

# COMBINATION CONTROL: STRENGTHENING THE REGULATORY FRAMEWORK OF COMPETITION LAW IN INDIA?

*Tanaya Sanyal & Sohini Chatterjee\**

*Combination control is a relatively new concept in Indian competition law. Although its roots can be traced to India's erstwhile antitrust legislation, the Monopolies and Restrictive Trade Practices Act, a sophisticated form of combination control was put into force only in 2011. A study of its working since enforcement offers interesting results. In this exercise, the drafting history of the legislation provides useful insights, especially into the objectives propelling the introduction of this system. Post enforcement, sincere efforts are in place to make the mechanism more appealing to the corporate players. However, in an overzealous bid to review more transactions, the system is often accused of regulatory overreach. Through the course of this paper, we shall attempt to understand the combination regulation mechanism operating in India, with special focus on specific provisions of the Competition Act, 2002 and Combination Regulations, 2011 in their recently amended form. We shall investigate the viability of the mechanism and demarcate its contributions from its shortcomings in the regulatory landscape of Indian competition law. Our attempt shall be guided by a principle consideration, that of identifying potential drawbacks holding up the working of the nascent combination control mechanism in India.*

## I. INTRODUCTION

The Competition Commission of India ('Commission') is the primary regulatory body entrusted with the task of examining antitrust challenges in India. In exercise of its power to frame delegated legislation under the Competition Act, 2002<sup>1</sup> the Commission enacted a set of regulations known as the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011<sup>2</sup> which became

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\* 3<sup>rd</sup> and 2<sup>nd</sup> year students of the W.B. National University of Juridical Sciences, Kolkata. We sincerely acknowledge Mr. Apoorv Gupta for his valuable research assistance for this paper. We also thank Mr. Parth Gokhale for his guidance in writing this paper. All errors, however, remain solely ours.

<sup>1</sup> See sub-section (1) and clauses (b), (c) and (f) of sub-section (2) of §64 read with sub-sections (2) and (5) of §6 of the Competition Act, 2002(No. 12 of 2003) ('Act').

<sup>2</sup> Competition Commission of India (Procedure in regard to the transaction of business relating to combination) Regulation 2011, available at <http://www.cci.gov.in/images/media/Regulations/>

operational on June 1, 2011 along with certain other substantive provisions of the Act relating to combinations.<sup>3</sup> The Combination Regulations mandate parties to a combination to notify the Commission in the event they enter into a 'combination' for the purposes of the Act. A combination can be of three types as per the Act: (a) acquisitions of control, voting rights, shares and assets, (b) acquisition of control over an enterprise that is engaged in similar or identical services as that of the acquirer and (c) mergers and amalgamations.<sup>4</sup> These regulations were introduced in an effort to fine-tune the process of regulating combinations in India, a process that began in 2002,<sup>5</sup> underwent changes in 2008<sup>6</sup> and 2009<sup>7</sup> and took final shape only in 2011. The Commission has been mindful of the concerns raised by various stakeholders,<sup>8</sup> both national and international, and incorporated suggestions proposed by them as a response to a draft version of the Combination Regulations.<sup>9</sup> Whether it has entirely succeeded in allaying apprehensions about the effectiveness of the Combination Regulations is a debatable issue but the Commission is actively engaging in 'simplifying' the process of notification. With this aim, the Commission introduced another set of amendments to the Combination Regulations in less than a year's time.

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CCI\_Combinations\_Regulations\_2011\_11\_05\_2011.pdf (Last visited on September 19, 2012) ('Combination Regulations').

<sup>3</sup> MINISTRY OF CORPORATE AFFAIRS, Notification S.O. 479(E), March 4, 2011 (§§5, 6, 20, 29, 30 & 31 of the Act came into force through this notification).

<sup>4</sup> See Act, §5.

<sup>5</sup> The Act, considered to be the centrepiece of India's antitrust framework, was enacted in 2002.

<sup>6</sup> The Competition (Amendment) Bill, 2007, available at [http://www.mca.gov.in/Ministry/acts-bills/pdf/Competition\\_Amendment\\_Act\\_2007.pdf](http://www.mca.gov.in/Ministry/acts-bills/pdf/Competition_Amendment_Act_2007.pdf) (Last visited on September 19, 2012).

<sup>7</sup> The Competition (Amendment) Bill, 2009, available at <http://164.100.24.219/BillsTexts/LSBillTexts/PassedBothHouses/competition.pdf> (Last visited on September 19, 2012). See also Press Release, MINISTRY OF CORPORATE AFFAIRS, *Parliament passes the Competition (Amendment) Bill, 2009* (December 16, 2009) at <http://pib.nic.in/newsite/erelease.aspx?relid=56090> (Last visited on September 20, 2012) (Through the Competition (Amendment) Act, 2009, the Competition Appellate Tribunal assumed jurisdiction over all pending cases on which the Monopolies and Restrictive Trade Practices Commission ('MRTPC') would have had jurisdiction previously, in accordance with the provisions of the repealed MRTP Act as though the MRTP Act had not been repealed).

<sup>8</sup> Joint Comments of the American Bar Association Section of Antitrust Law and Section of International Law on the Draft CCI (Procedure in regard to the transaction of business relating to combination) Regulations, March 21, 2011, available at <http://meetings.americanbar.org/webupload/commupload/IC906787/relatedresources/aba-SAL-SIL-Comments-on-India-draft-Combination-Regulations-final-w-apps.pdf-58k-2011-03-24> (Last visited on August 28, 2012).

<sup>9</sup> Draft Competition Commission of India (Procedure in regard to the transaction of business relating to combination) Regulations, 201\_ (No.\_ of 201\_), available at <http://www.cci.gov.in/images/media/Regulations/DraftCombinationRegulation.pdf> (Last visited on August 28, 2012) (Draft Regulations).

In this paper, we examine the Combination Regulations as they stand after the latest amendment<sup>10</sup> in February 2012.<sup>11</sup> Although some changes were purely clarificatory in nature, the Amended Regulations witnessed the addition of some new clauses. It would be useful if we remind ourselves that the Combination Regulations are mainly procedural in nature, in that they are designed to supplement and enforce the provisions in the parent statute.<sup>12</sup> The Commission's role in updating the Combination Regulations to keep them in tandem with industry requirements is being attributed to its own experience in scrutinising proposed combinations. Much as it is lauded, the question however remains if a disjunct is resulting from the introduction of rapid amendments through subsidiary legislation, often ignoring the need to revise the parent Act. Commentators have also expressed reservations on the pecuniary implications of filing notices and the ample time given to the Commission for processing notices under the present guidelines. It is to be noted that there has been an exponential rise in filing costs as per the Amended Regulations which remains unexplained. Despite such visible shortcomings, the Amended Regulations have sought to streamline notification procedures.

The framework of combination control guidelines can be mainly divided into 3 principal segments: general exemptions from notification, triggering of notification requirements based on threshold limits and scrutiny of notice by the Commission. The guidelines have clearly laid down the time period available for notifying the Commission. It makes a distinction between certain categories of institutionalised transactions which can be filed post the acquisition and all other transactions requiring mandatory notification which have to be intimated to the Commission prior to the actual combination. The Amended Regulations further prescribe the manner in which notices of combinations shall be filed and provide three kinds of Forms for the same. The difference in the Forms is with respect to the nature of information that is to be furnished under each of them. It is the prerogative of the parties to choose between the simpler or complex form but it has varied implications on the calculation of time period for scrutiny. Hence, it is clear that the Amended Regulations have given parties ample scope for flexibility in filing procedures, but have placed the onus on the parties to notify and do so in a responsible manner to avoid unnecessary delay in getting clearances from the Commission.

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<sup>10</sup> The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2012, available at [http://www.cci.gov.in/images/media/Regulations/CCI\\_Combinations\\_Amendment\\_Regulations\\_2012\\_23\\_02\\_2012.pdf](http://www.cci.gov.in/images/media/Regulations/CCI_Combinations_Amendment_Regulations_2012_23_02_2012.pdf) (Last visited on September 28, 2012).

<sup>11</sup> "The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 as amended upto 23rd February 2012", available at [http://www.cci.gov.in/images/media/Regulations/CCI\\_Combination\\_Regulations\\_as\\_amended\\_upto\\_23\\_02\\_2012.pdf](http://www.cci.gov.in/images/media/Regulations/CCI_Combination_Regulations_as_amended_upto_23_02_2012.pdf) (Last visited on September 28, 2012) ('Amended Regulations').

<sup>12</sup> See Act, §§5 and 6.

The aim of this paper is therefore be twofold: first, to glean a clearer understanding of the obligations imposed on the parties to a combination by the Amended Regulations; second, to investigate the claim of the Commission that the Amended Regulations were introduced to reduce ‘the compliance requirements’ of corporate players and ‘make filings simpler’.<sup>13</sup> In Part I, we shall discuss the background of the Combination Regulations and the reasons impelling the Commission to introduce amendments to a relatively new body of guidelines. In Part II, the focus shall be on the various stages of the notification process, which is usually a two-way process involving the parties and the Commission. In Part III, we shall specifically try to understand if the Commission as well as the legislature’s efforts to address visible gaps in the legislation have been sufficient to address the omissions and ambiguities in the Combination Regulations. With the aid of a few decided orders, we examine the Commission’s approach in tackling contentious issues and conclude whether it is keeping up to its promises of only reviewing those transactions that raise competition concerns in India.<sup>14</sup>

## II. TRAJECTORY OF COMBINATION CONTROL IN INDIA

Competition laws in India are aimed to imbibe the social and economic philosophy enshrined in the Directive Principles of State Policy contained in the Constitution.<sup>15</sup> The mandate to draw up a policy that prevents the concentration of wealth and means of production to the common detriment can not only be located in the Constitution but also in the Act which aims to prevent anti-competitive practices.<sup>16</sup> Amongst the principal kinds of anti-competitive behaviour<sup>17</sup> the Act prohibits are combinations resulting in an appreciable adverse effect on competition (‘AAEC’) within the relevant market in India. In pursuance to its policy of drawing up a robust anti-trust enforcement framework, the Commission also introduced measures for combination control. Since the combination control provisions are in their nascent stage, these guidelines are in the process of constant review, witnessing changes including those

<sup>13</sup> Press release, MINISTRY OF CORPORATE AFFAIRS, *Amendments to the Combination Regulations – Relief to Corporate entities by making process of filings simpler* (February 24, 2012) at <http://pib.nic.in/newsite/erelease.aspx?relid=80508> (Last visited on September 28, 2012).

<sup>14</sup> *Id.*

<sup>15</sup> See The Constitution of India, 1950, Art. 38.

<sup>16</sup> Statement of Objects & Reasons, Act, available at [http://www.cci.gov.in/images/media/competition\\_act/act2002.pdf?phpMyAdmin=QuqXb-8V2yTtoq6l7iR6-k2VA8d](http://www.cci.gov.in/images/media/competition_act/act2002.pdf?phpMyAdmin=QuqXb-8V2yTtoq6l7iR6-k2VA8d), 1 (Last visited on September 18, 2012).

