare."[10]

Thus, a better outcome is reached by issuing a remedy rather than probable straightforward blocking or unconditional approval of the transaction. These remedies are applied after

prior to the approval by the respective competition authority.

[9] International Competition Network, *ICN Merger Working Group Merger Remedies Guide* (2016), ICN, (Feb. 20, 2021, 11.20 AM) www.internationalcompetitionnetwork.org/uploads/library/doc1082.pdf. (ICN Merger Remedies)

[10] US Dep't of Justice, *Antitrust Division Policy Guide to Merger Remedies* 1–2 (June 2011), USDOJ, (Feb. 21, 2021, 10.01 AM) http://www.justice.gov/atr/public/guidelines/272350.pdf.

assessing the nature and scope of the potential harm to the competition in the market. While suggesting remedy, the authorities consider certain factors such as its effectiveness, impact on the market, practical feasibility in sense of monitoring and enforcement and duration of the warranted market correction to take place. The burden and costs of implementing and monitoring the enforcement are also taken into consideration. Finally, the authorities are supposed to maintain the transparency and consistency while devising remedy.

Once the authorities are of the view that remedies are essential to approve a transaction, they have to decide on the type of remedies to be suggested. Merger remedies are mainly of two types: structural remedies (e.g. divestitures) and non-structural remedies (e.g. conduct or behavioral remedies). Other than these two, there are what is otherwise known as hybrid remedies wherein features of both structural and behavioral remedies are applied depending on the facts and circumstances of each case. The regulators may incline towards either of the two remedies or direct the parties to implement a hybrid of these remedies[11]. In the following paras, each of these remedies along with the decisions rendered by the CCI issuing remedies are discussed in detail.

A. Structural Remedies

Structural remedies are usually one-off remedies and often used to address AAEC caused due to mergers between entities which are competitors in the relevant market (horizontal mergers). These remedies aim to restore the competition in the relevant markets. The combining entities are also able to realize various efficiencies out of the combination to the extent possible. In general, such remedies directly address the competition concerns and are easier to enforce and monitor.[12]

Largely, structural remedies involve sale of physical assets of the merging firms. In some instances, these remedies may also require sale or even irrevocable licensing of intellectual property rights to create new competitors to the merging firms.[13] In that regard, structural remedies have the potential to create new source of competition or strengthen an existing competitor who purchases the divested asset(s).[14] The success of this remedy invariably depends upon the following[15] factors:

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[11] OECD Policy Roundtables, *Remedies in Merger Cases* 2011 (DAF/COMP (2011)13), OECD (Feb 27, 2021, 9.08 PM) https://www.oecd.org/daf/competition/RemediesinMergerCases2011.pdf.

[12] Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJEU (Jan. 30, 2021, 12.29 PM). https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:267:0001:0027:EN:PDF

[13] RAMAPPA, supra note 5.

[14] USDOJ, supra note 10.

[15] *Id.*

i. *Sufficient divestiture to preserve competition*: This depends upon several factors such as divestiture of an existing and viable business already competing in the relevant market along with restrictions on the seller from competing indirectly in the same relevant market. Thus, the divestiture business should be composed in a manner that it attracts a suitable purchaser.

ii. *Business and financial capability of buyer to compete successfully*: The buyer should be financially capable, have the requisite know-how to successfully operate the divested business and be able to compete in the relevant market with the merging firms in the longer term.

These factors are essential for successfully restoring the existing competition otherwise, failure of the divested business is effectively, failure of the remedy.

As elucidated above, in practice the modifications are decided through cooperation and consultation with the Parties. However, as a structural remedy, divestiture is ordered when the Commission is of the opinion that potential consumer harm is higher and there is no way to restore competition in the relevant market if the firms are allowed to combine as it is. Other than the above stated factors, the Commission also considers the nature of the markets involved while divesting the assets. In these cases, the divestiture plan is tailored to restore the long-term competition in the relevant market and therefore "one size fits all" approach cannot be followed. The following prominent cases highlight the Commission's approach in dealing with cases calling for divestiture.

