# TREATMENT OF A NON-COMPETE CLAUSE IN M&A: FINALLY CLARIFYING THE INDIAN POSITION?

*Shivam Bhardwaj & Samyak Sibasish*[*]

*Barring a few legitimate exceptions, most non-compete covenants have been frowned upon by the competition regulating agencies worldwide. While reaching a conclusion, the agencies look at, inter alia, the temporal and geographical impact of the clause in the business transfer agreements in a Merger & Acquisition transaction. Any agreement having the ultimate effect of stifling legitimate competition in the relevant domestic market is condoned by regulating agencies worldwide. The European and American position regarding the treatment of a non-compete clause in an M&A transaction has been clear and well-grounded in their respective economic realities. The position of the Indian authorities, until very recently, has been ambiguous and unpredictable, where glaring inconsistencies have been observed. The Competition Commission of India's decision in the Hospira Healthcare India Private Limited, Orchid Chemicals and Pharmaceutical Limited case goes a long way in deciphering the intention of the Indian agencies vis-à-vis the legitimacy of a non-compete covenant in M&A transactions. This decision has helped India enter the list of nations where competition restraints are judged with utmost precaution.*

## I. INTRODUCTION

Competition law in India has a recent existence and any sceptic remark about the functionality of its procedural or substantive provisions is premature. However, in spite of being at a nascent stage, comparing the Indian competition jurisprudence with its global counterparts is essential to aid its development. Any competition legislation has three primary focus areas, namely – prohibiting abuse of dominance, anti-competitive agreements and combinations (including mergers and takeovers) that have adverse impact on competition in the relevant market. Thus, the regulation of Merger and Acquisition ('M&A') transactions has been one of the primal agendas of competition regulating agencies worldwide. India enacted its Competition Act ('Act') in the year 2003.[1] The concerned parties who were earlier speculating about the inefficiencies of the Competition Commission of India ('CCI') are now discussing

[*] 4th and 3rd year students of the W.B. National University of Juridical Sciences, Kolkata. Our sincere thanks to Mr. Smaran Shetty for his guidance and encouragement; we are solely responsible for any shortcomings in this paper.

the increased 'vigour' with which it is reviewing the applications for M&A.[2] However, no appreciation can compensate for the languid approach adopted by the CCI to regulate competition in certain realms of the relevant domestic market.[3] The law was amended twice, once in 2007 and shortly after in 2009, but both the amendments were ineffective in addressing the issue of joint dominance, the same being an inadvertent consequence of an M&A transaction, where two or more enterprises hold a 'dominant' position and coordinate in a manner so as to stifle the competition prevalent in the market.[4]

Another aspect where the CCI's failure is evident is the ambiguity regarding Business Transfer Agreements ('BTA'). BTAs typically involve sale of assets or ownership from one firm to another and the issue of 'control' of the enterprise becomes important. The ambiguous wording of the Act has often led to inconsistencies in determining whether or not the 'change in control' has actualised during BTAs.[5] However, while resolving this legislative ambiguity, the CCI has clearly laid down the preconditions to satisfy the criteria, *i.e.*, "the ability to exercise decisive influence over the management or affairs"[6] of a different corporate entity. This all-encompassing definition of the term 'control' is seemingly counterproductive to the extent that it blurs the distinction between protection of minority rights and negative control.[7] These lacunae in the drafting of the Act relating to BTAs and the subsequent confusion caused by the CCI's decisions, is one of the important themes that shall be explored in the present paper.

In spite of the woes regarding 'transfer of control' in BTAs, the CCI in line with global practices, has been actively investigating the

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1 KK Sharma, *State of Merger Control in India*, July 23, 2013, available at https://www.competitionpolicyinternational.com/state-of-merger-control-in-india (Last visited on December 29, 2013).

2 *Id*.

3 *See* Cyril Shroff & Nisha Kaur Uberoi, *India: Abuse of Dominance*, The Asia-Pacific Antitrust Review 2015, available at http://globalcompetitionreview.com/reviews/69/sections/235/chapters/2749/ (Last visited on September 20, 2015).

4 Vikas Kumar & Poonam Singh, *India's clumsy legislature and the gradually evolving competition law*, June 7, 2013, available at http://www.eastasiaforum.org/2013/06/07/indias-clumsy-legislature-and-the-gradually-evolving-competition-law/ (Last visited on December 29, 2013).

5 *See* The Competition Act, 2002, §5 (definition of the term 'control').

6 Shweta Shroff Chopra & Harman Singh Sandhu, *India: Merger Control*, available at http://globalcompetitionreview.com/reviews/51/sections/175/chapters/1972/ (Last visited on December 29, 2013) (citing Competition Commission of India, Independent Media Trust (RIL Group/Network 18 Group), Combination Registration No. C-2012/03/47; Competition Commission of India, MSM India/SPE Holdings/SPE Investments/Grandway/Atlas, Combination Registration No. C-2012/06/63; Competition Commission of India, (MSM/Sony), Century Tokyo Leasing Corporation/Tata Capital Financial Services Limited Combination Registration No. C-2012/09/78).

7 *Id*.

non-compete clauses added by the contracting parties in their BTAs.[8] Although it cannot be denied that certain exclusionary covenants are added in the agreement so as to maximise the investment of the buyer,[9] there are instances where this maximisation might take a toll over the overall existing fair market practices.[10] Furthermore, this disruption of competition is often voluntary and well planned, couched in the terminology of 'standard industry practice'.[11]

The present paper is a detailed analysis of the comparative position of competition regulating agencies globally and in India *vis-à-vis* non-compete clauses found in an M&A transaction. Mostly, economic realities are seen as the ultimate consideration to determine whether a transaction shall lead to stifling of competition in the relevant product market.[12] The doctrine of 'ancillary restraint' is also crucial in relation to non-compete clauses in M&A. This is because most jurisdictions approve of a non-compete covenant only if it is found to be merely ancillary to the complete arrangement.[13] These considerations are crucial to ensure that the covenant does not undermine the range of options available to the ultimate consumer by creating a dominant entity and reducing the number of entities operating competitively in the market. Considering these far reaching consequences, active investigation by the agencies of the non-compete covenants in M&A becomes inevitable. The CCI while analysing the BTAs has to weigh and balance the consumer's loss out of the proposed merger or acquisition, against the overall gain experienced by the entity involved. However, ensuring this cautious balance has ensued glaring inconsistencies in the Indian competition law regime, leading to confusion. There have been instances where 'go ahead' to certain non-compete covenants have been given by the CCI with impunity.[14] Against this background, this paper advocates for a cogent legal regime in India regarding non-competes in BTAs, by probing through the economic lens, and analysing the feasibility of such clauses, under Part II of the paper. In Part III and Part IV, the stand adopted by European and American competition agencies is fleshed out and the cases decided by the national agencies in the two nations are critically analysed. The

8 Slaughter and May, *Merger Regulation in Asia and the EU*, April, 2015, available at http://www.slaughterandmay.com/media/2187449/merger-regulation-in-asia-and-the-eu.pdf (Last visited on August 22, 2015); *See generally* the European Commission has investigated Telefónica and Portugal Telecom in 2011, Case AT.39839 – Telefónica / Portugal Telecom and investigated Areva and Siemens in 2010, Case COMP/39736.

9 Soumya Hariharan, *Competition Law Risks: Non-Compete Clauses in M&A Transactions – Part 1*, May 2, 2013, available at http://indiacorplaw.blogspot.in/2013/05/competition-law-risks-non-compete.html (Last visited on December 29, 2013).

10 *Id*.

11 *Id*.

12 International Competition Network (ICN), *ICN Report on Mergers Guidelines*, Chapter 2, April, 2004, available at http://www.internationalcompetitionnetwork.org/uploads/library/doc562.pdf (Last visited on August 22, 2015).

13 Hariharan, *supra* note 9.

14 Payaswini Upadhyay, *CCI's Non-Compete Concerns!*, July 6, 2013, available at http://thefirm.moneycontrol.com/story_page.php?autono=912663 (Last visited on December 29, 2013).

subsequent part of the paper seeks to discuss the recent progressive decision of the CCI that has embraced the matured notions of economic welfare as accepted by the agencies world over, including the jurisdictions analysed in Parts III and IV. The last part of the paper concludes the discussion on the treatment of non-compete clauses in the nation.

## II. ECONOMIC PERSPECTIVE

The present unprecedented increase in the number of M&As can be traced back to the liberalisation of the markets. Declining trade barriers, progress in transport and information technology and the establishment of uniform norms, standards and procedures has integrated markets worldwide.[15] The geographical expansion created the potential for an increase in productivity of the firms. The firms could realise economies of scale and scope by expanding their distribution routes to foreign markets. M&As, particularly cross-border mergers, represented the fastest way to access new markets and achieve cost savings in the long run. However, this market integration caused an increase in the number of competitors in the market.[16] As a result, the position of companies, both in their traditional markets and markets abroad, were being threatened by these new competitors. To meet the staunch competition, the market players thought to join forces with their rivals. Besides cost savings, these mergers also aimed at garnering more market power for the new entity. This joining forces necessitated the emergence of a 'non-compete' clause, which prevented the parties from carrying out similar businesses in a specific locality or in the entire market. The necessity of non-compete clauses in merger contracts invited increased scrutiny of mergers through merger regulations, since there was an apprehension of concentration of market power.[17]

Mergers can have two effects in the economic sense. *First*, it can exclusively create efficiencies that are welfare-enhancing for the society and *second*, it can encourage mergers that almost exclusively increase market power, having a negative impact on social welfare. However, when the cost and market power effects of mergers occur simultaneously, there is bound to be a conflict. It is then that the task of merger control is undertaken by competition regulators – to compare the advantages of lower concentration with the disadvantages of greater market power. This trade-off between efficiencies and competition has been in focus since Oliver Williamson brought forth the need

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[15] Christian Gormsen, *The Declining Barriers to Foreign Direct Investment and How to See Them*, January, 2011, available at http://www.hha.dk/nat/christiangs/Declining_FDI_barriers.pdf (Last visited on August 22, 2015).

