CHAPTER-VII
CONCLUSIONS AND SUGGESTIONS

Mastering the art of deal making is what transforms an everyday company into a leading business empire.¹

7.1. Conclusion

This quote aptly highlights the importance of merger and acquisition deals for a company. The present study explores the fast paced and highly complex world of mergers and acquisitions in India. In this chapter, the researcher shall summarize all the important perspectives and areas explored in this thesis. We all are familiar with the fact that mergers and acquisitions have become a common phenomenon and are considered as an important mechanism of corporate growth. They are an integral part of the new economic paradigm, especially in today’s booming Indian economy. Bet it Tata’s acquisition of Corus, Airtel acquisition of Zain Telecom, Sun Pharma’s Acquisition of Ranbaxy, Jet-Etihaad Deal, merger of Bank of Rajasthan with ICICI bank, RIL-RPL merger or the most recent one-acquisition in e-commerce segment Flipkart-Myntra Designs, merger and acquisition is the word of the day. They have become an integral part of the new economic paradigm.

The corporate world is hit by the Darwin’s theory of evolution i.e. survival of the fittest. In today’s globalised economy, competitiveness and competitive advantage have become the buzzwords for corporates around the world. Mergers and acquisitions are being increasingly used the world over as a strategy for achieving a larger size and asset base, faster growth in market share and for becoming more competitive through economies of scale.² Thus, mergers and acquisitions have become an important tool for corporate growth.

Across the world mergers and acquisitions remains high on the agenda for companies in all territories and it remains a key strategic tool to drive growth and build scale.

Certainly in the eyes of businesses, it remains the most effective way to enter a new territory.\textsuperscript{3} The trend towards globalisation of all national and regional economies has increased the intensity of mergers, in a bid to create more focused, competitive, viable, larger players in each industry.\textsuperscript{4} The economic and regulatory reforms have transformed the business scenario across the globe. A restructuring wave is sweeping the corporate sector the world over and taking within its fold both big and small companies.

In the ongoing scenario, when the stress is on globalisation, opening up the economy, worldwide competition, expanding markets, extending beyond the national frontiers, fast changing technologies, never ending needs for finance, necessity for diversification and similar such situations, small is no longer beautiful in fields of business, trade, and commerce. The stress now is on larger and bigger establishments/conglomerates to achieve more efficiencies for standing up against global challenges and worldwide competition by availing of the benefits of economies of scale and large scale production.\textsuperscript{5} Thus, the whole world is experiencing merger waves. As the sweeping wave of economic reforms and liberalisation has transformed business scenario all over the world, the national economies have been integrated with ‘market-oriented globalised economy.’ Considering the drastic changes in global environment and its obligation to WTO, India has also changed its economic policies.

With the advent of liberalisation in the FDI policies post-1991, M&As and alliance talks are heating up in India and growing at a tremendous pace. The policy of opening up of the economy thus allowing investors across the globe to enter the Indian market without restricting them to any particular type of business has lead to unprecedented rise in M&A transactions in India. Though the government initiated little steps towards liberalisation post-1985 period, the real opening of the economy started with the statement of Industrial Policy made on 24\textsuperscript{th} June 1991. The new industrial policy was in drastic diversion to 1956 policy. As a result of introduction of the policy, the MRTP Act


underwent major transformation by deleting most of the sections restricting the expansion of an enterprise, industries were deregulated, amendments were made in the Foreign Exchange Regulations Act in early 1993 with the intention of reversing the earlier policy of restricting foreign investment to one in which the state took an active role in promoting it and the regulations governing FDI were relaxed which subjected Indian industry to a major restructuring. This restructuring process has lead to an unprecedented rise in business strategies like mergers, amalgamations, demergers and acquisitions in India.

Since the mid-nineties, the concept of mergers and acquisitions has caught like fire. They have become very popular from all angles, policy considerations, businessmen outlook and even consumer point of view. The big industrial umpires such as Hindustan Lever Limited, Ajay Piramal Group, Murugapaa Group were built entirely on M&As. Since the 1990s, there has been substantial growth of M&As in the Indian corporate sector. Facilitated by changes in the policy environment, the number of mergers rose sharply to 1034 during the period 1990 to 2000 from 269 in the previous decade (1980-1989). If we divide the decade of nineties in two halves, the number of M&A deals were just 291 in 1990-95, rose to 743 in 1995-2000 and 1370 in 2000-06. Thus, it is evident that this trend towards M&As is sharper since the latter half of the 1990s. Thus, it is clear that the structural adjustment programme and the new industrial regime adopted by the Government of India allowed business houses to undertake without restriction any programme of expansion either by entering into a new market or through expansion in an existing market. Indian industries experienced shocks after the initiation of liberalisation of the economy in 1991. Post-liberalisation Indian industrial sector witnessed substantial rise in M&A activity in the industrial and financial sectors of the economy.

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7 “Corporate Sector: Mergers and Acquisitions”, *Monthly Review of Indian Economy*, CMIE (Centre for Monitoring Indian Economy), Department of Company Affairs, Research and Statistic Division, New Delhi, Various Issues.
8 Ibid.
10 Gurminder Kaur, 2005, p.29.
With the ushering in of the era of globalisation and the shackles of contrite regulations broken away, India has woken up to being a major player on the advent of globalisation. Probably, these are the reasons which can be attributed to the undergoing structural changes in the Indian Industries. This restructuring is primarily happening through M&As in India. Post 1991, constant exposure to both domestic and international competition has urged the corporates to restructure in order to prove their competence and improve their market credibility.\textsuperscript{11} Realising the economies of scale to be gained as well as privatisation, globalisation and deregulation acting as necessary catalysts, M&A activities have increased in frequency in India post-1991.

One of the most vital and welcome dimensions and trends in the present decade is the increasing degree of internationalisation of global economy through mergers and acquisitions.\textsuperscript{12} India has realised this fact and has allowed investors across the globe to enter the Indian market without restricting them to any particular type of business. That’s why, the market is witnessing increased number of high value inbound M&As in India. On the other hand, liberalisation of foreign investment and foreign exchange policies accompanied by rapid economic growth have enabled Indian companies to acquire softer targets in India or abroad. Indian companies are not only competing with foreign companies operating in India but also managed to compete with them in their home ground.

India’s emergence as a major developing economy and its potential to drive global economic growth alongwith China in this century is being acknowledged by economists across the globe. A sustained growth of 8-8.5 percent combined with a huge domestic demand is attracting global corporate towards India. This coupled with the increasing appetite of Indian companies for M&As has resulted in an increase in M&A activity in India with more and more companies scouting for potential targets.\textsuperscript{13}

\textsuperscript{13} Ernst and Young, Master Guide to Mergers and Acquisitions in India (Tax and Regulatory), Wolter Kluwer (India) Pvt. Ltd., Gurgaon, 2012, p. 5.
The present era in M&As is driven by the desire of Indian Industries to go global and withstanding global competition. Acquisition of foreign companies by the Indian businesses has been the trend in the Indian corporate sector post 2005. Tata Steel acquisition of Corus, Hindalco acquisition of Novelis, Bharti Airtel acquisition of telecom business of Zain in Africa, Infosys buying Axon Group, Videocon buying Daewoo Electronic Corporation, Tata-buying Jacquar and Land Rover-marked this trend in the Indian M&A history. A strategic shift in behavioural patterns of Indian entrepreneurs is being witnessed of off lately-they are willing to sell a part or whole of their stake to exit their business to foreign players. Weak Indian rupee which has made Indian business attractive accompanied by attractive valuations from foreign players are promoting Indian entrepreneurs to evaluate exits. Few successful exits in the recent past include Daiichi-Ranbaxy and Abott-Piramal. This vibrancy in M&A environment was due to positive regulatory mechanism, globally accepted business processes and a robust and optimistic investment climate.\footnote{Jayadeep Kaur, “Mergers and Acquisitions-Legal Framework and Compliances”, SEBI and Corporate Laws, 10-16 January 2011, Vol. 105, pp. 20-24, p. 23.}

In 2008-09, there was a slump in M&A activity. Euro zone crisis and a recession in the world economy had an impact on Indian economy also. That phase was only temporary and our M&A deals recovered back in the period from 2010-2012. But again, the financial year 2012-13 was not so encouraging for the Indian economy with drop in volume and value of deals. Global economic headwinds such as uncertainties pertaining to the Eurozone and the slow recovery of the US economy has marred M&A activity in financial year 2012.\footnote{Ernst and Young, “Transactions 2012: Maturing M&A Markets”, retrieved from http://www.ey.com/publication/revelme/assets/transaction_2012_Brochure_Final.pdf, accessed on 15 January 2013 at 12.42 pm.} This was aggravated by certain happenings in the domestic front such as slowdown in reforms, rising interest rates, the depreciating rupee, slow GDP growth and last but not the least the uncertainty created by retrospective tax amendments introduced to overcome the Vodafone judgement and the introduction of GAAR. The retroactive taxation was the most prominent reason for the downfall in M&A activity in 2012. This situation was worsened and aggravated by introduction of GAAR. The international investment community showed their reluctance in investing in
India. The volume and value of M&A deals fell down significantly in 2012 with the number of merger deals coming down by 37.2 percent. All these factors made our government to rethink over its tax proposals. The government did not roll back its retroactive taxation proposal but introduction of GAAR was postponed till 2016.

As a result, the M&A activity which declined in 2012 again surged up a little bit in 2013. The first half 2013 review by Thompson Reuters revealed that India’s overall merger and acquisition activities surged by 12.13 percent compared to the first half of 2012. The major deals happening during this period were Apollo Tyres acquisition of US based Cooper Tire and Rubber Co. for 14,500 crore; Unilever, British parent increasing stake in Indian arm i.e. Hindustan Unilever by 14.78 percent to 51.55 percent for $3.573 billion, and Abu Dhabi based Etihaad Airlines buying 24% stake in Jet Airways. But thanks to the optimism generated by Modi Government at the centre, data from industry tracker Merger market showed an increase of 47 percent in the value of M&A deals between January and June this year (2014) as compared to first six months of the previous year. Thus, India Inc. is gearing up for a season of mergers and acquisitions, with major deals taking place both domestically and abroad. This shows that although high inflation, currency devaluation, corruption, governance related issues and retroactive tax proposals remain a concern, the long-term outlook on M&As in India is robust.

As is evident from the above discussion, the era of mergers and acquisition has finally arrived in India thanks to liberalisation policies introduced post-1991. In the background of this reality, the researcher has studied various legal, regulatory, valuation, taxation, competition and various other emerging trends in the field of mergers and acquisitions.

17 This deal, accounted for 40.1 percent of inbound terms of value, “Indian Mergers and Acquisitions Down 6.8 percent to $ 23.8 billion so far this year: Report”, retrieved from http://profit.ndtv.com/news/corporates/article-indian-mergers-and-acquisition-down-6.8 percent to 23.8 billion-so-far-this year-report-328113, accessed on 22 November 2013 at 2.02 pm.
First of all, the researcher has studied extensively the motives behind M&As in India with the help of illustrations of real life merger cases of Indian companies. The researcher concludes that the primary motive for M&As is synergy and growth. In the Indian context, there is a long list of synergetic mergers such as HLL-TOMCO, merger of Hindustan Computers, Hindustan Reprographics, Hindustan Telecommunications and Indian Computer Software Company into HCL, Mahindra and Mahindra’s acquisition of Jiangling Motors of China, Tata Motors acquisition of Daewaoo’s Commercial Vehicles Unit, Jet-Sahara merger etc. Firms also merge to diversify the risk and improve profitability. This strategy was adopted by the RPG enterprises whereas absorption of Ahmedabad Cotton Mills Limited (ACML) by Arbind Mills in 1979 was with a view to reduce tax liability. The most prominent merger of Tata-Corus lead to increase in market power and resulted in gaining market leadership for the combined enterprise.

The researcher concludes that M&As give numerous benefits to the organisation in form of centralised management, access to each other resources and technology; to the shareholders in the form of huge increments in wealth; to the promoters in the form of increase in size of the company and lastly to consumers in the form of quality and innovative goods at competitive prices. They have certain negative implications also. Mergers can result in acquisition of enormous economic strength by the resultant undertaking, exercise of dominance by the merged entities, elimination of healthy competition and dictation of prices by the large merged undertaking i.e. it creates a monopoly position in the market.

But in a free economy, a monopolist does not stay for a longer period as other companies enter into the field to reap the benefits of high prices set in by the monopolist. This enforces competition in the market as consumers are free to substitute the alternative products. Therefore no generalisation can be drawn and every case of merger has to be viewed distinctly in the background of surrounding circumstances.

India is one among the fastest developing countries with highly impressive growth story. But to sustain this level of growth, there needs to be a favourable environment

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conducive to development. When the economic liberalisation process began in the early 1990s, the then existing Indian laws and regulations were relatively complex and stringent. On its part, successive Indian governments have made efforts to bring the relevant Indian laws, regulations and policies in line with international practices. As it is said:

"We cannot allow the dead hands of the past to stifle growth of the living present."

If the law fails to respond to the needs of changing society, it may stifle growth of the society and choke its progress. A legislation which is too old will lose its relevance and jeopardise the objective for which it was enacted. Subsequently, Indian regulators are these days sitting on the edge, recreating and revamping the legal framework for Indian corporations. As the laws regulating or effecting M&As deal with economic situations, they are constantly evolving or changing. First of all, the MRTP Act, 1969 which curbed monopolies and thus controlled mergers was replaced by Competition Act, 2002 which promotes competition in this highly competitive era. As the economic environment was changing rapidly which required suitable adjustment in the regulations to keep pace with changing social and economic matrix and the emerging global scenario, so SEBI (Substantial Acquisition of Shares and Takeover) Regulations 1997 were overhauled in 2011 and therefore we got SEBI (Substantial Acquisition of Shares and Takeover) Regulations 2011.

The existing Companies Act, 1956 was enacted by the Indian Legislature over half-a-century ago. In the ensuing years, much as changed in the nature of business and the manner in which they are conducted both domestically and internationally. Therefore, the existing Companies Act, 1956 has been recently replaced by the Companies Act, 2013 to respond to the needs of the every evolving economic activities and business models of India Inc. The Income Tax Act, 1961 which has an effect on M&As is

amended every year with the introduction of the yearly Finance Act. So in the light of these legislative changes, the researcher has discussed and analysed the legal and regulatory framework for M&As in India.

In business combinations, in any form of merger, takeover or acquisitions the individual and community interest of various parties viz. shareholders, creditors, employees and consumers are involved from different angles. Involvement of social interests in the economic activities implies application of law with a view to regulate the activity to ensure safeguard of general public interest. Various procedural and substantive laws have been enacted to regulate business reorganisations like mergers and acquisitions so that these restructuring activities do not jeopardise the public interest by exploiting minority shareholders, investors, creditors or consumers-the end users of the company’s products. That’s why the researcher has analysed the provisions of Companies Act, 1956 which aim to protect the interest of shareholders and creditors. Section 390 to 394 (alongwith section 394A) of the Companies Act, 1956 covers the complete gamut of the legal and procedural aspects of law governing ‘corporate restructuring’ including mergers and amalgamations. Indeed, sections 391 to 394 of the Companies Act 1956 are a complete Code which is intended to be a single window clearance system whereas sections 395, 396, 396A and 494 deal with specific situations.

Under section 391, there are two basic requirements-to get the scheme approved by members/creditors and to get it sanctioned by the court (now tribunal). From the list of judicial decisions discussed, the matters which the court has to consider in giving its sanctions are:

- The provisions of the statute have been complied with;
- The class was fairly represented by those who attended the meeting and that the statutory majority are acting bonafide and are not coercing the minority.
- Arrangement is such as a man of business would reasonably approve.

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24 Astbury J. in Anglo Continental Supply Co., In re (1922) 2Ch 723 at p. 736.
Thus, compromise and arrangement covered by section 391 are of widest character ranging from a simple composition or moratorium to an amalgamation of companies. The researcher finally concludes that the provisions of section 391 together with extracts from various judgements explaining the scope of the section will enable one to confidently embark on the task of restructuring companies by way of arrangement, reconstruction or amalgamation. The role of the courts (now tribunal) is stressed in unmistakable terms in section 392. The provisions of section 392 along with various case laws clearly demarcate the power of courts under section 392 which include within its ambit the power to supervise, modify and enforce compromise and arrangement and also pass winding up order as and when the situation arises.

Section 393 stipulates the disclosures to be made in the explanatory statement accompanying the notice calling the meeting. If such disclosure norms are not followed, the scheme will not be sanctioned as can be seen by going through various case laws on the section. It is further submitted that the most important power in context of a scheme of compromise or arrangement including merger or amalgamation i.e. power to sanction a scheme is in section 391 whereas section 394 deals with other powers to facilitate reconstruction and amalgamation. Section 394 is an extension of section 391 as it provides certain powers to facilitate amalgamation of companies. The facilitating power include the power of transfer of undertaking, determination of share exchange ratio, the continuation of legal proceedings of transferor company by the transferee company, the dissolution without winding up of the transferor company, provision to be made for the persons who dissent from the scheme and other incidental matters etc.

Another important issue that has been raised through this section is the valuation of shares. The valuation of shares of the amalgamating company and the amalgamated company is perhaps one of the important aspects of the scheme of amalgamation and the basis for the allotment of shares in the amalgamated company to the shareholders of the amalgamating company in lieu of shares held by them. Valuation of shares has always been a subject of practical difficulties in the accounting profession and generally agreement is not reached on the valuation of shares. Considering the importance of the

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subject, even J.J. Irani committee to advise the governments on new Company Law set up by Ministry of Company Affairs vide order dated 2 December 2004 made important suggestions in respect of valuation matters:

“Valuation of the shares of companies involved in schemes of mergers should be made mandatory in respect of such companies. Such valuation should be carried out by independent registered valuers rather than by Court appointed valuers. The law should lay out the exception, if any, to the mandatory valuation requirements. The law should also recognise valuation of incorporeal property. Valuation standards may also be developed on the lines of “International Valuation Standards” issued by the International Valuation Standards Committee. The valuation should be transparent so that the aggrieved person may get an opportunity to challenge the same before Court/Tribunal. Benchmarking of valuation techniques and Peer Review Mechanism for Valuers should also be provided for. Where an Audit Committee is mandatory for a company, the task of appointing the valuer should be entrusted to the Audit Committee. The Audit Committee should also have the duty to verify whether the valuer has an advisory mandate and had past association with the company management. The Audit committee should verify the independence of the valuer for the purpose of an independent valuation. In the case of companies not required to have Audit Committee, this task should be carried out by the Board.”