In case of *ZF Friedrichshafen (ZF)/ WABCO*[16], two market technology leaders *i.e*. WABCO and ZF serving OEMs and fleets of automotive and Commercial Vehicle (CV) industry where merging together. The preliminary assessment indicated that Parties held substantial market share for the supply of brake and clutch components / system for Commercial Vehicles (CVs) in India, thereby appearing to reduce / eliminate the incentives of WABCO and Brakes India (JV) (a joint venture between ZF and TVS), to compete in terms of price, products, innovation in the market of foundation brakes and clutch systems for commercial vehicles in India. The combined market shares in HCV clutch master cylinder, HCV clutch boosters and LCV brake boosters were in the range of 85-90%, 70-75%, and 80-85% respectively. To alleviate the concerns, the acquirer proposed to divest its shareholding in the JV along with rights. In addition, the remedy offered by the Parties to the US Department of Justice includes the divestment of steering business of WABCO in India also. The

[16] *ZF Friedrichshafen (ZF)/ WABCO,* C-2019/11/703

Commission accepted the proposed remedies and approved the combination without going to phase-II investigation.

Similarly, in *Dow Chemical/ DowDuPont*[17], the remedies offered by the Parties as a part of the global divestiture package regarding research and development of crop protection and material science was accepted by CCI. In *Abbott Laboratories/ St. Jude Medical, Inc.* [18], the combined market shares were in excess of 90% with the best competitor having less than 5% in the relevant medical devices market. CCI accepted the proposal of the parties to divest the business of the target on a worldwide basis to remove the concentration in India.

In *FMC Corporation/ E.I. du Pont de Nemours*[19], the Commission concluded that the combination would enhance the market power of the Parties in five overlapping agrochemical markets. Several product segments of the parties were divested and they were restrained from entering the Indian markets to sell products.

In cases which have proceeded to Phase II of the procedure, the orders have focused on creating a viable, independent competitor and ensuring transfer of all essential components and support for transition. In one of its earlier modification orders *i.e. Sun Pharmaceutical Industries Limited/ Ranbaxy Laboratories Limited*[20], the CCI found that the merger of two pharmaceutical companies was likely to have an AAEC in respect of seven overlapping products. The merger would have resulted in elimination of a significant competitor. As such the Commission focused on ensuring the transfer to player with the ability to exert competitive pressure on the merged entity.

In *Linde Aktiengesellschaft/ Praxair Inc.*[21], the Commission concluded that the merger of two international gas companies was likely to cause adverse effect in the gas market in India. Out of the three major players *viz*. Linde, Praxair and Inox AP in the markets of industrial and medical gases in India, Linde and Praxair were market leaders in the market for bulk supply of various industrial and medical gases in Southern and Eastern Regions. Commission carried out a detailed investigation and directed divestment of certain plants and cylinder fillings identified in the investigation. Linde was also directed to divest its Indian shareholding in one of its joint venture.

B. Non-Structural or Behavioral Remedies

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[17] *Dow Chemical/ DowDuPont*, C-2016/05/400
[18] *Abbott Laboratories/ St. Jude Medical, Inc.*, C-2016/08/418
[19] *FMC Corporation/ E.I. du Pont de Nemours,* C-2017/06/519
[20] *Sun Pharmaceutical Industries Limited/ Ranbaxy Laboratories Limited,* C-2014/05/170
[21] *Linde Aktiengesellschaft/ Praxair Inc,* C-2018/01/545

These are applied where a firm may use its horizontal market position to foreclose or lessen the competition, or in cases where a firm may use its vertical integration to limit or distort competition horizontally. A wide array of non-structural remedies can be tailored to address specific competitive concerns, including terms and conditions to access specific infrastructure / inputs, price regulation, internal firewalls, external remedies, third-party consents and approvals, and agency monitoring and reporting requirements. These remedies have a disadvantage over the structural remedies in terms of cost and effectiveness as they often require continuous monitoring over a significant period of time by the competition regulators.

Though not always the preferred modifications due to the requirement of continuous monitoring and tougher to implement status, the Commission has not been absolutely averse to these modifications. In fact, the Commission has duly valued the importance of these remedies by applying them in several cases. Now after all these years, the Commission has adopted complicated conduct remedies. In the case of acquisition of low voltage (LV) switchgear unit of Larson and Toubro by Schneider[22], Commission explored the '*White Labelling*' remedy for the first time in the Indian market.

The combination involved the top two players in the industry with highly complementary product lines in building LV switchgear. Investigations further revealed that brand name with complete portfolio had a strong preference in the market and the combination would have strengthened the position of the parties.