[16] Dan Schawbel, *How to Know Whether You Should Switch Employers*, Time, April 11, 2012, available at http://business.time.com/2012/04/11/how-to-know-whether-you-should-switch-employers/- (Last visited on January 2, 2014).

[17] *See* James M. MacDonald, Marvin L. Hayenga, *Concentration, Mergers and Antitrust Policy*, available at http://www.farmfoundation.org/news/articlefiles/816-macdonald.pdf (Last visited on October 29, 2015).

for such components for merger analysis in the latter half of the 1960s, this observation has shaped antitrust merger regulation policies world over.[18]

Mergers can be horizontal (between competitors of the same product) or vertical (between firms in different production/supply chain for the same product). Horizontal mergers have different impacts on social welfare. From the point of view of welfare economics, they should only be allowed if they enhance competition and increase social welfare, as a necessary corollary – the firm combinations that restrain competition should be prohibited.[19] To assess the welfare impacts of mergers, the cost and market power effects are analysed with regard to their contribution to efficiency gains.[20] Further, though the exercise of market power by joint entity by raising prices above the marginal cost leads to allocative inefficiency,[21] it also leads to dynamic efficiency where the entity will have to differentiate and innovate most efficiently to stay at the top. Thus, there is a trade-off between the welfare losses due to allocative inefficiency (market power) and the welfare gains accruing due to increased dynamic efficiency. Thus from the economic point of view, the task of the competition policy is to determine the net welfare effect of the M&A by balancing the pro-competitive effects against the anti-competitive effects. The non-compete clauses in a merger transaction ought to be regulated by applying the same balancing test.[22]

Currently, even though most schools of thought agree on the relevance of efficiency for the analysis of antitrust transactions including non-compete covenants, differences remain as to how efficiencies are to be defined and what weight ought to be assigned to them. Based on the interpretation of the term social welfare, two approaches to antitrust policy can be distinguished: the social (total) welfare and the consumer welfare standard.[23] Under the total welfare standard, non-compete clauses in a merger would not be challenged if it

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[18] O.E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, The American Economic Review 18-36 (1968) revised in A.P. Jacquemin & H.W. De Jong, Welfare Aspects Of Industrial Markets 237-71 (1977); it has often been claimed by the merging firms that the regulators do not take into account the proposed welfare – for example, the German suppliers have often called for less restrictive competition policy, to efficiently respond to external stimulus, such as offshore producers and changing consumer demands. There is thus a clear need to analyse the trade-offs between merger related cost savings and the instances of power concentration due to a merger, *see* Konstanze Kinne, *Efficiencies in Merger Analysis*, November-December, 2009, available at http://www.intereconomics.eu/downloads/getfile.php?id=86 (Last visited on January 2, 2014).

[19] Konstanze Kinne, *Efficiencies in Merger Analysis*, November-December, 2009, available at http://www.intereconomics.eu/downloads/getfile.php?id=86 (Last visited on January 2, 2014).

[20] *See* E. Sohmen, Allocation Theory in Economics (1976).

[21] Allocative inefficiency deals with not being able to achieve the best distribution of resources in an economy. It is a part of the static concept of efficiency that is concerned with the most efficient combination of resources at a given point of time.

[22] *See* John Dwight Ingram, *Covenants Not to Compete*, 36 AKRON L. REV. 49 (2002).

[23] D.G. McFetridge, *The Efficiency Defense in Merger Cases* in B.C. Malcolm & N.A. Kleit, Competition Policy Enforcement: The Economics of the Antitrust Process, 89-115 (1996).

had the effect of increasing the sum of producer and consumer surplus. Welfare is defined as surplus in the hands of the shareholders of the merged entity as well as surplus in the hands of suppliers and customers. In contrast, the consumer welfare approach weights the surplus lost by consumers more heavily than it weights the gain in surplus by producers.[24] Under this concept, therefore, the transfers of surplus between consumers and producers are not neutral. Thus, non-compete clauses, under such approach, can be allowed only when they are beneficial to customers, *i.e.*, in terms of lower prices or better quality.

The choice between the two welfare standards has important implications for merger enforcement policy. The total welfare standard approach to assess efficiencies in merger analysis was developed by Professor Oliver Reynolds.[25] In a simple partial equilibrium welfare economics model, he provides a clear analysis of the potential trade-offs between increases in market power and efficiencies following a merger. The model shows how the efficiency gains of a merger should be weighed against the welfare losses. If the cost savings are larger than the deadweight loss, then the owners gain more than the consumers lose, and overall social welfare rises.[26] In that case, non-compete clauses in a merger should be allowed even though market power is created. Reynolds argued that a relatively small cost reduction generally outweighs a relatively large increase in market power.[27] Although the analysis is based on simplifying assumptions, such as the extreme change from perfect competition to complete monopoly, the theoretical framework cannot be extended to more likely cases in practice, such as merging firms with pre-existing market power.[28] As a result of such qualifications, the cost savings necessary to offset further merger-induced price increase must be significantly greater than when this theory was proposed.

Under the consumer welfare approach, the trade-off analysis is different. In accordance with the consumer orientation of this concept, the monopoly overcharge (redistributed surplus between consumers and producers) as well as consumer deadweight loss are viewed as harmful. The standard is therefore indifferent to the welfare attained by the shareholders of the merging firms and focusses more on effect on consumers and producers. Thus consumer welfare and cost savings accrue from a merger only if they are sufficient to

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[24] Jon P. McClanahan & Kimberly M. Burke, *Sharpening the Blunt Blue Pencil: Renewing the Reasons for Covenants Not to Compete in North Carolina*, 90 N.C. L. REV. 1931, 1933 (2012).

[25] S.W. Salent, S. Switzer & R.J. Reynolds, *Losses from Horizontal Merger: The Effects of a Change in Industry Structure on Cournot-Nash Equilibrium*, The Quarterly Journal of Economics 185-99 (1983); J. Farrel & C. Shaprio, *Horizontal Mergers: An Equilibrium Analysis*, American Economic Review, 107-126 (1990).

[26] *Id*.

[27] *See* G.L. Roberts & S.C. Salop, *Efficiency Benefits in Dynamic Merger Analysis*, World Competition Law and Economics Review5-17 (1995) (for numerical estimates for the trade-off analysis under Cournot quantity competition).

[28] K. Cowling, Mergers and Economic Performance (1980), 54.

offset the incentive to increase prices due to increased market power.[29] This condition implies that a merger only satisfies the consumer welfare standard if the market price does not rise.[30] Since, the prices offered by the firms depend on their marginal cost, it can be said that the consumer welfare test focusses more on the efficiencies arising out of marginal cost reductions. Thus, it is more difficult to offset the likely anti-competitive effects of a merger under the consumer welfare than under the total welfare approach which does not focus on marginal costs.

## *A. CROSS-NATIONAL ANALYSIS*

Different nations have adopted the said approaches to oversee the anti-competitive practices over a course of time. For instance, the purpose of German competition policy is to guarantee competitive markets and to ban all agreements between parties that restrain competition. Besides preserving competition, the German cartel law also takes non-competition goals into account, whereby efficiency aims are also considered. In German cases, merger analysis is based on the social welfare approach. For examining merger-related efficiencies, German merger control uses a two-tiered procedure. In the first stage, the Federal Cartel Office analyses the effects of mergers on competition. In the second stage, the Federal Minister of Economics investigates whether, despite the negative effects on competition, a merger can still be approved for reason of the advantages to the economy as a whole or of a predominating public interest.[31] In order to grant an exemption, the minister has to publicly overrule the Cartel Office. Consequently, the requirements for ministerial approval are very high.[32]

European Union ('EU') competition policy seeks to advance the interests of consumers and protect effective competition in the common market. Competition policy is also seen as a means of promoting economic integration in Europe. Although both goals must be considered in merger analysis, the competition aims have priority over integration objectives.[33] Thus, underlying European merger control is a mixed approach that comprises elements of both the consumer and the social welfare standards. EU merger regulations consider efficiency aspects in a one-level procedure, *i.e.*, while analysing the competitive effects of an intended merger. To decide whether a merger creates or strengthens the dominant position, the European Commission ('EC') has to examine

[29] A.A. Fisher, F.I. Johnson et al, *Price Effects of Horizontal Mergers* in E.M. Fox & J.T. Halverson, Collaborations among Competitors, 361-402 (1991).

[30] As this method requires market price not to increase after the merger it is also referred to by many as price standard.

[31] *See* Law Against Restraints of Competition, Germany, §42(1).

[32] Norman D. Bishara, *Covenants Not to Compete in a Knowledge Economy: Balancing Innovation from Employee Mobility Against Legal Protection for Human Capital Investment*, 27 BERKELEY J. EMP. & LAB. L. 287, 300 (2006).

[33] Michael Newman & Shane Crase, *The Rule of Reason in Drafting Non-compete Agreements*, The Federal Lawyer, 20, 21 (Mar.–Apr. 2007).

whether the proposed transaction will advance dynamic efficiency through the development of technical and economic progress.[34] But the efficiency criterion can be used only if it is perfectly compatible with competition and consumers' interests. According to the wording of the Regulations, an efficiency defence can only be approved when there is no conflict between efficiency and market power.[35]

The analysis of the efficiency defence in United States ('US') demonstrates that the American merger practice differ from the German and European approaches, not only in the legal system but also in the arena of goals envisioned for the antitrust policy. While Congress has passed relatively vague statutes into law, it has stated a strong preference for the protection of American consumer interests.[36] Thus, the enforcement agencies and the courts apply the consumer welfare approach in merger analysis. The Merger Guidelines lay down how the Department of Justice and the Federal Trade Commission ought to analyse efficiencies in merger cases. The 1997 Guidelines adopt the term 'cognisable' for all those efficiencies that the agencies will consider in merger analysis.[37] Efficiencies are deemed to be 'cognisable' when they are likely to be accomplished by the proposed merger and do not result in reductions, like reduction of output etc. The agencies will not challenge a merger if the benefits from efficiencies are sufficient to prevent price increase for the consumers in the relevant market.[38]

Merger-related efficiencies are taken into account by all competition policies, albeit in different ways. A comparison demonstrates that the diverse positions concerning efficiency defence are grounded in different legal, procedural and institutional approaches. Nevertheless, there are similarities in approach while considering cost savings and efficiencies due to mergers. In competition laws worldwide efficiencies are contemplated in indefinite terms in order to provide a large leeway for considering the diverse forms of cost savings ensuing from a merger. But the three competition policies discussed above differ regarding the scope of accepted efficiencies to approve a merger. While the EC and the US antitrust agencies consider only real economies, the range of German ministerial approval extends to advantages in the public interest as well. Further, all the three policies have high appreciation for market efficiencies as a pro-competitive factor in merger analysis. The US and the German authorities have established detailed standards regarding the same. Contrary to

[34] European Merger Regulation 2004, Art. 2, ¶3.