Although the Apex Court in Hindustan Lever’s Case, and Miheer H. Mafatlal’s case, has clearly settled the law but still majority of litigation in case of amalgamation is regarding dispute on share exchange ratio. But most of the courts are unanimous that they will not interfere in the determination of the exchange ratio unless there is a blatant violation. The unanimous conclusion that can be drawn from the plethora of case laws studied by the researcher is that if valuation is done by an independent professional expert by adopting the well-known and widely used methods of valuation and such valuation is approved by the requisite majority of the shareholders as required under section 391(2) of the Companies Act, it cannot be questioned unless a fraud or malafide on the part of the valuer is proved.

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Section 394A makes it mandatory to give notice of every application to Central Government. This section enables the Central Government to study the proposal and raise such objection as it thinks fit in the light of the facts and information available with it. This section marks the turning point of the law relating to mergers and amalgamation as it expects a positive role from the Central Government whereas section 395 aims to prevent the deadlock which would otherwise arise when a minority of shareholders oppose a scheme. The object of section 395 is to bring the dissentient shareholders in line with the majority and force them to part with their shares, if the specified conditions are fulfilled.

The researcher finds that under the Companies Act 1956, amalgamation can be through sanction of the court, without its sanction by order of central government in public interest. Most of the amalgamations ordered under this section by Central Government are of public sectors companies. Another mode of reconstruction can be found under section 494 of the Companies Act by means of voluntary liquidation in which liquidator transfer the assets of a company called the transferor company in consideration of shares of another company. Thus under the provisions of Companies Act, three kinds of amalgamations are allowed—one is through the shareholders and creditors resolution and getting it sanctioned by the court, second is compulsory amalgamation by the Central Government under section 396 and third one is through the route of winding up under section 494.

The company planning to merge not only has to fulfill the statutory provisions from section 390 to 396A of the Companies Act but also has to fulfill the procedural compliances as mentioned in the Rules 67 to 87 of the Companies (Court) Rules, 1959. No doubt, we now have a new legislation i.e. Companies Act, 2013 replacing the old Act. But the rules under the 2013 Act have not been framed yet, so the companies undergoing mergers or amalgamations still have to comply with the Companies (Court) Rules, 1959. The procedure under these rules is complex involving not only the compromises or arrangements between the company and its creditors or members but it also involves safeguard of public interest and adherence to public policy. These aspects
are looked after by the Central Government through Official Liquidator, Regional Director, Ministry of Corporate Affairs and the court has to be satisfied of the same.\textsuperscript{29}

The Companies Act, 1956 was enacted by the Indian legislatures over half a century ago. In that over a half century ago, a radical and drastic change has taken place in the way business is conducted. The globalisation and liberalisation of Indian economy has created a complex and dynamic business environment. Therefore, the legislature has enacted Companies Act 2013 to suit the requirements of such complex business environment. Certain sections of the old Act in the amended form have been incorporated in the new Act. In addition to that, the new Act has added robust and progressive new provisions such as cross-border mergers, short-from mergers, dispensation with creditors and shareholder meetings, statutory auditor’s certificate, valuation from experts, extinguishment of holding of ‘Treasury Stocks’, notice of meeting to be sent to various regulatory authorities, option to transferee company to remain unlisted in case of merger of listed company with unlisted company, exit mechanism for minority shareholders, approval of scheme by postal ballot and streamlining of the valuation and the accounting process.

The new Act has taken a step forward to give new dimensions to corporate restructuring through mergers and amalgamations. The aim of the new Act is to introduce certain simplistic and forward-looking concepts to bring about transparency and accountability in the age old procedure, thereby making company law regulating M&A relatively friendlier and more acceptable in the global arena. But the full impact of the law cannot be predicted here as the provisions (sections 230-240) of the new Act regulating M&As have not been notified and no rules framed. But the new Act raises certain areas of concern which the regulators should pay heed to while notifying rules and issuing clarifications.

As various legislative provisions regarding mergers and amalgamation have developed and become an inseparable part of the corporate jurisprudence with the help of judicial perception, that’s why steps various provisions of the Companies Act have been explained with the help of case law. The topic of mergers and amalgamations in general

\textsuperscript{29} J.C. Verma, 2009, p. 425.
is fraught with litigation as no scheme can be sanctioned without court’s approval. Thus court’s have to play a very vital and potent role. It is not only an inquisitorial and supervisory role but also a pragmatic role which requires the forming of an independent and informed judgement as regards the feasibility or proper working of the scheme and making suitable modifications in the scheme and issuing appropriate directions with that end in view.\textsuperscript{30}

The researcher has highlighted many instances of the past where merger proposals have been turned down by the courts derailing many dreams as in the case of Wood Polymers Ltd.,\textit{In re},\textsuperscript{31} Pioneer Dying House Limited v. Dr. Shanker Vishnu Marathe,\textsuperscript{32} Vodafone Essar Gujarat Ltd.,\textit{In re},\textsuperscript{33} Rajeev S. Mardia and Rasik S. Mardia\textit{In re},\textsuperscript{34} AOP (India) (P.) Ltd. Workers Union v. Official Liquidator,\textsuperscript{35} and Integrated Finance Co. Ltd. v. Reserve Bank of India (SC).\textsuperscript{36} To sum up, the court/now tribunal is not required to examine the scheme in the way of a carping critic, a hair splitting expert, a meticulous accountant or a fastidious counsel. However at the same time, the court is not bound to superficially add its seal of approval to the scheme merely because it received the approval of the requisite majority at the meeting held for that purpose. The court is required to see that all legal requirements have been complied with. At the same time, the court has to ensure that the scheme of arrangement is not a camouflage for a purpose other than the ostensible reasons. If any of the aforesaid requirements appear to be found wanting in the scheme, the court can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously x-ray the same.\textsuperscript{37}

The first attempt at regulating takeovers was introduction of clause 40 in the Listing Agreement. But the clause suffered from major lacunas due to which it was replaced in 1990 by introduction of clause 40A and 40B in the Listing Agreement. But even the amended clauses were unable to provide a comprehensive regulatory framework

\textsuperscript{30} Mafatlal Industries Ltd.,\textit{In re}, (1995) 84 Com Cases 230 (Guj.).
\textsuperscript{31} (1977) 47 Com Cases 597 (Guj.).
\textsuperscript{32} AIR 1967 Bom 456.
\textsuperscript{33} (2012) 115 SCL 94.
\textsuperscript{34} (2010) 103 SCL 72 (Guj.).
\textsuperscript{35} (2011) 105 SCL 75.
\textsuperscript{36} (2013) 121 SCL 94 (SC).
\textsuperscript{37} Supreme Court in \textit{Integrated Finance Co. Ltd. v. Reserve Bank of India}, (2013) 121 SCL 94 (para 43).
governing takeovers due to their limited applicability and weak enforceability. But still they made a good beginning towards regulating takeovers and acquisitions in India.

As the process of takeovers is complex and is closely interlinked to the dynamics of the market place, the SEBI in pursuant to the powers vested in it under section 30 of the SEBI Act, 1992 came out with SEBI (Substantial Acquisitions of Shares and Takeovers) Regulations in 1994. It was a maiden attempt in India to regulate in an organised manner ‘takeover’ of a quoted company. Within two years of the working of regulations, a need was felt to improve the regulations to make them more comprehensive. Therefore, Bhagwati Committee was constituted which came out with a new set of regulations in 1997.

The economic environment was changing rapidly which required suitable adjustment in the regulations to keep pace with changing social and economic matrix, the 1997 regulations were amended 23 times in 13 years which created more confusion than clarifying the regulatory status of the law. The number of takeovers of listed companies increased from an average of 69 a year during the period between 1997 and 2005 to an average of 99 a year during the period between 2006 and 2010. Taking into consideration, the growing level of M&A activity in India, the increasing sophistication of takeover market, the decade long regulatory experience and various judicial pronouncement, it was felt necessary to review the 1997 Code and to bring it in line with the current understanding of the international market. The Indian capital market has witnessed a lot of changes since the Takeover Code was enacted in 1997. Based on the recommendations of the TRAC committee, international practices and feedback from interest group and general public, the SEBI notified new SEBI (Substantial Acquisitions of Shares and Takeovers) Regulations, 2011 (Takeover Code 2011).

It is important that the process of substantial acquisition of shares or takeovers is not only fair but also equitable to all the parties involved in the process. The 2011 Code is an excellent effort in this direction which has tried to balance the interest of acquirers, promoters, large as well as small shareholders. The approval of majority of TRAC recommendations by SEBI marks the beginning of a new era in the history of India Inc. The TRAC report on which 2011 Code is based has relied on sound statistical analysis, past court rulings, analysing International Takeover Codes, and plugging of loopholes.
on the basis of recent cases etc., all of which are essential to develop a robust legislation which can stand the test of time. It has tried to incorporate the best takeover practices from around the world. The new Code tries to provide clarity to deal makers by simplifying it and aligning it with international best practices.

The Takeover Code 2011 has rightly fixed the trigger for open offer at 25 percent which is according to the recommendations of TRAC as 25 percent is the level at which promoters would be capable of exercising de facto control. Moreover, special resolution can be blocked at anything in excess of 25 percent. The open offer trigger was at 15 percent according to 1997 Code. The increase in threshold from 15-25 percent has been in accordance with the global trend and international best practices. This increase would give an opportunity to potential acquirer to acquire a stake in a company without attracting takeover regulations. There will be an increase in private equity investment in Indian companies and companies will find it easier to raise capital without triggering open offer requirements. It will pave the way for economic development and a novel step towards liberalisation. But this overreaching positive acceptance has exception in the form of blocking of special resolution and fear of hostile takeovers.

The 2011 Code has done away with multiple trigger points by providing for creeping acquisition at one level i.e. 25-75 percent and has made the position simpler. No doubt, the new Takeover Code helps the promoters to consolidate their shareholdings upto the maximum permissible level of 75 percent which was difficult under the earlier Code but on the other hand, the opportunity given to the promoters to consolidate their holding upto 75 percent may have negative impact on the market price of the shares because of the reduction in the public float. Further, it may impact the trading volume of the scrip due to reduced public float of 25 percent.\footnote{Souvik Bhadra, “SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011- Some Key Features”, retrieved from http://pxv law wordpress.com/2011/10/08/sebi-substantial-acquisition-of-shares-and-takeovers-regulation-2011-somekey-features, accessed on 8 September 2012 at 3.00 pm.}

The Takeover Code 2011 has fixed the open offer size at 26 percent, now an acquirer with a 25 percent shareholding and increasing it by another 26 percent through the open offer under the Takeover Code, 2011 can acquire 51 percent shareholding and thereby attain simple majority in the target company.\footnote{T.V. Ganesan, “SEBI’s New Takeover Code 2011 and its Impact on Corporate India”, \textit{SEBI and Corporate Laws}, 16-22 January 2012, Vol. 111, pp. 33-40, p. 37.} This can reduce the public float and

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liquidity in the market with shares being concentrated in few hands. On the other hand, such a framework (i.e. 26 percent offer size) gives to inequity – a substantial shareholder would get superior treatment by way of a complete exit as opposed to the public shareholder who would get to exit only partially if the response to open offer is larger than the size of the open offer.\(^{40}\) In this way, benefit of takeover will not be uniform. TRAC has recommended a mandatory open offer for the entire shareholding i.e. 100 percent,\(^{41}\) which is in accordance with international best practices be it UK City Code on Takeovers or Singapore Code on Takeovers.

Moreover, the new Code has created an ambiguity in definition of control and made the process of listing cumbersome and tedious. Another area in the Takeover Code which requires imminent and serious reconsideration is the abolition of non-compete fee. No doubt, factoring of non-compete fee will be a great relief for public shareholders who will be treated equally along with promoter shareholders. But on the other hand, this provision may act as repellant for promoters who will feel aggrieved by the fact that other shareholders who have been benefitting from the success of the business due to their share efforts, expertise and hard work will get the same price. Non-compete fee was not allowed in the Cairn-Vedanta merger as Vedanta has to lower its open offer price from Rs. 405 a share to Rs. 355 due to objections from Cabinet Committee on Economic Affairs.

It seems unfair to ask promoters to share the monetary grant they receive in lieu of a self-restraint on carrying out a similar business with ordinary shareholders who have no connection with this issue.\(^{42}\) Therefore, considerations put forth in the case of *E-land Fashion China Holdings Ltd.*,\(^{43}\) that non-compete fee only be allowed on ‘strong business rationale’ and when there is ‘lurking fear of competition’ are quite reasonable


\(^{43}\) *E-Land Fashion China Holdings Ltd. v. Securities and Exchange Board of India* (2011) 107 SCL 406 (SAT-Mum.).
ones as they balance the interest of both the parties. The 2011 Code has tried to speedify the open offer process by reducing it to 57-day period. It has adequate provisions for disclosures to bring about transparency in the transactions and assist the regulator to effectively monitor the transactions in the market. The 2011 Code has made it mandatory to disclose all encumbrances of shares including pledge, lien and any other like transactions after the Satyam fiasco. If proper pledge disclosure norms had been in place than Ramalingan Raju would not have been able to manipulate accounts this far. So 2011 Code has replaced the word ‘pledge’ introduced by amendment in 2009 to the Takeover Code 1997 with ‘encumbrances’ and broadened the scope of regulations. The code has also endeavoured to improve corporate governance standards.

Baring the difficulties or lacunas highlighted in the research, the researcher believes that the new Takeover Code could pave the way for a transparent environment for M&As and will go a long way in curbing various kinds of undesirable practices affecting our capital market and will protect the interest of small investors from manipulations of any kind.

Combinations whether in the form of mergers, amalgamations or acquisitions are very important for a developing country like India. They provide numerous advantages to an economy like India in the form of diversification of business, increased synergy, accelerated growth, tax benefits, improved profitability etc. They enable foreign collaboration through cross-border mergers and enable companies to withstand global competition. But on the other hand, they may lead to monopoly or create barriers to entry and similar anti-competitive practices. Therefore, they need regulation. The need to swiftly permit such mergers which are beneficial to the economy and prohibit anti-competitive ones has led to the formulation of merger control regime all over the world.

In India, mergers were regulated under the MRTP Act, 1969. With the focus on curbing monopolies and not on promoting competition, the MRTP Act became obsolete in certain respects in the light of international economic development relating more particularly to competition laws. But with the economic liberalization making sweeping changes in industrial and trade policies, foreign investment rules, capital controls and

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44 Milan Mahendra Securities (P.) Ltd. v. SEBI (2007) 76 SCL 365 (SAT-Mum.).
other spheres, it was felt that there is a need for a new and modern competition law in the place of the old MRTP Act.\textsuperscript{45} Thus Competition Act, 2002 came into existence which aims to protect the whole market, players in the market including consumers from appreciable adverse impacts of combinations. The Act was amended in 2007 to plug a number of loopholes. As a critical step to implementing the merger control regime, the Commission also notified the implementing regulations tilted “The Competition Commission of India (Procedure in Regard to the Transaction of Business Relating to Combinations) Regulations, 2011.” The relevant provisions of the Competition Act along with these regulations complete the merger control framework in India. The relevant provisions of Competition Act, 2002 that regulate combinations are section 5, 6, 20, 29, 30 and 31.

Section 5 of the Act has set certain threshold limits and combinations below the given thresholds are beyond the jurisdiction of the Commission. But combinations above the aforesaid thresholds require mandatory notice to CCI. Section 6 prohibits combination which causes or is likely to cause an appreciable adverse effect on ‘competition’ within the ‘relevant market in India’ Mandatory notice to Commission is also provided in this section. The Commission shall have regard to factors mentioned in section 20(4) while deciding whether a combination would have or likely to have appreciable adverse effect on competition in India. The Act prescribes ‘rule of reason’ approach while inquiring into any combination, as the last factor mentioned in section 20(4) says that whether the benefits of the combination out-weigh the adverse impacts of the combination. This recognises that a merger can have adverse effects but it could also have positive gains for the economy such as economies of scale and increased efficiency.

In addition to that, merger control under our competition law involves \textit{ex ante} review i.e. it is based on preventive theory as cost of de-merging entities after merger has taken place is very difficult and involve heavy costs. Our Competition Act, 2002 introduced a system of pre-merger voluntary notification system which was changed to pre-merger mandatory notification system by Competition (Amendment) Act, 2007. After receiving notice, Commission moves to inquire and investigate into the combination. After

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inquiring and investigation into the combination, the commission can approve, disapprove or approve the merger with certain modifications. Giving of notice is mandatory and failure to give notice attracts a penalty of 1 percent of total assets or turnover, whichever is higher. An appeal against the order of CCI lies to Competition Appellate Tribunal (CAT) within 60 days of the receipt of the order of CCI. The CAT is expected to dispose off the appeal within 6 months. A further appeal from the decision of CAT lies to the Supreme Court.

Another aspect which has been highlighted in the present study is the ‘Effect Doctrine’ propounded by the Supreme Court in Haridas Exports v. All India Float Glass Manufacturers Association.\(^46\) Therefore, keeping in line with global practices, the competition law of India makes provision for extra-territorial merger control in section 32. Section 32 provides that the Commission shall have the power to inquire into combination even if it has taken place outside India provided that it has an appreciable adverse effect on competition in the relevant market in India. But this extra territorial application of domestic competition law has been criticized for its undermining of international principles relating to territorial jurisdiction of states. This principle in international jurisprudence recognises the right of every state to exercise sovereign jurisdiction over its national territory.\(^47\) Jurisdictional conflicts in the field of competition law may arise if a combination is approved by competition laws of one nation and disapproved by another. That’s why, nations should enter into memorandum of understanding with each other.

Keeping in mind, the shortcomings of extra-territorial jurisdiction and the hiccups involved in the enforcement of private international law, section 18 of the Act also empowers the CCI to enter into any memorandum or arrangement with the prior approval of the Central Government, with any agency of any foreign country in order to discharge its duty under the provisions of this Act.\(^48\) Therefore, Indian Competition

\(^{46}\) (2002) 6 SCC 600.
Authorities should enter into more and more such as MOUs with foreign competition authorities to solve the problem of jurisdictional conflicts in application of extraterritoriality provision.

