CHAPTER - 4

LEGAL ASPECTS OF MERGERS AND
ACQUISITIONS

A modern, statutory competition regime materialized in India only after the implementation of economic reform in 1991. The relative belatedness of development of Competition Act is a mystifying fact. For last three decades, Indian government had been a primary proponent of the neoliberal philosophy that places faithfulness in markets as the most proficient means of assigning public resources. Yet the prologue of the essential corollary, an operative policy thought-out to monitor newly competitive market did not emerge until year 2011. This chapter presents comprehensive economic assessment of India's emerging competition policy regime. Section 2 assesses the Competition Act, 2002. Section 3 describes comparison of Competition Act, 2002 with the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP) Section 4 shows applicable legal provision in case of M & A in India. Section 5 presents M & A and consumer protection and Section 6 outlines the conclusion.

4.1. Introduction:

Indian business enterprises were subjected to rigorous regulatory regime before 1990s. This has led to asymmetrical growth of Indian corporate enterprises during that period (Agarwal, 1999). The economic transformation initiated by the Government of India since 1991, has influenced the governance, and led to acceptance of different growth and expansion approaches by the business enterprises. In that course of action, Mergers and
Acquisitions (M & A) have emerged as a phenomenon to reckon with. M & A are not new in the Indian economy. In the past also, companies have used M & A to expand but now, Indian corporate enterprises are focusing on the lines of global competitiveness, market share, core competence, and consolidation. This procedure of refocusing has further been hastened by the arrival of foreign competitors. In this backdrop, Indian corporate business enterprises have commenced reshuffling movements through M & A to create a remarkable presence and expand in their core areas of interest, to acquire competitive edge. Closely on the heals of this development, the law aimed at fostering and promoting competition has also evolved.

In 1990, the first effort in regulating takeovers in India was made in a limited way by inserting Clause 40 in the Listing Agreement that provided for making a public offer to the shareholders of a company by any person who wanted to acquire 25% or more of the voting rights of the company. Apart from this, mergers, acquisitions and takeovers were regulated by Companies Act, 1956, Industries (Development and Regulation) Act, 1951, MRTP Act, 1969, FERA, 1973, Sick Industrial Companies (Special Provisions) Act, 1985, Section 72A of the Income Tax Act, 1961 and the Securities Contract Regulation Act, 1956 (SCRA) (with respect to transfer of shares of listed companies vide clauses 40A and 40B) (Tambi, 2005). In case of multinational companies related M & A, provisions of the FERA were applied which enforced a general limit on foreign ownership at 40%. Moreover, in the event of a hostile offer for the company, the board of a company, under Section 22A of the SCRA, had the power to decline transfer of shares\(^\text{15}\) to a specific buyer, thereby making it virtually unfeasible for a takeover to occur without the

\(^{15}\) In case of Escorts Ltd. and DCM Ltd., takeover by Swaraj Paul, Chairman of CAPARO Group of Companies. The management of former declined to register acquired shares to avert the takeover.
acknowledgment of the management of the target company. The scope of hostile takeovers (not of friendly takeovers) was restricted in India prior to 1991. According to Section 108 of the Companies Act 1956, the rejection to transfer shares by the company board could be on two reasons; that the transfer was against the welfare of the company, or against public interest. Also, prior to the 1990s, an open offer was compulsory for acquiring 25% stake in a company. In 1990, this upper limit was reduced to 10% of a company’s capital (Bagchi, 1999; the Companies Act, 1956).

The procedure of M & A in India is court determined, long drawn, and therefore problematic. A listed company commencing a court driven restructuring execution will have to go through a tiered structure of approaching the regional director, the high court, the shareholders / creditors, registrars of companies and the stock exchange. This entire procedure can take anywhere between 6 to 8 months and, in some cases; have taken more than one year (Teena, 2005). The procedure may be commenced through common contracts between the two parties, but that is not adequate to provide a legal shield to it. The authorization by the High Court is mandatory for bringing M & A into effect. The Companies Act, 1956 strengthens stipulation involving M & A and other narrated problems of negotiations, arrangements, and reconstructions. However, other necessities of the Companies Act get invoked at different times and in each case of M & A and the process remain far from trouble-free. The Central Government has a role to play in this procedure and it acts through an Official Liquidator (OL)/ the Regional Director of the Ministry of Company Affairs. The entire procedure has to be followed to the satisfaction of the Court.
4.2. **Competition Act 2002:**

The Competition Act, 2002 of India declares that it is a law to promote and preserve competition in Indian market to serve consumer interest while defending the freedom of economic action of several market contestants and to preclude practices which influence competition and to set-up a commission for these purposes.