[35] Kinne, *supra* note 19.

[36] Kollin L. Rice, *Ohio Law Governing Employee Covenants Not to Compete: A Practitioner's Guide to Current Trends and the Impact of Ohio's Adoption of the Uniform Trade Secrets Act*, 23 OHIO N.U. L. REV., 347, 361 (1996).

[37] CHARLES E. STEWART, MERGERS AND ACQUISITIONS: GERMANY 223 (2000).

[38] Peter F. Drucker, *Peter Drucker on the new business realities*, THE ANTITRUST BULLETIN: THE JOURNAL OF AMERICAN AND FOREIGN ANTITRUST AND TRADE REGULATIONS, 795-819 (1999).

this, the EC gives the parties little guidance on how to meet the economic and technical progress criteria.

Further, the trade-off analysis of balancing the pro-competitive effects of a merger with the anti-competitive effects is possible only under US and German Regulations. This is because even though both use different methods (Germany uses social welfare and US consumer welfare standard) they weigh equally the advantages and disadvantages of merger in terms of the resulting trade-off to the economy.[39] EU competition policy on the other hand weighs competition restraints heavily than efficiency gains out of the merger.[40] An unequal weightage precludes possibility of a formal trade-off analysis, but EC still tends to resolve this apparent lack of trade-off scrutiny indirectly by giving due consideration to the other merger criteria, *i.e.*, technical and economic progress in a very dynamic way.

Interestingly, in the EU, the efficiency defence has been often accepted as there have been no instances of conflict between efficiencies and market power.[41] However, agencies and courts have recognised efficiencies as a factor that may tilt the balance in favour of an otherwise anti-competitive transaction. The review of the relevant merger cases in the subsequent sections shall demonstrate clearly that the firms' complaints regarding the restrictive framework of antitrust merger regulations lacks substance. Thus, in cases where the merging parties claim efficiencies, the competition agency refuses to allow the proposed merger only because the alleged savings were either not verifiable or not high enough to offset the competition concerns. The legal framework of the merger policies examined below is therefore amply sufficient to meet the challenge of the current merger wave.[42]

## III. EUROPEAN POSITION: PRO-ACTIVE ROLE OF THE COMPETITION REGULATING AGENCIES

Article 101 of the Treaty on the Functioning of the European Union (TFEU),[43] comes under the domestic jurisdiction of the member country's courts and they have been given the task to interpret the said provision.[44]

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39 Kinne, *supra* note 19.

40 Kinne, *supra* note 19.

41 *See* Lars-Hendrik Röller, Johan Stennek & Frank Verboven, *Efficiency gains from mergers*, available at http://ec.europa.eu/competition/speeches/text/sp2005_013_en.pdf (Last visited on August 23, 2015).

42 David Round & John Siegfried, *Can economists agree, or are some more agreeable than others?*, 39(3) The Antitrust Bulletin, 753-69 (Fall 1994).

43 The EC Treaty, Art. 81, available at http://ec.europa.eu/competition/legislation/treaties/ec/art81_en.html (Last visited on December 29, 2013).

44 Edurne Navarro, Andrés Font et al, Merger Control in the EU, 307 ¶10.23 (2005).

The aforementioned article, being concerned with the Rules on Competition,[45] when read together with Recital 21 of the Regulation 139/2004[46] indicates the adjudicatory function of the EC. This function includes ascertaining the nature of the clauses inserted by the parties into their BTAs.[47] An acceptable restriction in the BTA will have to be ancillary in character, *i.e.*, it ought to be secondary in its operational sphere when compared to the primary commitments governing the sale of business.[48] The European jurisprudence is clear in its approach towards non-compete covenants by requiring that the link between the restriction placed by the clause and the resulting concentration must be direct.[49] Such a restriction has to be 'necessary' for concentration to be carried out. 'Necessary' would mean that in the absence of such a restriction the concentration becomes impossible or can only come into existence with substantial cost, making the venture economically unviable.[50]

The justification for a non-compete clause emanates from the fact that such a covenant shall help the purchaser to derive full worth of the business being acquired, by gaining protection from the vendor with regard to the competition in the relevant market.[51] The operability of a non-compete clause

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45 Official Journal of the European Union, *Consolidated version of the treaty on the functioning of the European Union*, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF (Last visited on December 29, 2013).

46 Recital 21, Regulation 139/2004 states:

> "This Regulation should also apply where the undertakings concerned accept restrictions directly related to, and necessary for, the implementation of the concentration. Commission decisions declaring concentrations compatible with the common market in application of this Regulation should automatically cover such restrictions, without the Commission having to assess such restrictions in individual cases. At the request of the undertakings concerned, however, the Commission should, in cases presenting novel or unresolved questions giving rise to genuine uncertainty, expressly assess whether or not any restriction is directly related to, and necessary for, the implementation of the concentration. A case presents a novel or unresolved question giving rise to genuine uncertainty if the question is not covered by the relevant Commission notice in force or a published Commission decision."

47 *See* Official Journal of the European Union, *Commission notice on restrictions directly related and necessary to concentrations*, March 5, 2005, 2005/C 56/03, Point 10 (The clauses were deemed necessary for a successful merger and hence were not considered to be restrictive for competition in cases like Case IV/M498, Commercial Union/Groupe Victoria (1994); Case IV/M532, Cable & Wireless/ Schlumberger (1994); Case IV/M663, Dupont/Dow (1996); Case IV/M855, BT/NS/Telfort (1996)).

48 *Id*.

49 Round & Siegfried, *supra* note 42, 309 ¶10.29; Official Journal of the European Union, *Commission notice on restrictions directly related and necessary to* concentrations, March 5, 2005, 2005/C 56/03, ¶13, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:056:0024:0031:EN:PDF(Last visited on August 23, 2015).

50 A necessary restriction can well be in form of a 'non-compete' clause, where the protection of purchaser's interest in the joint venture is all essential to ensure a successful consolidation of the business in the market. *See generally* Case No. COMP/JV.54, Smith & Nephew/Beiersdorf/JV (2001).

51 Case COMP/M2305, Vodafone Group plc/Eircell (2001)(The non-compete agreement was for a span of three years).

ought to be restricted to the services and products that constitute the majority of the transactions undertaken by the entity for financial gains.[52] Further, the mere acceptance of the term as ancillary by the parties involved shall not be a conclusive reason for the EC to accept such restrictions.[53] Imbibing the 'principle of proportionality', the restriction so put by the contracting parties is to be proportional to the object of concentration and should not go beyond the reasonable limits of duration,[54] content[55] and territorial coverage.[56] Thus, it is logical to assume that if there existed varied ways of realising goals of the anticipated merger, then the one which least restricts the competition in the relevant market would be approved.[57]

In the European context, the temporal limit of a restricting clause ought not to be more than three years when the protection extends to know-how[58] of the trade and the aforesaid period is reduced when there is an addition of goodwill in the restrictive clause.[59] It is interesting to note that the EU regime takes due note of externalities and may allow the limit of time based restriction to be extended in exceptional circumstances.[60] The geographical limit of a non-compete clause is further limited to the area where the vendor has been selling its products before the occurrence of the transfer of the business. This area can be widened if reason for such request can be justified. The justification could include cases where the vendor intended to market its products and had initiated the operations at the time when the transfer took place; this area can then reasonably be added to the territorial limit of the non-compete clause.[61]

52 *Id*., ¶27-31.

53 Official Journal of the European Union, *Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004*, December 5, 2013, 2005/C 56/04, ¶19.

54 Official Journal of the European Union, *Commission notice on restrictions directly related and necessary to concentrations*, March 5, 2005, 2005/C 56/03, ¶20; *See, e.g.,* Case COMP/M1901, Cap Gemini/Ernst & Young (2000).

55 The content of such restrictive clause must be limited to the areas of exploitation which are essential to the activities of the transferred undertaking; *See* Case IV/M437, Matra Marconi Space/British Aerospace Space Systems ((1994), Case IV/M465, GE/CIGI (1994); Case IV/M512, UAP/Provincial (1994).

56 *See* Official Journal of the European Union, *Commission notice on restrictions directly related and necessary to concentrations*, March 5, 2005, 2005/C 56/03, ¶20 (A non-compete clause ought to be restricted to the geographical limit where the vendor introduced his products and/or products before the said transfer).

57 Round & Siegfried, *supra* note 42, 211 ¶10.31.

58 Case IV/M1127, Nestle/Dagety (1998) 33; Case COMP/M2077, Clayton/Dubilier & Rice/Iteltel (1997) 15; COMP/M2305, Vodafone Group plc/Eircell (2001) 21-22.

59 Case IV/M1482, Kingfisher/Grosslabor (1999) 26; Case IV/M884, KNPBT/Bunzl/Wilheim Seiler (1997) 17.

60 *See, e.g.*, Case COMP/M1784, Delphi Automotive Systems/Lucas Diesel (2000) 10 (The non-compete agreement between the vendor and the purchaser for a period of five years was justified on the ground that time to adapt to new technology was necessary).