The gradual succession from the MRTP Act to Competition Act is one of the most important milestones as far as economic reforms in the field of competition law in the country are concerned. By shifting the focus from the stage of merely ‘curbing monopolies’ in the domestic market to ‘promoting competition’ the competition regime in India has attained recognition for its progressive ways.49 It provides for pre-merger notification, review and remedies in the form of modifications which if applied effectively can play a crucial role in regulating mergers. The merger control provisions are designed in such a way as to prevent mergers that are likely to have an appreciable adverse impact on competition.

Mandatory pre-merger notification is provided which can help in ensuring that the CCI would have relevant information of all proposed mergers above the threshold limit and would be able to avert the competition problems that may arise in case of certain mergers.50 The merger control law in India has all the elements of a progressive law and has imbibed several practices from the EU and US regimes. The underlying theme in this new enactment appears to be compliance with transparency. Despite its nascent existence, it has achieved tremendous success. But there are certain problems which need to be addressed so that the law can effectively regulate mergers.

These areas have been highlighted in list of proposals (mentioned later on) such as lack of guidelines on calculation of thresholds, no specific inclusion of arrangements, long waiting period of 210 days and conflict of competition law with other Indian laws on M&As such as Companies Act and SEBI Takeover Code, ambiguity in definition of ‘control’ and overlap of jurisdiction between CCI and other sectoral regulators where as combination regulation suffer from lack of clarity on ‘insignificant’ local nexus and de-

minimus provision etc. These areas need to be elaborated upon and need further modification.

But overall, the efficiency of the CCI is commendable as it has been approving combinations in a time bound manner given the nascency and ambiguities that are prevalent in the regime. Therefore, such lacunas and ambiguities in the regime should be removed at the earliest to make it more effective. If the various problems and concerns raised by the current provisions on merger regulation in the Competition Act are addressed, the Act can be an effective instrument in achieving its aim and preventing anti-competitive practices in the market. Moreover, none of the merger control decisions that have been arrived so far have resulted in any substantive legal issues, which have made the role of the Commission much easier. The true test of the Commission will only arise when complex and substantial legal issues are brought before it. But Commission should be commended for correctly analysing most of the decisions and to arrive at clearances ahead of the time limit set by Combination Regulations.

Thus the CCIs responsiveness to the industry concerns and its eagerness to develop a unique body of jurisprudence comparable to that of more advanced jurisdictions, is encouraging and puts to rest any fears of merger control acting a road block to M&A activity in India.\footnote{Nisha Kaur Uberoi and Cyril Shroff, “Latest Indian Merger Control Trends Analysed”, retrieved from http://www.iflr.com/article/3094583/latest-indian-merger-control-trend-analysed.html, accessed on 1 February 2013 at 11.00 am.} Overall, the Indian competition law is forward looking and intends to create an economy which will enable all to enjoy the fruits of developments through vigorous competition.

Despite continuing economic uncertainty and underlying concerns about a double-dip recession in many developed markets, M&A is still high on the agenda of large companies.\footnote{Ernst and Young, “Global M&A Tax Survey and Trends”, retrieved from www.ey.com/Publication/vwluAssets/Global_M-A_tax_survey_and_trends_The_growing_role_ofthe_taxdirector/File/Global_M-A_taxsurvey_and_trends.pdf, accessed on 3 July 2013 at 2.14 pm.} The focus on the tax aspects of corporate M&A is intensifying as tax becomes even more important to deal processes and valuations than it was before. There are two reasons for this. First, is that the increasing realisation among the companies
that tax functions need to be involved much earlier in a deal process to enable them to 
evaluate tax risks and opportunities and to select a transaction structure through which 
value is most likely to be realised, tax synergies fulfilled and unwanted pitfalls avoided. 
Second, is the increasing extra scrutiny of deals by tax and revenue authorities.

Transaction costs, such as tax liabilities, provisions of Income Tax Act, transfer taxes 
likes stamp duty etc can often make or break a deal, if not addressed appropriately, 
irrespective of whether the transaction is a cross-border, M&A deal or an internal 
reorganisation.\textsuperscript{53} That’s why, a company planning a merger or a takeover, need to do 
intensive tax planning before finalising the deal to get the maximum tax concessions 
and benefits in the deal. A company has to analyse the tax laws of the country before 
planning M&A deal. In case of cross border M&As, tax laws of the other jurisdiction 
involved has also to be studied. In addition to that, acquirer should evaluate the tax 
implications under the existing DTAA of India with the acquirer country to structure the 
M&A deal in the most tax efficient manner.

In any scheme of amalgamation, tax considerations, as already mentioned, predominate 
and inevitably direct the manner in which the entire scheme has to be designed. Any 
failure to take proper account of the tax implications might make the concerned 
companies and their shareholders repent later when they will not be in a position to 
retrace their steps. Thus tax planning in cases of amalgamations of companies is 
perhaps the most vital aspect of decision-making involved in framing of the scheme of 
amalgamation.\textsuperscript{54} The requirements under Company law are by and large procedural in 
nature and although it is the fulfillment of those requirements that results in the scheme 
of amalgamation being legally allowed to materialise, it is the framing of the scheme of 
amalgamation with a special emphasis on tax considerations which would determine in 
the long run the success or failure of the scheme. Thus, the amalgamating and the 
amalgamated company as well as their shareholders are entitled to so arrange their 
arfairs and transactions (which form an integral part of the scheme of amalgamation) as

\textsuperscript{53} Ernst and Young, 2012, p. vii. 
\textsuperscript{54} R. Santhanam, \textit{A Guide to Amalgamations of Companies with Special Reference to Tax Planning}, 
to ensure that either the liability to tax is not attracted or the tax liability which is attracted is the least.

If the amalgamating and the amalgamated company fulfill certain conditions under the provision of Income Tax Act, 1961, they are entitled to certain tax benefits. So both the amalgamating and the amalgamated company should keep those conditions in mind while planning a merger or amalgamation to get the tax benefits. In India, law provides for ample benefits in the form of various provisions to companies going in for amalgamation. A very good incentive is provided for revival of sick units in the form of section 72A. With the introduction of section 72A in 1978, many mergers-look place to avail the tax benefits. But in today’s scenario, we can assert that the tax consequences are the off-shoot of the merger and not vice versa. No doubt, companies can arrange their affairs, so that tax liability is reduced to minimum but if the sole purpose of the merger is to avoid payment of tax, then the courts may not approve such merger as happened in case of Wood Polymers Ltd., In re.\(^{55}\) This decision of Gujarat High Court was further endorsed by the Supreme Court in McDowell and Co. Ltd. v. CIT.\(^{56}\)

The tax implications of mergers and acquisitions will be incomplete without studying in detail the ongoing tax dispute between the Indian tax authorities and Vodafone in connection with taxability of the $11.2 billion Hutch-Vodafone deal. This case is one of the biggest-controversy in Indian multi-jurisdictional M&A history. This case provides a good case study of interface between law and business strategies. The Supreme Court,\(^{57}\) while adopting look at approach as against the look through approach adopted by the Bombay High Court ruled that the offshore transaction herein is a bonafide structured FDI investment into India which fell outside India’s territorial tax jurisdiction and hence not taxable.

There was widespread discontent among the government according to whom, this decision will set a precedent that will jeopardise thousands of crores of potential revenue to the exchequer. It will encourage tax avoidance through artificial devices-holding companies, subsidiaries, treaty shopping and selling valuable properties

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\(^{55}\) (1977) 47 Com Cases 597 (Guj.).

\(^{56}\) (1985) 154 ITR 148 (SC).

\(^{57}\) Vodafone International Holdings B.V. v. Union of India (2012) 111 SCL 67 (SC).
indirectly by entering into a maze of framework agreements. In the way, according to the Government of India this judgement will encourage innovative tax avoidance devices.

Tax laws in many countries tend to be complex, but with India beginning to occupy an increasingly important place on the world stage, the benchmark for comparison has to be changed. The Indian tax laws need to be made less complex, transparent and more certain. Certainty and stability form the basic foundation of any fiscal system. Tax policy certainty is crucial for tax payers to make rational economic choices in the most efficient manner. But this principle was totally disregarded by the retrospective tax amendments introduced by the Finance Act, 2012 with retrospective effect from 1 April 1962. The uncertainty created by these amendments and deviation from international practices prevailing had a negative impact on the investors sentiment and the Indian economy saw a rapid decline in FDI to India (almost 65 percent in April-June 2012).

The M&A activity also saw a decline in 2012 after the introduction of retrospective tax amendment. That’s why, Government constituted Shome Committee to provide for recommendations on taxation of indirect transfers. The recommendations of committee truly align with norms of certainty, predictability and stability of tax laws. But the Government did not follow the recommendations and the provisions regarding retrospective amendments of indirect transfers were retained. So the researcher, has given certain suggestions regarding this later on in this chapter to make the law more certain, clear and predictable. If after five years of the deal, the laws can be suddenly amended with retrospective effect to bring the deal within the taxation net (as in Vodafone case), it is certainly going to shake investors confidence. The result is that the major US corporates and bigwigs expressed their concern over investing in India due to retrospective taxation introduced by Government of India, when Prime Minister Narendra Modi had an interaction with them on his recent visit to US in the end of September 2014.

In addition to various benefits available to companies on amalgamations, tax implication of share acquisition & business acquisition are different and should be taken care of by the prospective buyer or the seller. In a country, where there is steep increase in financial transactions with large number of mergers and acquisitions happening, there is a need to post an efficient, reliable and transparent transfer pricing regime having regard to the implications it can have on the international trade. Though, we can be proud of having a more reliable transfer pricing provisions compared to other countries, the need to emerge as a stronghold of the international trade, India has to reinvigorate its taxing procedures. No doubt, India has done so by introducing provision of Advance Pricing Agreement and further clarifying safe harbour provisions in its Finance Act, 2012, to further bring its transfer pricing regime according to international norms and standards and it should continue to do so.

Indian revenue authorities, too, have not lagged behind in jumping on the transfer pricing bandwagon. They have also started getting extremely aggressive on transfer pricing issues. This has lead to increase in transfer pricing litigation. Therefore, it would be prudent for Indian companies undertaking M&A to conduct an exhaustive transfer pricing analysis and revisit their transfer pricing strategies. A strong transfer pricing policy is required to be maintained by them. The above should be supported by legal agreements that have been entered between the concerned entities to substantiate the terms of arrangements to mitigate risk of potential disregard of the restructuring payment made or not made by the taxpayer.

Lastly, the most controversial of all-GAAR. GAAR empowers the revenue authorities to deny the tax benefits of transactions or arrangements which do not have any commercial substance or consideration other than achieving the tax benefit. India too opted for GAAR in the Finance Act, 2012. But GAAR is one of the proposals which is facing maximum criticism from within as well as outside India. The issue is not that India should have GAAR or not, but the issue is more around possibility of its misuse.

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and ineffective implementation given that the provisions for GAAR in our Income Tax Act are too broad and wide and without adequate safeguards. To add fuel to the fire, this is accompanied by the time consuming dispute resolution system in India (e.g. Vodafone dispute which started in 2007 and is still not finally settled) wide powers of Indian tax officials and more so their unpredictable assessment of a case. Thus, worry of international community and investors is completely understandable. No doubt, the concept of GAAR is as such against the rule of law which requires law to be certain and predictable so that law abiding citizens are aware of what is permitted and prohibited.

But still GAAR is important for a country as it is not humanly possible to make laws for each and every tax avoidance tool used by the creative taxpayer. But seeing the widespread discontent among the investors community, its negative impact on the quantity and value of M&A deals in India, its implementation was rightly deferred till 2016. Because given the inherent subjectively involved in GAAR application, it does carry the risk of arbitrariness in tax administration. Therefore, when it comes into from 01.04.2016, it should be accompanied with adequate safeguards, most of which were provided by Shome Committed. Further, it will have to be seen how many recommendation of the Committee are incorporated in the rules which are to be framed by the Government. GAAR requires further amendments and safeguards, which are suggested in the later part of the chapter.

Finally, it can be said that the intent of the Indian law makers to legislate GAAR is progressive in so far as tax policy decisions are directed. But the success of GAAR lies in its judicious and sensible implementation. Let’s not forget to say few words on the uncertainty created in the Indian tax environment by the rulings of various judicial forums. But the recent trend seems to be that the Indian tax authorities will pierce the corporate veil to look into the real nature of a transaction to determine the capital gains chargeable to tax in India. Although the decision in Idea Cellular Case, is fact specific, but it is expected to have wide repercussions. The intention to bring overseas M&As within the Indian tax net is further fortified by the retrospective tax amendments

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in the Income Tax Act. Thus, given the potential tax implications of such deals, taxpayers need to consider the risks and potential pitfalls to avoid unintended consequences.

India need significant reforms in tax administration. International taxation in India is already faced with serious administrative challenges. The prominent among this is that the dispute resolution mechanism in India moves slowly. There is need to speed up the litigation procedure. Moreover, the ineffectiveness of the alternate dispute resolution mechanism also pose a serious challenge. Though, the government has taken some positive initiatives to facilitate expeditious resolution of tax disputes, the real problem lies in the implementation of these decisions. One step towards it will be that the National Tax Tribunal should be made functional. In most countries, there are provisions for ‘advance ruling’ to obtain a clear idea before hand, which could be in our country also. To conclude, we can say that the tax laws face a huge challenge in the present scenario. A balance has to be maintained between the interest of both domestic and international investors and the revenue-authorities. India has to reinvigorate its tax laws in such a way that M&A are not negatively affected and tax avoidance and evasion is also checked. So, the current scenario presents this daunting task to the Indian legislators.

Further, the researcher has delved into the issue of stamp duty in case of mergers and amalgamations because the incidence of stamp duty is an important consideration in the planning of any merger. In fact, in some cases the whole form in which the merger is sought to take place is selected taking into account the savings in stamp duty. The applicability of stamp duty on the court order approving the scheme of arrangement has been a keenly disputed issue for a considerable period of time owing to lack of preciseness in the Indian Stamp Act.

Initially, companies used to take a position that the court orders are not ‘conveyance’ as defined under the stamp duty law, therefore no stamp duty is payable on the same. In order to overcome the above contention, some of the states amended their Stamp Acts

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and included a specific entry for court orders passed under section 394 of the Companies Act. But consequent to such amendments, companies started taking a position that stamp duty is payable only in the states that have a specific entry for the court orders.

Though, in the judgement of *Hindustan Lever Ltd.*,⁶⁴ the Supreme Court laid down that the court-order is a conveyance and therefore subject to stamp duty but the certain companies continued to take the position that since this judgement was in the context of Bombay Stamp Act, it is not applicable to the states that do not have any specific entry and even some states took the position since transfer of property in a scheme happens by way of vesting, pursuant to a court order, and therefore, cannot be regarded as an instrument liable to stamp duty. This view was particularly taken by Division Bench of Calcutta High Court in *Madhu Intra’s Case*.⁶⁵ Thus, multiplicity of High Court rulings pointing in different directions has created a lot of confusion. Therefore, it is submitted that the Indian Stamp Act be suitably amended to avoid such extensive litigation in future. But majority of High Courts have held that transfer of property through court’s order in a merger or amalgamation is conveyance chargeable to stamp duty. Even recently the Delhi High Court had tried to remove the above uncertainty by including court order under Section 394 in the definition of ‘conveyance’ and hence stampable irrespective of a specific entry in the States Stamp Act. Nonetheless, the ruling of Delhi High Court assumes great importance in deciding stampability of mergers in states which have not enacted their separate stamp legislation. Thus, its possible impact upon such states cannot be over-emphasised.⁶⁶

The lack of uniformity of acceptance of a single stand point throughout the country and differential stamp duty regime in different states has created acute confusion on the issue. This confusion needs to be removed and uniform stand should be taken throughout the country. In addition to uniform stamp duty laws, rate should be uniformised and lowered all over India as lower rates will translate into increased revenues for the government in the long run.

⁶⁵ *Madhu Intra Ltd. & others v. Registrar of Companies* (2006) 130 Com Cases 510 (Cal.).
The recent years have seen a number of mega mergers between companies headquartered in different parts of world i.e. creating truly global enterprises in the end. The concept of cross-border mergers has gained prominence in India post-2000 due to effect of privatisation, globalisation and deregulation acting as necessary catalysts. Surely, the founding fathers of the TATA groups would not have dreamt about acquiring Ford, Jaguar, Land Rover or cracking the deal with Corus. With the cross border merger and acquisition activity in India growing at an exponential rate, a stage has been set for smaller business enterprises to take the plunge and this seems quite beneficial for the Indian economy.\footnote{Priyanka Rathi, “Cross-border Mergers and Acquisitions in India with Special Reference to FEMA”, retrieved from \url{www.taxmann.com/taxmannflashes/flashart 9-10-10_12.htm}, accessed on 10 October 2013 at 9.10 pm.} Indian companies see ‘going global’ as a strategic priority.

Initially, when cross-border mergers started taking place in India, the trend was more towards inbound deals. But, the ‘Indian Story’ has seen a profound shift in gear and direction during 2006 as this has seen the arrival of India as a shaping force evident in the powerful new trend towards overseas acquisitions by Indian companies. In fact, year 2006 was a remarkable year in Indian corporate history as Indian companies acquired strategically significant companies across the globe. The confidence within the Indian business community, combined with the natural enterprenurial zeal and intuitive ease with global business models have made them an easy target for foreign companies and an attractive acquirer for foreign companies.

The liberalisation process which was initiated due to India’s obligation to WTO lead to freedom of private sector from many regulations such as licensing, investment, regulation on price, distribution and import of raw materials. The liberalised economic policies introduced by the Government of India in 1991 and formation of WTO have exposed Indian industry to several challenges and in response to this, the Indian economy witnessed a sharp rise in mergers and acquisitions including cross-border M&As.

In case of cross-border mergers, the foremost aspect of the Indian legal scenario that any foreign entity desirous of acquiring an Indian company must pay attention is the FDI policy of India. In addition to Company Law, Takeover Code, Competition Law
and Taxation laws that regulate Cross-Border M&As in India, provisions of Foreign Exchange Management Act read with Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 become relevant.