The new conglomerate would have integrated the highly complementary portfolio of the parties. They would have enjoyed an unparalleled consumer preference. Commission discussed several remedies but the traditional remedies were considered inefficient to address the consumer harm. For example, the divestment of plants was not considered efficient since the parties had multi-product plants with the overlapping products forming a minor part of activities in each plant. Finally, the Commission agreed to behavioural remedy offered by the parties, which *inter-alia* included white labelling services to competitors, a prevailing industry practice, transfer of technology and non-exclusive distribution network. These were expected to allow new or existing competitors to develop their own product portfolio and distribution channel thus strengthening competition formed the essence of this remedy.

In one of the earliest combinations approved by the Commission after modifications in 2014[23] pertained to the combination amongst the Oil Public Sector Undertakings (PSUs) and Mumbai International Airport Private Limited (MIAL) for the creation of a JV in Mumbai

[22] *Schneider Electric India Private Limited/ MacRitchie Investments Pte. Limited,* C-2018/07/586
[23] *Mumbai International Airport Pvt. Ltd./ Mumbai Aviation Fuel Farm Facility Ltd.,* C-2014/04/164

Aviation Fuel Farm Facility Limited (MAFFFL). The objective explained by the parties was to create an integrated fuel facility at the Mumbai International Airport.

Upon seeking comments from private oil companies and regulatory authorities, Commission was of the *prima facie* opinion that the proposed combination would have adversely restricted the opportunities for other and new Air Turbine Fuel suppliers to operate and compete with Oil PSUs at the Mumbai Airport. The combination was only allowed after the parties submitted behavioral modifications to address the concerns of the Commission. The terms of the Share Holders Agreement (SHA) were amended to ensure no restrictions could be placed on non-PSU oil companies. The possibility of any restriction on suppliers other than the Oil PSUs was on the whole resolved by commanding the conduct of the parties to the combination.

C. Hybrid Remedies

Besides the independent application of structural and behavioral remedies, a combination of these may also efficiently address competition harm. Again, its implementation will depend upon the facts of the combination and the nature of the relevant market(s). Structural and behavioral remedies can complement each other to address competition harm. Rest of the section discusses certain cases dealt by the Commission by directing these remedies.

In the combination relating to acquisition of Monsanto Company (Monsanto) by Bayer AG (Bayer)[24], the Commission ordered hybrid remedies. The Commission identified market concerns in the business units relating to: (1) non-selective herbicides; (2) the upstream market for licensing of Bt. traits for cotton and parental lines or hybrids (including traits) for corn; (3) the downstream market for the commercialization of Bt. cotton seeds, hybrid rice seeds and hybrid millet seeds; and (4) various vegetable hybrid seeds.

Some of the concerns were addressed by ordering divestiture requiring Bayer to sell its non-selective herbicides business, global broad crop and crop seeds business along with entire global vegetable seeds business. Further, Monsanto was required to divest 26% indirect shareholding and rights in an Indian company in order to eliminate overlaps in Bt. cotton seeds, hybrid rice and millet seeds.

In addition to the divestiture, Commission accepted several behavioral remedies to reduce the effects of the multiple overlaps. Subsequent to the closing, Bayer had to follow a policy of broad-based, non-exclusive licensing of traits currently commercialized in India, or to be introduced there in the future, on a fair, reasonable and non-discriminatory (FRAND) basis

[24] *Bayer Aktiengesellschatt / Monsanto Company*, C-2017/08/523

with willing and eligible licensees for a period of 7 years in the market for licensing of parental lines or hybrids for corn seeds. Bayer was further restrained from bundling its products which had the potential of excluding competitors.

In the digital farming space, the parties were subjected to share access through licenses on FRAND terms for 7 years of existing Indian agro-climatic data, their digital farming platforms in India for supplying or selling agricultural inputs to agricultural producers and subscriptions to their digital farming products commercialized in India.

In an earlier acquisition of DT Cinemas by PVR approved by CCI in 2016[25], the Commission concluded that the parties were required to carry out a set of remedies which included both structural and behavioral. After completing its assessment, CCI was of the opinion that the proposed merged entity of PVR and DT cinemas would have had AAEC in the relevant market of multiplex theatre business in certain regions of Delhi NCR and Chandigarh. PVR was required to terminate its agreements for around 22 screens in the relevant markets of Noida and Gurgaon, and DLF (costing it around 22 screens), and the merged entity was prohibited to expand further for a period of five years.

DT Cinemas had to ensure that it either operate independently in the relevant geographic area of South Delhi for a period of 5 years or transfer the seven identified screens in the region to a competitor of PVR.