61 Case IV/M301, Tesco/Catteau (1993) 10 (the territorial limit of the restricting clause included the area of the purchased undertaking); Case IV/M786, Birmingham International Airport (1997) 24-28 (The Commission allowed the restrictive clause which prevented the parent company to operate or manage airports that had the possibility to influence the business operated

In addition to the territorial and geographic restrictions, the content as well as the nature of a non-compete clause is crucial in determining approval for the M&A transaction. Thus a clause which restricted the vendor from buying or acquiring shares in a competing corporate entity for a merely financial purpose without acquiring any substantial control in the competing company was not considered as ancillary and held anti-competitive.[62] Further, a restrictive clause in the nature of a non-solicitation and/or confidentiality agreement is often less absolute in its scope than a sole non-compete clause, since it is considered directly essential for the full functionality of a concentration agreement.[63] Similarly, valuable business secrets are given due protection and any restriction to augment the same has been considered as justified.[64] Non-compete clauses are usually included to protect the purchaser's interest more than that of the vendor and hence a clause that favours a vendor's interest more than that of the purchaser has often been not considered ancillary as it was not absolutely necessary for the merger.[65] Recently, even good faith obligations in case of a non-compete clause have become very lucrative. These clauses impose good faith restrictions on the conduct of the directors of the purchased entity to prevent instances of decrease in the value of the acquired business and are considered well justified in the European context.[66] While, these are thresholds for non-compete covenants in BTA's that protect purchaser's interests, another important aspect of merger regulation is dealing with non-compete covenants in Joint Venture Agreement where protection of the interest of both parties to the contract becomes important.

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by the joint venture. But disallowed another clause which restricted the operability of other airports which had no direct nexus with the operations of the joint venture).

62 Official Journal of the European Union, *Commission notice on restrictions directly related and necessary to concentrations*, March 5, 2005, 2005/C 56/03, ¶25.

63 The Commission has accepted non-solicitation clause as being ancillary in Case COMP/M2084, CSM/European Bakery Supplies Business (Unilever) (2000) 17; Case COMP/M2136, Schroder Ventures/Memec (2000) 21, 23 and 25; Case COMP/M2120, Toyota Motor Corporation/Toyota GB (2000) 14.

64 *See* Draft European Parliament Legislative Resolution, *On the proposal for a directive of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure*, (COM(2013)0813 – C7-0431/2013 – 2013/0402(COD), available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bREPORT%2bA8-2015-0199%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN (Last visited on October 29, 2015).

65 Case COMP/M1887, EDF/South Western Electricity (1999) 45 (A clause that prevents the purchaser to solicit the vendor's customers and employees was not termed as an ancillary restriction becausethe objective of the clause was the protection of the vendor's interest).

66 Case COMP/M1887, Credit Suisse First Boston/Gala Group (2009) (It was held that the restriction imposed on the conduct of the directors had a necessary nexus with the ordinary conduct of the business and was termed justified so as to enable the buyer to realize the full worth of the assets purchased ); *See also* Case IV/M983, Bacob Banque/Banque Paribas Belique (1997) 18 (The Commission limited the nature of the ancillary agreement to cover only the clause which protected the interest of the purchaser).

## A. TREATMENT OF A JOINT VENTURE

A non-compete obligation in a joint venture in the European context follows the same principles as a non-compete clause in a concentration agreement. The rationale is to gain full worth of the acquired assets and the dire need to shield the interest of the joint venture from the previously attained knowledge and know-how in the market by the parent companies.[67] It is essential to note that a non-compete clause which outlives the duration of the concluded joint venture between the parent companies can never be termed ancillary.[68] The EC has further confined the ancillary non-compete clauses to a limited period commencing from the inception of the venture and the same must not extend for the entire lifetime of the joint venture.[69]

The geographic limit of a non-compete clause in case of a joint venture is similar to the scope of such a clause in a BTA – the scope of such prohibition ought to be limited to the target markets of the parent companies before they agreed on a venture. Similar to conditions for non-compete clauses in BTAs, the area can be expanded only if either of the companies had started its operations in a new delimited territory at the time of the venture.[70] In the same vein, the goods and services not actually marketed in the relevant market by the parent companies at the time of venture, but being at an advance stage of development can also be covered validly under a non-compete clause.[71] A clear understanding of the area within which the joint ventures are to be operational is fundamental, since the limits on competition shall be accepted mainly within this delineated region.[72] Further, clauses pertaining to non-solicitation

[67] Official Journal of the European Union, *Commission notice on restrictions directly related and necessary to concentrations*, March 5, 2005, 2005/C 56/03, ¶28.

[68] *Id*., 31; Case COMP/JV24, Bertelsmann/Planeta/BOL Spain (1999) 30; Case COMP/M1786, General Electrical Thomson-CSF/JV (2000), 23; Case IV/M2023, Brambles/Ermewa/JV (2000) 26; Case IV/M910, CLF CCB (Dexia)/San Paolo/Crediop (1997) 24 (In this case the commission did not allow obligations for a term that went beyond the joint venture itself).

[69] Case COMP/JV51, Bertelsmann/Mondadori/BOL Italia (2000) 31 (The non-compete clause operated for a period of five years and the commission considered the time limit sufficient to ensure a successful entry of the venture in the relevant market). *See also* Case IV/M1807, FNAC/COIN/JV (2000) 20 (The commission used its discretion to limit the applicability of the joint venture to the period deemed necessary to recover the worth of investment made).

[70] Official Journal of the European Union, *Commission notice on restrictions directly related and necessary to concentrations*, March 5, 2005, 2005/C 56/03, ¶37; In Case COMP/M1913, Lufthansa Menzies/LGS/JV (2000) 18 and Case COMP/M2243, Stora Enso/Assidoman/JV (2000) 49 (The commission opined that the non-compete clause shall be restricted to the area where the parent companies have been offering their product and services before the joint venture came into existence).

[71] Official Journal of the European Union, *Commission notice on restrictions directly related and necessary to concentrations*, March 5, 2005, 2005/C 56/03, ¶38; In Case IV/M1332, Thomson/Lucas (1998) 20 (The commission rejected contention of the joint venture that a restrictive clause which covered a potential market which was not under the operability zone of the parent companies at the time of joint venture was ancillary and held it to be unjustified).

[72] Official Journal of the European Union, *Commission notice on restrictions directly related and necessary to concentrations*, March 5, 2005, 2005/C 56/03, ¶39.

or confidentiality ought not to be longer than the life of the venture under consideration.[73] The Commission has been accepting of arrangements that augment the interest of the newly formulated joint venture; thus, clauses which inhibit the parent companies from providing goods and services, similar in nature to the ones produced by the joint venture, to the competitors of the newly formed entity has been allowed by the EC.[74]

The EC has been receptive to the changes and has taken a liberal view while assessing the intended effect of the non-compete clause in the case of a concentration and a joint venture. The EC hasn't taken a strictly legal approach while evaluating the clauses – the reliance on economic considerations have led the Commission to take commercially viable decisions. Further, terms that are conducive for establishment of a new venture or help stabilise the business so acquired by the purchaser are generally given a go ahead.[75] As discussed above, the EC has favoured the purchaser's interest over the vendor while assessing if the restrictive covenant is ancillary. However, in recent decisions an alternate trend has been noticed, where provisions favouring the vendor have also been accepted.[76] Thus, there has been a shift and the broader emphasis of EC has been towards ensuring full functionality of the business concern, *i.e.*, a concentration or a joint venture. The clauses having positive effects have been approved when they play a supportive role in the transactions being entered into by the newly formulated entity.[77] Further, proportionality of the clause has been adjudged on the well-established parameters regarding the scope, time span and territorial limit of the clause.[78] Interestingly, in spite of being mostly liberal in their approach, the EC's rulings have sometimes been considered interventionist. They have often modified the substantial operability of the non-compete clauses to a logically justifiable objective standard.[79]

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[73] A contrary view was adopted by the commission in Case IV/M1455, Gruner+Jahr/Financial Times/JV (1999) 35-36, where it gave its assent to a confidentiality agreement extending beyond the period of termination of the venture. The justification given was that the amount of know-how transferred to the joint venture necessitated longer period of confidentiality obligation on the parties.

[74] *See* Case IV/M/786, Birmingham International Airport (1997) 25 (The Commission considered an undertaking clause by one of the parent companies to restrain from giving the same services it provides the joint venture to a competitor airport. Though the parent company had a crucial and strategic role in operation of the joint venture, the Commission held the clause to be unjustified).

[75] Case COMP/M1887, Credit Suisse First Boston/Gala Group (2000) (Limitations were put on the conduct of the present managerial staff).

[76] *See* Case COMP/M1925, Scottish Newcastle/Groupe Danone (2000); Case COMP/M1840, KKR/Bosch Telekom Private Networks (2000).

[77] Round & Siegfried, *supra* note 42, 324 ¶10.70.

[78] Round & Siegfried, *supra* note 42, 324 ¶10.70.

[79] The Commission restricted the quantity supplied in Case No. IV/M550, Union Carbide/Enicehm (1995); Case No. IV/M612, RWE-DEA/Augusta (II) (1995); Duration of the contract was restricted in Case No. IV/M182, Inchcape/IEP (1992); Case COMP/M1901, Cap Gemini/Ernst & Young (2000); Cases where the Commission limited the geographical scope; *see* Case No. IV/M832, NorskHydro/Enichem Agricoltura-Terni (1996).

Even accepting the intrusive argument, the EC has adopted rather flexible criteria which has altered with each case, allowing the parties involved to justify the clauses and explain the economic ramifications of the said clause on the market structure.[80] The antitrust control under Article 101 of the TFEU hinges predominantly on legal and economic considerations emanating out of the proposed concentration and/or joint venture in the European context.