The researcher has further analysed the area of the cross-border mergers in the light of fall out of Bharti-MTN deal. The attempt by Bharti enterprises to integrate with the South African giant, MTN Ltd., however, brought many lacunas in the Indian laws out of the closet.68 The 23 billion dollar deal has been taken up for study because of novelty in the process of carrying of the cross-border mergers and it highlights the continuing interface between the growing Indian economy and the existing framework of capital control in the country. The deal faced hurdles in the form of dual listing, changes in FDI policies, issue of GDRs under the SEBI Takeover Code 1997. Both the companies since then have parted ways and adopted separate strategies. Bharti Airtel acquired 70 percent stake in Bangladesh based Warid Telecom in 2010. It also acquired African assets of Zain Telecom, a Kuwait based telecom company. It does seem that both the companies have moved on from the failed deal but certainly this deal’s exceptional potential because of the market penetration opportunities available in the African markets and the low cost model of Bharti Airtel cannot be ignored.69

This deal should act as an eye opener for the Indian policy makers because the current state of globalisation makes it imperative that this deal would not remain a one off incident.70 Hence need of the hour is to make necessary changes in the law and regulatory procedures so that such a situation does not arise in future and to prevent companies from trying back door entries when a legally regulated front-door entry is possible.

Before-and-after comparisons of cash-flow returns of acquired firms lead to the conclusion that acquisition bring wealth gains to distressed firms and that those gains

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70 Esha Shekhar and Vasudha Sharma, 2011, p. 113.
are greater in cross-border M&A transactions than in domestic ones.\textsuperscript{71} The significant role of cross-border mergers and acquisitions lies in encouraging longer-term reforms, such as operational restructuring and reallocation of assets in firms. Cross-border mergers help a company to improve efficiency, global competitiveness and corporate governance.

India’s economic liberalisation in 1991 sparked fears that the country would be overrun by foreign multinationals. However, Indian companies have not only competed with foreign companies operating in India but also managed to compete with them in their home ground. Buoyant Indian economy, extra cash with Indian corporates, government policies and newly found dynamism in Indian businessmen have contributed to rise in cross-border M&A in India.\textsuperscript{72}

Now, let’s focus on the issue of role of intellectual property in the field of mergers and acquisitions. Intellectual property is fast becoming the biggest incentive for mergers and acquisitions. The driving force behind a majority of mergers completed during the past decade has been the acquirer’s desire to obtain the target’s intellectual property assets.\textsuperscript{73}

Intellectual property is very important and critical to a business and its growth. Successful multinational companies give tremendous value to their intellectual property. When Nestle acquired Rowntree for more than its double value, it was due to intellectual property rights of Rowntree. Therefore, due diligence, valuation and audit of Intellectual Property Rights (IPRs) in M&A is extremely essential. The Volkswagen story is an excellent example of consequences of failure to conduct Intellectual Property (IP) due diligence in M&A.

The acquiring company should make sure that it gets the ownership of intangible assets or if not ownership, atleast it should get licence to use it. If it does not get to use the


IPRs of the acquired company due lack of due diligence, it may lead to failure of merger in case the main motive of merger or acquisition is to use the intellectual property rights of the acquired company. To ensure success of merger, both buyer and seller should conduct valuation and due diligence of IPR’s before merger. In case of seller, this will ensure that he gets proper price for his company and full value for the precious IPR’s he was sold alongwith other assets. Conversely, buyer can ensure that he does not overpay for the company he is acquiring so that he can realise after-merger synergies.

But it is common experience that companies and corporate entities do not give much importance to the portfolio management of the intellectual property rights. Files, certificates, applications and up to date information may not be traceable and organised and when some body some day digs out these files, it is found that precious intellectual property rights have been lost due to failure to renew or non-prosecution of application or proceedings.74 In case of Indian companies, knowledge of laws on various IPRs such as patents, copyrights, trademarks, industrial designs etc. as well as rules of transmission and assignment under these laws is extremely essential, so that one gets proper ownership or at least licence to use them as per provisions of Indian laws.

Such is the importance of IPRs in today’s scenario, that many mergers fail to create value if intellectual property rights are lost due to failure of conducting due diligence, valuation and audit at proper time. To sum up, we can say that as the global economy races towards an information based economy, the intellectual property will be the dominant force in future commercial transactions like mergers and acquisitions. This makes proper and timely due diligence, valuation and audit of intellectual property rights before entering M&A transactions indispensable for the success of such transaction.

We all know that mergers, amalgamations and acquisitions are undertaken for the purpose of expansion or growth. However, there is more to such transactions than joining two legal entities or creating a new one. A merger can join two cultures, two

sets of procedures and protocols, two sets of policies and change the employment environment and prospects of several hundreds of employees, who have been the bedrock of past successes and the key to future values. But unifying the employees of both the companies under one umbrella is definitely a huge and a challenging task as the working style, practice and culture etc of the amalgamated companies may differ. M&As may lead to job loss, relocation, distrust, misunderstanding, hostility towards the acquiring company etc. On the other hand, acquirer company’s employees can feel a sense of invasion which may lead to resentment at times. All this may further result into frustrations, poor performance and low productivity. This situation is further exaggerated in case of cross-border mergers due to difference in national cultures and working style.

Many mergers failed to create value due to non-integration of human resources of both the companies. One of the most prominent failures due to lack of human resource integration is the merger of Air India-Indian Airlines. In this case, more attention was devoted to discussion around non-core issues such as long-term fleet acquisition, establishing subsidiaries for ground handling and maintenance then on human resources-one of the most precious asset of any organisation which lead to a potentially messy situation for the merged enterprise. In case of many mergers, dissatisfied employees have even knocked at the door of our courts and court has done the needful in many cases to protect their rights. All such cases have been already highlighted in our study.

To sum up, inspite of overwhelming importance of the human resources in M&As, they are often ignored as more stress is laid on the financial aspects of the transaction. But they should be addressed simultaneously alongwith issues of financial and legal integration if not well before. The success of a merger and acquisition depends on how well an organisation deals with issues related to its people and cultural integration. If success has to be achieved in the market place, what is required is a cohesive, well-integrated and motivated workforce willing to take on the multifarious challenges that arise on the horizon from time to time.

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7.2. Suggestions

To conclude from the above part, we can say that mergers and acquisitions are an integral part of the new economic paradigm, especially in today’s booming Indian economy. They have made Indian companies truly global enterprises able to compete with best in the world. That’s why, laws regulating M&As should promote corporate restructuring through mergers and acquisitions. As a result, Company Law, Takeover Code, Competition Act, Taxation Law and FEMA Laws have been constantly evolved by our policy makers, still a lot of loopholes are still there. So here under, the researcher forwards a blueprint of proposals to further promote M&As and make the process of M&As smoother.

7.2.1. Suggestions for Amendments in Company Law

Business restructuring through mergers, amalgamations and takeovers have become an important perspective of today’s world. In the Indian scenario, the controls and restrictions of seventies and eighties were replaced by liberalisation and free trade post-1991. Therefore, various laws were modified and re-enacted to suit the liberal environment. But the Companies Act, 1956 was continued as such thereby causing hurdles to restructuring through M&As. That’s why it was only last year that a new Companies Act 2013 received presidential assent on 29 August 2013. The new Act aims to be forward looking, more transparent, compact and able to adequately respond to the needs of the ever evolving economic activities and business models of India Inc. But there are certain areas of concern which the regulators should pay heed to while notifying rules and issuing clarifications.

(1) Provisions Regarding Cross-border Mergers to be Relaxed: Cross-border M&A transaction present tremendous opportunities for economic growth and increase in shareholders or investors value. They should be allowed freely by the law. But the Companies Act 1956 did not permit the Indian company to merge into the foreign company i.e. outbound mergers. But the Companies Act 2013, has removed the restriction and allowed Indian company to merge into a foreign company but only of select jurisdictions as may be notified by Central Government from time to time. Introducing qualification such as, only allowing transactions with certain notified
jurisdiction has the potential to erode away the benefits of this provision. This will restrict the scope of outbound mergers. In the view of the researcher, this provision needs to be revisited in the new Act.

(2) Removal of Thresholds for Making Objection: Section 230(4) provides that persons holding minimum 10 percent of shares or 5 percent of total outstanding debt can raise objections to the scheme. But the interest of small shareholders and creditors are undermined as it substantially erodes their power of objections. The minority would need to commit substantial effort in pooling stakes if they want to raise objections, unless a large institutional shareholders agrees to take their cause.

(3) Notice of the Scheme to Various Regulatory Authorities: Section 230(5) of the new Act provides that notice of the scheme should be additionally provided to various regulatory authorities such as the Income Tax Department, SEBI, RBI, CCI, respective stock exchanges etc. But this will increase the paperwork and the already cumbersome documentation process in M&A will be more time consuming. This provision should be done away with in the 2013 Act and notice to these regulators to be given only in cases when it is required under other acts and regulations.

(4) Dispensation of Shareholder’s Meeting: In order to speed up the process of mergers, section 230(9) of the 2013 Act allows for dispensation of creditors meeting in certain cases. This should be extended to shareholders meeting also in similar circumstances when shareholders having 90 percent in value agree to the scheme as often calling the meeting can be a lengthy and cumbersome process which could waste both transferor and transferee company’s vital time and make the process of merger more lengthy.

(5) Section 396A/239 to be Done Away With: Section 396A of the 1956 Act has been retained as such in section 239 of the 2013 Act, which provides that books and papers of the amalgamated company or acquired company shall not be disposed of without the prior permission of the Central Government and before granting such permission, the Central Government may appoint a person to examine the books and papers to ascertain any evidence of commission of offence. The Companies Act, 1956 had multiple checks before the sanctioning of the scheme by the Court/Tribunal in form of two provisos to
Section 394(1) both of which required reports from Registrar and Official Liquidator to keep a check on malpractices prevalent in the scheme.

In the researcher’s view, it would have been better if the two provisos were retained in the new Act as it is always better to prevent any malpractices before the sanctioning of scheme. If the scheme is against public interest then it should not be sanctioned by the court. If any offence is committed in connection with merger or scheme of merger is against public interest, it should be ascertained beforehand. As when amalgamation or acquisition is completed, undoing such amalgamation or acquisition will involve heavy costs for both the companies as well as the economy. Moreover, section 209(4A), of the 1956 Act stipulates that the books of account of every company relating to a period of not less than eight years immediately preceding the current year together with the vouchers relevant to any entry in such books of account shall be preserved in good order. This provision has been retained in the form of section 128(5) in the Companies Act 2013. So section 128(5) of the 2013 Act along with the two provisos (which should have been retained in the 2013 Act) will provide sufficient checks and section 239 should be done away with. Moreover, pre-merger checks are more effective and more rational than post-merger checks. Thus, both the proviso should be added to section 232 and section 239 should be done away it as it corresponds to section 396 A which has outlived it utility. Besides, there are also checks in other acts which can play the role of this section.

(6) Approval of the Scheme: The 1956 Act as well as the 2013 Act both require that scheme for merger or any arrangement should be approved by a majority in number also representing 3/4th in value of shareholders/creditors present and voting. The requirement of majority in number does not serve any useful purpose considering that value is simultaneously being considered as a criteria and poses an additional hurdle to approval of the scheme. Moreover, international best practices recognise value as the determining factor and does not appear to impose such additional conditions of majority in number. So section 230(6) should be modified to provide only for approval by 3/4th in value of shareholders and creditors, present and voting.
(7) Introduction of Non-obstante Clause in Section 394(2)/section 232(4):  Section 394(2) of the Companies Act 1956/section 232(4) of the Companies Act 2013 provides that when an order transferring any property or liabilities is passed, then by virtue of that order, such assets will be vested and liabilities will be transferred to the transferee company. Since the section does not contain a non-obstante clause, it creates immense practical difficulties in actual transfer of the various properties/assets of the transferor company into the transferee company. It is observed that section 32 of the Sick Industrial Companies (Special Provisions) Act, 1985 has clear provisions in the nature of a non-obstante declaratory order while sanctioning a scheme of restructuring. It is therefore recommended that a non-obstante provision like, ‘Notwithstanding, anything to the contrary in any other law for the time being in force’ to be introduced in section 232(4) of the 2013 to ensure that the assets and liabilities of the transferor company absolutely vest in the transferee company and the transferee company is not subjected to cumbersome formalities for the transfer of assets and liabilities in its own name.

(8) Multi-layered Structures to be Allowed in Genuine Cases:  Section 186(1) of the Companies Act 2013 imposes a restriction for investment through not more than two-layers of investment companies. This reduces flexibility in structuring investments especially in sectors like infrastructure and mining where it is common to have multi-layered structures to implement large projects and fulfill financial requirements. No doubt, this provision aims to check tax avoidance through multiple structures but it may act as detriment to merger and acquisition activity as many acquisitions are structured through multiple layers to avoid tax burden. Moreover, these acquisitions through multi-layered structures may have many other economic benefits. Therefore, atleast in case of genuine multi-layered corporate structures exception should be allowed.

(9) Clarification on Voting by Postal Ballot:  Section 230(12) allows voting by postal ballot. The rules to be framed under the new Act should clarify or the law should specifically clear that the voting by postal ballot should be in addition to and not complete substitution of an actual meeting of shareholders. This view of the researcher was even very recently endorsed by Bombay High Court in its judgement of Wadala Commodities Ltd. In re, the court held that:

76 (2014) 125 SCL 337 (Bom.).
“The principle of indoor democracy gives a shareholder an inalienable right to ask questions, seek clarifications and receive responses before he decides which way he will vote and shareholder’s right to persuade and right to be persuaded are of vital importance which cannot be altogether defenestrated.”

“A shareholder cannot be restricted to this level where all he can do is say aye or may but not seek any clarifications, express any doubts or reservation, or raise any questions.”

7.2.2. Suggestions for Amendments in the Takeover Code

The SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 are based on the principle of transparency, fairness and equal opportunity to all. The new Takeover Code is expected to provide transparent environment for M&As and has incorporated best takeover practices from around the world. But when those best takeover practices from around the world are applied into Indian Corporate System, certain areas of concern arise which need to be deliberated upon. These areas of concern are highlighted while suggesting amendments in Takeover Code.

(I) Clarity in the Definition of Control: Since under the New Takeover Regulations, the definition of ‘control’ remain unchanged, the ambiguity regarding ‘negative control’ continues. SEBI judgement in Shubhkam Case-brought ‘negative control’ within the purview of control under the erstwhile Takeover Code. But SAT overruled the SEBI’s view in an appeal, filed before it by saying that control is a proactive not a reactive power. It is positive and not negative. But the Supreme Court kept the question of law open and said that the impugned order of SAT will not be treated as a precedent. But the Apex Court order has disturbed the equilibrium by effectively nullifying the broader implications of the SAT order.

Due to investing in high-risk capital of a company, the private equity investors often seek certain governance and capital protection rights for tracking the growth and performance of such company. If acquisition of such rights amount to control, then

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77 Para 18 of the judgement.
78 Subhkam Ventures (India) Private Limited v. SEBI (2010) 99 SCL 159 (SAT-Mum.).
they hesitate in acquiring such rights which in turn will discourage private equity investment. Such investment is a paramount need of the day as it not only provides capital and liquidity to cash-strapped companies but also facilitates their growth and enhance their financial performance.

Therefore, having clarity on the implications of ‘negative control’ is imperative. The Supreme Court can lend clarity in the matter only if a similar case like Shubhkam comes before it again. We cannot say with certainty that how much time it may take. Therefore, it is better that SEBI amends the definition of ‘control’ in the 2011 Code and clarifies the matter. This will certainly boost the confidence of the private equity and venture capital investors in undertaking much needed large investments in listed entities.

(2) Offer Size to be Increased to 100 percent as Proposed by TRAC: An offer size of 26 percent gives rise to inequity- a substantial shareholders would get superior treatment by way of a complete exit as opposed to the public shareholder who would get to exit only partially if the response to the offer size is larger than the size of the open offer. In the view of the researcher the offer size should be increased to 100 percent from the present provision of 26 percent. The logic behind this is that if a shareholder wanted to exit a target company at the offer price mandated under the Takeover Code, there ought to be no reason for the law to deny him a complete exit.

(3) Relaxation of Funding Norms: RBI should allow more flexible norms for grant of loans for strategic investments in the Indian listed companies. There should be required amendment in this regard so that Indian acquirer also has an easy access to funds to financial acquisitions as their foreign counterparts.

(4) Auto Delisting: If the acquirer crosses the delisting threshold through the open offer there should be no further requirement to make a separate delisting offer under the delisting regulations, the company should be allowed to be delisted at one go as the union of takeover and delisting regulations as a part of the same transaction would save

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80 Such a suggestion is in accordance with international norms also Japan, Hong Kong, Singapore, in all these developed market offer size is 100% as quoted in “SEBI Liberalises Takeover Norms”, The Tribune, 29 July 2011, p. 17.
the acquirer from the cumbersome and expensive reverse book-building method required pursuant to SEBI (Delisting of Equity Shares) Regulations, 2009 and requisite approvals from the stock exchanges.

(5) **Non-compete fee should not form Part of the Offer Price:** The factory of non-compete fee in the offer price seems unfair to the promoters to share the monetary grant they receive in lieu of self-restraint in carrying out a similar business with ordinary shareholders who do not deserve to receive a share of it. Secondly, there will be increase in cost of takeovers, as non-compete fees which were previously only paid to promoters will now accrue to all shareholders. Moreover, with the introduction of this provision in the Takeover Code, the importance of promoters has been ignored considering the scenario. Therefore, this provision should be removed and the previous provision of 1997 Code to be retained in its place which said that the non-compete fee above 25 percent to form part of offer price. In addition to that, a proviso to be added to the above regulation saying that non-compete fee should be allowed only when there is ‘strong business rationale’ and ‘lurking fear of competition’.

(6) **Information as Regards Abnormal Share Price Movement:** Given the fact that the SEBI and the stock exchanges place a great reliance on timely information flows to iron out arbitrage opportunities, it seems odd that why the Takeover Code 2011 has not put forth a mechanism for forcing bidders/target to make a public announcement of impending discussions in the event of abnormal share price movements. We can follow the instance of UK where any price movement of more than 5 percent requires target/bidder to voluntarily inform the regulator.81

(7) **Provision of Disclosures on Asset Alienation should be Widened:** Regulation 25(2) provides that the if the acquirer has not declared an intention in the detailed public statement or the letter of offer to alienate any material assets of the company, then he shall be debarred from causing such alienation for a period of two years after the offer period. This provision should be extended to areas beyond ‘alienation of assets’. Disclosures as regarding strategic intent should go beyond asset disposals and can

include such areas as strategy, employees, facilities, key contracts etc. This provision would enable a framework in the Code in which the shareholders of the target company will get access to the acquirer’s intention before they evaluate an open offer.