<sup>17</sup> See Act, §3. “Anti-Competitive Agreements: (1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. (2) Any agreement entered into in contravention of the provisions contained in subsection (1) shall be void.”

with respect to exemptions from filing, fees and the form of notification to be used. The latest addition to the body of combination control laws in India, the Amended Regulations, was necessitated by an accelerated growth in corporate initiatives with mergers, acquisitions and corporate restructuring becoming the driving force of the economy.

## A. LEGISLATIVE HISTORY

In order to fully comprehend the rationale behind the incorporation of the combination control guidelines and the subsequent changes in the Amended Regulations, we shall look at two main elements: the background events prompting the legislative efforts to regulate combinations in India and the key changes brought about by the amendments as a response to these background events.

### 1. MRTP Act

The Monopolies and Restrictive Trade Practices Act, 1969 ('MRTP Act') was India's first antitrust legislation which established a quasi-judicial body for investigating cases of unfair and restrictive trade practices<sup>18</sup> named the Monopolies and Restrictive Trade Practices Commission ('MRTP Commission') which was also the precursor to the Commission.<sup>19</sup>

The concept of combination control was not explicitly recognized in the MRTP Act, nor was it expanded upon. This can be contrasted with the inclusion of §§5 and 6 in the Act which is solely dedicated to combination control. We are of the view that this marks a clear transition in the regulatory framework of Indian competition law. While the lawmakers in 1969 did not feel the need to even include the term 'combination' in the MRTP Act, the lawmakers in the new decade not only incorporated combination control in the Act but buttressed it with supplementary guidelines. Even though the MRTP Act did not explicitly include the term 'combination' in the body of the code, it contained provisions which implicitly dealt with combinations at an elementary level. In Part A of Chapter III of the MRTP Act, 1969, §20 to §26 dealt with Mergers and Acquisitions.<sup>20</sup> But these sections were subsequently deleted by the MRTP

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<sup>18</sup> The principal objectives sought to be achieved through the MRTP Act, as stated in the Preamble to the Act were prevention of concentration of economic power to the common detriment, control of monopolies, prohibition of monopolistic trade practices and prohibition of restrictive trade practices. See MRTP Act, 1969.

<sup>19</sup> See MRTP Act, §5. "Establishment and Constitution of the Commission: (1) "For the purposes of this Act, the Central Government shall establish, by notification, a Commission to be known as the Monopolies and Restrictive Trade Practices Commission which shall consist of a Chairman and not less than two and not more than eight other members, to be appointed by the Central Government."

<sup>20</sup> Kartik Bajpai, *History and Dynamics of the MRTP Act and Competition Act in the Realm of Mergers and Acquisitions*, available at <http://jurisonline.in/?p=2075> (Last visited on

(Amendment) Act, 1991.<sup>21</sup> Prior to the Amendment, §23 of the Act was the most significant provision with respect to Mergers, Amalgamations and Takeovers.<sup>22</sup> It laid down a rudimentary form of combination control by imposing stringent conditions on the formation of combinations. It also mandated that no such combination can take place without the sanction and express approval of the Central Government.<sup>23</sup> These sections gave the Central Government significant power to prevent combinations which would lead to concentration of economic power. §24 of the erstwhile MRTP Act provided that if the Central government felt, upon examination of the facts, that there has been a violation of §23, then it may consult with the MRTP Commission and direct the owner of the company to not contravene the provisions by carrying on with the merger or amalgamation.<sup>24</sup> The jurisdiction of the Central Government over combinations was overriding on the jurisdiction of the MRTP Commission. These provisions were in force till the liberalization reforms in the early nineties, after which the MRTP Act was amended and the §§20 to 26 were deleted.

Eventually, the Ministry of Corporate Affairs vide its Notification dated August 28, 2009 repealed the MRTP Act.<sup>25</sup> There were primarily two reasons behind the repeal of the MRTP Act and its subsequent replacement by the Act. Firstly, with the growing complexity of industrial structure, it was felt that the interference of the Government through the MRTP Act in the investment decisions of large companies had a deleterious effect on Indian industrial growth.<sup>26</sup> Secondly, antitrust policy was evolving from an anti-monopoly to pro-competition approach worldwide and Indian competition policy needed to mirror this changed dynamic. But the introduction of a new legislation regulating competition law witnessed some preliminary hurdles. Since the Act was brought into force in a phased manner, a legislative oddity occurred. There was a period of time between 2002 and 2009 when both the MRTP Act, 1969 and the Act of 2002 had concurrent jurisdiction over competition law matters. This ambiguity, especially relating to combination review, was resolved in 2011 with the enforcement of §§5, 6 and certain other provisions of the Act.<sup>27</sup> What is relevant for the present discussion is to understand that the mandate of the present act is to do away with the rigid structural control of the MRTP Act. The Act in conjunction with the Combination Regulations divests the power to review

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September 19, 2012).

<sup>21</sup> The MRTP (Amendment) Act, 1991, w.e.f. 27-9-1991.

<sup>22</sup> Bajpai, *supra* note 20.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Rahul Goel, *Crossroads of Regimes- Competition Law and Intellectual Property Rights*, available at <http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=e9377ec4-2a41-4c81-8ea5-600cf8ee4b1b&txtsearch=Subject:%20Competition%20/%20Antitrust> (Last visited on September 28, 2012).

<sup>26</sup> S. M. DUGAR, *GUIDE TO COMPETITION LAW* 69 (2010).

<sup>27</sup> MINISTRY OF CORPORATE AFFAIRS, Notification S.O. 496(E), March 4, 2011.

the combinations to the Commission as opposed to the Central Government, thereby introducing more flexibility and autonomy in combination control.

## 2. Draft National Competition Policy, 2011

The idea of drawing up an integrated competition policy had begun in 2007 when the Commission was primarily engaged in consultation and advocacy.<sup>28</sup> The initiative involved the constitution of an expert Committee for framing of a viable policy and culminated in the Draft National Competition Policy Statement ('Draft NCP') which was tabled before the Ministry of Corporate Affairs on July 28, 2011. It underwent a similar stakeholder participation process as the Combination Regulations, thereby ensuring transparency in the entire legislative process. The Draft NCP reflects a commitment to arrive at a consensus regarding certain minimum benchmarks necessary for competition regulation. Although the statement does not engage with combinations on multiple occasions, the significance of combination control has been acknowledged in the text.<sup>29</sup> The Draft NCP recognises 'effective prevention of anticompetitive conduct'<sup>30</sup> as one of its core principles and combination control as a tool to integrate this principle within the competition regime in India. Although the policy is being finalised, it can be reasonably assumed from a bare reading of the Amendment Regulations that it sought to reflect the principle of Draft NCP.

## 3. Draft Combination Regulations, March 2011

On March 1, 2011, the Commission published a draft version of the Combination Regulations ('Draft Regulations').<sup>31</sup> The primary objective behind releasing these regulations a few months prior to the actual code is fairly

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<sup>28</sup> The Global Voice for Consumers, *India: Stronger competition policy will enhance outdated regulations*, August 19, 2011, available at <http://www.consumersinternational.org/our-members/member-activity/2011/08/india-stronger-competition-policy-will-enhance-outdated-regulations> (Last visited on September 3, 2012).

<sup>29</sup> See Draft National Competition Policy 2011, Ministry of Corporate Affairs, Government of India, available at [http://www.mca.gov.in/Ministry\\_hn/pdf/Draft\\_National\\_Competition\\_Policy.pdf](http://www.mca.gov.in/Ministry_hn/pdf/Draft_National_Competition_Policy.pdf) (Last visited on September 19, 2012).

<sup>30</sup> See Draft NCP, §7.1 (a) "Effective prevention of anticompetitive conduct: The Competition Act, 2002 prohibits anti-competitive agreements and combinations which have or are likely to have appreciable adverse effect on competition. It also seeks to prohibit abuse of dominant position by an enterprise. There should be effective control of anticompetitive conduct which causes or is likely to cause appreciable adverse effect on competition in the markets within India. The Act establishes the CCI as the sole national body to enforce the provisions of the Act, as also its obligations under Section 49 (3) for competition advocacy. It is envisaged that the implementation of NCP will strengthen competition culture in the market and complement the endeavours of CCI."

<sup>31</sup> PWC Newsletter, *The Competition Commission of India issues draft regulations in relation to the transaction of business relating to Combinations*, March 11, 2011, available at [http://www.pwc.com/in/en/services/Tax/News\\_Alert/2011/pdf/PwC\\_News\\_Alert\\_11\\_March\\_2011\\_CCI\\_issued\\_draft\\_regulations\\_in\\_regard\\_to\\_the\\_transaction\\_of\\_business\\_relating\\_to\\_Combinations.pdf](http://www.pwc.com/in/en/services/Tax/News_Alert/2011/pdf/PwC_News_Alert_11_March_2011_CCI_issued_draft_regulations_in_regard_to_the_transaction_of_business_relating_to_Combinations.pdf) (Last visited on September 28, 2012).

obvious. As part of a pre-enactment advocacy drive, the Commission wanted to invite comments on the code before its finally drafted, especially on the potential lacunae of the regulations. A number of procedural issues were elucidated upon,<sup>32</sup> two of which deserve attention. First, the Draft Regulations had introduced a procedure in which any enterprise which was to enter into a combination would have to make a written request to the Commission for a verbal and informal consultation about filing the notice.<sup>33</sup> This was a great step taken by the Commission as it would help in reducing ambiguities and increasing the knowledge base among professionals. Secondly, the Draft Regulations proposed a review period that would commence only on receipt of a valid, defect-free notice. Additionally, the Commission has to form a *prima facie* opinion as to whether the combination is likely to cause an AAEC in the relevant market in India. This had to be done within thirty days of the receipt of the notice.<sup>34</sup> Also, if the Commission deems fit, it may call for information from any enterprise while enquiring as to whether a combination has caused or is likely to cause an AAEC in India.<sup>35</sup>

#### 4. Combination Regulations, 2011

The Combination Regulations were considered to be a marked improvement on the earlier Draft Regulations primarily due to the public debate it generated. The inclusive pre-legislation consultation exposed the Draft Regulations to their share of criticism, mostly because of some instances of faulty drafting and structural inadequacies. The Commission was also fairly responsive in incorporating the views of various stakeholders on the Draft Regulations, thereby providing more clarity on several issues of concern. The Draft Regulations, however, continued to be, by and large, a blueprint for the Combination Regulations. Thus, the Commission notified the Combination Regulations on a positive note. But as is the case with most new legislation, the Combination Regulations were also ridden with flaws. This paved the way for the enactment of the Amended Regulations in 2012. What is pertinent for us is that with this notification, India joined a club of 100 other countries that have a merger control regime.<sup>36</sup>

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<sup>32</sup> Vinay Kumar Sanduja, *Competition Law: Draft regulations on regulation of competition*, India Law Journal, available at [http://www.indialawjournal.com/volume4/issue\\_2/article\\_by\\_vinay.html](http://www.indialawjournal.com/volume4/issue_2/article_by_vinay.html) (Last visited on September 28, 2012).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Bar and Bench News Network, *CCI has today notified the final merger control regulations*, May 11, 2011, available at <http://barandbench.com/brief/2/1466/cci-has-today-notified-the-final-merger-control-regulations> (Last visited on August 30, 2012).