In the pursuit of globalization, India has responded by removing controls and resorting to liberalization. The natural outcome of this is that the Indian market should be geared to face competition from within the country, and outside (Viswanathan, 2003). To take care of the needs of the trading, industry and business associations, the Central Government decided to enact a law on competition. Finance Minister, Chidambaram (2003) highlighted the need to have a strong legal system and said “A world class legal system is absolutely essential to support an economy that aims to be world class. India needs to take a hard look at its commercial laws and the system of dispensing justice in commercial matters.” Exercising the power vested in the Central Government, it has established the Competition Commission of India (CCI) having its head office at New Delhi with effect from October 14, 2003 but could not be made operational due to filing of a writ petition before the Supreme Court. While addressing of the writ appeal on the 20th January, 2005, the Supreme Court held that if a professional body is to be formed by the Union Government, it might be suitable for the Government to think creation of two separate bodies.

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16 The Competition Act, 2002 which received assent of the President of India on January 13, 2003 and was published in the Gazette of India dated January 14, 2003. Some of the sections of the Act were brought into force on March 31, 2003 and majority of the other sections on June 19, 2003. However, the entire Act has not come into force.
The Commission is a body corporate having perpetual succession and a common seal. It may establish offices at other places in India. The Commission consists of a Chairperson and not less than two and not more than 10 other members to be appointed by the Central Government, as on 28th May 2012 the Commission consisted following members;

(CCI website, 25th May 2012)

4.2.1 The Competition Authority:

The Authority is a multi-member body comprising of both full time as well as part time members, who are specialists in the field of economics, business, administration, international trade, and law. Selection of the members is done in a manner that ensures qualitative standing of the body. Only active persons of honesty and competence are employed as full time members, instead of retired judges or civil servants. Proceedings of the authority should be ruled bound, non-discriminatory, and transparent. The authority is located at New Delhi, with its benches at Calcutta, Mumbai, and Chennai. The authority should have its nodal positions in at least all the States of the country\(^\text{17}\) with restricted powers and functions.

\(^\text{17}\) No Nodal positions established in any States of India by CCI till 1st June 2012 (http://www.cci.gov.in/ accessed on 24th June 2012).
The authority have apparent accountability in the field of competition-education and competition advocacy to make sure public awareness of the competition values in order to encourage a healthy rivalry culture in the country. The nodal positions of the Authority should be made to bear responsibilities in the boulevard of competition-education and competition advocacy. The authority should have its own research & investigative staff and should be supported with enough budget and authorities for conducting meticulous research and inquiries. This division, however, should not have prosecutorial authorities in order to shield the truthfulness of its functions.

4.2.2 Highlights of Competition Act 2002:

The Act requires setting up of Competition Commission of India (CCI) to prevent practices having unfavorable outcome on competition, to encourage and keep up competition in markets, to safeguard welfare of consumers and to make sure freedom of trade carried out by other participants in markets. CCI proscribes enterprises to penetrate into anti-competitive contracts, abusing their dominant circumstance and forming combinations.

Scope of CCI: CCI shall look into any suspected encroachment under the Act;

(a) Either on its own motion, or

(b) On acceptance of a complaint from any individual, consumer or their trade association, or

(c) On references made by the Central Government, State Governments or any statutory authority.
Act taking place outside India but having an effect on competition in India, CCI shall notwithstanding that an agreement has been entered into outside India; or any party to such agreement is outside India; or any enterprise abuses its dominant position is outside India; or a combination has taken place outside India; or any party to combination is outside India; or any other matter or practice or action arising out of such agreement or dominant position or combination is outside India which causes an appreciable adverse effect on competition in the relevant market in India,

CCI has the power;

- To inquire into such agreement or abuse of dominant position or combination if such agreement or dominant position or combination has, or is likely to have an appreciable adverse effect on competition in the relevant market of India.
- To grant interim relief or award compensation,
- Impose penalty,
- To grant any other appropriate relief.
- To levy penalty for contravention of its orders, making of false statements or omission to furnish material information, etc.

Exclusion of jurisdiction of civil courts: According to section 61, No civil court shall have the jurisdiction to consider any suit or legal proceedings in respect of any matter which CCI is authorized by or under the Act to determine. Also, no injunction can be granted by any court or other authority in reverence of any prosecution taken or to be taken in pursuance of any power conferred by or under the Act. CCI is not compelled by the procedure laid down by Code of Civil Procedure, 1908 but shall be guided by the principles of natural justice. CCI, thus, has the power to regulate its own process.
Division of dominant enterprise: CCI can give an opinion to the Central Government division of a dominant enterprise to ensure that it does not abuse its position. On the recommendation, the Central Government under Section 28 of the Act may direct division of such an enterprise.