(8) Improvement in Regulation on Disclosures Regarding Encumbered Shares: No doubt, the 2012 Code has done a remarkable job by retaining the 2009 amendment on pledging of shares and has rather widened its scope but still this regulation requires certain modifications for the benefit of investors and to rule out the possibility of exploitation of loopholes. Here are those modifications:

(i) Director or any Substantial Shareholder has also to make Disclosures: According to regulation 31(1) of the Takeover Code, the promoter along with PAC has to make disclosures of encumbered shares. The regulation should be amended and even director or any other substantial shareholder should be included in it as share prices are likely to see a similar impact.

(ii) Purpose of Encumbrance or Pledge to be Disclosed: The purpose for which shares are encumbered or pledged should also be disclosed. A sub-regulation to regulation 31 should be added in this regard for the betterment of investors and to make the system more transparent. The investor need to know whether the promoters have pledged the shares for the growth, betterment or expansion of the company or for their personal gain. If it is for former purpose, the investor may still consider it worth to invest in that company.

(iii) Pledging and Lien should be brought within the Ambit of Insider Trading Regulations: Insider trading includes dealing in securities to the detriment of investors whereas pledging by promoters also amounts to dealing in securities while being in possession of price sensitive information which, if divulged, could result in a different valuation for the company than the one which exists till the point in time it is not divulged. Hence, in order to make the punishment more stringent in this regard and to deter the promoters from risking the future of the companies they promote for their personal benefits, pledging by promoters, where it is done in personal interest, as
against the interest of the company and investors at large, should be brought within the ambit of insider trading as have been done by many countries of the west like U.K.  

(9) Guidelines on External Professional Advice: The board of directors of the target company are obligated to constitute a committee of independent directors to provide reasoned recommendations on the open offer for the guidance of shareholders. Such committee shall be entitled to seek ‘external professional advice’ for such purpose. The Code does not provide guidelines or any details of how to seek external professional advice. A little bit detail on this point should be added to make this expression clear and unambiguous.

(10) Party in Tax Treatment: In researcher’s view, the Central Board of Direct Taxes should put a proposal to the Ministry of Finance for the requisite amendment in the Income Tax Act to exempt long term capital gains resulting from sale of shares tendered in an open offer. Long-term capital gains on shares sold at the stock exchanges after payment of securities transaction tax (STT) is fully exempt from tax where as no such tax exemption is available in respect of the shares sold through the open offer route, as STT is not levied. Such tax exemption should be provided in case of sale of shares through open offer as non-availability of the tax exemption defeats the objective of open offer to a certain extent.

7.2.3. Suggestions for Amendments in the Competition Law

The Indian Competition Law has largely developed its lineage from the EU and US and is in fidelity with these laws. The law provide for mandatory pre-merger notification, definite threshold limits, preventing mergers that have appreciable adverse impact on competition, prescribes time period for merger notification and the remedies. These provisions help the competition authorities to work towards its duties of preventing adverse effects on competition, protecting interest of consumers and ensuring freedom of trade. However, there are certain factors which need to be deliberated upon and need

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further skilled escalation. These issues must be addressed in order that the law can effectively deal with mergers.

**(1) Calculation of Threshold Limits:** Currently, the Competition Act does not make clear how to calculate turnover and assets. Despite being a threshold based regime, the CCI has yet to provide any guidelines or regulations in relation to the computation of assets and turnover. The term ‘turnover’ i.e. in terms of ‘gross-turnover’ or ‘net-turnover’ has not been defined under the Competition Act, 2002. Therefore, it could be ascertained from other sources, like the Guidance Notes on Terms used in Financial Statements issued by the Institute of Chartered Accountants of India. Since the terms ‘assets’ and ‘turnover’ have not been adequately defined under the Competition Act, the parties concerned could dispute the interpretation made by CCI. Therefore, it would be advisable to issue clarification in this regard as it will bring uniformity in manner of calculation of value of asset and turnover. The CCI should provide clear-cut guidelines or regulation clearly describing the methods of computation of assets and turnovers.

**(2) Guidelines on Types of Mergers:** One of the most important aspects that need deliberation is the need for lucid and cogent guidelines on types of mergers and their effects. Like the EU or US Guidelines of horizontal and non-horizontal mergers, which also prescribe for co-ordinated and non co-ordinated effects caused by mergers the Indian law should also try to provide for similar.

**(3) Definition of Appreciable Adverse Effect on Competition:** The substantive assessment of mergers is done on the test of whether the combination has ‘appreciable’ adverse effect on competition. But this term has not been defined anywhere in the Act. Only section 20(4) lays down the factors which the Commission has to consider while deciding whether a combination has appreciable adverse impact on competition or not. Clarity regarding this issue is important as this is the vary basis on which proposed

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combination may be permitted or prohibited. So the term should be clearly defined in the Act.

(4) **Arrangements to be Specifically Included:** Section 5 of the Competition Act, 2002 contains provisions regarding acquisitions, acquiring of control, mergers and amalgamations but the Act does not delve into the repercussions of arrangement on competition. The Companies Act, 1956, section 390(b) defines the term arrangement as ‘including a re-organisation of the share capital of the company by consolidation of shares of different classes or by the division of shares into shares of different classes or by both these methods’. The term is of wide import and includes all modes of re-organisation of the share capital, takeover of shares of one company by another including interference with preferential and other special rights attached to shares. Arrangements may have an adverse impact on competition and must, therefore be specifically included in the provisions regarding combinations.

(5) **210 Days waiting Period should be Reduced:** The Competition Act provides for a post-filing review period of 210 days, during which the merger cannot be consummated and within which the Competition Commission is required to pass its order with respect to the notice received. If the Commission fails to pass an order within the time limit, the proposed combination will be deemed to be approved. In case, there is defect in notice or Commission requires some additional information or filing of notice in Form II, the time taken by parties in removing defects, filing additional information or notice in form II is excluded from the period of 30/210 days which further lengthens the process. Thus 210 days is not the outer limit and process can be extended beyond 210 days. While the principles behind the review process are similar to those applied in many other countries (like US) apprehensions are about the length and scope of the process. The period of 210 days is considerably longer than the corresponding provisions in other jurisdictions. On comparing the procedure of CCI and its UK counterpart and ECMR, it is observed that under the competition law and policy in the EC and UK, the investigation is carried out by the Commission in two stages. In the first stage, the

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Commission has to make an initial decision regarding such combination within 25 working days and if the commission feels that the combination could result in anti-competitive scenario, then it enters into the second stage. The second stage investigations are more detailed and the Commission is given another period of 90 days within which it has to decide whether the merger is incompatible with the common market. Similarly, in South Africa, the initial period for consideration of small or intermediated merger is merely of 20 business days and for large mergers is 40 business days and the extension may be provided to the Commission of a time period of not more than 40 business days to finally arrive at conclusion.

Thus, the time-period provided to the Competition Commission of South Africa as well as to the Commission in UK and EC and merger review period in US and Canada are smaller as compared to the CCI. In US, the Hart-Scott Rodino Anti-Trust Improvement Act of 1976 provides for procedure for merger review. In any case, merger review under it do not exceed 60 days considering even the procedure required to examine complex mergers. Even in Canada, the new two stage merger review process for even complex mergers cannot exceed 60 days. The Competition Agencies of these developed countries like US, Japan and others use scientific method of investigation into competitive and anti-competitive effects of mergers, still time taken for merger review is very less as compared to Indian jurisdiction. Since these Commissions are working successfully, it can be argued that a proper and thorough investigation can also be carried by CCI within a shorter period of time which will be more beneficial for our economy. Such longer period will discourage investment from foreign investors who will prefer investing in jurisdiction with smaller merger review period. It also acts as a hindrance to M&A activity in India.

It should also be taken into account that transactions in the securities market are very volatile and price sensitive. They are required to be consummated immediately. Any


unwarranted delay in their completion would lead to unfavourable market conditions for the parties involved in such transactions and will in turn affect the interest of thousands of shareholders, investors etc.\textsuperscript{92} It is feared that the 210 merger review could slowdown M&As in the economy as no buyer would be ready to wait for that long. Even the Raghavan Committee in its report on Competition Law recommended a period of 90 days.\textsuperscript{93} The recent Competition (Amendment) Bill, 2012 provides for lowering of review period from 210 to 180 days. But in view of the researcher the period require further reduction. It should be not more than 90-120 days.

(6) Avoidance of Conflict with Other Indian Laws and Regulations: The provisions of the Competition Act and the Combination Regulations has the effect of bringing in certain conflict with other Indian laws and Regulations especially the Companies Act and the SEBI Takeover Code. The possible areas of conflict between the above-mentioned laws are explained as under:

(i) Competition Act and Takeover Code: The 210 day period of approval will result in extra financial burden on the acquirer under the Takeover Code. The acquirer is bound to pay the shareholders their dues within 10 days of closure of offer according to regulation 18(10) of the Takeover Code 2011.\textsuperscript{94} The proviso to the above-mentioned regulation provides for extension of time to the acquirer under certain circumstances. It says that where the SEBI on its satisfaction that the application for statutory approvals was diligently pursued by the acquirer and that these was no neglect or default on the part of the acquirer which could lead to non-receipt of required statutory approval, may grant him an extension of time subject to the fact that the acquirer is agreeing to pay interest to the shareholders.

Further, the Competition Act requires that all the acquisitions shall be notified to CCI as soon as any agreement or any other document for the said acquisition is executed.\textsuperscript{95} The

\textsuperscript{92} Shubham Khare and Niharika Maske, 2010, p. 75.
\textsuperscript{94} Regulation 18(10) of Takeover Code, 2011 says, “The acquirer shall, within ten working days from the last date of the tendering period, complete all requirements under these regulations and other applicable law relating to the open offer including payment of consideration to the shareholders, who have accepted the open offer.”
\textsuperscript{95} Section 6(2)(b) of the Competition Act, 2002.
Act further provides a turnaround time of 210 days to approve or reject a combination. Thus, legally the Commission is entitled to use the complete 210 days to issue an order, whereas under the Takeover Code, the entire open offer process from the public announcement to the payment of consideration can now be done within 57 working days. This would invariably put the acquirer under the obligation to pay interest to the shareholders if both legislations are triggered simultaneously.\textsuperscript{96} No doubt, the Combination Regulations provide for CCI to form its prima-facie opinion in 30 days. But if the CCI fails to pass an order within 210 days stipulated time, the competition is deemed to be approved but there is no deemed approval where the CCI fails to form a prima facie opinion within 30 days. Therefore, 210 day period is too long and should be reduced to avoid conflict with other regulators. Moreover, two more modifications are required in the Competition Act to bring it in conformity with Takeover Code:

(a) The SEBI takeover regulations permit consolidation of shares or voting rights beyond 25 percent upto 75 percent, provided the acquirer does not acquire more than 5 percent of shares or voting rights of the target company in any financial years.\textsuperscript{97} However, acquisition of shares or voting rights beyond 25 percent would apparently attract the notification procedure under the Act. It should be clarified that notification to CCI will not be required for consolidation of shares or voting rights permitted under the SEBI Takeover Regulations.

(b) The definition of the term ‘shares’ should be modified to specifically exclude preference shares within its preview, as is the case in the SEBI Takeover Code, 2011.\textsuperscript{98}

(ii) Competition Act and Mergers/Amalgamations under Companies Act: As already discussed, section 391 read with 394 provide that scheme of any kind of merger, amalgamation has to be approved and sanctioned by the Tribunal. The Tribunal has also been given the power to supervise and modify such scheme. The whole process of approval from Tribunal takes around 120-130 days (approx.). On the other hand, the

\textsuperscript{96} Shubham Khare and Niharika Maske, 2010, p. 71.
\textsuperscript{97} Regulation 3(2) of the Takeover Code 2011.
\textsuperscript{98} Acquisition of preference shares is exempt from the purview of regulation 3 and 4 by virtue of regulation 10 of the Takeover Code 2011.
CCI has turnover period of 210 days which can further be extended under certain situation. This poses practical difficulty in the regime of merger and amalgamation. Thus, as already proposed by the researcher, the 210 day period should be reduced to around 90-120 days. Secondly, High Court (now Tribunal) and CCI can order for modification in the proposed scheme of merger. A dilemma could arise when compliance with modification of High Court would make it impossible for the company to comply with modifications proposed by CCI. Such a paradox will create conflict between the two regulators. Therefore, a mechanism should be developed through which both regulators can co-ordinate and exchange information with each other so that such a paradox can be avoided.

(7) Immediate Steps to Deal with Mandatory Notification Systems: As the Competition Act after its amendment in 2007, provides for a mandatory notification procedure, it is evident that this would considerably increase the workload of CCI. As the researcher has highlighted the importance and necessity of mandatory notification system, therefore prompt steps are required to take to ensure that the notifications are examined and cleared without undue delay as in merger review time is the essence and delay in such process may affect the completion of the transaction itself.

(8) Clarifications Regarding Joint Ventures: The position on joint ventures is not very clear. The term ‘joint venture’ is nowhere defined in the Act. In fact, there is no standardised universally accepted definition of it. Rather the term is used to describe a range of activities between firms that fall short of a complete merger. The inclusion of joint ventures in merger regulations is highly debated worldwide. Whether joint ventures are covered under merger regulation is not a settled position of law and different jurisdiction have taken different stands on this regard. The Indian Competition Law has not dealt with joint ventures except minor inclusions at few places. The Competition Act, till date does not provide for definition of joint ventures. The Act under section 3(3) of the Competition Act, 2002 provides for applicability of per se rule whereby certain activities such as price maintenance, division of market shares, bid rigging, collusive bidding and other like activities are presumed to be illegal and anti-competitive in nature. However, in the proviso to section 3(3), mention is made about joint ventures and provides that any agreement entered into by the way of a joint
venture shall not be presumed to be anti-competitive if it increases efficiency in production, supply, distribution etc. As noted above, section 5 of the Act provides for acquisition and control and section 3 provides for anti-competitive agreements. A proposed joint venture transaction may fall within the ambit of section 5 if it met the threshold limits, else, it could as well be challenged under section 3 for an agreement being anti-competitive in nature hence creating an ambiguity over the status of a proposed joint venture.

A certainty over the status of joint venture needs to be incorporated in the Indian Competition Law as both the possibilities have certain positive and negative points. If the joint ventures are treated as acquisitions, as done, under the American law, where if two or more parties contribute to form a new company and as a result receive voting securities of this new company, the contributing parties are treated as acquiring party and the new company is treated as acquired party, then the procedure under section 5 and 6, needs to be followed, which involves, prior approval from the Commission if the relevant turnover thresholds are satisfied.99 On the other hand, treating such transaction within the ambit of section 3, would increase the burden on the Competition Commission, as the possibility of complaints arising under section 3 is much higher.

(9) Director Generals’ Report: Prior to the amendment of the Act in 2007, the Directors General’s report was made available to both the parties. With the amendment to section 26(4) of the Act, however, the Director General’s report can only be made available on discretionary basis. This will lead to an exclusion of the parties’ right to review the Report and comment on the same which is violation of principles of natural justice.100 Thus, the director general’s report should be made available to both the parties when required.

(10) Certain Amendments in the Provision of Extra-territoriality: Section 32 authorises CCI only to inquire into combinations taking place outside India but having an effect on competition in India. It is suggested that CCI should have also been given
powers to pass appropriate orders apart from inquiring in such matters. The Act should also have incorporated provisions conferring necessary powers to the Commission seeking cooperation from authorities in other countries in investigation and implementation of its orders with respect to cross-border anticompetitive practices.

Finally with respect to the situation where if the acquirer is a foreign company without any Indian presence, the Competition Law is silent with this respect. According to the Act any Combination outside India will be governed by commission only if there is a domestic nexus in India. Though section 32 clearly states that any acts taking place outside India but having effects in India will be governed by section 32 but on the same hand section 5 determines the domestic nexus provision. Therefore, it is difficult to determine what constitute the effects under section 32 of the Act.\textsuperscript{101} Lastly, though different countries may seek to apply their competition laws on an extra-territorial basis, this in turn raises questions of jurisdictional conflicts. To solve this, CCI must endeavour to enter into bilateral/multi-lateral agreements with other competition regulators under section 18 of the Act. To conclude, we can quote following lines from Raghavan’s Committee Report which offers a partial solution to this jurisdictional conflict. “If a country wants to have extra-territorial reach of its competition law, it should allow other countries to have extra-territorial reach of their competition laws in its soil.”\textsuperscript{102}

\textbf{(11) Ambiguity in Definition of ‘Control’ to be Removed:} There is no guidance from the CCI and limited precedent on the concept of ‘control’ under the Act, No doubt, the CCI has clarified in informal consultation that control will be construed on a case-by-case basis. Thus, going with this CCI has dealt with the concept of control in two instances. In its recent order of acquisition by Independent Media Trust, the CCI approved the acquisition of zero coupon optionally convertible debentures by the Independent Media Trust controlled by Reliance Industries. The CCI held that the

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\end{footnotes}
subscription of convertible securities with an option to convert such convertible securities into equity shares of the target companies confers upon the acquirer the ability to exercise the decisive influence over the management and affairs of the target companies.\textsuperscript{103} Further, in *Alok industries/Grabal Alok Impex*, the CCI held that the existence of common promoters and management between two companies would indicate common control.\textsuperscript{104} But, more clarity should be provided in the above definition so that the acquirers should know beforehand that whether their transaction will attract competition regulation and can preplan accordingly to structure their transaction in such a way that it is approved by CCI. Moreover, CCI should clarify whether control will include positive as well as negative control as in EU competition law.

(12) Overlap of Jurisdiction between CCI and other Sectoral Regulators to be Avoided: Another area of concern is possible jurisdictional conflicts between the CCI and other sectoral regulators like Telecom Regulatory Authority of India, Reserve Bank of India, Petroleum and Natural Gas Regulatory Board, Securities and Exchange Board of India etc. The interface between sector specific regulation and competition law is inevitable. For instance, the Ministry of Corporate Affairs is formulating regulations for the pharmaceutical sector as it is proposed that the CCI review all foreign direct investment into the sector even if the jurisdictional thresholds have not been crossed.\textsuperscript{105} These recent deliberations regarding oversight of all transactions by CCI is a welcome step. CCI as an expert competition watchdog has been very successful in its area of operation. The oversight of pharma deals by CCI would ensure that in future the consumer in India will not suffer from any abuse of dominance by pharma company acquired by foreign pharma companies.