## B. MAJOR CHANGES BROUGHT ABOUT BY THE REGULATIONS

### 1. Combination Regulations, 2011

- a. The guidelines expressly included what are commonly referred to as ‘transitional provisions.’ These provisions state that aforesaid guidelines will only apply to combinations where binding documents are executed on or after June 1, 2011. Therefore, all the pending transactions and unsigned transactions prior to the stipulated date are not notifiable, reducing ‘uncertainty’ and ‘compliance burden’ of the parties and stalling the flow of notifications before the Commission.<sup>37</sup>
- b. The impact of the enactment of the Combination Regulations was immense. §32 of the Act confers extra-territorial jurisdiction on the Commission to accomplish its task of terminating practices having an AAEC and the Combination Regulations are a mode of exercising these powers.
- c. The Combination Regulations differ from the Draft Regulations in that they do not provide for any pre-merger consultation. Whereas the Draft Regulations had provided for an informal deliberation for any enterprise which proposed to enter into a combination, the Combination Regulations dismissed the pre-merger consultation provisions. This was done by taking away the option of parties to seek clarifications from the Commission.<sup>38</sup> Incidentally, the mechanism has still not found its place in the Amended Regulations.<sup>39</sup>
- d. Another notable change is with regard to the time frame for completing the process of review. The Act mandates the Commission to pass a final order within 210 days from the date of filing.<sup>40</sup> If an order is not passed by the Commission within the stipulated time frame, the combination would be deemed to have been approved. According to the provisions of the Combination Regulations, however, the stipulated time period

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<sup>37</sup> This is in marked contrast to Draft Regulations, *supra* note 9, Reg. 28 which suggested that transactions pending as of the effective date of regulations will also be subject to the Draft Regulations. *See supra* note 6, 2.

<sup>38</sup> Biyani, Reis & Joshipura, *Indian Merger Control Regulations Finally Notified*, May 13, 2011, available at [http://www.nishithdesai.com/New\\_Hotline/Competition/Competition\\_Law\\_hotline\\_May1311.htm](http://www.nishithdesai.com/New_Hotline/Competition/Competition_Law_hotline_May1311.htm) (Last visited on September 4, 2012).

<sup>39</sup> *See infra*, 16-8.

<sup>40</sup> *See Act*, §31(11): “If the Commission does not, on the expiry of a period of two hundred and ten days from the date of notice given to the Commission under sub-section (2) of section 6, pass an order or issue direction in accordance with the provisions of sub-section (1) or sub-section (2) or sub-section (7), the combination shall be deemed to have been approved by the Commission.” *See also Act*, §6(2A).

for review has been modified. The Combination Regulations impose a mandatory duty on the Commission to ‘endeavour’ to pass a final order within 180 days from the date of filing.<sup>41</sup> Given that the language used in the Combination Regulations is not strictly binding and that a subsidiary regulation cannot override the provisions of the parent Act, the statutory time limit still continues to remain 210 days.

## 2. The SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (‘Takeover Code’)

The Securities and Exchange Board of India was in the process of reviewing the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997<sup>42</sup> for quite some time. In 2009, a Takeover Regulations Advisory Committee was constituted for the purpose. The Takeover Code finally became effective in October, 2011.<sup>43</sup> In one of the major changes introduced by the Takeover Code, the threshold for triggering open offer was substantially increased from the initial limit of 15% shareholding of the company.<sup>44</sup> Presently, a public offer under the Takeover Code is necessary when 25% voting rights or shares of the target company is acquired.<sup>45</sup>

In a similar vein, the Combination Regulations generally exempted those acquisitions from notification which do not result in exceeding 15% voting rights or interests in the company being acquired.<sup>46</sup> Since an acquisition of interests in a target company can lead to multiple obligations, as under the securities and competition legislation, a need for harmonization between the two assumes relevance.<sup>47</sup> In light of such concerns, the Commission stepped in to make the Combination Regulations consistent with the Takeover Code and exempted combinations resulting in direct or indirect acquisition of less than 25 % of voting rights or shares in the target enterprise.<sup>48</sup>

<sup>41</sup> See Combination Regulations, *supra* note 2, Reg. 28(6): “Having due regard to the provisions contained in sub-section (11) of section 31 of the Act, the Commission shall endeavour to pass an order or issue direction in accordance with sub-section (1) or sub-section (2) or sub-section (7) of section 31 of the Act within one hundred and eighty days of filing of the notice under sub-section (2) of section 6 of the Act.”

<sup>42</sup> Souvik Bhadra, *SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011- some key features*, October 8, 2011, available at <http://pxvlaw.wordpress.com/2011/10/08/sebi-substantial-acquisition-of-shares-and-takeovers-regulations-2011-%E2%80%93-some-key-features/> (Last visited on September 1, 2012).

<sup>43</sup> *Id.*

<sup>44</sup> SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, Reg. 10.

<sup>45</sup> Takeover Code, Reg. 3(1).

<sup>46</sup> Combination Regulations, *supra* note 2, Schedule 1, Cl. 1.

<sup>47</sup> *Merger Control & Regulatory Harmony*, (CNBC-TV18, May 17, 2011), available at [http://thefirm.moneycontrol.com/story\\_page.php?autono=544108](http://thefirm.moneycontrol.com/story_page.php?autono=544108) (Last visited on September 28, 2012).

<sup>48</sup> Amended Regulations, *supra* note 11, Schedule 1, Cl. 1.

### 3. Amended Regulations

Apart from consistency with overlapping legislations, an added motivation of the Commission in amending the guidelines was judicious use of its resources in assessing the validity of only those transactions which may have an AAEC in India.<sup>49</sup> Its enforcement experiences are proof that transactions with minor or non-existent implications for competition law have occupied substantial amount of its time and staff in the limited life-span of the Combination Regulations.<sup>50</sup> The Press Release issued by the Commission on the introduction of the Amended Regulations is a handy tool in understanding the legislative intent behind the code. The objectives as documented in the statement were relieving corporations from inconsequential filings and lessening regulatory burden imposed on them, streamlining the filing procedure and ensuring overall clarity in the application of the Act and the Combination Regulations.<sup>51</sup> They introduced, *inter alia*, the following modifications to the Combination Regulations:

- a. There has been a significant change with respect to the calculation of time period for review. The Amended Regulations presently provide that the statutory 210 day time limit would be calculated afresh from the date of filing of second stage notice (Form II) with the Commission.<sup>52</sup> Earlier, such time limit was triggered from filing of first stage notice and the time taken in filing the additional information in Form II was excluded from the assessment. This is not a sound move as the parties, by using the default Form I option will now have to wait longer to get an order from the Commission.<sup>53</sup>
- b. The option to file Form I remains with the parties.<sup>54</sup> But the Amended Regulations provide the following instances, wherein it would be preferable to file Form-II directly (which requires more detailed information), without prior filing of Form I (which requires summary information) on the basis of the size of the combination, or standalone size of the

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<sup>49</sup> Vivek Agarwal, *Special Report: India fine-tunes merger control*, March 5, 2012, available at <http://indiaincorporated.com/index/item/464-special-report-india-fine-tunes-merger-control.html> (Last visited on September 30, 2012).

<sup>50</sup> Cyril Shroff, *Moving forward on Competition law*, THE HINDU BUSINESS LINE July 4, 2012, available at file:///C:/Users/tanaya/Downloads/Grade%20A/Business%20Line%20%20%20Opinion%20%20%20Moving%20forward%20on%20competition%20law.htm (Last visited on September 30, 2012) (pegs the number of intra-group notifications through mergers at 32 out of 51 notifications filed before the Commission till July, 2012).

<sup>51</sup> Sachin Goyal, *Merger Control Regime in India*, June 23, 2012, available at [http://220.227.161.86/26892cajournal\\_june2012-23.pdf](http://220.227.161.86/26892cajournal_june2012-23.pdf) (Last visited on September 1, 2012).

<sup>52</sup> Amended Regulations, *supra* note 11, Reg. 5(5), second proviso.

<sup>53</sup> Rahul Singh, *Amendments to the Merger Regulations*, February 27, 2012, available at <http://indiacorplaw.blogspot.in/2012/02/amendments-to-merger-regulations.html> (Last visited on September 30, 2012).

<sup>54</sup> Amended Regulations, *supra* note 11, Reg. 5(2).

parties involved. Preference for such additional information is exhibited in cases of vertical or horizontal overlaps between the combining entities and market size post combination.<sup>55</sup>

- c. The amended Regulation 13 requires the combining enterprise to submit a brief summary of the combination which should include details regarding products and services of the parties to the combination, nature of competition in the specific markets in which the parties to the combination operate, value of assets and respective operative markets.<sup>56</sup> This digest should be a minimum of two thousand words. Keeping in mind the sensitive nature of information that is involved in such transactions, however, the parties do have the option of excluding any information that they consider confidential to their business.
- d. In a vital inclusion to the Combination Regulations, Reg. 5(9) provides for instances in which an entity divests assets to a newly created enterprise for the sole purpose of indirectly entering into a combination. If such divestment happens over a series of steps or individual transactions, the calculation of total value of assets and turnover of the transferee enterprise shall include value of assets and turnover of the transferor enterprise under the Act.<sup>57</sup> The provision thus takes care of any indirect routing of resources to a new entity for entering into combinations not meeting the threshold limits of notification.<sup>58</sup>
- e. The Commission inflated the filing fees for the more common Form I from 50,000 to 10, 00,000 and to 40, 00,000 from 10, 00,000 for Form II.<sup>59</sup> It offered fairly weak reasons for this drastic hike in fees such as bringing the filing fees at par with international standards and making good the high cost of assessment involved in scrutinising notices.<sup>60</sup> The Commission also presumed that the Amended Regulations will significantly curb filings and hence the high fees will not be a major deterrent in keeping up with compliance requirements. We express reservations on such an approach taken by the Commission and contend that a phase-wise increment in fees would have been more suitable to the needs of a growing economy. Also, as an effect of clarificatory additions like Reg. 5(9) and grant of partial exemptions to intra-group

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<sup>55</sup> *Id.*, Reg. 5(3).

<sup>56</sup> Dhruv Manchanda & Anjali Sheoran, *CCI Amends Merger Control Regulations*, March 7, 2012, available at <http://www.ilntoday.com/2012/03/ci-amends-merger-control-regulations/> (Last visited on August 30, 2012).

<sup>57</sup> *See* Amended Regulations, *supra* note 11, Reg. 5(9).

<sup>58</sup> Rahul Singh, *Merger Control Amendments: Plus Ça Change...?*, February 27, 2012, available at [http://thefirm.moneycontrol.com/story\\_page.php?autono=673968](http://thefirm.moneycontrol.com/story_page.php?autono=673968) (Last visited on September, 28, 2012).