Appeal from CCI: Any person aggrieved by any decision or order of CCI may file an appeal to the Supreme Court within 60 days from the date of the communication of the decision or order. It shall be in such form and be accompanied by such fee as may be prescribed. An appeal may be entertained by the Appellate Tribunal after the expiry of the said period of sixty days if it is satisfied that there was sufficient cause for not filing it within that period.

The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011:

1) Meaning of ‘Combination’: The term 'combination' for the purposes of the Competition Act is defined in section-5 of the Act, to include any acquisition of shares, voting rights, control or assets or merger or amalgamation of enterprises, where the parties to the acquisition, merger or amalgamation satisfy the prescribed monetary thresholds in relation to the size of the acquired enterprise and the combined size of the acquiring and acquired enterprises with regard to the assets and turnover of such enterprises.

A. Threshold for size of targeted companies: A transaction will be a ‘combination’ for the purposes of the Act and require approval of CCI only if the size of the targeted company is at least ₹ 250 Crores in terms of assets or ₹ 750 Crores in terms of turnover. It means that if the targeted

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18 An enterprise for the purposes of the Competition Act includes all entities within a ‘group’, defined to mean controlling entities, controlled entities and entities under common control. In this context, 'control' means exercising at least 50% of voting rights, appointing at least 50% of directors or management control.
company has assets of less than ₹ 250 Crores or turnover of less than ₹ 750 Crores, based on the most recent audited financial statements of the entities involved, notification and approval requirements under the combination provisions (i.e. section 5) of the Competition Act are not required.

B. Threshold for combined size of acquiring and targeted companies: A transaction attracts the combination provisions of the Competition Act only if the combined size of acquiring and a targeted companies, upon completion of the transaction, meets the following thresholds:

<table>
<thead>
<tr>
<th>In India</th>
<th>ASSETS</th>
<th>TURNOVER</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Group</td>
<td>₹ 1,500 Crores</td>
<td>₹ 4,500 Crores</td>
</tr>
<tr>
<td>Group</td>
<td>₹ 6,000 Crores</td>
<td>₹ 18,000 Crores</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>In India or outside</th>
<th>ASSETS</th>
<th>TURNOVER</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Group</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Global Assets</td>
<td>USD $750 million</td>
<td>₹ 750 Crores</td>
</tr>
<tr>
<td>India Assets</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Global Turnover</td>
<td></td>
<td></td>
</tr>
<tr>
<td>India Turnover</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Group</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Global Assets</td>
<td>USD $3 billion</td>
<td>₹ 750 Crores</td>
</tr>
</tbody>
</table>

C. Meaning of ‘assets’ and ‘turnover’: The Act does not define ‘assets’ but provides for purpose of valuation of assets to be based upon the book value of the assets as shown in the audited books of account of the company, in the financial year immediately preceding the date of transaction. Under the Act, value of assets includes brand value, goodwill and value of intellectual property but eliminates depreciation. Further, the
Act defines ‘turnover’ to include the value of sale of goods or services, the Combination Regulations clarify that indirect taxes will be excluded from the computation of turnover.

2) **Transitory Dealings:** Under the Combination Regulations, the dealings agreed pursuant to definitive documentation prior to June 1, 2011 have been exempted.

A. **Acquisition/acquisition of control:** For every acquisition of shares or control (resulting into combination), the CCI is enforced to be notified only if the ‘binding document(s)’ (i.e. a document conveying a decision to acquire control, shares or voting rights) in relation to such acquisition is executed on or after June 1, 2011.

B. **Merger/amalgamation:** For every merger/amalgamation (following into combination), the CCI is to be notified only if the date of sanction (i.e. final decision taken by the board of directors) of proposals is on or after June 1, 2011.

3) **Trigger Proceedings:** The obligation to file notice at the CCI is based upon certain trigger proceedings

A. **Acquisition/acquisition of control:** The CCI is required to inform within 30 days of the implementation of any contract or other document for acquisition or acquiring of control.

The phrase ‘other document’ means any ‘binding document’ conveying an agreement or decision to acquire control of shares, voting rights or assets. In the context of hostile takeover, ‘other document’ means any document
executed by the acquirer, which conveys a decision to acquire control of shares or voting rights. Where no document has been executed but the intention to acquire has been communicated to the Central Government or State Government or any statutory authority, the date of communication will be deemed to be the date of implementation of the ‘other document’ for acquisition.

B. Merger and amalgamation: The CCI is required to be notified within 30 days of the approval of the proposal relating to merger or amalgamation by the board of directors of the companies involved with such merger or amalgamation. The approval of the board of directors has been elucidated under Combination Regulations to refer to the final decision of the board of directors.