Other sectoral regulators such as RBI, are trying to exclude M&As in the banking sector from the purview of the CCI. The Banking Law (Amendment) Bill 2011 sought to exempt banking M&As from the purview of Competition Act. But when the final Act


\textsuperscript{104} Ibid.

\textsuperscript{105} Ibid.
was passed, this provision was excluded from the Banking Law (Amendment) Act 2012. This is a step in the right direction. As prudential regulation of banks has to be distinguished from competition regulation. Prudential regulation is largely centered on laying and enforcing rules that limit risk taking of banks, ensuring safety of depositors funds and stability of the financial sector where as competition regulations aims at maintaining healthy competition in the market so that banking companies do not make excessive profit at the expense of customers or try to squeeze other players out of the market. While CCI does not have the expertise on prudential regulation, RBI does not have the expertise to regulate anticompetitive behaviour.\textsuperscript{106}

Regulation of an industry has three primary dimensions-technical, economic and competition. These three elements have to be distributed between the sectoral regulators and competition authority. Sectoral regulators like RBI should have a free hand in the technical and economic regulation of their respective sector but the competition regulation must be in hands of expert authority i.e. CCI.\textsuperscript{107} A clear example of the requirement to regulate competition in the banking sector is the recent CCI notices to banks asking them to explain the imposition of penalty on the borrowers for pre-payment of home loans. CCI’s notice is based on the premise that pre-payment penalty acts as a barrier by preventing customers to shift their loans from one bank to another bank which offer better interest rates. Pre-payment penalties have been in existence for a long time. However, its impact on the banking sector was never detected or analysed by RBI, primarily because RBI officials have not been trained to do so.\textsuperscript{108}

Similarly, the department of Telecommunications has reportedly sought an exemption for the telecommunication sector in India in order to facilitate consolidation in that sector.\textsuperscript{109} Hence, with several regulatory authorities cropping up simultaneously, it is natural that they might end up having overlapping jurisdictions. Thus, apart from defining its relationship with the existing regulators, proper coordination and


\textsuperscript{107} Hari Krishan, 2012, pp. 55.

\textsuperscript{108} \textit{Ibid.}

information exchange between the CCI and such sectoral regulators is important to ensure that M&A activity in India is not hampered. Moreover, this slight overlap between CCI and various sectoral regulators can be resolved by taking examples from other countries which have successfully implemented the competition law. Their functions should be clearly demarcated by giving technical and economic regulation to the sectoral regulators and competition to the CCI. Concurrent jurisdiction of two or more regulatory bodies may not necessarily be a hindrance where the turf of both the bodies is well defined and there is a cooperation among them dealing with a proposed transaction.

(13) Synergy between Government Policy and Competition Policy: Since nineties, many sectoral regulators like those in banking, insurance, telecommunication have been appointed to regulate these sectors, to attract investment as well as to ensure healthy competition. These sectoral regulators such as Telecom Regulatory Authority of India (TRAI), Insurance Regulatory Development Authority (IRDA), Reserve Bank of India (RBI), Petroleum and Natural Gas Regulatory Boards also regulate M&As in their respective sectors. So this may lead to conflict in certain situations due to overlapping jurisdictions. Thus, the most important need is to develop synergy between government action and competition policy. A failure to develop harmonious relation between the two can be detrimental to the cause and purpose of both. Thus following points should be incorporated which will ensure a compatible development of both.

- All laws and policies of the government should be assessed on the touchstone of competition.
- The policies of the government should have an explicit statement about its impact on competition.
- A system of ‘competition audit’ to be evolved and applied to all existing and future government policies.
- Both Central and state government should keep the competition and market process in mind while framing its policies.

Such an approach is must for the success of both.
(14) Subjectivity of Factors Mentioned in Section 20(4) to be Removed: The factors listed in section 20(4) are subjective and open to judgement and interpretation. For instance, there can be no empirical rule and conjecture free answers to factors like ‘likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market’,\textsuperscript{110} possibility of a failing business,\textsuperscript{111} nature and extent of innovation,\textsuperscript{112} relative advantage by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse impact on competition,\textsuperscript{113} and whether the benefits of the combination outweigh the adverse impact of the combination, if any.\textsuperscript{114} Therefore, the merger regulation contain a high risk of subjectivity and discretion for each transaction, making it difficult for the acquirers to anticipate, whether the combination will have appreciable adverse impact on competition. The pre-merger consultation process is of little help as it is informal, verbal and non-binding on the Commission. There, an objective criteria and more clarification to be laid in the Combination Regulations 2011.

(15) Amendments in the Combination Regulations:

(i) Clarity Regarding ‘Insignificant Local Nexus’: The term ‘insignificant local nexus’ is vague and subjective. The combination regulations seem to have clarified that transactions taking place outside India, and having ‘insignificant local nexus’ in India need not be notified. But this term has not been defined and no objective criteria to determine the ‘insignificant local nexus’ laid down. The combination regulations should be amended to include a definition of the term and an objective criteria to determine insignificant ‘local nexus’ should also be laid down.

(ii) Clarity on De-minimis Provision: As already explained, the Government vide its notification has exempted for a period of 5 years those combinations where the target enterprise whose control, voting rights or assets are being acquired has assets not more than Rs. 250 crores or turnover of not more than Rs. 750 crores. This is the de-minimis provision. Now, lack of clarity is on the area that whether these thresholds are in India

\textsuperscript{110} Clause (i) to section 20(4) of the Competition Act, 2002.
\textsuperscript{111} Clause (k) to section 20(4) of the Competition Act, 2002.
\textsuperscript{112} Clause (l) to section 20(4) of the Competition Act, 2002.
\textsuperscript{113} Clause (m) to section 20(4) of the Competition Act, 2002.
\textsuperscript{114} Clause (n) to section 20(4) of the Competition Act, 2002.
or worldwide. This confusion should be resolved as soon as possible. The government while issuing a clarification in this notification via further notification can take the recommendation of International Competition Network (ICN) Recommendations which says that the de-minimus provision should have local nexus only.

(iii) Pre-filing Consultation on both Procedural and Substantive Issues: Pre-filing consultation has been another area of concern in India. Competition regulators in many countries encourage companies to open a dialogue with the regulator even as they are completing due diligence. Such consultations are useful as companies knew within a few meetings if their plans are likely to run into any regulatory hurdles or if they need to modify the proposed transaction. But India’s merger control regime allows such consultation on procedural issues, it is up to the discretion of the officials at CCI to discuss substantive issue. Also when discussions are held, the opinion shared is not binding on the Commission. As merger control regime is its nascent stage in India, consultation on all issues should be provided, i.e. substantive and procedural. It will be of great help to parties to combination.

(iv) Request for Confidential Treatment (Regulation 30): The confidentiality provision should be reviewed and elaborated with regard to following aspects:

(a) If the CCI rejects any request to afford confidential treatment to any document or information submitted during investigation, it should give reason in writing for rejecting the request. Appropriate amendments to this regard should be made in regulation 35 of the CCI (General) Regulation, 2009.

(b) Any information coming forth from third parties must also be subjected to confidentiality norms and provisions to this regard can be included in Combination Regulations.

(v) Calculation of Threshold Limit in case of Slump Sales (Regulation 5(9) to be done away with): Slump sale is a sale of a business undertaking for a lump sum consideration on a going concern basis without assigning individual value to each asset. The CCI view on slump sales and sale of business divisions, expressed in two early merger-control orders, was that for the purpose of the calculation of thresholds under section 5,
the “target enterprise” would be the vendor entity as a whole, the entity which is selling the business division and not merely the relevant business division being sold. As noted in the Mitsui/Sanyo,\textsuperscript{115} and Saint Gobain Orders,\textsuperscript{116} however, parties sought to structure transaction to avoid the slump sale issue and avoid CCI notification by transferring the relevant business divisions or assets to a newly incorporated SPV, which could make use of the target exemption on account of not having any turnover. The CCI, in these orders, adopted the principle of aggregation and aggregated the assets and turnover of the transferor company and the SPV.\textsuperscript{117} Thus CCI, in case of slump sale instead of taking value of business undertaking being sold has adopted the approach of taking the total asset value of vendor entity. This principle was later incorporated into the new regulation 5(9).\textsuperscript{118} This regulation provides that if, as part of a series of steps in a proposed transaction, particular assets of an enterprise are moved to another enterprise, which is then acquired by a third party, the entire assets and turnover of the selling enterprise (from which these assets and turnover are hived off) will also be considered while calculating thresholds for the purpose of section 5 of the Act. This sub regulation should be done away with as it narrows the scope of the de-minimis target based threshold under the target exemption and is not in consonance with international best practices. Moreover, it also toughens our competition regime which is not suitable for a developing country like India.

\textit{(vi) Intra-group Mergers and Amalgamations to be Exempted:} As intra-group acquisitions are fully exempted, the same should be the case of intra-group mergers and amalgamations as they also do not raise any competition concern. The condition imposed that the enterprises involved should be wholly owned within the same group should be done away with in case of intra-group mergers and amalgamations. Conditional exemption in case of intra-group amalgamations should be done away with.

\textsuperscript{115} C-2011/12/14 as quoted in Cyril Shroff, “Indian Update: Trends in Merger Control”, 2012, retrieved from \url{http://www.irc.caltech.edu}, accessed on 1 February 2012 at 1.30 pm.

\textsuperscript{116} C-2012/01/19 as quoted in Cyril Shroff, “Indian Update: Trends in Merger Control”, 2012, retrieved from \url{http://www.irc.caltech.edu}, accessed on 1 February 2012 at 1.30 pm.


\textsuperscript{118} Regulation 5(9) introduced via amendment to Combination Regulations in 23 February 2012.
7.2.4. Suggestions for Amendments in the Taxation Laws

The focus on tax aspects in M&A is intensifying as tax becomes more and more important to deal processes and valuations these days. Transaction costs, such as tax liabilities, provisions of the Income Tax Act, transfer taxes like stamp duty etc. can often make or break a deal, if not addressed properly. The introduction of retroactive taxation and GAAR has created widespread discontent among the investors community worldwide. So hereafter, the researcher forwards a few proposals to address those areas to further promote M&As in India.

(1) Section 79 to be Scrapped as it Acts as an Obstacle for the Rehabilitation of Sick Private Companies: There has been vehement criticism of section 79 as this section comes in the way of rehabilitation of sick private companies even though there are many enterprises willing to take up the challenge of rehabilitation of these companies.\(^{119}\) If a sick private company is being amalgamated with another company (whether private or public), as per section 2(1B) which contains the definition of amalgamation, it will be satisfied only if shareholders holding not less than 3/4\(^{th}\) in value of the amalgamating company becomes shareholders in the amalgamated company by virtue of amalgamation. If this definition is satisfied, then because of the change in the shareholding of more than 51 percent, section 79 will get attracted, denying in the process the right to carry forward and set off the losses incurred in the previous year.\(^{120}\) This section creates a paradox and the researcher hopes that the government will scrap section 79 altogether.

(2) Reforms in Tax Administration: India need significant reforms in tax administration. Our dispute resolution mechanisms move slowly. There should be limitation period on disposal of appeals. The National Tax Tribunal should be made functional to speed up the litigation procedure. Moreover, the alternate dispute resolution mechanisms should be strengthened. Parties should be encouraged to resolve their tax disputes amicably through the alternative dispute resolution mechanisms.

\(^{119}\) S. Ramanujam, 2012, p. 923, para 41.10.
\(^{120}\) Ibid.
(3) Change Required in the Retrospective Amendments Relating to Indirect Transfer:
The retrospective amendments introduced by the Finance Act, 2012, to counter the
judgement of the Supreme Court created uncertainty regarding the taxability and the
possible interest and penalty consequences in respect of concluded transactions, it also
had a negative impact on foreign direct investment in India. At the time when India is
going through one of its toughest phases, these amendments met with criticism from
both within and the outside the country. Therefore, Government constituted Shome
Committee to look into this matter. The recommendations of the Shome Committee are
truly salutary and they align with norms of certainty, predictability and stability of tax
laws. They align with international best practices. In view of the researcher, the
following recommendation of the Shome Committee in its draft report should be carried
forward by the way of amendments in the Finance Act.

(i) Amendments to be made Prospective: The Committee observed that retrospective
amendments of a tax law should only be made in the rarest of rare cases and cannot be
made for expanding the tax base. Moreover, amendments should be made only after
exhaustive and transparent consultation with stakeholders who would be affected by it.
The recommendations made by the Expert Committee were made with reference to
practices in several countries with regard to taxation of capital gain in the hands of non-
residents and treatment of indirect transfers. The Committee also referred to the model
conventions and tax treaties entered into by India with various countries. The researcher agrees with the views of the Committee and reiterates that amendments concerning indirect transfers are not clarificatory in nature as asserted by the Government. They, in fact, widen the tax base. Therefore, they should be applied prospectively. This would align with global best practices as well as the principle of equity and will reflect probity in the formulation and implementation of commonly

121 Ernst and Young, “Draft Report of the Expert Committee on Retrospective Amendments Relating to

recognised taxation principles.\textsuperscript{123} Further, in case the government decides to proceed with retrospective amendments then the Committee, suggested:

(a) Retrospective amendments for taxing transactions pertaining to the transfer of shares of a foreign company having underlying assets in India should apply only to taxpayer who has earned capital gains from such transfers.

(b) No liability for the failure to withhold tax from the sale consideration should be fastened on the person responsible for the payment and no person should be treated as ‘representative assessee’ of a non-resident.

(c) In all cases where tax demand is raised on account of the retrospective amendment, no interest or penalty should be levied.

But the researcher is of the view, the amendments should be made prospective whatever the case may be otherwise it will effect foreign investors confidence in India. If suddenly after five years of consummation of deal, laws can be amended with retrospective effect and Vodafone charged with heavy interest and penalty in addition to tax liability, is naturally going to create apprehensions in the mind of the investors.

The researcher also recommends few clarifications in the amendments introduced by Finance Act, 2012 in addition to their being made prospective as emphasised above. Some of these recommendations were endorsed by Shome Committee also. These recommendations are:

\textit{(i) Meaning of the Phrase ‘Share or Interest’ in a Company or Entity Registered or Incorporated Outside India:} It should mean to include only shares or interest which result in ownership, capital, control or management but should exclude mere economic interest. This classification is to narrow the meaning of the phrase so that situations such as subscription to units of a mutual fund set up abroad and private equity industry where limited partners may hold an economic interest are addressed. This view was also endorsed by the Shome Committee.

(ii) Word ‘Substantially’ to be Defined: As per the amendment to section 9, income from the transfer of a share or interest in foreign company or an entity would be taxable in India if such share or interest derives its value substantially from the assets located in India. The word ‘substantially’ has not been defined. It may lead to differing interpretation by tax authorities and further increase litigation. The term should mean a 50 percent test whereby at least 50 percent of the total value should be derived from assets located in India. This was even proposed in the Direct Taxes Code 2010. This recommendation was also endorsed by the Shome Committee.

(iii) Meaning of the Phrase ‘Directly or Indirectly’ to be Properly Elaborated: The phrase ‘directly or indirectly used in explanation 5 to section 9 is not properly explained. The phrase ‘directly or indirectly’ should be classified to represent ‘look through’ approach. It implies that, for determination of value of a share of a foreign company, all intermediaries between the foreign company and assets in India may be ignored. This is in accordance with international best practices as OECD and UN model conventions interpret this phrase as ‘look through approach’. This recommendation also finds place in Shome Committee’s draft report on retrospective amendments relating to indirect transfer.

(iv) Capital Gains to be Taxed on Proportional Bases: Taxation of capital gains should be restricted to capital gains attributable to assets located in India. Thus, capital gains to be taxed on proportionate basis between the fair market value of India assets and global assets of the foreign company. There is no reason to tax 100 percent of gains just because majority assets of the foreign company are located in India.\(^\text{124}\) This will be a major relief to foreign companies and investors. This is also endorsed by the Shome Committee.

(v) Implications of Amendment to the Definition of term ‘Transfer’: The amendment to the indirect transfer provisions had sought to widen the meaning of the term ‘transfer’ to include creation of an interest. But this widening of the definition may cover unintended activities like pledge/mortgage of property of the foreign company having assets located in India. Even introduction of a new partner in a partnership firm may be considered to

\(^{124}\) Ibid.
be disposal of or parting with an interest in property or firm and thus fall within the amended definition of transfer. Thus, such an amendment can have unwanted repercussions by way of taxing transactions which were otherwise not taxable under section 9 of the Act. Therefore, according to Shome Committee definition of transfer should be read along with section 9 rather than on stand alone basis to fulfill the intention of the amendment to tax transfer of shares of a foreign company having underlying assets in India.

(vi) Exemption to Small Shareholders: The amendments in their current form could attract taxation of shares of a foreign company having its substantial assets in India even to the extent of transfer of a single share. But according to the committee if the voting power or share capital of the transferor is less than 26 percent of the total voting power or share capital of the company or the entity, then it would not be taxable under section 9(1)(i) of the Act. The Committee has recommended that 26 percent threshold computation, included holding by the transferor along with associated enterprises, but the researcher suggests that this is aggregation, and only the voting power or share capital of the transferor company should be counted. This exemption is required so that transfer of small shareholdings in a foreign company should not be subjected to undue hardship as such transfer would not result in transfer of any controlling interest in Indian assets.

(vii) Exemption to Overseas Business Reorganisations: Business reorganisations such as amalgamations and demergers within group companies should be excluded from the ambit of taxation of indirect transfers in India provided such transfers are not taxable in the jurisdiction where such company is resident. The view is also endorsed by the Shome Committee because these intra-group reorganisations do not result in any real income. This is also in line with the realisation principle that unless there is an actual realisation of capital gains, the same should not be subject to taxation.

126 The Shome Committee has set out a threshold of 26 percent because a shareholder can block a special resolution if he holds 26 percent or more voting power or share capital in an Indian Company i.e. he can exercise ‘negative control’.
(viii) Clarity on Interplay with Tax Treaties: In case where capital gains arise to a non-resident company on account of transfer of shares or interest in a foreign company, and if such non-resident company is from a jurisdiction which has a Double Taxation Avoidance Agreement (Tax Treaty) with India then no tax should be applicable in India. The Shome Committee recommends that this is subject to two exceptions:

- The tax treaty provides a right of taxation of capital gains to India as per its domestic law.
- The tax treaty specifically provides right of taxation to India on transfer of shares or interest of foreign company or entity.