<sup>59</sup> *See* Amended Regulations, *supra* note 11, Reg. 11.

<sup>60</sup> *Supra* note 13.

mergers and amalgamations,<sup>61</sup> compliance requirements will not drastically decrease.

On an appreciation of the history behind the enactment and the subsequent legislative responses, we can conclude that the framework of combination control in India has been a dynamic and responsive system. It reflects a careful consideration of the contemporaneous events as well as policy shifts in treatment of combinations under antitrust laws. Despite the general industry apprehensions of a slowdown in the mergers and acquisitions markets due to the time given to Commission for issuance of approval, the Commission has performed its role satisfactorily in clearing most of the initial combination proposals within the stipulated period of one month from the date of filing.<sup>62</sup> This should be construed as an agreeable indicator of efficient regulatory action by the regulator in the future. Its continuous revision of the guidelines does, however, bear the potential to not only increase the transaction costs of parties as well the time required to get a clearance. Liberally drafted provisions regarding the calculation of time period as well as the burden of supplying a summary of the notice, over and above providing information through the regular forms, only lengthens the entire process of getting a clearance.

### III. THE COMBINATION REGULATIONS: DECODIFIED

#### A. GENERAL EXEMPTIONS

It is important to be aware of the fact that the combination control framework does not require all combinations to be notified. It lays down certain thresholds, which if satisfied by the parties, will impose an obligation to notify. The thresholds are calculated on the basis of assets and turnovers of either the *parties* (buyer and target enterprise) or *groups* to which the parties will belong post-combination.<sup>63</sup> The Ministry of Corporate Affairs through a notification, has further revised the value of assets and turnover triggering the filing obligation, presumably for the purpose of providing more relief from filing.<sup>64</sup>

Other than the Act, the exemptions to filing can be located in two main instruments: the Combination Regulations and the notifications issued by the Ministry of Corporate Affairs. The Ministry employed a ‘*target test*’ to exempt certain acquired enterprises of a particular size from the obligation to

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<sup>61</sup> *Id.*, Schedule 1, Cl. 8A.

<sup>62</sup> Competition Commission of India, Orders of the Commission, available at [http://www.cci.gov.in/index.php?option=com\\_content&task=view&id=171](http://www.cci.gov.in/index.php?option=com_content&task=view&id=171) (Last visited on September 30, 2012).

<sup>63</sup> *Supra* note 12.

<sup>64</sup> MINISTRY OF CORPORATE AFFAIRS, Notification S.O.-480(E), March 4, 2011.

notify for a period of 5 years.<sup>65</sup> The initial drafting of this *de minimis* exemption notification suggested that the exemption can be based on the worldwide assets or turnover of the enterprises. But it was subsequently clarified that computation of assets or turnover of the target enterprise must be with respect to India, thereby establishing that a nexus to India is necessary for notifiable transactions under the combination control system.<sup>66</sup> Even the Act specifies that although the assets or turnover of the combining parties mandated to file a notice may not be wholly in India, a certain proportion must be in India.

The Commission has also sought to provide exemptions to certain transactions. Through Reg. 4 of the Combination Regulations, it has listed some transactions<sup>67</sup> that are “ordinarily not likely to cause an AAEC in India” and exempt them from notification under normal circumstances.<sup>68</sup> The effect of this exemption is vague as the Commission has not clarified what would happen if the scheduled transactions have an undesirable effect on the competitive structure in the market. It also makes the position of the parties to a listed transaction vis-à-vis their notification obligation unclear.

## B. WHEN & HOW TO FILE

As per the Act, an entity proposing to enter into a combination<sup>69</sup>, shall notify the Commission in the specified form disclosing the details of the proposed combination within 30 days of the approval of such proposal by the Board of Directors<sup>70</sup> or execution of any agreement or other document.<sup>71</sup> The Commission may, however, admit the notice received beyond the time as provided in §6(2) of the Act without being prejudiced by the penal sanctions that get attracted for failure to file notice.<sup>72</sup> Significantly, the Act requires the Commission to penalise the parties if they do not furnish notice as envisaged

<sup>65</sup> MINISTRY OF CORPORATE AFFAIRS, Notification S.O.-482(E), March 4, 2011 (The referred notification provides relief to certain entities whose interests are being acquired if either their assets are not more than 250 crores or turnover is not more than 750 crores in India).

<sup>66</sup> MINISTRY OF CORPORATE AFFAIRS, Corrigendum S.O.-1218(E), May 27, 2011 (amending Notification S.O.-482(E), March 4, 2011).

<sup>67</sup> Combination Regulations, *supra* note 2, Schedule 1.

<sup>68</sup> *Id.*, Reg. 4.

“Categories of transactions not likely to have appreciable adverse effect on competition in India.- In view of the duty cast upon the Commission under section 18 and powers conferred under section 36 of the Act, and having regard to the mandate given to the Commission to, inter-alia, regulate combinations which have caused or are likely to cause appreciable adverse effect on competition in terms of sub-section (1) of section 6 of the Act, it is clarified that since the categories of combinations mentioned in Schedule I are ordinarily not likely to cause an appreciable adverse effect on competition in India, notice under sub-section(2) of section 6 of the Act need not normally be filed.”

<sup>69</sup> See Competition Act, 2002, §5.

<sup>70</sup> *Id.*, §6(2)(a); for mergers or amalgamations see Competition Act, 2002, §5(c).

<sup>71</sup> *Id.*, §6(2)(b); for acquisitions see Competition Act, 2002, §5(a) & acquisition of control see Act, §5(b).

<sup>72</sup> Combination Regulations, *supra* note 2, Reg. 7.

by the statute.<sup>73</sup> It is interesting to note how the Combination Regulations have allowed for flexibility in condonation of delay despite the strict timeline and penalties imposed by the parent Act.

Recently, the Commission was faced with the task of interpreting whether the signing of a Memorandum of Understanding ('MoU') and Subscription and Investor Rights Agreement would be the right stage for triggering filing requirement under the Act.<sup>74</sup> Through one of its wholly owned subsidiaries, Peter England Fashions and Retail Ltd. ('PEFRL'), Aditya Birla Novu Ltd. proposed to acquire the Pantaloons Retail Format business of Pantaloons Retail India Pvt. Ltd. by way of a demerger as well as merge Future Value Fashion Retail Limited ('FVFRL') into PEFRL. There were some additional transactions envisaged as well in which PEFRL proposed to invest a substantial sum in optionally convertible debentures of PIRL unless such debentures are cancelled upon finalisation of the demerger scheme or redeemed earlier. The parties contended that since a series of interconnected transactions were undertaken pursuant to the MoU, the trigger for filing arose from the execution of the MoU and the Subscription and Investor Rights Agreement for which a joint notice was filed before the Commission.<sup>75</sup> In determining the validity of the notice, the Commission rejected this argument of the parties on three grounds: *firstly*, the signing of the MoU and the said agreements are "only the steps towards the negotiations between the parties in relation to finalizing the scheme." *Secondly*, on an appreciation of the terms of the MoU, the Commission observed that it is an interim agreement awaiting termination immediately on execution of the implementation agreement or if the scheme is not approved by the Board of Directors of the combining parties. Accordingly, the MoU was held not to be a 'binding document' for the purpose of §31. *Lastly*, the said notice was deficient as it did not contain the final approval of the Board of

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<sup>73</sup> Competition Act, 2002, §43A. "Power to impose penalty for non-furnishing of information on combinations: If any person or enterprise who fails to give notice to the Commission under subsection (2) of §6, the Commission shall impose on such person or enterprise a penalty which may extend to one per cent. of the total turnover or the assets, whichever is higher, of such a combination."

<sup>74</sup> Notice under §6(2) jointly filed by ABNL, PEFRL, ITSL, PRIL and FVFRL Combination Registration No. C-2012/07/69 ; See Business Standard, *Aditya Birla Nuvo, Pantaloon to re-submit CCI application*, August 22, 2012 available at <http://www.business-standard.com/india/news/aditya-birla-nuvo-pantaloon-to-re-submit-cci-application/183684/on> (Last visited on September 30, 2012).

<sup>75</sup> Notice, *id.*, ¶6.

Directors to the proposed scheme of merger and demerger which is an essential pre-requisite for a valid notice<sup>76</sup> under the Act.<sup>77</sup>

The decision of the Commission in this case proffers some clarity with respect to the event triggering filing of notice. As per §6(2) and Reg. 31, the obligation to notify is only triggered when the proposed scheme has been approved by the Board of Directors in case of mergers and amalgamations. By ensuring that only finally approved transactions are filed for clearance, the Commission has sought to avoid unnecessary hassles on reviewing transactions that will not be fructified at a later date. But the Combination Regulations allow a single notice to be filed for a series of interconnected transactions aiming to effectuate a single business transaction.<sup>78</sup> The order of the Commission should therefore be construed to mean that each of the intermediate steps must be capable of triggering the filing requirement independently.<sup>79</sup> In other words, for every transaction that is envisaged, a final approval from the Board of Directors for §5(c) transactions and a binding document for §§5(a) and (b) transactions is necessary. But this decision does not offer much guidance on the interpretation of the expression ‘binding document’ in the Combination Regulations, the execution of which is necessary for filing notice in case of acquisitions. The parent Act incidentally requires the notice to be filed within a month of “any agreement or other document” for acquisition entered into by the parties and attaches an expansive meaning to ‘agreements’ under the Act.

Once the notification is triggered, notice of the proposed combination is to be given to the Commission in Form I or Form II<sup>80</sup> duly filled in, verified and accompanied by evidence of payment of requisite fees as prescribed in Reg. 11. Ordinarily notice shall be filed in Form I<sup>81</sup> with the option to file in Form II to those who prefer to do so.<sup>82</sup> If during the course of enquiry, the Commission finds that it requires additional information, it may direct the

<sup>76</sup> Combination Regulations, *supra* note 2, Reg. 31.

“Filing of notice under sub-section (2) of section 6 of the Act.- The notice referred to in sub-section (2) of section 6 of the Act would be applicable as follows: (a) for mergers or amalgamations referred to in clause (c) of section 5 of the Act, notice to be filed only in regard to proposals approved by the board of directors on or after the 1st day of June, 2011; and

(b) for acquisitions referred to in clause (a) of section 5 of the Act or acquiring of control referred to in clause (b) of section 5 of the Act, notice need to be filed only, where binding document(s) is executed, on or after the 1st day of June, 2011.

Explanation- Approval of board of directors under clause (a) of this regulation refers to the final decision of the board of directors.”

<sup>77</sup> Notice, *supra* note 74, ¶10.

<sup>78</sup> Combination Regulations, *supra* note 2, Reg. 9(4).

<sup>79</sup> Maheshwari, Chatterjee & Reis, *Triggering the Combination Regulations*, September 8, 2012, available at [http://www.nishithdesai.com/New\\_Hotline/Competition/Competition%20Law%20Hotline\\_Sep0812.htm](http://www.nishithdesai.com/New_Hotline/Competition/Competition%20Law%20Hotline_Sep0812.htm) (Last visited on September 30, 2012).