III. FIREWALL PROVISIONS IN REMEDIES

Another remedy which is being favored by both the Commission as well as the parties in the recent times is the firewall provision. The idea of firewall is to separate business units operationally[26]. The parties are allowed to remain under the same corporate umbrella but the operating model is changed to allow separation. These are most commonly used in vertical merger cases. Requirement of continuous monitoring is a major concern associated with this type of remedy. Some regulators have expressed their disfavor in their guidance notes also. The guidance note issued by the competition regulator of Germany[27] refers to it as the 'Chinese Wall' and disapproves of it mostly.

However, this remedy is widely adopted in spite of the split verdict on its implementation. It has been continuously used even in some of the biggest mergers. For example, Federal Trade

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[25] *PVR Limited/ DT Cinemas* C-2015/07/288

[26] Pallavi Guniganti, *Firewalls: Separation short of a breakup*, GCR, July 12, 2019.

[27] Bundeskartellamt, Guidance on Remedies in Merger Control, May 2017, (Mar.13, 2021, 5.35 PM) Bundeskartellamt, https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Guidance%20on%20Remedies%20in%20Merger%20Control.pdf?__blob=publicationFile&v=4

Commission (FTC) unanimously agreed to a firewall remedy in 2010[28] when Pepsico and Coca-Cola, two fierce competitors entered into separate agreements with bottlers and distributors.

CCI has also considered firewall provision in modifications while allowing combinations in a few exceptional cases. *Mitsui & Co./IHH Healthcare Berhad* [29], *TRIL Urban Transport Private Limited/ GMR Airports Limited*[30] *and Nippon Yusen Kabushiki Kaisha Ltd./ Kawasaki Kisen Kaisha Ltd.*[31] combinations are some instances where the Commission had adopted firewall provisions. The Commission's practice reflects that the firewall provisions are only deployed to supplement the primary remedy.

Mitsui & Co./IHH Healthcare Berhad[32]combination involved investment by Northern TK Venture (Northern TK) which was a wholly owned subsidiary of IHH Healthcare Berhad (IHH) in Fortis Healthcare Hospital and Fortis Malar Hospital. Concerns arose as Northern TK/IHH had existing investments in Apollo Gleneagles Hospital, which was a competing hospital in the relevant market. Since the concerns arose only in a small section of specialty hospitals market in the region of Kolkata, CCI approved the combination subject to the compliance of voluntary modifications submitted by them. Parties were required to ensure that the competing hospitals operated independently and separately. No common directors were allowed on the board of the combined entity and the JV. Additionally, the rule of information control was implemented to disallow dissemination of sensitive information.

Similar remedies relating to sharing of information and compliance were ordered in the combination amongst Nippon Yusen Kabushiki Kaisha Ltd. (NYK), Mitsui O.S.K. Lines Ltd. (MOL) and Kawasaki Kisen Kaisha, Ltd. (KL)[33]. This combination envisaged a merger of the Parties' container liner shipping business worldwide and container terminal services business worldwide, except in Japan.

In the acquisition of 44.44% by one of Tata Sons companies in GMR Airports Limited[34], the upstream and downstream growth of Tata Sons in businesses /services at the airport after the merger were identified by the Commission. It was observed by the Commission that the vertical relationship between the Tata Sons group and GMR group may lead to vertical

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[28] *In the Matter of PepsiCo, Inc.*, FTC, Docket No. C-4301, 2010.
[29] *Mitsui & Co./IHH Healthcare Berhad,* C-2018/09/601.
[30] *TRIL Urban Transport Private Limited/ Valkyrie Investment Pte. Ltd/ Solis Capital (Singapore) Pte. Ltd./GMR Airports Limited,* C-2019/07/676.
[31] *Nippon Yusen Kabushiki Kaisha Ltd./ Kawasaki Kisen Kaisha Ltd.*, C-2016/11/459.
[32] Supra note 29.
[33] Supra note 31.
[34] Supra note 30.

integration, by virtue of which, Parties may be incentivized to foreclose competing airlines and other service providers. In order to alleviate any potential conflict of interest arising out of the said acquisition, exchanging of sensitive information was disallowed as an additional measure and added to the remedy package.