This provision will clarify all the doubts and prevent a lot of litigation which takes play due to conflict with tax treaties.

(ix) Computation Provisions for Tax on Indirect Transfers: Computation mechanism for tax on indirect transfers is not satisfactory. More clarity regarding this should be provided in the income tax law. As an illustration, protection from foreign exchange fluctuation presently available to compute tax on capital gain from direct transfer should also be provided in respect of taxation arising on indirect transfer.

(4) Amendments in GAAR Provisions: GAAR provisions in the Income Tax Act are specially overriding in nature and give vast powers to revenue authorities without any adequate safeguards. GAAR is one of the proposal which is facing maximum criticism from within or outside India due to possibility of its misuse and ineffective implementation. No doubt, the Government has incorporated many proposals of the Shome Committee in the income tax law by Finance Act, 2013 but still certain more safeguards/further amendments are required in GAAR provisions when they become effective in 2016.

(i) Scope of Section 96 to be Restricted: Section 96(2) says that an arrangement shall be presumed be carried out for obtaining a tax benefit, if the main purpose of a step or a part is to obtain a tax benefit. Consequently, while a transaction as a whole may be
bonafide one, it still may lead to invocation of GAAR provision if any of the steps on a standalone basis are undertaken to obtain a tax benefit. Thus, even genuine business transactions might fall on the wrong side of GAAR. This provisions to be done away with to limit the broad scope of section 96.

(ii) **GAAR should not Override Treaty Provisions**: As we all know, in cross-border mergers treaties play a very important role in a case where a tax treaty has inbuilt anti-avoidance provisions in the form of a Limitation of Benefits (LOB) clause, etc. (eg. Singapore), the GAAR provisions should not apply to override the treaty. If there is evidence of violations of anti-avoidance provisions in the treaty, such treaty should be revisited, but GAAR should not override the treaty as unilateral enactment of a new domestic tax law which is contrary to an existing treaty, without any amendment or change in treaty could be regarded as violation of international law.

(iii) **GAAR v. SAAR**: The GAAR provisions should not be invoked to look into an aspect, where specific anti-avoidance rules are applicable to that particular aspect/element. Because, the basic aim of enacting GAAR is to provide for cases which are not covered by SAAR.

(iv) **Onus of Proof**: As per section 96 as amended by the Finance Act, 2013, the onus of proving that the transaction has not been entered into for the main purpose of obtaining a tax benefit, is on the assessee. But this onus of proving tax avoidance should be shifted to tax authorities. This would be in line with international practice.

(v) **Direct Taxes Circular No. 789 should not be Overridden by GAAR Provisions**: The CBDT Circular 789 of 2000 provides that the certificate issued by the government of Mauritius would constitute sufficient evidence for accepting the status of residence of a person. GAAR provisions shall not be applied to examine the genuineness of the residency of an entity set up in Mauritius, if the entity has Mauritius Tax Residency Certificate (TRC) issued by the Government of Mauritius. Currently, the tax department cannot look into the genuineness of a residence of a company incorporated in Mauritius

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once TRC is issued by the Mauritius authorities.¹²⁹ This present position should not be changed through GAAR provisions. The Mauritius treaty should be revisited if policy so dictates, rather than taking action unilaterally by challenging it indirectly through the use of GAAR provisions.

*(vi) Objective Criteria to be Laid:* An objective criteria should be laid in the rules for application of GAAR to remove the subjectivity inherent in this area. There is need to lay down more objective criteria and specific administrative guidelines for invoking GAAR. These guidelines should specify ‘negative test’ where GAAR would not be invoked as recommended by Shome Committee and GAAR should be applicable only in case of abusive, contrival and artificial transaction.

The above suggestions for GAAR should be carried out before it becomes effective from 01.04.2016, otherwise M&A activities may be negatively impacted. These concerns should be addressed before they become a dampener for M&A market. As regards the retrospective tax amendment in the indirect transfers, they should be made prospective along with the safeguards suggested by the researcher. The above suggestions intend to balance the interest of revenue authorities and the investors.

To conclude, for a foreign investor, a country’s tax regime is very significant factor if not a decisive one. Today business are looking at inorganic growth through M&As to achieve better economics of scale, synergy and competency in the form of business reorganisations. Therefore, the tax policies of the government need to be critically framed so as to achieve the purpose of tax reform and also being positive to business environment of the country.¹³⁰

### 7.2.5. Amendments Required in the Stamp Law

One of the most contentious issue in a scheme of amalgamation is the levy of stamp duty on instrument transferring property in amalgamation. The issue has lead to a lot of litigation. On the other hand, varying and high rates of stamp duty put another hurdle in the way of mergers and amalgamations. So here are proposals to settle the above issues.

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(1) Uniform Stamp Duty Law throughout India: In the present scenario, mergers and amalgamations should be encouraged by relaxation of tax and stamp duty as imposition of stamp duty may have a dampening impact on Indian M&A scenario. Therefore, in the first instance stamp duty should not be imposed. This is possible by an amendment in the Indian Stamp Act 1899 and the respective state acts by expressly excluding court’s order under section 394 in the definition of ‘conveyance’.

But seeing the trend of our Government policy of imposing tax (retrospective tax amendments as a result of judgement in Vodafone’s case) and finding innovative ways to impose the same on the corporate sector, to fill the state exchequer, this does not seem to be possibility in near future. Therefore, in the second instance as differential stamp duty regime has created acute confusion on the issue, it should be replaced by a single standpoint throughout the country in the form of uniform stamp law. Therefore, as suggested in draft amendments is Indian Stamp Act, 1899 approved by the Ministry of Finance, section 2(10) of the Indian stamp Act should be amended to include the following within the definition of ‘conveyance’:

- Every order made by the High Court/Tribunal under section 394 of the Companies Act, 1956/section 232 of the Companies Act, 2013 sanctioning a scheme of amalgamation.
- Every order made by the Reserve Bank of India under section 44A of the Banking Regulation Act, 1949 in respect of amalgamation or reconstruction of banking companies.

Such amendment should be carried out as soon as possible and for states who have their state legislation in this subject and are not governed by Indian Stamp Act should make suitable modification in their acts on the model of seven States. It is high time that Indian stamp Act is amended to make this legal issue abundantly clear so that unnecessary litigation is avoided.

(2) Lowering and Rationalising Stamp Duty Rates in India: In addition to uniformity in stamp law, stamp duty rate should also be lowered all over India and made uniform. In rest of Asia, rate of stamp duty are 2-3 percent on an average whereas in India they are around 8-10 percent. Even the Planning Commission in its 10th five-year plan has
stressed upon the legislative reforms for rationalisation and reduction of stamp duty rates in various states in India to 3-5 percent. In researchers’ view, stamp duty rates should be reduced on an average at least around 3-4 percent so that other Asian Countries do not have an edge in attracting foreign investment than India. Lower stamp duty rates will on one hand promote mergers and on the other hand result in increased revenues for the Government in the long run.

7.2.6. Proper and Timely Due Diligence and Valuation of Intellectual Property Rights in Mergers and Acquisitions

The acquiring company should conduct proper and timely due diligence of IPRs possessed by the acquired company so that it gets the ownership of those IPRs or at least license to use it. If it does not get to use the precious IPRs of the acquired company, it may in many instances lead to failure of mergers. In addition to it, IPRs should be properly valued following the approaches mentioned in the previous chapter, so that correct value of the target company can be arrived at. This is also important so that acquiring company do not overpay to acquire the target. If the cost of target is too high due to faulty valuation of IPRs, then synergies to be realised from the merger will be greatly reduced. On the other hand, target company should get the full value and right premium for their business. Thus, timely due diligence and valuation of IPRs before entering into M&A transaction is indispensable for the success of such transactions.

Moreover, because of difference in laws of different jurisdictions, the acquiring company should engage counsel experienced in world wide transfer of intellectual property rights and familiar with the preparation of documents necessary for each jurisdiction

7.2.7. Proper Integration of Human Resources in Mergers

Inspite of the overwhelming importance of human resources in M&As, they are often ignored by companies undertaking M&As as more stress and importance is given to financial aspects of the transaction. But the human aspects should be addressed

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simultaneously along with issues of financial and legal integration if not well before. In fact, they should be paid attention right from the design stage if a merger or acquisition is to succeed. A well-planned process built on the foundation of an open, honest and consistent communication strategy accompanied by proper management of cultural differences, promoting co-operation, providing training, development and counseling to employees and their involvement in decision making process can pave the way to success. Moreover, Competition Act should be amended and mergers having a negative impact on employment in a particular region or resulting in job losses should be prohibited by CCI even if they seem unlikely to harm competition. The South African Competition Act has a similar provision. This provision will help in protecting the interest of employees in an amalgamation scheme.

7.3. Final Remarks

The ongoing liberalisation process has placed India on the spotlight as one of the most vibrant and fastest developing economies in the world. The ‘Indian Story’ has seen a profound gear and direction in recent times given India’s sheer demographic size, growing size of India’s educated middle class with disposable incomes, foreign corporations could no longer ignore India as a business destination. That’s why foreign companies are entering India. One of the most important route followed by them is through inorganic route i.e. through M&As. On the other hand, Indian businesses have also illustrated their natural urge to take part in the global economy. As controls and restriction in an economy are replaced by competition and free trade, the result is that businesses are restructured and reorganised. Thus in the present highly competitive, liberalised and globalised world, mergers and acquisition have really become unstoppable.

Therefore, the blueprint of proposals forwarded by the researcher to carry out the necessary changes in law should be taken note by the Indian Legislatures to further promote M&As in India as they are the symbol of the new economic world.
ANNEXURE-I

A COMPARATIVE TABLE OF PROVISIONS OF COMPANIES ACT 2013 VIS-À-VIS PROVISIONS OF COMPANIES ACT 1956

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<thead>
<tr>
<th>Sr. No.</th>
<th>Points of Comparison</th>
<th>Companies Act 2013</th>
<th>Companies Act 1956</th>
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<tr>
<td>2.</td>
<td>Power to sanction compromises and arrangements</td>
<td>Power to sanction compromises and arrangement with tribunal.</td>
<td>Power to sanction compromises and arrangements with High Court.</td>
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| 3.      | Detailed disclosures to the Tribunal by affidavit by the applicant | The following detailed disclosures by affidavit have to be made according to section 230(2):  
- All material facts relating to the company, such as the latest financial position of the company, the latest auditor’s report on the accounts of the company and the pendency of any investigation or proceedings against the company;  
- Reduction of share capital of the company, if any, included in the compromise or arrangement;  
- Any scheme of corporate debt restructuring consented to by not less than 75% of the secured creditors in value, including:  
  (i) A creditor’s responsibility statement in the prescribed form,  
  (ii) Safeguards for the protection of other secured and unsecured creditors,  
  (iii) Report by the auditor that the fund requirements of the company after the corporate debt restructuring as approved shall conform to the liquidity test | No such detailed disclosures required. |
<table>
<thead>
<tr>
<th>Sr. No.</th>
<th>Points of Comparison</th>
<th>Companies Act 2013</th>
<th>Companies Act 1956</th>
</tr>
</thead>
<tbody>
<tr>
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<td>based upon the estimates provided to them by the board, (iv) Where the company proposes to adopt the corporate debt restructuring guidelines specified by the Reserve Bank of India, a statement to that effect, and (v) A valuation report in respect of the shares and the property and all assets, tangible and intangible, movable and immovable, of the company by a registered valuer.</td>
<td></td>
</tr>
<tr>
<td>4.</td>
<td>Persons entitled to object to the scheme of compromise or arrangement</td>
<td>Persons holding not less than 10% of the shareholding or persons having outstanding debt amounting to not less than 5% of total outstanding debt as per the latest audited financial statements [Proviso to section 230(4)].</td>
<td>No such express provision in the 1956 Act.</td>
</tr>
<tr>
<td>5.</td>
<td>Notice to various Regulatory Authorities</td>
<td>As per section 230(5) notice of meeting along with all the documents to be sent to the Central Government, the Income-Tax Authorities, the Reserve Bank of India, the Securities and Exchange Board of India, the Registrar, the Respective Stock Exchanges, the Official Liquidator, the Competition Commission of India etc. The notice shall require that representations if any made by the statutory authorities shall be made within 30 days from the receipt of such notice and failing which it shall be presumed that they have no representations to make.</td>
<td>No such provision.</td>
</tr>
<tr>
<td>6.</td>
<td>Dispensation of meeting of creditors</td>
<td>As per section 230(9), the Tribunal may dispense with calling of meeting of creditors or class of creditors where atleast 90% value agree and confirm by way of affidavit to compromise or arrangement.</td>
<td>No such express provision.</td>
</tr>
<tr>
<td>7.</td>
<td>Buy-back of Securities</td>
<td>Compromise or arrangement shall not include buy-back of securities unless such buy-back is in</td>
<td>No express stipulation as to whether ‘compromise or arrangement’ includes buy-</td>
</tr>
<tr>
<td>Sr. No.</td>
<td>Points of Comparison</td>
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<td>accordance with the provisions of section 68 [Sec 230(10)].</td>
<td>back of securities.</td>
</tr>
<tr>
<td>8.</td>
<td>Takeover Offer</td>
<td>As per section 230(11), compromise or arrangement may include takeover offer made in such manner as may be prescribed. In case of listed companies, takeover offer to be according to SEBI Guidelines.</td>
<td>No specific provisions on this issue as to whether compromise or arrangement can include ‘takeover offer’.</td>
</tr>
<tr>
<td>9.</td>
<td>Compliance with Accounting Standard</td>
<td>Proviso to section 230(7), provides that no compromise or arrangement shall be sanctioned by the tribunal unless: (a) The accounting treatment, if any, proposed in the scheme of compromise or arrangement is in accordance with the accounting standard prescribed under section 133 (b) A certificate to that effect from the company’s auditor has been filed with the Tribunal.</td>
<td>No such requirement.</td>
</tr>
<tr>
<td>10.</td>
<td>Power of Tribunal to enforce sanctioned scheme of compromise or arrangement</td>
<td>Under the new Act, as per section 231, mere non-workability of sanctioned scheme is not enough to wind up the company. In addition to non-workability it must also be established that the company is unable to pay its debts as per the scheme.</td>
<td>Mere non-workability of sanctioned scheme is enough to wind up the company.</td>
</tr>
<tr>
<td>11.</td>
<td>Demerger</td>
<td>Specific mention of division i.e. demergers in section 232 dealing with mergers/amalgamations.</td>
<td>No mention of demergers/division in the 1956 Act.</td>
</tr>
<tr>
<td>12.</td>
<td>Power of Tribunal to allow set-off of fees paid on authorised capital</td>
<td>The Tribunal order may in any case where transferor company is dissolved, provide that fee, if any, paid by the transferor company on its authorised capital shall be set-off against any fees payable by the transferee company on its authorised capital subsequent to the amalgamation [Sec 232(3)(i)].</td>
<td>The High Court not expressly empowered to provide for such set-off.</td>
</tr>
<tr>
<td>13.</td>
<td>Where in amalgamation/</td>
<td>As per section 232(3)(h), the Tribunal’s order (i.e. order</td>
<td>No provision for such a situation.</td>
</tr>
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<thead>
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<td></td>
<td>merger the transferor company is a listed company and the transferee company is an unlisted company</td>
<td>sanctioning the scheme or subsequent order) may provide where the transferor company is a listed company and the transferee company is an unlisted company that the transferee company shall remain an unlisted company until it becomes a listed company and secondly, if shareholders of the transferor company decide to opt out the transferee company, provision shall be made for the payment of the value of shares held by them in accordance with a pre-determined price formula.</td>
<td>the two proviso to sec 394(1) provide that:</td>
</tr>
<tr>
<td>14.</td>
<td>Report from the Registrar of companies and Official Liquidator that the affairs of the company have not been conducted in a manner prejudicial to the interest of its members or public interest</td>
<td>The requirement for such report has been omitted by the Companies Act, 2013.</td>
<td>- No compromise or arrangement, proposed for the purposes of, or in connection with, a scheme for the amalgamation of a company, which is being wound up, with any other company or companies, shall be sanctioned by the Court unless the Court has received a report from the Registrar that the affairs of the company have not been conducted in a manner prejudicial to the interest of its members or to public interest.</td>
</tr>
<tr>
<td></td>
<td>The two proviso to sec 394(1) provide that:</td>
<td>- No order for the dissolution (without winding up) of any transferor company shall be made by the Court unless the Official Liquidator has, on scrutiny of the books and papers of the company, made a report to the Court that the affairs of the company have not been conducted in a manner prejudicial to the interests of its</td>
<td></td>
</tr>
<tr>
<td>Sr. No.</td>
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<td>15.</td>
<td>Simplified procedure for merger or amalgamation of certain companies</td>
<td>Section 233 provides for simplified procedure for merger which is prescribed in this section. Such simplified procedure can be adopted for certain companies only which are as follows: (i) two or more small companies (ii) a holding company and its wholly owned subsidiary company (iii) such other class or classes of companies as may be prescribed.</td>
<td>The 1956 act did not allow simplified procedure for merger for any class of companies.</td>
</tr>
<tr>
<td>16.</td>
<td>Cross-border Mergers</td>
<td>As per section 234, Indian companies can merge into foreign company and vice versa. But such foreign companies should be incorporated in jurisdictions as notified by central government from time to time and prior approval of Reserve Bank of India is required.</td>
<td>Section 394 of the 1956 Act defined ‘transferee company’ as: ‘transferee company’ does not include any company other than a company within the meaning of this Act; but ‘transferor company’ includes any body corporate, whether a company within the meaning of this Act or not. In other words, under the 1956 Act, a scheme of amalgamation where transferee company is not an Indian company cannot be sanctioned.</td>
</tr>
<tr>
<td>17.</td>
<td>Power to acquire shares of shareholders dissenting from scheme or contract approved by majority</td>
<td>Section 235 of the 2013 Act omits this requirement of 75% in number. In addition to that, section 235 furthers provides for time bound disbursal of purchase consideration received by transferor company to its shareholders. The period is 60 days from the date of receipt by transferor company. This was not the case in the 1956 Act.</td>
<td>Where shares in the transferor company of the same class as the shares whose transfer is involved are already held by, or by a nominee of the transferee company or its subsidiary companies to a value greater than 10% of the aggregate of the values of all the shares in the company of such class, the holders who approve the scheme or contract, besides holding not less than 90% in value of the shares (other than those already held as aforesaid) whose transfer is involved,</td>
</tr>
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<tr>
<td>18.</td>
<td>Purchase of minority shareholding</td>
<td>New provisions-‘Squeeze-out provision’ introduced by the 2013 Act in section 236.</td>
<td>There were no ‘squeeze-out provisions’ in the 1956 Act.</td>
</tr>
<tr>
<td>19.</td>
<td>Power of Central Government to provide for amalgamation of companies in public interest</td>
<td>Section 237(4) provides that any person aggrieved by the assessment of compensation made by the Central Government can appeal to the Tribunal within 30 days of the date of the publication of the assessment in the official gazette.</td>
<td>Section 396(3A) provided that any person aggrieved by the assessment of compensation made by the Central Government could appeal to Company Law Board within 30 days of the date of the publication of the assessment in the Official Gazette.</td>
</tr>
<tr>
<td>20.</td>
<td>Liability of officers in respect of offences committed prior to merger, amalgamation etc</td>
<td>Section 240 of the 2013 Act has introduced a new provision which provides for liability in respect of offences committed under this Act by officers in default of the transferor company prior to its merger, amalgamation or acquisition shall continue after such merger, amalgamation or acquisition.</td>
<td>There was no such provision in the 1956 Act.</td>
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ANNEXURE-II
A COMPARATIVE TABLE OF REGULATIONS OF TAKEOVER CODE 2011 AND CORRESPONDING PROVISIONS OF TAKEOVER CODE 1997*