<sup>80</sup> Combination Regulations, *supra* note 2, Schedule II.

<sup>81</sup> *Id.*, Reg. 5(2).

<sup>82</sup> *Id.*, Reg. 5(3).

parties to file such information.<sup>83</sup> If the Commission requires information in Form II to form its *prime facie* opinion whether the combination is likely to cause or has caused AAEC within the relevant market, it shall direct the parties to file notice in form II.<sup>84</sup>

### C. WHO SHALL FILE THE INFORMATION?

The liability of filing the notice is upon the acquirer for acquisitions and in case of mergers or amalgamations jointly upon the parties, duly signed by the person(s) as specified in Reg. 11 of the Competition Commission of India (General) Regulation, 2009.<sup>85</sup> Even in case of hostile takeovers, the acquirer shall furnish such information as is available to him relating to the enterprise, in Form I or II.<sup>86</sup> If he is not in a position to furnish within fifteen days all the required information, the Commission may direct that enterprise to furnish such information as it deems fit.<sup>87</sup> Further, as discussed above, to reduce the burden of multiple filings, a single notice is required to be filed covering a series or smaller individual transactions which are interconnected or interdependent on each other, one or more of which may amount to a combination.<sup>88</sup>

### D. FAILURE TO FILE INFORMATION

On parties failing to file notice, the Commission may inquire into whether a combination has caused or is likely to cause an AAEC within India and direct the parties, to file the notice in Form II which has to be done within 30 days.<sup>89</sup> The parties shall be asked to remove defects or to furnish required information including documents if found wanting on scrutiny of the notice, within the time specified by the Commission. Failure to do so will render the notice invalid.<sup>90</sup> Any change in the information has to be intimated to the Commission during the continuation of the proceedings under the Act. If satisfied, the change shall be taken on record. But if of the view that the change is likely to affect the factors for the determination of the AAEC significantly, the Commission may, after giving opportunity of being heard and after recording reasons, treat the notice as not valid. No additional fee shall, however, be payable if a notice is filed again for the same transaction within a period of thirty days from the date of communication of the said decision.<sup>91</sup>

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<sup>83</sup> *Id.*, Reg. 5(4).

<sup>84</sup> *Id.*, Reg. 5(5).

<sup>85</sup> *Id.*, Regs. 9(1) and 3.

<sup>86</sup> *Id.*, Reg. 9(2).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*, Reg. 9(5).

<sup>89</sup> *Id.*, Reg. 8.

<sup>90</sup> *Id.*, Reg. 14.

<sup>91</sup> *Id.*, Reg. 16.

The provisions of §6(2) of the Act, however, do not extend to a certain category of financial institutions.<sup>92</sup> Public financial institution, foreign institutional investor, bank or venture capital fund entering into combination in pursuance of any covenant of loan or investment agreement, for share subscription or financing facility or any acquisition has to inform the Commission within seven days from the date of acquisition, in Form III.<sup>93</sup> There is, however, no requirement of payment of fees.<sup>94</sup>

### *E. SCRUTINY OF NOTICES*

The Commission derives its scrutinizing powers in relation to combinations from §§20 and 30 of the Act and lays down procedure for the same in §29. As per the provisions of the specified section, if in the *prime facie* opinion of the Commission, the combination causes or is likely to cause an AAEC, it shall issue a show-cause notice to the parties calling them to respond within thirty days of its receipt, as to why the investigation in respect of such combination should not be conducted.<sup>95</sup> If the Commission is *prime facie* of the opinion that the combination has or is likely to have the said effect, it shall direct the parties, within seven working days of the receipt of response from the parties or the report from the Director General whichever is later, to publish within ten working days details of the combination in Form IV as submitted by the parties in all India editions of four leading dailies including at least two business newspapers and also hosted on commission's website.<sup>96</sup> This is done for bringing the combination to the knowledge of the public or persons affected or likely to be affected by such combination.<sup>97</sup> The Commission may invite any person or member of the public so affected, to file his written objection within fifteen working days from the date of publication.<sup>98</sup> Thereupon, within fifteen working days from the expiry of the said fifteen days, the Commission may call for such additional or other information from the parties to the combination as it deems fit.<sup>99</sup> which are then furnished to objecting persons, within fifteen days.<sup>100</sup> After the receipt of all information and within forty five working days from the expiry of the period specified in subsection (5), the Commission shall proceed to deal with the case in accordance with the provisions contained in §31 which relate to decision making powers of the Commission.

The Commission, on examination, may be of the opinion that the combination: a) *has* the adverse effect or b) *does not* have that effect or c) has

<sup>92</sup> See Act, §6(4).

<sup>93</sup> Combination Regulations, *supra* note 2, Reg. 6.

<sup>94</sup> *Id.*

<sup>95</sup> See Act, §29(1).

<sup>96</sup> Combination Regulations, *supra* note 2, Reg. 22.

<sup>97</sup> See Act, §29(2).

<sup>98</sup> *Id.*, §29(3).

<sup>99</sup> *Id.*, §29(4).

<sup>100</sup> *Id.*, §29(5).

the effect but can be eliminated by suitable *modification*. If an anti-competitive effect could be eliminated, the Commission may propose appropriate modifications to the combination.<sup>101</sup> The parties may accept the proposal. They may not accept as such and submit amendment, within thirty working days.<sup>102</sup> The amendment submitted by the parties may be agreed upon by the Commission. If not agreed upon, it shall allow a further period of thirty working days for the parties to accept the modifications proposed under sub-section (3).<sup>103</sup> If they fail to do so, the combination shall be deemed to have an adverse effect on competition.<sup>104</sup>

The Act though largely certain and precise in most of its provisions, has some contentious areas relating to the time period provided in different sections of the Act, which becomes of particular relevance in combination control. Provisions of §§6(2), 6(5) and 29(5) do not include the word ‘working’ in relation to the time period specified. Of the very few scholars that have commented on the Act, most have interpreted the said provisions to mean working days. The legislative intent is not clearly discernible from the expression used. If the legislature had intended that ‘days’ will include working days, it could have qualified the expression. Since the Act is in its nascent stage and the Commission lacks decisional practice, it is difficult to reach a conclusion on such matters. If a problem related to these provisions comes into light than it is difficult to say which line of interpretation the Commission will follow.

#### IV. OMISSIONS IN THE REGULATIONS

The Regulations despite bolstering the regulatory framework with respect to notification of combinations in India can be found lacking in certain areas. Besides obvious omissions, several provisions of the guidelines have given rise to self-conflicting interpretations that are not in line with the underlying objective<sup>105</sup> of the parent Act or do not satisfy the international standards relating to combination control. At times, the mandate imposed on the parties by the Act itself is unclear, which cannot be solved by merely amending the subsidiary guidelines.

##### A. THE INDETERMINACY OF ‘CONTROL’

It is imperative to understand that the concept of ‘control’ is different in a securities legislation (for instance the Takeover Code) vis-à-vis the

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<sup>101</sup> *Id.*, §31(3).

<sup>102</sup> *Id.*, §31(6).

<sup>103</sup> *Id.*, §31(8).

<sup>104</sup> *Id.*, §31(9).

<sup>105</sup> Print Release, MINISTRY OF CORPORATE AFFAIRS, *CCI Releases Regulation of Combinations for Corporate Sector* (May 11, 2011) at <http://pib.nic.in/newsite/PrintRelease.aspx?relid=72069> (Last visited on August 28, 2012).

antitrust law. The scope of the two pieces of legislation is different. Hence, we will limit the understanding of ‘control’ to the framework of competition laws in India.

The Act lays down the definition of control in Explanation (a) to §5, as applicable to combination control provisions, in somewhat vague terms: “‘control’ includes controlling the affairs or management”. The exercise of control can be done solely or jointly, by enterprises and groups. The Act, however, does not provide any more guidelines to determine what constitutes possession of an effective control over another group. It can be presumed that the Act wanted to leave the determination of the issue as and when it arises before the Commission. Nevertheless, the concept of control attains crucial significance due to the exemption being granted to acquisition of up to 25% voting rights or shares, provided it does not result in acquisition of control in the acquired entity.<sup>106</sup> An expansive interpretation of what constitutes control will lead to lesser exemptions and more filings before the Commission, most of which might not actually involve *de facto* control being vested in the acquiring party as a result of the acquisition. Consequently, transactions having negligible impact on the competitive structure of the market will be notified. Contrarily, if control is to be construed narrowly, only those acquisitions that involve a transfer of control will require notification, thereby fulfilling the underlying rationale behind combination control. The Commission has passed only a handful of orders on the issue of what constitutes control or a change in control but it is yet to hand out a decision on merits for future reference.

A handy example is the Commission’s order<sup>107</sup> in the notice for acquisition filed by KKR Mauritius Direct Investment (‘KKR FII’). KKR FII was intending to acquire 10% equity share capital of Magma Fincorp Ltd., (‘Magma’) a non-banking financial company. Due to the acquisition, the entire shareholding of KKR FII along with one of its affiliates would increase from 14.95% to 24.95% of Magma’s equity share capital.<sup>108</sup> The Commission was faced with the task of deciding whether the proposed transaction would result in a change of control. It briefly stated that since there has been no change in constitution of the Board of Directors of the target enterprise, i.e. Magma, or its management, no change in control was effectuated.<sup>109</sup>

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<sup>106</sup> See Amended Regulations, *supra* note 11, Schedule 1, Cl. 1. See also Nandish Vyas & Pranati Ishwar, *The Viewpoint-The Anatomy of Control*, July 12, 2012, available at <http://barandbench.com/brief/1/2593/the-viewpoint-the-anatomy-of-control> (Last visited on September 15, 2012).

<sup>107</sup> Combination Registration No. C-2011/11/10.

<sup>108</sup> Prior to the amendment to the Combination Regulations, acquisitions till 15 % shares or voting rights in the target enterprise was exempt from notification provided they do not result in change in control. See Combination Regulations, *supra* note 2, Schedule 1, Cl. 1.

<sup>109</sup> *Supra* note 107, ¶9.

Another noteworthy pronouncement<sup>110</sup> was the *Network18* order<sup>111</sup> which arose out of multiple transactions intended to cover a proposed scheme of combination. The Commission treated all the interconnected transactions as a single transaction for the scrutiny. The significant parties were Independent Media Trust ('IMT'), a trust established for the exclusive benefit of the Reliance India Group ('RIL Group'). IMT intended to subscribe a certain category of optionally convertible debentures issued by the enterprises sought to be acquired. The target enterprises, in turn, held 40% equity stakes in the Network 18 group.