C. PFI, FII, bank and venture capital fund: Any share subscription or financing facility or any acquisition by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant of a loan agreement or investment agreement are exempted from merger control provisions under the Competition Act. However, the CCI is required to be informed within 7 days of such share subscription or financing facility or acquisition by a public financial institution, foreign institutional investor, bank, or venture capital fund in Form III.

M & A in the banking sector would be kept outside the purview of the Act. The Bill pertaining to Banking Amendment, which is pending before Parliament, gives power to Reserve Bank of India (RBI) to clear M & A in the banking sector.
4) **Requirement to Notify:**

A. **Acquisition/acquisition of control:** The acquirer has the legal responsibility to file the notice in Form I or Form II (see point-5 below), as the case may be.

B. **Hostile takeovers:** Where the company is being acquired without its approval, the acquirer has the liability to file the notice in Form I or Form II, as the case may be.

C. **Merger/amalgamation:** Parties to the combination are enforced to jointly file the notice in Form I or II, as the case may be.

D. **Contract in Tranches:** Parties to the combination may file a single notice covering all the contracts where the eventual proposed outcome of a business contract is achieved by way of a series of steps or smaller individual contracts which are inter-connected or inter-dependent on each other, one or more of which may amount to a combination.

5) **Announcement to CCI:** In cases where the prior announcement and approval necessities under the combination provisions in accordance with sub-section (2) of section 6 of the Act are attracted, an announcement in the standard form must be filed with the CCI and the combination cannot be effected unless prior approval is taken from the CCI.

A. **Filing fee:** The following table summarizes the filing fees:

<table>
<thead>
<tr>
<th>Notice</th>
<th>Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Form I</td>
<td>₹ 50,000</td>
</tr>
<tr>
<td>Form II</td>
<td>₹ 1,000,000</td>
</tr>
<tr>
<td>Form III</td>
<td>No fee</td>
</tr>
</tbody>
</table>
6) **CCI’s Assessment:**

**A. Combination Stopwatch:** The combination ‘stopwatch’ starts ticking from the date of receipt of notice by the CCI. The clock stops if the parties to the combination are required to file any additional information or rectify any information or carry out modification pursuant to the CCI’s direction.

**B. Timelines and fast track endeavour:** Under the Combination Regulations, the CCI has committed that it shall “endeavour” to pass an order or issue direction in accordance with sub-section (1) or sub-section (7) of section 31 of the Act. The following table summarizes the timelines for the CCI:

<table>
<thead>
<tr>
<th>Nature of the timeline</th>
<th># of days from receipt of valid and complete notice</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stage 0 Combination stopwatch starts ticking</td>
<td>0</td>
</tr>
<tr>
<td>Stage I Formulation of <em>prima facie</em> opinion</td>
<td>30 days</td>
</tr>
<tr>
<td>Stage II “Endeavour” to pass a final order or issue direction</td>
<td>180 days</td>
</tr>
<tr>
<td>Stage III Final deadline beyond which combination will be deemed to have been approved</td>
<td>210 days</td>
</tr>
</tbody>
</table>

7) **Contracts where notice need not be filed:** Schedule I of the Combination Regulations itemizes categories of combinations that are unlikely to cause an appreciable adverse effect on competition and therefore need not ordinarily require notification;

**A.** an acquisition of shares or voting rights solely as an investment or in the ordinary course of business (in so far as the total shares or voting rights held by the acquirer, directly or indirectly, do not exceed 15% and does not lead to acquisition of control);
B. an acquisition of shares or voting rights, where the acquirer, prior to the acquisition, has 50% or more of share or voting rights (except where the contract results in change from joint control to sole control);

C. an acquisition of assets, not directly related to the business activity of the acquirer or made solely as an investment or in the ordinary course of business, not leading to the control of the enterprise (except where assets being acquired represent substantial business operations in a particular location or for a particular product or service of the enterprise)

D. an amended or renewed tender offer where a notice to CCI is filed by the party making the offer, prior to such amendment or renewal of the offer;

E. an acquisition of stock-in-trade, raw materials, stores and spares in the ordinary course of business;

F. an acquisition of shares or voting rights pursuant to a bonus issue or stock splits or consolidation of face value of shares or subscription to rights issue (not leading to acquisition of control);

G. any acquisition of shares or voting rights by a person acting as a securities underwriter or a registered stock broker;

H. an acquisition of control or shares or voting rights or assets by one enterprise of another within the same group;

I. an acquisition of ‘current assets in the ordinary course of business: and (Explanation: ‘Current Assets’ shall have the same meaning as attributed to them in schedule VI of the Companies Act, 1956)

J. A combination taking place entirely outside India with insignificant local nexus and effects on markets in India.

However, the notification of such contracts will be compulsory where they are likely to cause appreciable adverse effect on competition in India.
8) **Self-governing Monitoring Agencies:** Where the CCI is of the judgment that the modifications proposed by it and accepted by the parties to the combination require supervision, the CCI may appoint self-governing agencies (i.e. accounting firm, management consultancy, law firm, professional organization, or independent practitioners of repute) who/which have no conflict of interest. These agencies shall submit their report to the CCI and will be paid by the parties.