<table>
<thead>
<tr>
<th>Regulation of Takeover code 2011</th>
<th>Corresponding Regulation of Takeover Code 1997</th>
<th>Subject matter</th>
<th>Changes Introduced</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>1</td>
<td>Coverage of the Takeover Code</td>
<td>Regulation 1(3) of 2011 Code makes the 2011 Code applicable to both direct acquisitions and indirect acquisitions of shares.</td>
</tr>
<tr>
<td>2</td>
<td>2</td>
<td>Definitions</td>
<td>New definitions in 2011 Code- “acquisition”, “enterprise value”, “financial year”, “frequently traded shares”, “identified date”, “immediate relative”, “tendering period”, “volume weighted average market price”, “volume weighted average”, “weighted average number of total shares”. Definition of “panel” (Takeover Panel) omitted as 2011 Code omits provisions relating to takeover panel. The definition of “persons acting in concert” fortified by including promoter group in the definition of deemed PACs. Definition of “control” amended to clarify that director or officer of target company shall not be deemed to have control over it merely by virtue of holding that position.</td>
</tr>
<tr>
<td>3(1)</td>
<td>10</td>
<td>Initial trigger for open offer obligations of an acquirer in case of substantial acquisition of shares/ voting rights.</td>
<td>Initial trigger threshold increased from 15% to 25%.</td>
</tr>
</tbody>
</table>

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<tr>
<td>3(2)</td>
<td>11</td>
<td>Creeping acquisition</td>
<td>Multiple triggers replaced by a single trigger limit of 5% for additional acquisitions.</td>
</tr>
<tr>
<td>4</td>
<td>12</td>
<td>Acquisition of control over a company</td>
<td>Whitewash provisions (exemption from provisions on basis of special resolution passed by shareholders) omitted.</td>
</tr>
<tr>
<td>5</td>
<td>Explanation to Regulation 11</td>
<td>Definition of “indirect acquisition”</td>
<td>Provisions of 2011 Code deem indirect acquisitions as direct acquisitions in cases where any of the three 80% financial parameters (proportionate NAV/ sales turnover/ market capitalization are met.</td>
</tr>
<tr>
<td>6/7</td>
<td>21</td>
<td>Voluntary Offer</td>
<td>Minimum voluntary offer size increased from 20% to 26%</td>
</tr>
<tr>
<td>8</td>
<td>20/20A</td>
<td>Minimum Offer Price</td>
<td>The market price based parameter used in 2011 Regulations for determining minimum offer price is 60 trading day volume-weighted average market price (VWAMP) in lieu of the average of the weekly high and low of the closing prices/ daily intra-day high and low prices of shares under the 1997 Code since the daily volume weighted average price data are currently readily available. The 2011 Code omits the clause relating to non-compete fee(i.e. non-compete fee in excess of 25% of offer price to be added to offer price) and provides that any consideration paid in any form (whether as non-compete fee or as control premium) inclusive of all ancillary and collateral agreements shall form part of the negotiated price</td>
</tr>
<tr>
<td>9</td>
<td>20(2)</td>
<td>Modes of payment of offer price to shareholders</td>
<td>In order to ensure that interest of the shareholders of the target company are duly protected, 2011 Code provides that only frequently traded</td>
</tr>
<tr>
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<td></td>
<td>who tender their shares in an open offer</td>
<td>equity shares that conform to specified criteria, secured and listed debt instruments with investment grade credit rating or above, and convertibility instruments, which are converted into frequently traded shares, should be allowed as the modes of paying the offer price under the open offer. This new provision in the 2011 Code which is not there in 1997 Code will ensure that shareholders are not saddled with illiquid securities.</td>
<td></td>
</tr>
<tr>
<td>10</td>
<td>3</td>
<td>General Exemptions from open offer obligations</td>
<td>Corporate Debt Restructuring under the scheme prescribed by the RBI provides a means by which funds can be infused into a financially weak company. Presently there is no specific provision under the 1997 Code that explicitly exempts such schemes. Therefore, to facilitate such CDR schemes, the 2011 Code provides that acquisitions pursuant to such schemes are exempt from open offer obligations in case of acquisition of shares (Regulation 3) but not in case of acquisition of control (Regulation 4). Such exemption is available only if the scheme has been authorised by the shareholders by way of a special resolution passed by postal ballot, and no change in control over the target company takes place through such acquisition.</td>
</tr>
<tr>
<td>11</td>
<td>29A</td>
<td>Power of SEBI to exempt</td>
<td>SEBI would continue to have the power to grant exemption from making an open offer. SEBI would also continue to have the discretion to give relaxation from strict compliance with procedural</td>
</tr>
<tr>
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<td>requirements and the same would be linked to specific conditions that would have to be met. However, the requirement of making a mandatory reference to a Panel by SEBI before granting an exemption has been done away with and such requirement has now been made discretionary.</td>
<td></td>
</tr>
<tr>
<td>12</td>
<td>13</td>
<td>Manager to Open Offer</td>
<td>The requirement that Merchant banker should not be an associate of or group of the target company has been omitted from 2011 Code.</td>
</tr>
<tr>
<td>13</td>
<td>14</td>
<td>Public Announcement</td>
<td>Currently, the 1997 Code require a public announcement regarding the open offer (other than indirect acquisitions) to be made within four working days of acquiring or agreeing to acquire shares in the target company. The new provisions in Regulation 13 of the 2011 Code requires that a short public announcement shall be made on the same day as the date of the transaction which triggered the open offer. A detailed public statement should be made within a period of five working days thereafter so as to accord the acquirer sufficient time to actually work out the logistics of the offer obligations. In the event the acquirer does not succeed in acquiring the ability to exercise or direct the exercise of voting rights in, or control over the target company, the acquirer shall not be required to make a detailed public statement of an open offer for acquiring shares under these regulations.</td>
</tr>
<tr>
<td>14</td>
<td>15</td>
<td>Publications of PA and DPS</td>
<td>Currently, the 1997 Code requires a PA regarding the open offer to be made within four working days of</td>
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<thead>
<tr>
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<td>acquiring or agreeing to acquire shares in the target company. The PA is required to be detailed and contains all the details about the open offer. The 2011 Code now requires that a short PA shall be made on the same day as the date of the transaction which triggered the open offer. A detailed public statement should be made within a period of five working days thereafter so as to accord the acquirer sufficient time to actually work out the logistics of the offer obligations. While the 1997 Code required publication of PA in newspapers, the 2011 Code only requires that the short PA be sent to stock exchanges [see Regulations 15] who shall then disseminate the information about the acquisition to the public. However, the detailed public statement is required to be published in newspapers.</td>
<td></td>
</tr>
<tr>
<td>15</td>
<td>16</td>
<td>Contents of PA and DPS</td>
<td>The extant provisions (Regulation 16 of the 1997 Code) require the PA to be very detailed. The provisions of Regulation 15 of the 2011 Code do not require such detailed disclosures in the PA. PA will be short and followed by detailed public statement pursuant to the public announcement. Regulation 15(3) provides that the PA of the open offer, the detailed public statement, and any other statement, advertisement, circular, brochure, publicity material or letter of offer issued in relation to the acquisition of shares under these regulations shall not omit any relevant information, or contain any misleading information. These provisions are improvement over</td>
</tr>
<tr>
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<td>those of the Regulation 17 of the 1997 Code. Regulation 17 of the 1997 Code only provided that the PA, advertisement, brochure etc. should not contain misleading information. It did not cover omission of information to make documents misleading. Regulation 15(3) also prohibits omission of information from PA, detailed public statement etc.</td>
<td></td>
</tr>
<tr>
<td>16 18</td>
<td>Filing of Letter of Offer with SEBI</td>
<td>Changes in Time Line and filing fees</td>
<td></td>
</tr>
<tr>
<td>17 28</td>
<td>Provision of Escrow account</td>
<td>Changes in amount to be escrowed.</td>
<td></td>
</tr>
<tr>
<td>18 22&amp;26</td>
<td>Other provisions</td>
<td>Changes in time line</td>
<td></td>
</tr>
<tr>
<td>19 21A</td>
<td>Conditional Offers</td>
<td>Not much change</td>
<td></td>
</tr>
<tr>
<td>20 25</td>
<td>Competing Offers</td>
<td>With a view to rationalise the time lines for making a competing offer, Regulation 20 provides that a competing offer may be made within 15 working days from the date of the original detailed public statement instead of 21 calendar days from the date of the original public announcement. The 2011 Code further provides that an open offer made by a competing acquirer shall not be regarded as a voluntary open offer. Further, within 21 working days from expiry of the offer period, any competing acquirer would be free to negotiate and acquire the shares tendered to the other competing acquirer, at the same price that was offered by him to the public.</td>
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<td>However, the holding of the acquirer and persons acting in concert with him ought not to increase beyond the maximum permitted non-public shareholding and during the pendency of competing offers, no appointment of additional directors ought to be made on the board of directors of the target company.</td>
</tr>
<tr>
<td>21 29</td>
<td>Payment of Consideration</td>
<td></td>
<td>The deadline for transfer of consideration amount to special bank account was seven calendar days from the date of closure of the offer under the 1997 Code. The 2011 Code provides that both transfer to special account and payment to shareholders to be completed within ten working days of the expiry of the tendering period.</td>
</tr>
<tr>
<td>22 No such provision in any Regulation</td>
<td>Completion of transaction that triggered the open offer</td>
<td></td>
<td>New provision. The agreement that attracts an open offer obligation may be acted upon during the pendency of the open offer only if 100% of the consideration payable under the open offer is placed in escrow. An agreement that triggered an open offer obligation would have to be completed within 26 weeks after the offer period.</td>
</tr>
<tr>
<td>23 27 Withdrawal of open offer</td>
<td></td>
<td></td>
<td>The 2011 Code also permits withdrawal of offer on the additional ground that any condition stipulated in the agreement for acquisition attracting the obligation to make the open offer is not met for reasons outside the reasonable control of the acquirer, such agreement is rescinded, and subject condition has been disclosed in the detailed public statement and the letter of offer.</td>
</tr>
<tr>
<td>Regulation of Takeover code 2011</td>
<td>Corresponding Regulation of Takeover Code 1997</td>
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</tr>
<tr>
<td>24</td>
<td>22(3)/ 22(7)</td>
<td>Obligations of directors of the target company</td>
<td>Provisions made more stringent. During the offer period, no person representing the acquirer or any person acting in concert with him shall be appointed as director on the board of directors of the target company, whether as an additional director or in a casual vacancy. Such appointment may be made only after the deadline for making competing offers expires ( \text{i.e. after an initial period of 15 working days from the date of detailed public statement} ) provided the acquirer places in escrow 100% of the consideration under the open offer in cash. Further, during the pendency of competing offers, irrespective of the amount deposited in escrow account by acquirers, there shall be no appointment of additional directors to the board of directors of the target company. However, in the event of death or incapacitation of any director, the vacancy arising therefrom may be filled by any person subject to approval of such appointment by shareholders of the target company by way of a postal ballot.</td>
</tr>
<tr>
<td>25</td>
<td>22</td>
<td>Obligation of the acquirer</td>
<td>The 1997 Code [Regulation 22(18) ] currently provides that where the acquirer has not stated his intention to dispose of or otherwise encumber any assets of the target company except in the ordinary course of business of the target company, the acquirer shall be debared from disposing of or otherwise encumbering the assets of the target company for a period of 2 years from the date of enclosure of the public offer.</td>
</tr>
<tr>
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<td>Corresponding Regulation of Takeover Code 1997</td>
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<td>offer. The new provisions of Regulation 25 of the 2011 Code provide that unless acquirer has declared an intention in the detailed public statement and the letter of offer, the acquirer shall be <em>debarred from alienating any material assets of the target company (including its subsidiaries)</em> for a period of 2 years after the offer period. However, where such alienation is necessary despite no such intention having been expressed by the acquirer, such alienation shall require a special resolution passed by shareholders of the target company, by way of a postal ballot shall and the notice for such postal ballot <em>inter alia</em> contain reasons as to why such alienation is necessary.</td>
</tr>
<tr>
<td>26</td>
<td>23</td>
<td>Obligation of target company</td>
<td>The 1997 Code entirely leaves it to the discretion of directors of the target company to issue their recommendations, if any, on an open offer. This provision is seldom used. Therefore, in line with the international best practices, the new provisions in Regulation 26(6) of the 2011 Code provide that, upon receipt of the detailed public statement, a committee of independent directors of the target company shall be formed to consider and give its reasoned recommendations on the open offer, which shall be published by the target company.</td>
</tr>
<tr>
<td>27</td>
<td>24</td>
<td>Obligations of the manager to the open offer</td>
<td>The 2011 Code specifically provides that “The manager to the open offer shall exercise diligence, care and professional judgment to ensure compliance with these regulations.”</td>
</tr>
<tr>
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<td>Corresponding Regulation of Takeover Code 1997</td>
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<td>[Regulation 27(5)] This requirement was not there in the 1997 Code. Besides, Regulation 27(7) provides that in the event of an \textit{inter se} transfer between competing acquirers, the manager to the open offer of each such competing acquirer shall file a report with the Board within 7 working days of such transfer in specified form giving particulars of such transfer. Corresponding provision was not there in the 1997 Code.</td>
</tr>
<tr>
<td>28</td>
<td>-</td>
<td>Disclosure-related provisions</td>
<td>New provisions in the Takeover Code</td>
</tr>
<tr>
<td>29</td>
<td>7</td>
<td>Disclosures of acquisition and disposal</td>
<td>The 1997 Code provided that any acquirer, who acquires shares or voting rights which (taken together with shares or voting rights, if any, held by him) would entitle him to more than 5% or 10% or 14% or 54% or 74% shares or voting rights in a company, in any manner whatsoever, shall disclose at every stage the aggregate of his shareholding or voting rights in that company and to the stock exchanges where shares of the target company are listed. The 2011 Code replaces multiple trigger points for disclosure obligations (5%, 10%, 14%, 54% and 74%) with one single trigger point-5% or more voting rights in target company.</td>
</tr>
<tr>
<td>30</td>
<td>8</td>
<td>Continual Disclosures</td>
<td>The 1997 Code (Regulation 8) cast disclosure obligations (annual disclosure of holdings as at 31st March) on the substantial shareholder (holder of 15% or more voting rights in target company), any</td>
</tr>
<tr>
<td>Regulation of Takeover Code 2011</td>
<td>Corresponding Regulation of Takeover Code 1997</td>
<td>Subject matter</td>
<td>Changes Introduced</td>
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<td>person having less than 15% voting rights but having control and promoters. The 2011 Code casts such disclosure obligations on substantial shareholder (holder of 25% or more voting rights in target company) and promoters but not on a person who has less than 25% voting rights but having control of target company. Further, the obligations of every listed company to disclose to stock exchanges of holdings of substantial shareholder, person having control and promoters in the company have been omitted from the 2011 Code.</td>
<td></td>
</tr>
<tr>
<td>31</td>
<td>8A</td>
<td>Disclosure of encumbered shares enlarged the scope and</td>
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<td></td>
<td></td>
<td>● The 1997 Code covered only pledge of shares. The 2011 Code has enlarged the scope and covers all encumbrances of shares.</td>
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<td>● The 1997 Code also cast disclosure of pledges and invocation by promoters on the listed companies. The 2011 Code omits this requirement.</td>
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<td>● The 2011 Code requires disclosures of release of encumbrances as well. The 1997 Code did not require this disclosure.</td>
<td></td>
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<tr>
<td>32</td>
<td>44</td>
<td>Power of SEBI to issue directions</td>
<td></td>
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<td></td>
<td></td>
<td>● The 2011 Code empowers SEBI also to give following directions:</td>
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<td>● Directing the acquirer who has failed to make payment of the open offer consideration to shareholders, not to make any open offer or enter into any transaction that would attract the obligation to make an open offer in respect of shares of any target company for such period as the Board may deem fit;</td>
<td></td>
</tr>
<tr>
<td>Regulation of Takeover code 2011</td>
<td>Corresponding Regulation of Takeover Code 1997</td>
<td>Subject matter</td>
<td>Changes Introduced</td>
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</tbody>
</table>
|                                 |                                               |                | • Directing any person to cease and desist from exercising control acquired over any target company without complying with the requirements under these regulations;  
• Directing divestiture of such number of shares as would result in the shareholding of an acquirer and persons acting in concert with him being limited to the maximum permissible non-public shareholding or below. |
| 33                              | 5                                             | Power of SEBI to remove difficulties | No change |
| 34                              | -                                             | Amendment to other regulations | New provision |
| 35                              | 47                                            | Repeal and Saving | - |