By examining the order reviewing the proposed scheme, the Commission's reasoning on the concept of control can be broadly divided into two main prongs: the idea of immediate control and ultimate control. On the first issue, it decided that the subscription will give the acquiring entity a right to convert the debentures into equity shares during the subsistence of the agreement and acquire full capital control over the target enterprises. This amounts to 'decisive influence'<sup>112</sup> over the management and affairs of the target enterprises and satisfies the requisite test for 'control' as laid down in the Act. Hence, IMT exercises direct control over the functioning of the target enterprises.<sup>113</sup> Additionally, due to its control over the affairs of the target enterprises, it shall also extend to indirect control over management of Network 18 group.

The Commission then sought to identify the ultimate acquirer of control in the chain of transactions. It decided that RIL exercises control over IMT for two reasons: RIL is the sole beneficiary of the trust deed that instituted IMT and appointed the protector of the deed, a wholly owned subsidiary of RIL. The subsidiary exercises significant control in appointment and removal of trustees managing IMT. By drawing a link between the target enterprises, holdings controlled by it, the acquirer and the ultimate beneficiary of the acquirer, the Commission rightly traced the chain of control in the proposed transaction and held that RIL exercised indirect control over Network 18 group.<sup>114</sup>

The order in the present case was subject to the application of an interesting test for determination of control, that of, the 'decisive influence' test. Acquisition of a right to convert some securities at a future stage was held to have granted control on the acquirer, notwithstanding the fact that the right has not been exercised and control over the target enterprise is not captured. It has been argued that by reading an option to convert as indicative of decisive influence, the concept of control has been expanded.<sup>115</sup>

<sup>110</sup> N Sundaresha Subramanian, *RIL controls Network18 group indirectly, says CCI*, BUSINESS STANDARD June 23, 2012, available at <http://www.business-standard.com/india/news/ril-controls-network18-group-indirectly-says-cci/478250/> (Last visited on September 30, 2012).

<sup>111</sup> Combination Registration No. C-2012/03/47.

<sup>112</sup> *Id.*, ¶15.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*, ¶¶16-7.

<sup>115</sup> Vyas & Ishwar, *supra* note 106.

What remains to be seen is the effect of such pronouncements on the determination of control in other cases. Also, there has been no decision of the Commission that explicitly discusses the positive or negative nature of voting rights and if the latter can amount to exercising ‘decisive influence’ over the affairs and management of the target entity. While it can be reasonably argued that mere acquiring of veto powers is insufficient to result in effective control over the management of affairs, guidance on the issue is necessary.

### *B. ABSENCE OF EFFECTIVE PRE-COMBINATION CONSULTATION PROCESS*

There has been considerable debate surrounding the inclusion of a pre-combination consultation process in the regulatory framework. The Commission mooted the idea through the Draft Regulations<sup>116</sup> released by them in March 2011 but subsequently dropped it from the final version of the Regulations. The Commission however assured that it will facilitate such a consultative apparatus through its website at a later stage in tandem with “international practices”. It did keep up with its promise but disappointed by its non-inclusion in the Regulations.

The Commission has been widely criticised for its omission to incorporate a statutory consultation mechanism that can be invoked prior to the filing of combination notices. At present, the Commission provides a link on the homepage of its website<sup>117</sup> to direct users to a brief overview of the consultation scheme. The process enjoys a mere informal and non-binding status under the present framework.<sup>118</sup> Parties can correspond with the Commission staff in writing and orally consult them but the advice tendered by the Commission will not bind the body at a later stage of investigation and scrutiny.

The pre-combination notification machinery has been established with a dual aim: first, to avoid a prolonged time period for seeking approval of the Commission<sup>119</sup> and second, to eliminate some difficulties which the anti-trust enforcement agencies encounter when anti-competitive combinations are challenged before them *ex post facto*. In most combination arrangements, time is of the essence and the parties are usually wary of a long-winded approval process. Pre-combination consultations come handy in drawing up a rough estimate of the time required for the scrutiny and reduce the time-pe-

<sup>116</sup> Draft Regulations, *supra* note 9, 8-9 (Last visited on August 28, 2012).

<sup>117</sup> Available at <http://www.cci.gov.in/index.php> (Last visited on August 28, 2012).

<sup>118</sup> Competition Commission of India, Consultation prior to filing of notice of the proposed combination under sub section (2) of section 6 of the Competition Act, 2002, available at <http://www.cci.gov.in/May2011/Home/ConsultationPrior250511.pdf> (Last visited on August 28, 2012).

<sup>119</sup> The Economic Times, *CCI proposes talks ahead of M&As to cut deal time*, February 27, 2010, available at [http://articles.economictimes.indiatimes.com/2010-02-17/news/27584499\\_1\\_merger-competition-commission-competition-act](http://articles.economictimes.indiatimes.com/2010-02-17/news/27584499_1_merger-competition-commission-competition-act) (Last visited on August 28, 2012).

ried by already resolving the preliminary doubts of the parties. Additionally, the Commission may find it onerous to restore competition fully because circumstances change once a combination takes place. It requires undoing of several procedural and substantive juggernauts to negate the effects of adverse combination. Furthermore, any attempt by the Commission to cure the adverse effects of anti-competitive combinations will have structural as well as monetary implications for the parties and those adversely affected by the combination. Prior review under the pre-combination notification program has created an opportunity to avoid these problems by enabling the concerned parties to know the effect of the proposed combination before they are consummated.

The exact nature and mode of the consultation provided by the Commission is, however, unclear. The Commission has provided no guidelines as regards the kind of questions that will be entertained by the Combination Division and whether the parties can request for consultation in presence of any industry experts of their choice. It is also not clear if the consultation process is done anonymously, respecting the confidentiality of the parties and details of the proposed transaction. This confusion, we believe, is the fallout of insufficient information provided in the Commission website, which does not mention if the consultation shall be carried out in strict confidence. It is pertinent to note here that the Draft version of the Regulations<sup>120</sup> had expressly provided for confidentiality in consultation. On the nature of queries, the general understanding at present is that the parties can seek clarifications pertaining to the proposed combination but it is restricted to procedural matters, leaving review of substantive matters entirely out of the ambit of the process.<sup>121</sup> Further, the non-binding nature of the consultation process casts doubts on the efficacy or reliability of the entire process.<sup>122</sup>

As has been suggested by several experts,<sup>123</sup> giving statutory recognition to pre-combination consultation will give teeth to the entire process of regulating combinations having an AAEC. It is therefore necessary that the Commission incorporates this facility in the Amended Regulations. To ensure that the consultative process becomes a matter of regular practice, certain benefits can be extended to the parties who refer to it. For instance, parties who have already consulted the Commission can be exempted from the more extensive filing requirements under Form II of the Schedule. This will be in line with the guidelines issued by the International Competition Network (“ICN”), which promotes flexibility in the process of scrutiny of notifications. The ICN

<sup>120</sup> Draft Regulations, *supra* note 9, Reg. 12(5).

<sup>121</sup> Pallavi S. Shroff, *India: Merger Control*, The Asia-Pacific Antitrust Review 2012, available at <http://www.globalcompetitionreview.com/reviews/42/sections/146/chapters/1646/india-merger-control/> (Last visited on August 28, 2012).

<sup>122</sup> *Id.*

<sup>123</sup> Satvik Verma, *Merging business with competition law*, May 23, 2011, available at <http://www.governancenow.com/views/columns/merging-business-competition-law> (Last visited on August 28, 2012).

recommendations, interestingly, advise some jurisdictions to allow parties an option to “to seek a waiver of the obligation to produce requested information”. This can be permitted if in the course of pre-notification consultation, the parties can show that the cost of providing information before the agency is higher than the utility of such information in assessment of claims relating to the proposed transaction.<sup>124</sup>

The ICN initially recommended pre-notification consultation for two reasons: to advise the parties if the proposed transaction will raise any competitive concerns and the kind of information to be provided if notification becomes necessary.<sup>125</sup> While the manner of consultation recommended by ICN does not expressly specify substantive scrutiny, it does mention that certain jurisdictions can and do permit parties to engage in any discussion, whether procedural or substantive, with the agency staff.<sup>126</sup> They further permit the parties to adduce any documents before the staff aiding in better and faster assessment of the competition concerns relating to the proposed transaction. It is submitted that the Commission should follow the latter model to bolster its pre-consultation mechanism and give out opinions on the merits of the proposed combination along with advice on procedural issues. The consultation process should be in writing, or if conducted orally, the parties should be allowed to submit documents in support of their claims. This will help the Commission in understanding the finer details of the proposed transaction and will accord a greater degree of formality to the opinions of the Commission which can be relied subsequently during review of an actual notice of combination.

The idea behind incorporation of a detailed pre-merger consultation process is to ensure that combinations having AAEC are regulated at an initial stage and the parties get a clearer guidance as regards the impact of the proposed combination. The parties must therefore have an option to resort to the Commission to seek guidance on any matter pertaining to the proposed combination if they want to. Such a regulatory control prior to the review process reduces the time taken during actual scrutiny and improves dialogue between the Commission and the parties thereby reflecting regulatory foresight. A well defined consultation mechanism will allow the parties to a combination to familiarise themselves with the procedure of filing, facilitate their engagement with the Commission on substantive issues and result in better drawn up combinations that comply with the regulatory requirements.

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<sup>124</sup> See Recommended Practices For Merger Notification Procedures, Recommended Practice V.C., available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc328.pdf>, 13 (Last visited on September 5, 2012).

<sup>125</sup> *Id.*

<sup>126</sup> International Competition Network, *Information Requirements for Merger Notification*, Prepared by The Notification & Procedures Subgroup, Presented at the 8<sup>th</sup> Annual Conference of the ICN, Zurich, Switzerland, June 2009, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc328.pdf>, 22 (Last visited on September 5, 2012).

### C. INTRA GROUP EXEMPTIONS

#### 1. Position under the Competition Act and Regulations, 2011

In the *Alstom Holdings* order, a notice filed under §6(2) of the Act pursuant to an amalgamation proposed to be entered into by Alstom Holdings (India) Limited (“AHIL”) and Alstom Projects India Limited (“APIL”) was under examination. Both the parties are wholly owned subsidiaries of enterprises belonging to the Alstom group, AHIL being a direct subsidiary while APIL was an indirect<sup>127</sup> one. The observations made by the Commission in this order are particularly relevant for our present discussion. Approving the notice for amalgamation, the Commission took note of the following factors: (1) The ultimate control of the amalgamating parties vests with the same parent group, that is, Alstom Holdings. (2) Post-amalgamation, there will be no change in the management of the amalgamated company.<sup>128</sup>

The above combination was in pursuance of a group restructuring initiative of the Alstom Group in India<sup>129</sup> and had no discernible impact on the level of competition, as correctly decided by the Commission. Incidentally, this was the first order of Commission with respect to a combination under §5(c) and faced criticism for scrutinising transactions that are essentially intra-group restructurings and raise no antitrust concerns.