9) **Compliance Report:** Where the CCI is of the opinion that combination has or is to be expected to have appreciable adverse effect on competition but such adverse effect can be eradicated by appropriate modification to such combination, it may propose appropriate modification to the combination to the parties to the combination. The modifications shall be carried out by the parties to the combination within the period specified by the CCI. The parties to the combination shall, upon completion of modification, file compliance report with the CCI.

10) **Confidentiality:** The CCI is obligated under the Competition Act to maintain confidentiality. The parties to the combination requesting confidentiality are required to clearly state the reasons, justifications and implications for the business so that CCI may consider the request for confidentiality.

11) **Cooperation with other agencies or statutory authorities:** The CCI may seek the opinion of any other agency or statutory authority in relation to a combination.
Highlights of New regulations, titled The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011

The Indian regulatory environment has seen theatrical changes over the past few years with meaningful amendments recommended to the direct and indirect tax regimes as well as several corporate and securities laws. One of these vital changes has been presented by SEBI- the revamp of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997. SEBI has notified on 30 September 2011, the much anticipated New Takeover Regulations i.e. SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (“SEBI (SAST) Regulations, 2011”) which will replace the existing Takeover (SAST) Regulations, 1997. The new Regulations shall come into force on the 30th day from the date of their publication in the Official Gazette i.e. 22/10/2011, any acquisition, or sale of shares of Listed Company shall be governed by provisions of SEBI (SAST) Regulations, 2011.

The new amendments announced by SEBI have fundamentally been made on the basis of the report submitted by the Takeover Regulations Advisory Committee, under the chairmanship of Mr. C. Achuthan. The Committee was established by SEBI to recommend enhancements in the Takeover Code. The report had been formulated taking into account a plethora of vital factors having a strong relevance on functioning of the Indian capital markets, which have seen amendments since the Takeover Code was passed in 1997. These comprise the rapidly increasing level of M&A activity, the rising refinement of the takeovers Indian market, SEBI’s decade-long regulatory proficiency in capital markets, and several legal verdicts concerning to the Takeover Code.
On the basis of research and existing best procedures in other states jurisdictions, the Committee has recommended several amendments to the exiting Takeover (SAST) Regulation of 1997. The result of these modifications has been to achieve the amended code considerably in line with worldwide takeover regulations. The objectives of SAST are to protect interest of the investors in security market for a listed company providing amongst others, a chance for the public shareholders to exit where there is a significant acquisition of equity shares or voting rights or control over a listed company, consolidation of holdings by dominant shareholders and associated disclosures and punishments for non-compliance, etc.

There are three major changes in the takeover code which are different from the earlier takeover code. These changes are as follows:

A. Increase in Initial Threshold Limit from 15% to 25%.

   The Initial Threshold limit provided for Open Offer obligations is increased from 15% to 25% of the voting rights of the Target Company.

B. Increase in Offer Size from 20% to 26%.

   The increase in open offer increased from 20% to 26%.

C. Abolition of Non-compete fees

The scrapping the non-compete fee or control premium. Any amount paid to the Promoters/Sellers whether as consideration, non-compete fee or control premium or otherwise, shall be added in Offer Price and hence public shareholders shall be given offer at the highest of such prices.
4.2. Comparison of Competition Act with MRTP

The differences between the old law (namely the MRTP Act, 1969) and the new law (the Competition Act, 2002) are captured in the form of a table 4.1 given below:

<table>
<thead>
<tr>
<th>SR. No</th>
<th>MRTP Act, 1969</th>
<th>Competition Act, 2002</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Based on the pre-reforms state of affairs</td>
<td>Based on the post-reforms circumstances</td>
</tr>
<tr>
<td>2</td>
<td>Based on size as a factor</td>
<td>Based on structure as a factor</td>
</tr>
<tr>
<td>3</td>
<td>Competition offences unstated or not defined</td>
<td>Competition offences unambiguous and defined</td>
</tr>
<tr>
<td>4</td>
<td>Complicated in arrangement and language</td>
<td>Straightforward in arrangement and language</td>
</tr>
<tr>
<td>5</td>
<td>14 <em>per-se</em> offences negating the principles of natural justice</td>
<td>4 <em>per-se</em> offences and all the rest subjected to <em>rule of reason.</em></td>
</tr>
<tr>
<td>6</td>
<td>Grimaces upon dominance</td>
<td>Grimaces upon abuse of dominance</td>
</tr>
<tr>
<td>7</td>
<td>Registration of contracts compulsory</td>
<td>No requirement of registration of contracts</td>
</tr>
<tr>
<td>8</td>
<td>No combinations regulation</td>
<td>Combinations regulated beyond a specified threshold limit.</td>
</tr>
<tr>
<td>9</td>
<td>Competition Commission employed by the Government</td>
<td>Competition Commission selected by a Collegium (search committee)</td>
</tr>
<tr>
<td>10</td>
<td>Inadequate executive and financial sovereignty for Monopolies Commission</td>
<td>Comparatively adequate executive and financial autonomy for Competition Commission</td>
</tr>
<tr>
<td>11</td>
<td>No competition advocacy responsibility for the Monopolies Commission</td>
<td>Competition Commission has responsibility of competition advocacy</td>
</tr>
<tr>
<td>12</td>
<td>Reactive and rigid</td>
<td>Proactive and flexible</td>
</tr>
<tr>
<td>13</td>
<td>Unfair trade practices covered</td>
<td>Unfair trade practices omitted (Consumer Act will deal with them)</td>
</tr>
</tbody>
</table>
The Act is hence a new wine in a new bottle, the extant MRTP Act 1969 has aged for more than three decades and has given birth to the Competition Act in line with the changed and changing economic scenario in India and rest of the world as also in time with the current economic thinking comprising liberalization, privatization, and globalization (LPG).

4.3. **Applicable Indian legal provisions in case of M & A**

There is no specific process defined for carrying out M & A. It is largely based on commercial considerations that companies keep in view of the impact of taxes and its profitability. Presented hereunder is the summary of legal provisions stated in SEBI Regulations, Takeover Code, Companies Act, and Exchange Control Act.

A. **Securities and Exchange Board of India Act, 1997 (SEBI) provisions for Mergers and Amalgamation:**

1) **Takeover Code**: SEBI is the nodal authority regulating companies that are listed on stock exchanges in India. The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (Takeover Code) confines and standardizes the acquisition of shares or control in listed companies. Generally, According to regulation 10, if an acquirer obtains 15% or more of the shares or voting rights of a listed company, the acquirer would be required as per regulation 21, to make an offer to the public to acquire at least 20% of the voting capital of the company. However, Regulation 3 (1) (j) of the Takeover Code provides that Regulations 10, 11 and 12 would not apply to any transfer or acquisition of shares or voting rights pursuant to a proposal of arrangement or reconstruction, including amalgamation or merger or demerger, under
any law or regulation, whether Indian or foreign. Therefore, if a merger is authorized by the Court under the Merger Provisions, the above mentioned provisions of the Takeover Code would not be relevant.

a) **Disclosure necessities in the Takeover Code:** Regulations 7 and 8 of the Takeover Code remain applicable to a merger involving a listed company.

b) **Disclosures on certain acquisitions:** Regulation 7 requires an acquirer to make disclosures of the aggregate of his shareholding if the acquirer obtains more than 5%, 10%, 14%, 54% or 74% of the shares/voting rights of a company. Such disclosures must be made at each stage of acquisition and are to be made to the company and to the stock exchanges on which the shares of the company are listed. Regulation 7 further stipulates that an acquirer, who has acquired shares/voting rights under Regulation 11 (Consolidation of holdings), must reveal purchase or sale of 2% or more of the share capital of the company, to the company and to the stock exchanges on which the shares of the company are listed. The disclosures referred to above are to be made within 2 days of the acknowledgment of intimation of allotment of shares or the acquisition of shares or voting rights, as the case may be. The company whose shares are acquired must also reveal to the stock exchanges, the total number of shares held by the acquirers referred above.

c) **Repeated disclosures:** Regulation 8 needs a person holding more than 15% of the shares or voting rights of a company to make annual disclosures to the company (within 21 days from the financial year ending March 31) in reverence of his/her holdings as on March 31 of every year.
2) **Listing Agreement:**

The listing agreement entered into by a company for the purpose of listing its shares with a stock exchange requires the following in the case of a Court approved merger as per Clause 24 of the listing agreement of the Bombay Stock exchange:

- The scheme of merger/amalgamation/reconstruction must be filed with the stock exchange at least 1 month earlier to filing with the Court.
- The proposal cannot violate or override the provisions of any securities law or stock exchange requirements.
- The pre and post-merger shareholding must be revealed to the shareholders.