IV. Procedure relating to remedies in India

Indian Regulator adopts a pragmatic approach when it comes to deciding remedies and parties remain an integral part of the procedure adopted. With the Merger Control provisions coming into effect from 1st June 2011, significant changes were adopted in the way mergers were earlier regulated in India. In addition to the domestic mergers, the present Competition Act 2002 (Act) allows India to analyze global mergers having potential to cause AAEC in India. Due to the mandatory approval regime, the Competition Commission of India (CCI or the Commission) instantly acquired importance due consummation of global mergers. Since its inception, the Commission has assessed more than 800 mergers and acquisitions and majority of these mergers did not raise any competition concerns in the respective relevant markets. However, the Commission has been swift in acting against combinations with the potential of causing competition harm in market (s). Till date, the Commission has ordered remedies in 22 combinations and none of the mergers were required to be completely blocked.

The provisions relating to the combinations are found in the Act and the procedure under Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (Combination Regulations). *Vide* sections 29, 30 and 31 of the Act, the powers of the Commission to investigate, issue show cause notice and grant remedial orders, respectively are laid down in detail. Relying on these powers, the Commission has implemented structural[35], behavioral[36] and/or hybrid remedies as the situation called for.

After notification by the combining parties, the Commission forms a *prima facie* opinion, within 30 days, on whether the proposed combination has AAEC in the relevant market.[37] If the Commission, after the detailed assessment, concludes that the proposed combination

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[35] *Sun/Ranbaxy Industries Limited/ Ranbaxy Laboratories* C-2014/05/170 and the continuation order dated 17th March 2015; *Holcim Limited/ Lafarge SA* C-2014/07/190 and supplementary order dated 2nd February 2016; *ZF Friedrichshafe AG/ TRW Automotive Holdings Corp.* C-2014/10/215; *Dow Chemical Company/ DowDuPont Inc.* C-2016/05/400; *Abbott Laboratories/ St. Jude Medical, Inc.* C-2016/08/418; *China National Agrochemical Corporation/ Syngenta AG* C-2016/08/424; *Agrium Inc./Potash Corporation of Saskatchewan Inc.* C-2016/10/443; *FMC Corporation Company/ E.I. du Pont de Nemours and Company* C-2017/06/519; *Bayer Aktiengesellschatt/Monsanto* C-2017/08/523 and *Linde Aktiengesellschaft / Praxair Inc.* C-2018/01/545.

[36] *Schneider Electric*, C-2018/07/586.

[37] Regulation 19 of the Combination Regulations 2011.

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would cause AAEC in the relevant market, it orders remedies or disallow the proposed transaction.[38]

In order to make the process quicker and in furtherance of the ease of doing business initiative[39], the CCI amended the Combination Regulations in 2018[40]. As per the amended Regulation 19, the parties are now allowed to address competition concerns by self-assessment even prior to the Commission forming *prima facie* opinion under sub-section (1) of Section 29 of the Act.[41]

Further, as per newly inserted clause (1A) of Regulation 25 (1), the parties while responding to the Commission's show-cause notice (SCN) under Section 29 (1) can also propose modification(s) to address prima facie concerns.[42] Even before the formal amendment to this regulation, this procedure was in practice and some of the cases in which the Commission accepted the modifications proposed by the parties in response to the SCN are *Mumbai International Airport*[43], *Nippon Yusen Kabushiki*[44] and *China National Agrochemical Corporation/ Syngenta AG*[45].

It is important to note that there are several advantages in cases of acceptance of modifications proposed by the parties. From the Commission's perspective, once it is understood that the proposed remedy will address the specific concern, the onus totally shifts

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[38] In transactions where time is of essence, this procedure at times may cause disquiet amongst the stakeholders. First, the parties have to wait for the 30 working days period and if the preliminary inquiry raises competition concerns, the closing time for the transaction can increase considerably. At this point it must be noted that only a fraction of the notified proposed combination go through the Phase II investigation and during the period 2018-2019 the average days taken by the Commission to decide upon a proposed combination were only 18. (Competition Commission of India Annual Report 2018-2019, CCI, (Mar.8, 2021, 5.45 PM www.cci.gov.in

[39] Initiative for The Ease of Doing Business (EoDB) index is a ranking system established by the World Bank Group. Information, GoI (Mar.1, 2021, 7.35 PM) https://www.makeinindia.com/eodb

[40] The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2018

[41] Regulation 19 (2) Before the Commission forming an opinion under sub-section (1) of section 29 of the Act, the parties to the combination may offer modification to the combination and on that basis, the Commission may approve the proposed combination under sub-section (1) of section 31 of the Act:
Provided that where modification is offered by the parties to the combination, the additional time, not exceeding fifteen days, needed for evaluation of the offered modification, shall be excluded from the period provided in sub-regulation (1) of this regulation, sub-section (2A) of section 6 of the Act and sub-section (11) of section 31 of the Act."