## *B. TELEFÓNICA AND PORTUGAL TELECOM DECISION: CLARIFYING THE TAKE OF EUROPEAN AGENCIES.*

Having discussed the broad parameters that the EC follows while evaluating the merit of non-compete clauses in a concentration agreement or a joint venture, it is essential to consider the individual orders passed by the EC. Article 101 TFEU prohibits the implementation of concerted practices which may have an adverse effect on the competition at either community or national level. The EC's decision in Telefónica S.A. ('Telefónica') and Portugal Telecom SGPS, S.A. ('PT') co-operative case is crucial in deciphering the operability of the said Article. The Spanish and Portuguese telecom incumbents entered into an agreement in the year 2010, whereby they mutually agreed to refrain from competing with each other in the Iberian telecommunication markets, the settlement having been reached in context of the sole acquisition of Vivo, the Brazilian mobile operator, by Telefónica.[81] Through a Stock Purchase Agreement entered into by the named parties on July 28, 2010.[82] The clause reads as follows:

> "Ninth — Non-compete — To the extent permitted by law, each party shall refrain from engaging or investing, directly or indirectly through any affiliate, in any project in the telecommunication business (including fixed and mobile services, Internet access and television services, but excluding any investment or activity currently held or performed as of the date hereof) that can be deemed to be in competition with the other within the Iberian market for a period starting on the date of closing [ 27 September 2010] until December 31, 2011."[83]

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80 *See* Case COMP/M1933, Citigroup/Flender (2000) (The need for a five year restriction is explained by comparative long development cycles and product life cycles).

81 European Union Press Release Database, *Antitrust: Commission probes co-operation between Telefónica and Portugal Telecom on Iberian markets*, January 24, 2011, available at http://europa.eu/rapid/press-release_IP-11-58_en.htm (Last visited on December 30, 2013).

82 Stock Purchase Agreement, July 28, 2010, Document ID 0028.

83 Case COMP/39.83, *Summary of Commission Decision of 23 January 2013 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union*, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52013XC0518(03):EN:NOT (Last visited on December 30, 2013).

The clause was discovered in September 2010 by the competent authorities of Spain, *Comisión Nacional de Competencia*,[84] who informed the Competent authority in Portugal, *Autoridade da Concorrência*;[85] both authorities following the dictates of Article 11(6) of Regulation (EC) No 1/2003,[86] authorised the EC to take over investigation of the case.

The EC, on a preliminary finding, concluded that the negotiation was in breach of EU Antitrust Rules and were non-conducive restrictive business practices. Further, the EC in its enquiry in January 2011, concluded that the agreement was reached with an ulterior object of portioning the relevant markets and would plausibly increase prices and limit the choice for the final consumers. The statement of objection ('SO') issued by the EC was a formal indication of the governing authority's discomfort with the terminology adopted by the contracting parties in the aforesaid clause.[87]

The parties argued that since the clause was dismantled within sixteen days after the probe was initiated by EC it would pose no threat to the competition in the market.[88] However, the EC rejected the contention because Art. 101 does not require the Commission to look into the actual effect of the clause on market conditions.[89] An additional assertion was made by Telefónica that the clause was at best in nature of a self-restraining provision. It adopted a vague terminology so that the non-compete obligations covered under the clause could well be discussed by the parties before any action in the aforesaid regard was taken.[90] The EC rejected the contention as it was convinced that the clause was precise and could be applied to the facts directly without any pre negotiation in this regard. The EC held that the parties had negotiated to evade

[84] *Letter from* Comisión Nacional de Competencia, Competition Authority of Spain *to* the European Commission *dated* October 7, 2010 (Document ID 0015).

[85] *Letter from* Autoridade da Concorrência, Competition Authority of Portugal *to* the European Commission *dated* October 14, 2010 (Document ID 0045).

[86] "The initiation by the Commission of proceedings for the adoption of a decision under Chapter III shall relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82 of the Treaty. If a competition authority of a Member State is already acting on a case, the Commission shall only initiate proceedings after consulting with that national competition authority."

[87] Case COMP/39.83, *Summary of Commission Decision of 23 January 2013 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union*, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52013XC0518(03):EN:NOT (Last visited on December 30, 2013).

[88] *Id.*, ¶25.

[89] *Id.*, ¶20.

[90] *Reply to the Statement of Objections by Telefónica to European Commission* (Document ID 0763) ¶285; European Commission Competition, CASE AT.39839- Telefonica/Portugal Telecom, 37, available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39839/39839_1210_4.pdf (Last visited on December 30, 2013).

competition in all the relevant markets covered, thereby affecting the interest of the overall consumer.[91]

On the point of 'geography', Telefónica contended that the term 'Iberian market' in the clause had no geographically relevant market as understood in the domain of competition law because it was impossible to define 'Iberian market' in context of telecommunication sector.[92] Hence Telefónica asserted that the mention of the clause in the SO as being geographically inclusive of Spain and Portugal is unfounded and incorrect.[93] It further stated that there was no understanding between the parties that Telefónica would not compete in Portugal and PT would do the same in Spain, as *quid pro quo*. PT, again adopting a defensive stance, responded to the SO by stating that the clause was to merely ensure the 'equivalence of obligations' – where if any of the parties were to compete in either Portugal or Spain, then that territory was to be excluded from the operative scope of the clause for both the parties.[94] The EC rejected this interpretation, saying that the mere fact that either of the parties were competing in one of the markets in Spain or Portugal would not automatically force the EC to conclude that the parties were to be "deemed to be in competition with each other" in another state in the EU.[95]

Further, Telefónica stated that potential competition to ascertain the impact of a non-compete clause has to be grounded in actual and not theoretical considerations; it contended that the EC ought to ascertain four factors before striking down a clause as being anti-competitive in nature.

> "…(a) the objective capacity to enter the market and compete; (b) real (not hypothetical) incentives to enter the market; (c) the likelihood of entry to the market in the short-medium term; and (d) the likelihood for the entrant to be successful and modify the structure of the market in an appreciable manner…"[96]

It stated that the EC did not consider the fact that in view of PT's international plans, which were centred in Brazil and Africa, it had no intention to enter the communication market in Spain. Moreover on the point of

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91 *Reply to the Statement of Objections by Telefónica to European Commission* (Document ID 0763), ¶154.

92 *Reply to the Statement of Objections by Telefónica to European Commission* (Document ID 0763) ¶259.

93 *Reply to the Statement of Objections by Telefónica to European Commission* (Document ID 0763), ¶175, 248.

94 *Reply to the Statement of Objections by Portugal Telecom to European Commission* (Document ID 0763) ¶177.

95 *Id*., ¶ 178.

96 *Reply to the Statement of Objections by Portugal Telecom to European Commission* (Document ID 0763) ¶269 (a),(b),(c).

Telefónica's entry into Portugal, it was argued that the incentives for Telefónica's entry were only theoretical and not practical because the sovereign debt crisis in Portugal and the already matured electronic communication market would have dissuaded the company to invest in Portugal.[97] Thus the two companies would not have been in competition in any true sense of the term. Responding to this contention, EC noted that the very act of entering into a non-compete agreement signals towards an implicit acceptance by the parties that they are in competition with each other in some regard or scope in the markets, even if undetermined at the time.[98]

The EC clarified that the equality of the contracting parties is to be made explicit in the clause itself and no artificial assistance would aid the parties later.[99] The EC in this particular decision reiterated its position taken at earlier instances[100] where it was clearly laid out that for attracting liability under Article 101 of the Treaty, there is no requirement for the objectives of a competition restriction clause to actualise. The mere presence of the clause operative in the aforesaid field is enough. Hence the parties' assertion that clause did not 'actually' affect the competition in the relevant market held no ground. The clause by its sheer nature had the potential to restrict the competition within the internal market as defined under Article 101 of the treaty and thus the EC was justified in imposing the penalty as per the relevant guidelines.[101] The EC, though, considered certain mitigating factors to reduce the fine, for e.g., the infringement was for a period of four months, parties had made the clauses public without any secrecy and they self-terminated the clause soon after the commencement of the investigation.[102] Thus, after a rational analysis by the EC, the parties, *i.e.*, PT and Telefónica, were fined a sum of seventy nine million euros for the illegal non-compete contract clause.

The case provides cogent reasons to believe that the EC takes a deep interest in the anti-competitive practices and has been proactive in monitoring non-compete clauses in mergers. A restrictive clause is thus analysed on the parameters of its territorial and temporal reach. The evaluation criteria of the EC have devolved on the content, objective and the economic and legal

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97 *Reply to the Statement of Objections by Portugal Telecom to European Commission* (Document ID 0763) ¶269 (a),(b),(c).

98 *Id.*, ¶270.

99 *Id.*, ¶180.

100 Joined Cases C-501/06 P, C-513/06 P and C-519/06 P Glaxo Smithkline Services and Case C-8/08 TMobile Netherlands and Others; C-519/06 P, Glaxo Smithkline Services Unlimited v. Commission, ECR (2009) I-09291 ¶55.

101 EUR-Lex, *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003*, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC0901(01):EN:NOT (Last visited on December 30, 2013).

102 European Union Press Release Database, *Antitrust: Commission fines Telefónica and Portugal Telecom € 79 million for illegal non-compete contract clause*, available at http://europa.eu/rapid/press-release_IP-13-39_en.htm (Last visited on December 30, 2013).

context of which the clause forms an essential part.[103] A wholesome liberal and commercial understanding by the EC has led to a sound decision in the case of Telefónica, PT. Notifications and clarifications which are a constant part of the EU regime have ensured that the laws are restructured and/or amended at regular intervals so that the exigencies associated with business undertakings are duly addressed in an expeditious and efficacious manner. In a nutshell, a mere mention of a non-compete clause is enough to invite the ire of the EC. Actualisation of the clause is not a condition precedent for the EC to penalise the parties involved in the aforesaid contractual arrangement, although while analysing the clause, the Commission employs economic consideration to reach a commercially viable decision.