B. **SEBI 2009 provisions for acquisitions:**

1) **SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009:**


As per the ICDR Regulations, if the purchase of an Indian listed company includes the question of new equity shares or securities convertible into equity shares ("Specified Securities") by the target company to the acquirer company, the provisions of Chapter VII ("Preferential Allotment Regulations") incorporated in ICDR Regulations will be relevant (in addition to the provisions of the Companies Act). Some of the applicable and important provisions of Regulations are highlighted below.
a) **Pricing of the issue:** According to Regulation 76(1) of the ICDR Regulations, where the equity shares of the target company have been listed on a stock exchange for a period of 6 months or more prior to the relevant date, the price of the equity shares released on a preferential basis must be not less than the price that is the higher of,

i. the average of the weekly high and low of the closing prices of the related equity shares quoted on the stock exchange during the 6 months foregoing the relevant date, or

ii. the average of the weekly high and low of the closing prices of the related equity shares quoted on a stock exchange during the two weeks foregoing the relevant date.

*Explanation:* "Relevant Date" for preferential issues of equity shares, is the date thirty days prior to the date on which the general meeting of the shareholders is held to sanction the proposed issue of shares. In case of preferential issue of convertible securities, either the date mentioned aforesaid or the date thirty days prior to the date on which the holders of the convertible securities become entitled to apply for the equity shares.

b) **Lock-in:** Lock-in period for Specified Securities issued to the acquirer company (who is not a promoter of the target company) are as follows;

<table>
<thead>
<tr>
<th>SR. NO</th>
<th>Securities</th>
<th>Lock-in Duration</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>To acquirer Company (who is not a promoter of the target Company)</td>
<td>1 Year</td>
</tr>
<tr>
<td>2</td>
<td>Acquired holds prior to Preferential Allotment</td>
<td>6 Months</td>
</tr>
<tr>
<td>3</td>
<td>Preferential basis (permitted limit of 20% of the total capital)</td>
<td>3 Years</td>
</tr>
</tbody>
</table>
Explanation: In general, promoters would be the persons in over-all control of the company or who are named as promoters in the prospectus of the company. The term promoter group has an even wider connotation and would include immediate relatives of the promoter. If the promoter is a company, it would include a subsidiary or holding company of that company, any company in which the promoter holds 10% or more of the equity capital or which holds 10% or more of the equity capital of the promoter, etc.

c) **Currency of the resolution**: The preferential allocation of specified securities pursuant to a declaration of the shareholders approving such issuance must be concluded within a period of 15 days from the date on which the resolution is passed by the shareholders, failing which a fresh authorization of the shareholders shall be essential. According to Regulation 74 (1) if distribution of shares is pending on account of any authorization required from a government authority then the allotment must be completed within 15 days from the date of such authorization.

Exemption: According to Regulation 70 (1), the Preferential Allotment Regulations (other than the lock-in provisions) do not apply in the case of a preferential allotment of shares pursuant to merger/ amalgamation approved by the Court under the Merger Provisions.

### 2. Takeover Code:

It an acquisition has taken place by process of issue of new shares, or the acquisition of existing shares of a listed company, to or by an acquirer, the regulations of the Takeover Code may be applicable. Under the Takeover Code, an acquirer, along with Persons Acting in Concert (PAC):
a) According to Regulation 10, company cannot acquire shares or voting rights which (taken together with shares or voting rights, if any, held by him/her and by persons acting in concert) entitle such acquirer to exercise 15% or more of the shares or voting rights in the target company,

b) According to Regulation 11(1), who has acquired, 15% or more but less than 55% of the shares or voting rights in the target company, cannot acquire, either by himself/herself or through persons acting in concert, additional shares or voting rights entitling him/her to exercise more than 5% of the voting rights in the target company, in any financial year ending on 31st March,

c) According to Regulation 11(2), who holds 55% or more but less than 75% of the shares or voting rights in the target company, cannot acquire either by himself/herself or through persons acting in concert, any additional shares or voting rights therein,

Explanation: There are 2 minimum threshold requirements of public shareholding for continued listing of a listed company i.e. 25% and 10%. Where the target company is bound by the least 10% threshold then the 75% mentioned in this regulation is substituted by 90%.

d) Who holds 75% of the shares or voting rights in the target company, cannot acquire either by himself/herself or through persons acting in concert, any additional shares or voting rights therein, except the acquirer company makes a public announcement to acquire the shares or voting rights of the target company in accordance to the provisions of the Takeover Code.
The term ‘acquisition’ would include both, direct acquisition in an Indian listed company as well as indirect acquisition of an Indian listed company by virtue of acquisition of companies, whether listed or unlisted, whether in India or abroad. Further, the aforesaid limit of 5% acquisition is computed aggregating all purchases, without netting of sales.