Close on the heels of *Alstom Holdings* came the much publicised *TCL-Wyoming* order.<sup>130</sup> It clarified the position adopted on notification requirement for combinations between parent companies and subsidiaries. Tata Chemicals Limited (‘TCL’) and Wyoming 1(Mauritius) Private Limited (Wyoming 1) filed a notice for amalgamation of the latter into TCL. Despite notifying, the parties questioned the necessity of filing such notification before the Commission. During the course of preliminary submissions, the parties claimed exemption on three grounds, two of which are relevant for the present discussion. The first contention was that the Act treats a parent company and its subsidiary as part of a ‘single economic enterprise’ and hence there is no need to notify a transaction between such entities. Secondly, the combination if effected through an acquisition would have been liable for an exemption under Item 8 of Schedule 1 of the Regulations, and hence the present amalgamation should also be exempted. The Commission rejected both the contentions and ruled in favour of notification of such transactions. In doing so, the

<sup>127</sup> Indirect subsidiary of Alstom Holdings with 68.46% of equity shares held by wholly owned subsidiaries of Alstom Holdings including AHIL.

<sup>128</sup> Combination Registration No. C-2011/10/06, ¶8.

<sup>129</sup> *Id.*, ¶7: “. . .the instant amalgamation was a measure of the group restructuring of the Alstom group in India to help reduce shareholding tiers, rationalize investments and reduce administrative and management costs and make the entities administratively more efficient.”

<sup>130</sup> Combination Registration No. C-2011/12/12.

Commission resorted to a joint reading of §2(h) and §2(l) of the Act. As per the Commission, an ‘enterprise’ defined in §2(h) of the Act, can be carried out by a person or the government, directly or through its subsidiaries. This definition does not envisage a subsidiary and the holding company as a single economic entity but should be taken as indicative of the fact that an enterprise can carry out its activities through various means-like units, divisions or subsidiaries.<sup>131</sup> To further substantiate such a reasoning, the Commission relied on the definition of a ‘person’ in §2(l), which includes a company but not a subsidiary.<sup>132</sup> If a subsidiary on its own qualifies the criteria laid down in §2(h), it would amount to an enterprise. Hence, on a conjoint reading of the two provisions, a distinction was drawn between a subsidiary and its holding company as two separate enterprises, transactions between which need to be notified.

Apart from a strict interpretation of the definition of an enterprise, the Commission summarily rejected the claim of exemption based on Item 8 of Schedule 1 of the Combination Regulations. Only intra-group acquisitions were held to be within the purview of exemption granted under the Combination Regulations and not combinations under §5(c), that is, mergers and amalgamations.<sup>133</sup> Despite holding that notification is necessary in this case, the Commission ultimately approved the amalgamation between TCL and Wyoming 1 for it did not entail any horizontal or vertical overlap or any change in control of the combined entity.<sup>134</sup>

## 2. Position under the amended Competition Regulations, 2012

In response to the demands of business groups clamouring for intra-group exemptions from filing, the Commission introduced a crucial amendment to the Regulations. In addition to intra-group acquisitions,<sup>135</sup> mergers and amalgamations between intra-group entities were included in Schedule 1 which lists the category of transactions that are exempt from filing requirements. The exemption is, however, only with respect to a certain category of mergers and amalgamations. Cl. 8A of Schedule I of the Regulations<sup>136</sup> lays down the new transactions that are exempt:

<sup>131</sup> *Id.*, ¶6(a).

<sup>132</sup> *See* Act, §2(l) (iii).

<sup>133</sup> *Supra* note 130, ¶6(c).

<sup>134</sup> *Id.*, ¶10. For orders in a similar vein *see* Notice for merger of SOVL and SIIL Combination Registration No. C-2012/02/30, ¶¶6-7.

<sup>135</sup> *See* Amended Regulations, *supra* note 11, Schedule I, Clause 8: “An acquisition of control or shares or voting rights or assets by one person or enterprise of another person or enterprise within the same group.”

<sup>136</sup> *Id.*, Schedule I, Cl. 8A: “A merger or amalgamation involving a holding company and its subsidiary wholly owned by enterprises belonging to the same group and/or mergers or amalgamations involving subsidiaries wholly owned by enterprises belonging to the same group.”

- a. Those between the holding company and its direct and indirect subsidiaries wholly owned by enterprises of the same group; and
- b. Between subsidiaries completely owned by enterprises belonging to the same parent group.

This inclusion in the latest version of Regulations has a two-fold implication. It is a clear reflection of the legislative intent to expressly exempt a certain category of mergers and amalgamations from the notification requirements under §6(2) of the Act. Additionally, it removes all doubts on the interpretation of the expression ‘categories of combinations mentioned in Schedule 1’ in Reg. 4 and clarifies that all forms of intra-group combinations are not eligible for the exemption save those expressly mentioned.

Such a clarification was necessary as the erstwhile guidelines raised significant doubts over the understanding of the disputed expression in Reg. 4. The confusion was due to the inclusive nature of the expression ‘categories’. The ambiguity in drafting generated the following conflicting views:

One of the positions adopted was that all combinations mentioned in §5 of the Act can avail of the exemption and not only those resulting in “an acquisition of control or shares or voting rights or assets by one person or enterprise of another person or enterprise within the same group”.<sup>137</sup> In other words, the legislature had not limited the availability of exemptions to only transactions under §5(a) of the Act and it was possible that intra-group combinations under §5(b) and §5(c) of the Act can claim relief from notification. The alternative view suggested that a deliberate omission to include any other type of transaction save those covered by §5(a) in Cl. 8, Schedule 1, meant that only these can be excused from pre-merger clearance. Prior to the Amendments, the Commission decided notifications before it in accordance with this understanding.

The divergence has been reconciled through the Amendment by specific inclusion of certain categories of combinations in Cl. 8A of the Schedule. Although the amended guidelines have tackled concerns relating to interpretation, there exists rankling about the impact of the Regulations on corporate restructurings. Practitioners in the industry consider the provision relating to notification of intra-group transactions as impinging upon the flexibility of parties in corporate restructurings. The principal objection proceeds on two main lines of reasoning. It is argued that intra-group combinations hardly ever result in a significant alteration of the market structure or affect the level of competition giving rise to anti-trust concerns. Even after the proposed

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<sup>137</sup> Avantika Kakkar, *Why would the CCI interest itself in group restructurings?*, December 2, 2011, available at [http://articles.economicstimes.indiatimes.com/2011-12-02/news/30467718\\_1\\_cci-enterprise-sections](http://articles.economicstimes.indiatimes.com/2011-12-02/news/30467718_1_cci-enterprise-sections) (Last visited on September 6, 2012).

combination, the resultant controlling entity remains the same<sup>138</sup> and there is no change in control possessed by the 'group'.<sup>139</sup> Secondly, internal restructurings can be effected by both acquisitions or mergers and amalgamations. There is no justification for excluding acquisitions that result in change of control within the group while leaving out mergers and amalgamations, if the latter are not between wholly owned subsidiaries and ultimate parent entities.

Despite the best intentions of the Commission to introduce regulatory flexibility through the Amendments, combinations between holding entities and subsidiaries that are substantially owned by enterprises of the same group will not be granted the benefit of the exemption. Let us take a hypothetical situation in which two companies, X and Y propose to merge or amalgamate. Both are subsidiaries owned by the same parent group. X is, however, wholly owned by various enterprises of the group whereas Y is owned substantially, though not wholly, by the concerned group. Although the ownership pattern of X and Y does not vary significantly and the concerned group exercises control over both the entities, the exemption will not be granted to such a combination due to the strict requirement of Item 8A of Schedule 1. We argue that substantial ownership of subsidiaries should be a ground for granting exemptions since the effect of combining such entities with the ultimate holding company is not largely different from combining wholly owned subsidiaries into parent companies. Infact the past experience of the Commission in reviewing most combination notifications has revealed that most intra-group combinations have no effect on the assets or turnover or denotes no change in control in the resultant combined entity.<sup>140</sup>

#### *D. JOINT VENTURES: NOT PRUNING THE 'GREENFIELDS'?*

Joint ventures form the grey area of the Act. The Regulations, introduced to provide more clarity to combination control, also fail to offer any guidance on the manner in which joint ventures are to be treated. Before we attempt to understand the rationale behind the omission to incorporate joint ventures in combination control provisions, it is imperative to delve into their

<sup>138</sup> By Nandish Vyas & Vijay Manjrekar, *The Viewpoint - Anti-trust review of intra-group restructurings*, April 10, 2012, available at <http://barandbench.com/brief/1/2745/the-viewpoint-factoring-an-overview> (Last visited on September 6, 2012).

<sup>139</sup> Kanika Chaudhary Nayar, *Combination Regulations: The journey so far...*, 1 COMPETITION LAW REPORTS B-139, 184 (2012).

<sup>140</sup> Vyas & Manjrekar, *supra* note 138. See also Notice for amalgamation jointly filed by VSCL, TSIL, VGIL and VRPL Combination Registration No. C-2012/04/54, ¶12-13 (The proposed intra-group amalgamation involving demergers and consolidation was approved as it resulted in no change in control and was carried out in order to re-structure the interests of the combining entities. The combining entities included several wholly owned subsidiaries and companies over which the parent group exercised significant control).

treatment under the parent Act. The following statement aptly summarises the antitrust understanding of joint ventures in India:

“At present there is no clear picture as only §3 of the act, which deals with anticompetitive agreements, refers to joint ventures and even there they are mentioned in a circular way.”<sup>141</sup>

Since, joint ventures have not been defined under the Act, there is much confusion regarding their status. Conflicting opinions have been expressed on the question of applicability of the provisions of §5 of the Act to joint ventures. One such view suggests that notwithstanding the express non-inclusion of joint ventures under the §5 of the Act, it is applicable to joint ventures when they are treated as regular combinations, such as the traditional 50/50 equity/corporate joint ventures<sup>142</sup> and will be subject to filing under §6(2).<sup>143</sup> But a filing is mandated under §6(2) only if the combining entities fulfil certain threshold requirements prescribed in §5. It is quite likely that the threshold may never be met by joint ventures, especially the ones created specifically to generate newer benefits which do not entail the transfer of any assets to the entity.<sup>144</sup> Additionally, the ‘*de minimis* exemptions’ created by the Ministry of Corporate Affairs<sup>145</sup> notification gives a significant leeway to corporate entities to circumvent notification by working within the target exemptions.

On a literal interpretation of §5, it is fair to suggest that the provision concerns the acquisition of an enterprise and the definition of ‘an enterprise’<sup>146</sup> appears to capture an existing business, not a newly created business.<sup>147</sup> Thus, there is scope to argue that a newly incorporated joint venture

<sup>141</sup> Vinod Dhall in Rebecca Abrahams, *Mixed Signals*, June, 2011, available at <http://www.indilaw.com/pdfs/Mixed%20signals.pdf> (Last visited on September 20, 2012).

<sup>142</sup> Joint ventures are frequently characterized by a 50/50 participation in which each partner contributes 50 percent of the equity in return for 50 percent participating control. The relative contributions, as well as degree of ownership and control, are largely matters for negotiation. They relate to the value each party places, and the other party accepts, on the contributions, and reflect the objectives of the venturers. In short, the parties equally share control and residual cash flow rights. See Robert Hauswald, *Ownership and Control in Joint Ventures: Theory and Evidence*, March 2, 2002, available at <http://www.hec.fr/var/fre/storage/original/application/2a07ce9f75fa751877e5ef28d12d1b66.pdf> (Last visited on September 20, 2012); Rahul Sayal, *Joint Venture*, August 4, 2010, available at <http://www.scribd.com/doc/29576027/Joint-Venture> (Last visited on September 20, 2012).