## IV. USA COMPETITION LAW FRAMEWORK: AN IDEAL MODEL?

In the common law jurisprudence, the competition authorities are generally of the view that any merger between competing firms is *per se* illegal.[104] Antitrust considerations in the field of M&A are mainly delimited to the impact of such undertakings in the geographic product market.[105] The statutory control mechanism in US regulating the anti-competitive practices is the Sherman Antitrust Act, 1890,[106] which prohibits proposed combinations restraining trade or in essence monopolising national trade. To cover all bases, the nation adopted the Clayton Antitrust Act in the year 1914, which prevents corporate merger and acquisitions "where… the effect of such acquisition may be substantially to lessen competition or to tend to create monopoly."[107] The said Acts have been supplemented by the passing of Merger Guidelines by the US Department of Justice ('DOJ'). The recent edition of the guidelines was passed in the year 2010[108] and it has categorically listed the grounds which are deemed essential to ascertain the ramifications of a merger on the relevant product market. The rationale behind passing of the guidelines was to augment the congressional intent to resolve issues related to competition restriction in their incipiency.[109] The department is concerned about the ultimate consumer

[103] EUR Lex, C*ommunication from the Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011XC0114(04):EN:NOT (Last visited on December 30, 2013), ¶25; European Commission, *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* ¶22, available at http://ec.europa.eu/competition/consultations/2010_horizontals/guidelines_en.pdf (Last visited on December 30, 2013).

[104] William J. Carney, Mergers and Acquisitions: Cases and Materials 35 (2007).

[105] *Id.*

[106] Sherman Antitrust Act, 15 U.S.C., §1 (U.S.).

[107] Clayton Antitrust Act, 1914 §7 (U.S.), Sherman Antitrust Act, 15 U.S.C., §18 U.S.).

[108] US Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, available at http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf (Last visited on December 30, 2013).

[109] *Id.*, 1.

who stands to be aggrieved by the high prices resulting from the exclusionary clauses inserted by the contracting parties.

Like its European counterpart, the American agencies evaluate the anti-competitive effects of the non-compete clauses by not just by its 'actual' effects but also consider the unfavourable consequences 'likely' to be caused by the M&A.[110] The agencies follow the same flow of analysis when evaluating a non-consummated merger. Interest of competitive firms entering into a merger is often at loggerheads with that of the consumers who bear the brunt of increased prices once the merger is in place. The agencies thus target explicit or implicit evidences that portray the ultimate intention of the corporate entities when entering into the BTA. The intentions for entering into a BTA could include seeking a price raise, reducing output or capacity, reducing product quality or variety, or withdrawing products or delaying their information, or curtailing research and development etc.[111] Thus, the emphasis of US Antitrust agencies has been on devising an approach that anticipates the practical conditions prevalent in the market to assess the impact of the restrictive clause.[112]

Definition of the 'market' plays a crucial role in determining the scope of the concerned merger. Not only does the market limit the territorial aspect of the agreement but it also helps the agencies to decipher the target population getting affected by such conglomeration. The geographic dimensions of a relevant product market often devolve around the transportation costs. Common factors affecting the definitional limits of the market could be the location of the supplier and/or the consumer. Further, the authorities also identify the substitutes available to the customers while assessing the relevance of the market concerned.[113] The oft employed test by the US agencies is of a 'hypothetical monopolist' - the test presumes the existence of a relevant product market where the merging entity is presumed to have substantially increased the price of the product.[114] The agencies while evaluating the scope of the merger also give due consideration to the presence of other entities in the relevant market which shall be able to replace the lack of competition that has occasioned due to the M&A.[115] Thus, the presence of balanced proportions of competition in the market post the merger shall logically fare well for the merging entities. Apart from considering other rival entities, the level of market concentration resulting from the merger will be an important indicator for the agency to flag

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110 US Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, available at http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf (Last visited on December 30, 2013) ¶2.1.1.

111 *Id*., ¶2.2.1.

112 Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to fox in forty years*, available at http://faculty.haas.berkeley.edu/shapiro/hedgehog.pdf (Last visited on December 30, 2013), 703.

113 Carney, *supra* note 104, 7.

114 Carney, *supra* note 104, 7.

115 Carney, *supra* note 104, 18.

a deal as anti-competitive.[116] To calculate the level of concentration in the relevant market, the agencies employ the Herfindahl-Hirschman Index ('HHI'). The mathematical determination of the aforesaid index is done by adding the doubles of the individual firms' market shares.[117]

The agency then consider the HHI both at pre and post-merger level and based on the arithmetical observations made, the level of concentration in the market is ascertained. Further, the level of concentration is graded as un-concentrated Markets, Moderately Concentrated Markets and Highly Concentrated Markets.[118] The intention behind such segregation is not to impose a water tight differentiating mechanism that conclusively determines the effect of a merger. However, the intention is to enlist certain mergers which shall not affect the level of competition in the market and certain others which require due deliberation by the concerned agencies.[119] Closely related is another mathematical assertion where the 'unilateral price effects' of a merging entity are noted. The concept of diversion is essential here. This is because it is believed that the merging entity shall increase the price of the product and divert the loss caused by the increased prices to the products sold by other entities, thereby increasing the overall profit earned by the two firms when compared with the pre-merger position.[120] An unprecedented change in the pre and post diversions shall be the threshold to determine the level of adverse effect that the concerned merger has caused in the relevant market, especially where the non-merging firms are unable to provide a close substitute to the product.[121]

Thus the preceding discussion evidences that the agencies in the US have played a pro-active role in determining the ultimate effect of a merger in the national context. The merging entities have been mandated under § 7A of the Clayton Act (added in the year 1976) to send a premerger notice to the Government, thus making the process transparent.[122] No merger

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[116] Joseph Farrell & Carl Shapiro, *Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition*, 10 The B.E. Journal of Theoretical Economics 1, Article 9 (2010), available at http://www.bepress.com/bejte/vol10/iss1/art9 (last visited on December 30, 2013).

[117] *See e.g.*, a market consisting of four firms with market shares of thirty percent, thirty percent, twenty percent, and twenty percent has an HHI of 2600 (302 + 302 + 202 + 202 = 2600). The HHI ranges from 10,000 (in the case of a pure monopoly) to a number approaching zero (in the case of an atomistic market). Although it is desirable to include all firms in the calculation, lack of information about firms with small shares is not critical because such firms do not affect the HHI significantly.

[118] Unconcentrated Markets: HHI below 1500, Moderately Concentrated Markets: HHI between 1500 and 2500, Highly Concentrated Markets: HHI above 2500.

[119] Carney, *supra* note 104, 19.

[120] Barry E. Hawk, International Antitrust Law & Policy: Fordham Competition Law 139 (2010).

[121] US Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, available at http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf, (Last visited on December 30, 2013), §6.1.

[122] Carney, *supra* note 104, 9.

can be shrouded in secrecy in the American context, where after receiving the notification, the authorities are under an obligation to evaluate the clauses agreed upon by the contracting parties, so that all restrictive embranchments can well be nipped in the bud.

## *A. UNITED STATES V. EBAY, INC.: DECIPHERING A COMPLEX NON-COMPETE AGREEMENT BETWEEN TWO MULTINATIONALS*

Having discussed the rudimentary framework dictating the attitude of competent agencies' in case of a non-compete obligation, it is imperative to decipher the practical considerations that are often faced by the officials when evaluating a restrictive clause in a merger or a joint venture. The case of *United States of America* v. *eBay Inc.*[123] is essential in this regard. In this case the Federal Trade Commission and the Antitrust Division of the DOJ tracked with great fervour the non-compete obligations entered into between the American multinational (consumer to consumer entity), eBay Inc. and the American software company Intuit.[124] Both the companies were active in the field of software development and hence were in direct competition with each other to recruit specialised scientific experts and computer engineers.[125] This process of competitive hiring ultimately resulted in offering repetitively higher remunerations to the employees. To diminish the possibility of an employee demanding higher wages, both companies entered into an agreement whereby the two contracting parties were prohibited from hiring each other's pool of employees. The agreement lasted for over a year and led to a sharp decline in the wages of the employees who would have benefited from an opportunity to work in Intuit which in turn would have induced eBay to keep the average salary and remuneration levels high.[126]

By an explicit prevention of the hiring of technical staff within the named companies, a significant proportion of competition had been eliminated. This conduct was antithetical to the well-reasoned leverage that ought to be enjoyed by the employees who lost out on better livelihood options and

[123] United States of America v. eBay Inc., Case No. 12-CV-05869-EJD-PSG (U.S. District Court, Northern District of California) (Unreported), available at http://www.justice.gov/atr/cases/f297500/297580.pdf (Last visited on December 30, 2013).

[124] Hogan Lovells, *Antitrust authorities get tough on non-compete clauses in M&A transactions*, January 24, 2013, available at http://ehoganlovells.com/cv/06665986a908a801b57beea21ab8f003cc10715a (Last visited on December 30, 2013).

[125] The Associated Press, *EBay and Intuit Named in Federal Antitrust Lawsuit*, New York Times November 17, 2012, available at http://www.nytimes.com/2012/11/17/business/ebay-and-intuit-named-in-federal-antitrust-lawsuit.html?_r=0 (Last visited on December 30, 2013).

[126] Casey Newton, *eBay accused of violating antitrust laws with Intuit accord*, November 16, 2012, available at http://news.cnet.com/8301-13578_3-57551429-38/ebay-accused-of-violating-antitrust-laws-with-intuit-accord/ (Last visited on December 30, 2013).

opportunities due to this agreement.[127] The action originated under the provisions of §1 of the Sherman Act, the arrangement was in the nature of a "handshake" whereby the top honchos of the companies entered into a restrictive settlement.[128] The said understanding prevented eBay from hiring any employee from Intuit. The contractual obligation was thus a naked restriction of trade that was *per se* unlawful under the provisions of the Sherman Act.[129] Interestingly, in a non-restrictive labour market the employers compete to lure the most efficient and valuable talents in the particular field of dealing. The non-solicitation and non-hiring decision so adopted by the two companies in all probabilities forced many of the employees to be stuck in jobs which were not utilising their respective calibre optimally.[130] The truce, so called by the two firms, was at the expense of the employees and the overall societal benefit that emanates from a competitive environment.[131]

'Cold-calling' which had been employed as a recruitment tool, emphasised the need for industries involved in technical fields to widen their gamut of employment strategies from targeting people looking for jobs to include those who are not looking for employment as well.[132] The consensus reached by the two companies aborted this competition. More importantly the agreement was shrouded in secrecy since no public announcement with regard to the same was made. The restraint in the instant case squarely fell in the *per se* illegality criterion under the Sherman Act,[133] which bars further enquiry into the merits of the events. Even if the aforesaid rule is discarded, the rule of 'quick look'[134]

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[127] Christina Ortiz, *What's Behind the eBay-Intuit Anti-Compete Agreement*, November 22, 2012, available at http://readwrite.com/2012/11/21/who-did-the-ebay-intuit-anti-compete-agreement-actually-hurt#awesm=~oiDjdaiA3sJnw2 (last visited on December 30, 2013).