[42] "Regulation 25 (1)(1A) of the Combination Regulations Along with their response to the notice issued under sub-section (1) of section 29 of the Act, the parties to the combination may offer modification to address the prima facie concerns in the said notice and on that basis, the Commission may approve the proposed combination under sub-section (1) of section 31 of the Act:
Provided that in such a case, the additional time, not exceeding fifteen days, needed for evaluation of the modification offered, shall be excluded from the period provided in sub-section (2A) of section 6 of the Act, sub-section (2) of section 29 of the Act and subsection (11) of section 31 of the Act." Prior to this amendment parties were only allowed to submit modifications in reply, as per section 31(6) of the Act, to the proposed modifications suggested by the Commission under Section 31(3) of the Act.

[43] Supra note 23

[44] Supra note 31

[45] *China National Agrochemical Corporation/ Syngenta AG,* C-2016/08/424

on the parties to carry out the modification. For instance, in *China National Agriculture Corporation/ Syngenta AG*[46], the Commission categorically stated that in the event of the failure of the parties to implement the proposed modification, it would be deemed that the proposed combination has caused AAEC. In effect, there is significant reduction in the Commission's burden thereby allowing it to effectively allocate resources on other cases.

The parties also benefit from this procedure as it is cost-effective, and in dynamic markets where consummation of mergers is time bound, parties get an opportunity to ensure compliance. Further, proposing a suitable remedy, after internal consultation, by oneself is more efficient for the parties in comparison to directions issued by the Commission. It also allows the parties to close the transaction early.

V. REMEDIES IN DIGITAL MARKETS

The contemporary challenge faced by the competition regulators all over the globe is the examination of mergers in the digital space. The challenge begins from the stage of notification itself and deciding a remedy in a notified combination requires the regulators to search beyond the conventional[47]. Even in cases where an acquisition may amount to a *killer acquisition,* the Regulators may not get an opportunity to examine the transaction due to the minimum assets and turnover thresholds. The authorities have accepted this challenge and have started exploring the strategies to revise their process and procedures.

In the United States, big tech companies such as Google, Amazon, Facebook have been asked to give details of all the mergers entered into by them since 2010. The FTC has maintained that the information sought is to carry out a detailed analysis without forcing any retrospective action. Based on these merger trends, non-compete agreements of these companies, the regulator seeks to adopt a comprehensive policy that allows scrutiny without overly burdening the parties or the regulator[48]. Similarly, EU confirmed that killer acquisitions are an issue on their radar[49].

The Competition Law Review Committee (CLRC) set up to examine the application of Competition Act, 2002 in India also discussed the need to introduce a 'Deal Value Threshold' for combinations in India[50]. The Committee observed that in the previous decade high stake

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[46] *Ibid*

[47] A. Ezrachi & M. E. Stucke, *Collusion: Problems and Counter-Measures,* OECD Roundtable on Algorithms and Collusion Algorithmic, 21-23 June (2017)

[48]FTC Press Release, FTC, (Mar.17, 2021, 9.25 PM) https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies

[49] Margrethe Vestager, *Shaping Competition Policy in the Era of Digitisation*, European Commission, (Mar.2, 2021, 9.25 PM), https://ec.europa.eu/competition/scp19/

[50] Government of India, *Competition Law Review Committee*, MINISTRY OF CORPORATE AFFAIRS (Jan.2, 2021,

acquisitions made by large technological companies[51] were able to steer clear of competition assessment in India due to the threshold limits. Once these recommendations are implemented, the scrutiny of mergers in digital markets in India are expected to rise.

CCI had the opportunity address consumer harm arising from a combination in the digital space in the acquisition of ANI technologies Pvt. Ltd. (ANI/OLA) and Ola Electric Mobility Private Limited (OEMPL) by Hyundai Motor Company (HMC) and Kia Motors Corporation (KMC)[52]. This combination posed the dual challenge of being a conglomerate and being in the digital space, but the Commission established the norms for Regulators worldwide in dealing with such mergers.