<sup>143</sup> T. RAMAPPA, COMPETITION IN INDIA 224 (2009); Vidyullatha Kishor, *Comparative Merger Control Regulations-Lessons From EU And US*, <http://cci.gov.in/images/media/ResearchReports/VidyullathaKishor30jan2012.pdf> (Last visited on September 20, 2012).

<sup>144</sup> SRINIVASAN PARTHASARATHY, COMPETITION LAW IN INDIA 301 (2011); See also Pallavi Shroff, *supra* note 121.

<sup>145</sup> *Supra* note 65.

<sup>146</sup> See Act, §2(h).

<sup>147</sup> *Id.*, §2(h) and Combination Regulations, *supra* note 2, Reg. 2(e) for the definition of an ‘enterprise’.

would not fall within the definition of a combination as it would not be an enterprise “which is or has been engaged in any activity”.<sup>148</sup> The impact of such a reading would render start-up ventures to be completely excluded from the purview of combination control. Whilst it is desirable that newer ventures are not encumbered with notification requirements, the exemption of joint ventures by implication does raise some serious concerns. This is because the parent legislation provides a further leeway to the scrutiny of joint ventures through the proviso to §3(3). The proviso excludes joint ventures agreements if they have certain efficiency enhancing results even if they engage in practices that are otherwise deemed anti-competitive under §3 of the Act. But the Act provides no minimum benchmark for measuring the standard of efficiencies generated by the joint venture to qualify for an immunity under §3. In the light of this discrepancy, we submit that a mere physical description of efficiency enhancing factors without any monetary thresholds in review of joint ventures is a dangerous lacuna. Assuming that start-up joint ventures are already exempted under §5 of the Act and the corresponding regulations, a lenient approach under §3 will further leave new joint ventures outside the purview of the antitrust regime even if they engage in some anti-competitive practices. Regarding the applicability of §3, scholars are of the opinion that though nothing contained in sub-section (3) of the section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency,<sup>149</sup> such agreements will be governed by Rule of Reason<sup>150</sup> to determine appreciable adverse effect on competition.<sup>151</sup> The co-operation under the joint venture should be of complementary nature which does not restrict competition at the level of co-operating parties.<sup>152</sup>

## 1. How the U.S. controls anti-competitive Joint Ventures.

In the US, §1 of the Sherman Act, 1890 applies to the formation and operation of a joint venture. §2 applies to cases where a joint venture is used to monopolize, attempt to monopolize or engage in conspiracy to monopolize a relevant market. Additionally, if the joint venture substantially lessens

<sup>148</sup> Desai, Chaudhari & Mohan, *Joint Ventures under India's Competition Act*, available at <http://www.mayerbrown.com/files/Publication/32dec7fb-795e-4132-867e-e707c168152b/Presentation/PublicationAttachment/ba4dc164-90d4-41f5-8d0f-dbf68d0aeb8/10438.pdf> (Last visited on September 20, 2012); See also M.M.Sharma, *Merger Control Provisions under the Competition Act-Some Key Concepts & Issues*, December 19, 2011, available at [http://www.assochem.org/events/recent/event\\_649/session2/MM\\_SHARMA.pdf](http://www.assochem.org/events/recent/event_649/session2/MM_SHARMA.pdf) (Last visited on September 20, 2012).

<sup>149</sup> See Act, Proviso to §3(3).

<sup>150</sup> The Rule of Reason is a doctrine developed by the United States Supreme Court in its interpretation of the Sherman Antitrust Act. The rule, stated and applied in the case of *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911), 67-8, 100-1, 103 is that only combinations and contracts *unreasonably* restraining trade are subject to actions under the anti-trust laws, and that possession of monopoly power is not inherently illegal.

<sup>151</sup> See Kishor, *supra* note 143.

<sup>152</sup> D.P.MITTAL, *COMPETITION LAW & PRACTICE* 187 (2009).

competition, or tends to create a monopoly, §7 of the Clayton Act, 1914 becomes applicable. Unlike India, where there is uncertainty regarding the application of §5 of the Act to 'greenfield' joint ventures, in US, this section of the Clayton Act is applicable to situations where two companies form a joint venture to engage in an entirely new business.<sup>153</sup>

A joint venture is also reportable under the HSR Act.<sup>154</sup> The Rules contain a special provision governing the formation of new corporations and corporate joint ventures. If the acquisition is of interests in a joint venture that is formed as a non-corporate entity, only the acquiring person<sup>155</sup> that holds 50 per cent or more of the interests in the entity will be subject to HSR reporting obligations. If no acquiring person holds such majority, the non-corporate joint venture is not reportable. Further, §5 of the Federal Trade Commission Act, 1914 applies to the formation and operation of joint ventures.

Apart from the abovementioned laws, the merger guidelines<sup>156</sup> provide that a merger will be analyzed if:

- a. The participants are competitors in a relevant market
- b. The formation of the collaboration increases efficiency
- c. The integration eliminates all competition between the participants in the relevant market and
- d. The collaboration does not terminate within sufficiently limited period by its own specific and express terms.

If the joint venture does not increase efficiency and emanates harmful effect on competition, they are condemned *per se*. But, if participants enter into an efficiency enhancing agreement which has such harmful effect, then the authorities apply the rule of reason.<sup>157</sup>

It is therefore evident that rules and regulation governing joint ventures in US are much more exhaustive than those in India. Joint ventures are liable to scrutiny even if they fail to meet the threshold requirements for combinations.

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<sup>153</sup> United States v. Penn- Olin Chemical Co., 378 US 158 (1964), 167-8.

<sup>154</sup> See Clayton Act, 1914 (15 U.S.C. §18a), Sec. 7A.

<sup>155</sup> If the collaborators form a corporation or unincorporated entity such as a partnership or LLC; each collaborator will be an "acquiring person" and the joint venture company will be the "acquired person"; See Clayton Act, §7A, 16 C.F.R. §801.40.

<sup>156</sup> I.1, U.S. Dept. of Justice & Federal Trade Commission, Antitrust Guidelines for Collaborations among competitors (2000).

<sup>157</sup> Kishor, *supra* note 143.

## 2. An EU perspective on Joint Ventures

The European Commission's treatment of joint ventures varies according to the kind of joint venture in question. All full-function<sup>158</sup> joint ventures are regulated by the EC Merger Regulation ('ECMR'), provided that they meet the threshold requirements.<sup>159</sup> The assessment of full-function joint ventures under the ECMR concerns the structural arrangements affecting the joint control of a single enterprise.<sup>160</sup> The non-full function joint ventures are governed by rules on restrictive practices in Art. 101 of the Treaty on the Functioning of the European Union ('TFEU') (formerly Art. 81 of the EC Treaty). Agreements between undertakings that may affect trade between member states and that have as their object or effect the prevention, restriction or distortion of competition are prohibited under Art. 101(1). Even Art. 101(3) of the TFEU provides for exemptions. But these exemptions are not specifically for joint ventures but for commercial arrangements generally. And unlike India, these provisions are much more comprehensive and provide certain rules which need to be fulfilled in order to grant such exemption. There is an element of certainty in EC laws which their Indian counterparts lack. They are liable to scrutiny even if they have a positive impact on efficiency.

## 3. Rationale for the Indian position

The *per se* approach applied in particular in the US with respect to certain anti-competitive practices is the strongest type of prohibition. Such agreements when discovered can never be allowed. The Indian laws on the issue try to apply this approach in principle but not in absolute terms. It is more lenient in its application.<sup>161</sup> If a joint venture increase efficiency, it is exempted from the application of §3 of the Act. Indian antitrust law has been made lenient in order to promote joint ventures. Pooling resources under a joint venture increases cost efficiency, product design and quality, after sales services and R&D productivity.<sup>162</sup> It improves service quality and provides better services at a lower price. A part of these cost and service benefits are transferred to the consumers which in turn helps in achieving the ultimate objective of the Act.<sup>163</sup> Thus, there exists a rationale behind the leniency shown towards joint ventures in the Indian antitrust framework. Probably that justifies the silence of a guideline in the Act and the Combination Regulations on pre-combination control of 'greenfield' ventures.

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<sup>158</sup> To qualify as 'full function', the joint venture must be an autonomous economic entity resulting in a permanent structural market change, regardless of any resulting coordination of the competitive behaviour of the parents.

<sup>159</sup> See Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), Art. 3(4).

<sup>160</sup> ANTHONY WOOLICH, JOINT VENTURES IN THE EUROPEAN UNION 3 (2008).

<sup>161</sup> MITTAL, *supra* note 152, 186.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

## V. CONCLUSION

The examination of the Combination Regulations and the subsequent amendments reveals two significant trends: firstly, a lack of effective engagement on the part of the Commission in deciding orders on merits until very recently. The Combination Regulations are yet to be subjected to significant interpretive exercises for filling in the gaps left by the parent statute. It prompts us to question whether this is in pursuance of the supplementary role envisaged of the Combination Regulations and an attempt to restrict its application only to procedural aspects. We also observe that several of the irregularities involving notification is the result of omissions in the Act, which a subsidiary legislation cannot attempt to cure. Secondly, the Commission has only partially succeeded in delivering on its hallowed promise of reduced regulatory burden, with several combinations that are merely part of intra-group activities, still requiring notification under the Amended Regulations.

Accepting the limited role of the Combination Regulations, we submit that they can be used as an important tool to bridge the missing links in the parent Act. For instance, the Combination Regulations can include *definitive guidelines* on what constitutes a binding document for the purpose of triggering the filing requirement in case of a proposed acquisition. Additionally, an inclusion in the Combination Regulations is much less cumbersome, since the Commission has been conferred with adequate powers to introduce flexibility in the system of combination control. We definitely laud the growing initiatives to make the Combination Regulations more flexible by way of timely amendments and additions to the website of the Commission. For instance, the lack of clarity and silence of the Combination Regulations on matters as relevant as pre-combination consultations or intra-group exemptions have been resorted to a certain extent. Much is however expected of the Commission, especially in the manner in which it approaches issues sharing common ground with other legislations such as the Takeover Code. Till date, it has shown limited engagement in either adopting or rejecting interpretations arrived at by the courts applying the Takeover Code or other such legislation. While the trend can be because the Commission has not had to adjudicate matters submitted in the more complex form, a few cases like *Network 18* reflect a reticence on part of the Commission to lay down persuasive guidelines that can add to the jurisprudence of combination control in India. We support the view taken by some commentators that the Commission should identify certain 'protective rights' and affirm that an acquisition of such rights does not result in transfer of control.<sup>164</sup>

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<sup>164</sup> Vyas & Ishwar, *supra* note 106.