[128] United States of America v. eBay Inc., Case No. 12-CV-05869-EJD-PSG, (U.S. District Court, Northern District of California) (Unreported), available at http://www.justice.gov/atr/cases/f297500/297580.pdf (Last visited on December 30, 2013), ¶2.

[129] *Id.*, ¶4.

[130] *Id.*, ¶11.

[131] *Id.*, ¶12.

[132] *Id.*, ¶10.

[133] Per se illegality includes activities such as price fixing, geographic market division, group boycott et al. In the instant case the non-recruitment contractual agreement can well be construed as a truce that shall stop the two entities to attract employees, and resulted in a situation that curtailed competition in the relevant employee market. The ultimate effect having pernicious effect on competition shall lack any redeeming value; *See also* Continental T.V., Inc. v. GTE Sylvania Inc., 53 L Ed 2d 568 : 433 US 36, 58 (1977) [quoting Northern Pacific Railway Co. v. United States, 2 L Ed 2d 545 : 356 US 1, 5 (1958)].

[134] State v. Safeway Inc., 651 F 3d 1118, 1134 (9th Cir 2011) [quoting California Dental Assn. v. FTC, 143 L Ed 2d 935 : 526 US 756, 770 (1999)]; *See also* Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and their Application ¶1911(a) at 326 (3rd ed., 2011) ("quick look" is "intended to connote a certain class of restraints, while not unambiguously in the per se category, may require a less elaborate examination to establish that their principal or only effect is anticompetitive."). Such condemnation can be accomplished "'in the twinkling on an eye.'" *See* State v. Safeway Inc, 651 F.3d 1118, 1134 (9th Cir 2011) [quoting National Collegiate Athletic Assn. v. Board of Regents of University of Oklahoma, 82 L Ed 2d 70 : 468 US 85, 109 n 39 (1984)].

can be employed, whereby a clause limiting the pool of hiring will result in an anti-competitive condition in the labour market.[135]

To avoid liability under the provisions of §1 of the Sherman Act[136] it would have to be proved that the agreement reached was between two parts of the same firm or economic enterprises.[137] EBay claimed that it and Intuit had to be construed as a single entity for the said consensus and hence sought to take advantage of the exceptions made available to a joint entity (M&A and Joint Venture ('JV')). The antitrust agency rightfully noted that just because one of the directors, Mr. Scott Cook, was common to both the firms, the two otherwise competitive firms cannot be termed as a 'single entity' and cannot fall outside the scrutiny of §1 of the Sherman Act.[138] Thus, the assertion made by eBay that the consensus reached was in the nature of an internal company policy concerning solely the interactions made to the single entity were considered wholly unjustified. The averment was illogical because when Mr. Cook accepted the restrictive covenant he was not acting in interest of eBay but looking out for the interest of Intuit Inc. Thus it was clear that there was a *quid pro quo* agreement between the two competing firms who were separate in all respects possible and not a single entity.[139]

After a brief discussion of the facts involved in the eBay case it is obvious that the restrictive agreement there was a naked restraint on competition which was not necessitated by any pro-competitive effects such as business collaboration etc.[140] The intervention showed by the authorities in the US is in sync with the global precedent of striking down restrictive covenants inhibiting competitive practices and imposing penalties on the incumbent companies. It is clear from the discussion undertaken in the preceding few paragraphs that the thrust of antitrust laws in the US is to scrape clauses or agreements which may have the ultimate effect of stifling legitimate competition in the relevant market. The statutory requirement to notify the concerned authorities of such clauses helps in making these clauses public and highlights the significance of transparency for the general public and the individuals affiliated with any of the contracting parties. The magnitude of the effects caused by a clause/ agreement has to be analysed in light of its economic repercussions and its reach, both geographical and temporal. Thus, the American structure makes an attempt to efficiently addresses major global concerns regarding anti-competitive

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135 United States of America v. EBAY Inc., 12-CV-05869-EJD-PSG, available at http://www.justice.gov/atr/cases/f297500/297580.pdf (Last visited on December 30, 2013), 17.

136 See Copperweld Corpn. v. Independence Tube Corpn., 81 L Ed 2d 628 : 467 US 752, 769 (1984).

137 Carney, *supra* note 104, 6.

138 Carney, *supra* note 104, 7.

139 Carney, *supra* note 104.

140 United States of America v. eBay Inc., 12-CV-05869-EJD-PSG, available at http://www.justice.gov/atr/cases/f297500/297580.pdf (Last visited on December 30, 2013), 3.

practices *vis-à-vis* M&A, JV or even a naked restraint scenario not falling in the above-mentioned categories.

## V. INDIA: HEADING TOWARDS A NEW DAWN IN REGUALTING M&A TRANSACTIONS

In the Indian context, law as a matter of policy has been against any restrictive clause or covenant which has the tendency to restraint an individual's liberty to contract or enter into any transaction or agreement with another entity. The Indian Contract Act, 1872 to this end terms an agreement void as per §27[141] which has the tendency to "…restraint anyone from carrying on a lawful profession, trade or business." Interpretation of the section has been called into question in a number of judgments[142] and the crux of these decisions signify that any restriction that travels beyond the period of employment, or a post contractual restraint is illegal and is considered as non-existent for all practical purposes.

Given the long history of judicial scrutiny, the trajectory of cases dealing with contractual matters relating to restrictive conditions is well evolved. In contrast to the well-established contract law jurisprudence, the antitrust jurisprudence is only at its nascent stage and thus one would not be amused by the follies the competition agencies might commit while dealing with new cases. However, interestingly, the jurisprudential thought process which emanated out of the Monopolies and Restrictive Trade Practices Act, 1969 has undergone a radical shift with the enactment of the Act. The Act in its *au courant* form has efficiently addressed the external influence on the market caused by a contractual obligation entered into between two or more individuals or entities. As noted above, a restrictive covenant is void and hence unenforceable by the court of law. The associated parties may materialise the substantial portion of the clause if they choose.[143] The Act intervenes when this actualisation of clauses have a clear appreciable effect on the competition in the relevant domestic market.[144]

The relevant statutory provisions regulating the combinations of the nature of mergers, amalgamations and acquisitions[145] are specified in the

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[141] The Indian Contract Act, 1872 §27.

[142] Percept D'Mark (India) (P) Ltd v. Zaheer Khan, (2006) 4 SCC 227; VFS Global Services (P) Ltd. v. Suprit Roy, (2008) 2 Bom CR 446; Niranjan Shankar Golikari v. Century Spg. and Mfg. Co. Ltd., AIR 1967 SC 1098 : (1967) 1 LLJ 740 (SC); Gujarat Bottling Co. Ltd. v. Coca Cola Co., (1995) 5 SCC 545 : AIR 1995 SC 2372; Superintendence Co. of India (P) Ltd. v. Krishan Murgai, (1981) 2 SCC 246 : (1981) 1 LLJ 121 (SC).

[143] Joseph Chitty, Chitty on Contracts: General principles 16-076 (2012); *See also* Boddington v. Lawton, 1994 ICR 478.

[144] Pollock & Mulla, Indian Contract And Specific Relief Acts 317 (Nilima Bhadbhade, 10th ed., 2010).

[145] The Competition Act, 2002, §5.

Act. An acquisition where the acquirer gains control, share, voting rights, assets etc. shall be deemed to be a combination under the Act.[146] The pre-combination notice as mandated by the 2007 Amendment Act[147] brings the CCI to the centre stage and it is required to decipher the ramifications of the proposed merger/amalgamation on the relevant market.[148] §6 of the Act while enlisting the same, refers to the term 'appreciable adverse effect within relevant market in India' thus hinting towards a geographical analysis of the restrictive covenant in the M&A agreements.

The Indian agency's treatment of a non-compete clause in an M&A when juxtaposed with European or American treatment reveals that Indian jurisprudence lacks basic classification of restraints. Further, there is nothing in the statute to define the meaning and scope of the term 'ancillary restraint'. The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ('Combination Regulation 2011'), have undoubtedly tried to clear the mist surrounding the CCI's treatment of a combination.[149] But, in spite of trying to clear the legal framework, the investigation regarding the real intention behind such clauses is still missing. Further, adding to the legislative ambiguity – even the CCI's case law jurisprudence was not clear as to what kind of non-compete clauses had appreciable adverse impact on competition.[150]

## *A. THE CCI'S DECISION IN THE ORCHID CHEMICALS & HOSPIRA HEALTHCARE INDIA PRIVATE LIMITED DEAL: CRYSTALLISING THE INDIAN POSITION ON RESTRICTIVE CLAUSES IN MERGERS & ACQUISITIONS.*

Having analysed the brief background pertaining to the Indian statutory treatment of non-compete clauses in an M&A, it is essential to delve into one of the recent orders passed by the CCI that has made an attempt to crystallised the Indian stand on a restrictive clause in a combination.

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[146] The Competition Act, 2002, §5(a)(i).

[147] The Competition (Amendment) Act, 2007, available at http://dpal.kar.nic.in/.%5CAct%2039%20of%202007%20PR-90.pdf (Last visited on December 30, 2013).

[148] *See also* The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011, Regulation 5 (The notification requirement and procedure differs with the type of combination, as elaborated under sub regulation 5 (3)(a)).