At the time of the transaction, Hyundai was the second largest passenger car manufacturer in Indian and Kia had recently entered in passenger car market in India. OLA being a ride-sharing company facilitated transportation services through an online platform. OLA along with Uber held a significant market position on a pan-India basis.

OLA, through its wholly owned subsidiary Ola Fleet Technologies Private Limited (OFT) was engaged in the business of operational car leasing. It procured passenger cars of different makes and leased them to drivers, who in-turn used the vehicle. The Commission observed that a substantial majority of vehicles leased by OFT were registered in the platform of OLA. The gross booking value and incentives to OFT cars were also higher. The strategic agreement between the parties to combination revealed that the acquirers wanted to consolidate on this network to increase the sale of their cars.

Once this concern was highlighted by the Commission, voluntary behavioural remedies were offered by the parties. The exclusivity and preference agreed to be provided to the acquirer's cars were removed. The algorithm had to be programmed to allow equal treatment of all drivers of all cars.

VI. REMEDIES IN GLOBAL COMPETITION SETTING

Increasingly for multi-jurisdictional transactions, competition authorities have cooperated during the investigation stage and, on some occasions, at the remedies stage. The ICN Merger Remedies indicates that each competition authority should exercise its independent judgement in reaching its decision regarding the need for a remedy[53]. Nevertheless, in many

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8:00 PM) https://www.mca.gov.in/

[51] Digital Competition Expert Panel Report: Unlocking digital competition, GoUK, (Jan.2, 2021, 8:00 PM) www.gov.uk/government/publications

[52] *Hyundai Motor Company/ Kia Motor Company* C-2019/09/682

[53] ICN, Supra note 9

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investigations, coordination among competition authorities may avoid conflicting remedies (*i.e.* when one or more authority enters into separate remedy orders) or, in some cases, even the need for a particular jurisdiction to enter into a remedy itself because of the actions taken by another jurisdiction. Such coordination and cooperation are particularly needed when the authority reaches the conclusion that an effective remedy should include assets outside of its jurisdiction[54]. Timely waivers from the parties allows the regulators to discuss the combinations in details.

Even in global mergers, the market harm in each jurisdiction may be contrasting. Every Regulator is required to ensure the remedies are sufficient to address the competition harm in its jurisdiction. In *Bayer/ Monsanto*[55], though several modifications were aligned at the International level, CCI realized that they may not be sufficient and supplemented the remedies to address the domestic environment.

VII. Compliance and Monitoring

Periodic monitoring and assessment of the compliance by the parties while implementing the remedies enhances its effectiveness. Monitoring agencies, either formed by using the resources of the authorities or by commissioning independent third-party trustees/ agencies, ensure that the remedy is implemented in its letter and spirit. Complex mergers with long term remedies require continuous monitoring over longer durations. Although, the onus is on the parties to comply with the order, Competition Authorities are required to ensure and oversee the compliance. So far the Commission has appointed a Monitoring Agency in eight combinations and in three of these cases[56] the mandate of the agencies has been duly complied with.

VIII. Conclusion

Merger review remains an important tool for *ex ante* regulations. There is no one size fits all approach towards merger review and remedies. Competition Authorities across the globe have applied different approaches depending on the case and industry/ sector in consideration. Even within the short duration since the inception of merger control regime, Indian markets, have witnessed the different approaches and standards applied to decide merger remedies as a whole. This approach is grounded in the best international practices, with constant engagement with other jurisdictional authorities, has been recognized

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[54] *Ibid*
[55] Supra Note 24
[56] *Sun Pharma/Ranbaxy*, *Holcim/Lafarge* and *Dow Chemical/DowDuPont*

internationally. However, CCI's approach, like many other jurisdictions, is still evolving while dealing with issues such as cross ownership of minority shareholders, anticompetitive concerns in digital markets, conglomerate effects of mergers, etc.

The framework of merger review has also evolved and most of the stakeholders have a say while negotiating remedies. This has made the process more flexible and reduced the time taken for merger review in the cases where remedies had to be imposed. With passage of time as the jurisprudence will evolve, more aspects may be added to make the merger assessment process more efficient.[57] The CLRC has dealt with this subject extensively in its report and made recommendations on similar lines[58]. As agencies responsible for reviewing mergers continue to refine and rework their approaches, one can hope that merger remedies will be continue to be tailored efficiently and effectively in the future.

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[57] For instance, market testing of remedies is formal part of merger review in the EU, but is not yet implemented in India

[58] GoI, Supra Note 45

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