[149] *See* Tata Chemicals Limited – Wyoming (Combination Registration No. C-2011/12/12) (the treatment of combination by the CCI was a bone of contention in the case).

[150] Zerick Dastur, *Boundaries Drawn*, Business World Online, August 22, 2013, available at http://www.jsalaw.com/Admin/uplodedfiles/PublicationFiles/Boundaries%20Drawn.pdf (Last visited on August 24, 2015).

The CCI was notified of the proposed combination of two pharmaceutical majors. The first party was Orchid Chemicals and Pharmaceutical Limited ('OCIPL'), a listed Indian public limited company, engaged in the manufacturing of Active Pharmaceutical Ingredients ('APIs'). The second party was Hospira Healthcare India Private Limited ('HHIPL'), a private limited company that was a 100 percent indirect subsidiary of Hospira, Inc. USA. The contracting parties made available the BTA to the CCI, wherein they stated the details pertaining to the proposed transfer. The CCI deliberated over possibilities, howsoever remote, of any horizontal or vertical overlap[151] between the products being offered by the two named parties in the relevant Indian domestic markets. Even though there were a few overlaps in a few injectable variants, they were considered insignificant by the CCI. However, the major roadblock for obtaining the requisite approval from the CCI was the non-compete clause in the BTA. The clause by adopting an absolute terminology, in essence prohibited, OCIPL and one of its promoters from undertaking certain business activities pertinent to the transferred business.[152] This restriction was to run for a period of eight and five years respectively. The clause further stipulated a restriction on the research, development and testing of certain APIs for injectable formulations. It is essential to note that the Research and Development ('R&D') on this particular formulation has not been carried out by any of the companies till date in either India or in any other country. Thus, for all practical purposes this restriction was on a non-existent API.[153] The contracting parties in their respective replies to the CCI adopted a defensive stance and tried justifying the clauses by stating it to be a 'standard industry practice' so that the acquirer, *i.e.*, HHIPL gets full value of the acquired asset. Thus, they argued that the restriction fell squarely within the industry approved 'effective implementation' policies.

The reason advanced by parties for adopting such a restrictive terminology was OCPL's know-how and experience. It was argued that given its know-how, OPCL could establish an independent business that could overlap with the acquired business of HHIPL and this would limit the scope of profit to the acquirer, *i.e.*, HHIPL from the transferred business.[154] The CCI, for the first time since its inception, came up with an unambiguous stance on assessing non-compete clauses in M&A. Its approach has been pitched to be in sync

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[151] Vertical market or an overlap of the nature encompasses a market where vendors make available goods and services for a particular industry, trade, profession, or for any other specific requirement. It differs from a horizontal overlap where vendors offer a broad range of goods and services to a wider target customer base with an expansive range of needs.

[152] Competition Commission of India, Order under §31 (1) of the Competition Act, 2002, Combination Registration No. C-2012/09/79, available at http://www.cci.gov.in/May2011/OrderOfCommission/CombinationOrders/C-2012-09-79.pdf (Last visited on December 30, 2013), 4.

[153] Press Trust of India (PTI), *Orchid Chemicals gets CCI nod for Hospira deal*, Business Today, December 25, 2012, available at http://businesstoday.intoday.in/story/orchid-chemicals-gets-cci-nod-for-hospira-deal/1/191003.html (Last visited on December 30, 2013).

[154] CCI, *supra* note 152, 4.

with the international treatment of a non-compete clauses.[155] While rendering its decision the CCI did not refute that a non-compete clause is indeed essential for ensuring full value of the asset to the acquirer. However, the CCI's stand was that even if the clause has to be deemed necessary, it shall have to be 'reasonable' in the this regard,"[…] (a) the duration over which such restraint is enforceable; and (b) the business activities, geographical areas and person(s) subject to such restraints, so as to ensure that such obligations do not result in an appreciable adverse effect on competition […]"[156]

By applying these tests to the present case, the CCI called into question the time span for which the restriction was to apply and the activities which were being inhibited by the aforesaid covenant. Further, the CCI termed the clauses to be over and above the internationally acceptable standards of diminution. On this basis, the contracting parties modifed their initial BTA and incorporated substantial changes by altering the clauses as per the provisions of sub-regulation (2) of Regulation 19 of the Combination Regulation 2011. The parties limited the time span of the non-compete to a period of four years in the relevant Indian domestic market and also agreed to allow OCPL to conduct research on new molecules that might result in development of the new APIs (these are currently not in existence in any part of the world). The mutated terms were duly incorporated by the parties in the BTA, giving due recognition to the views of CCI. After due consideration of the relevant facts, the initial notice as given under §6 sub clause (2) of The Act[157] and the modifications so incorporated by the parties, the CCI finally gave a go ahead to the BTA.

The recent decision demonstrates the unmistakable will of the CCI to crystallise the legal position regarding restrictive clauses that have the potential to affect the competition in the relevant domestic market. It is obvious that non-compete clauses are indeed essential for commercial success of the newly merged or acquired entity but the scope of such covenant has to be within the limits of the competition law framework of the country. The Act is a well drafted piece of legislation that addresses the notification requirement which inevitably brings all cases of combinations, mergers within the ambit of the CCI. By doing so it gives a fair opportunity to the concerned instrumentalities to scrutinise the business arrangement. The message conveyed to corporates by the decision of the CCI as well as the European and American decisions is that, the merging entities ought to engage individuals or organisations seasoned in the field of competition law to draft the BTAs. This will ensure that the

[155] Upadhyay, *supra* note 14.
[156] CCI, *supra* note 152, 4.
[157] The Competition Act, 2002, §6

> "Subject to the provisions contained in sub-§ (1), any person or enterprise, who or which proposes to enter into a combination, 13[shall] give notice to the Commission, in the form as may be specified, and the fee which may be determined, by regulations, disclosing the details of the proposed combination, within 14[thirty days] of…"

deadlines for merger approval are not delayed by the objections made by the concerned authorities regarding non-compete clauses. Thus, such legal expertise becomes important from the very inception of the aforesaid arrangement.[158]

Scope, both temporal and spatial, must be precise and should only include the specific activity which is being transferred to the acquirer. A general or all-inclusive terminology is often assumed to be antithetical to competition in the domestic market of the economy. If the non-compete in reality is only a clandestine 'market sharing' arrangement, it would be quashed by the CCI at the first instance when it is notified about the M&A by the contracting parties. In the Indian scenario, the statute and cases governs all contractual obligations, explicitly forbids the contracting parties from entering into restrictive agreements that curtails the freedom of transaction of either of the parties. Thus, even in India a merger control clearance will be granted only when the cases are well within the bounds of internationally recognised principles of competition law. The Indian competition regime though still remains unclear of the economic standards that it may employ to term a clause as anti-competitive. Unlike its European and American counterparts, there has been no cogent evidence that may show whether the CCI uses the total social welfare index or the consumer welfare index as the guiding tool for reaching a decision. A thorough academic research in the said area may result in a more uniform treatment of non-compete clauses by the CCI. This decision is the first step towards inducting India into the list of countries where competition law is interpreted with utmost precision and in light of international best standards.

## VI. CONCLUSION

After a detailed analysis of the prevalent practices globally, it is unambiguous that the thrust of all competition regulating agencies is towards ensuring a non-concentrated, pro-consumer, liberal market. The European approach has been to scrutinise the territorial and temporal aspects of a non-compete covenant. Only an ancillary restraint that solely impacts the products or entities being acquired/merged is approved by competition agencies. The model has been spelt out impeccably in the statutory guidelines and undertakings, *i.e.*, Article 101 of the TFEU read with the Guidelines on mergers. The clarity in threshold and definition of an anti-competitive non-compete covenant has significantly eliminated any possibility of arbitrary or discretional action by the agencies. The cracks in the Indian jurisprudence with regard to a non-compete agreement in an M&A transaction can be traced back to the ambiguous provisions of the Act. Although the legislators have enlisted the specific conditions under which a restraint shall be termed as antithetical to domestic competition, the basic classification of an 'ancillary' restraint has never been crystallised by the CCI.

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[158] Hariharan, *supra* note 9.

This legislative ambiguity has resulted in irregular interpretation of combination provisions to include geographical and spatial concerns as preconditions to grant the go-ahead to an M&A scheme, without there being a clear precedent or clarification in this regard. At this juncture, the OCIP and HHIPL decision has made an attempt to clear the cloud of uncertainty. In this case, the CCI laid down its approach towards such covenants and adopted a view that was in sync with the globally accepted trend. The CCI in the case, by rejecting the 'standard industry practice' defence, has laid down a reliable precedent which shall act as a guiding light for the officials deciding future cases. This decision also signifies a shift towards increased analysis of economic considerations relating to the BTAs. The different models pitched by the American agencies can be helpful, such as the HHI, where a market is classified as either unconcentrated, moderately concentrated or highly concentrated. This classification helps in assessing which mergers fall foul of the *per se* anti-competitive agreement rule. The potential of such a mathematically endorsed mode of determining the impact of a merger in the domestic market framework cannot be denied. However, apprehensions remain about whether such a mathematic threshold would suit the socio-economic realities of India. Given the developing nature of the Indian economy, it has been widely understood that in order to attract more foreign inflow of capital, the competition law concerns ought to take a back seat.

The theoretical notions of dead weight loss are well acceptable but the degree of its acceptance in the Indian scenario where cross border mergers are not only welcomed but promoted by the governmental agencies at large, is at best questionable. The notification requirement of a proposed M&A at the very least ascertains that no such activity goes unnoticed. Further, additional regulations that seek to provide a procedural guide to assist the pleading parties would help codify the legislative intent. The Combination Regulation 2011 is the first step towards such a legal regime.

Further, to make the M&A transaction viable on financial grounds, companies should not indulge in justifying their restrictive terminology as it will only delay approval for the M&A. Given the recent trend in the CCI decisions, it is reasonable to assume that the companies shall be losing upon their valuable investment if the non-compete covenant is not for a limited period or covers areas beyond the predetermined area of operations of the new or acquired entity.