However, vide a modification in the year 2009, any person holding 55% or more (but less than 75%) shares is permitted to additional increase his/her shareholding by not in excess of 5% in the target company without making a public announcement. If the acquisition is by mode of open market purchase in typical segment on the stock exchange but not through negotiated deal/bulk deal/block deal/preferential allotment or the increase in the shareholding or voting rights of the acquirer is pursuant to a buyback of shares by the target company. Though there were precise uncertainties as to the phase during which the 5% limit can be fatigued, SEBI has elucidated that the 5% threshold shall be valid throughout the survival of the target company without any restriction as to financial year or otherwise. However, just like the acquisition of 5% up to 55%, the acquisition is considered accumulating all acquisitions, not including netting of sales.

Where an acquirer who (collectively with persons acting in concert with him/her) possess 55% or more but less than 75% of the shares or voting rights in a target firm, is zealous of combining his/her possession while certifying that the public shareholding in the target company does not drop under the minimum level allowed by the Listing Agreement, he/she may do so only by making a public announcement in concurrence with these regulations:
Allowed that in a situation where the target company had secured listing of its shares by making a public offer of at least 10% of issue size of equity capital to the public in terms of clause (b) of sub-rule (2) of rule 19 of the Securities Contracts (Regulation) Rules, 1957, or in provisions of any relaxation granted from stringent enforcement of the said rule, this sub-regulation shall apply as if for the words and figures ‘75%’, the words and figures ‘ 90%’ were swapped.

Regulation 3(2) of the Takeover Code, acquisition of American Depositary Receipts/Global Depositary Receipts (ADRs/GDRs) was excused from open offer prerequisite under Chapter III of the Takeover Code until the time of exchange into the underlying equity shares. It was normally understood that this situation would stay unaffected even when routine voting preparations are entered into between depositories and ADR/GDR owners. However, pursuant to the SEBI media Release No.300/2009 dated September 22, 2009, an amendment was brought in by SEBI in the Takeover Code that such exception from open offer would be accessible only as long as ADR / GDR owners remain inactive investors without any kind of voting right with the depository banks on the underlying equity shares.

Regulation 12 of the Takeover Code additionally requires that irrespective of whether or not there has been any acquisition of equity shares or voting rights in a company, no acquirer shall acquire control over the target company, unless such individual makes a public announcement to acquire equity shares and acquires such equity shares in accordance with the Takeover Code. For the purpose of this Regulation, the word ‘acquisition’ includes direct or indirect acquisition of control of the target company by virtue of acquisition of companies, whether listed or unlisted and whether in India or abrcad.
However, the prerequisite under Regulation 12 does not relate to a change in control which takes place pursuant to an exceptional decision approved by the shareholders in a general meeting. Therefore, if 3/4ths of shareholders attendance and voting at a meeting sanction the change of control, then the prerequisite to make a public offer under Regulation 12 would not be initiated. For the purpose of this Regulation, the definition of the term ‘control’ in the Takeover Code is very extensive and includes every probable technique of obtaining control. Regulation 2 (1) (c) defines ‘control’ to include the right to employ majority of the directors, or to control the management or policy decisions of the target company, exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner

- **Pricing of the Offer:** On the basis of the parameters laid down in the Takeover Code the merchant banker will decide the price for the offer. Regulation 20 (4) reveals that the offer price for equity shares of a target company (whose equity shares are recurrently traded) will be the highest of Bargained price (BP), Closing Price (CP) and Average Price (AP);

<table>
<thead>
<tr>
<th></th>
<th>BP &gt; CP &gt; AP = BP</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>CP &gt; BP &gt; AP = CP</td>
</tr>
<tr>
<td>3</td>
<td>AP &gt; BP &gt; CP = AP</td>
</tr>
</tbody>
</table>

- **Mode of Payment of Offer Price:** The offer price may be paid in cash or by issue or exchange or transfer of equity shares of the acquirer, if an acquirer is a listed company, by issue or exchange or transfer of protected instruments of the acquirer with a minimum ‘A’ grade rating from a credit rating bureau registered with the SEBI, or a combination of all of the above.
- **Non-compete payments**: Payments made to persons other than the target company under any non-compete agreement exceeding 25% of the offer price inwards at as per the necessities mentioned above, must be added to the offer price.

- **Pricing for indirect acquisition or control**: The offer price for indirect acquisition or control shall be settled on with reference to the date of the public announcement for the parent company and the date of the public announcement for acquisition of equity shares of the target company, whichever is higher, in accordance with necessities set-out above.

  According to Regulation 22 (18) the acquirer proposes to dispose of the assets in the target company, excluding in the normal course of business, then he/she must make such a disclosure in the public announcement or in the letter of offer to the shareholders, in the absence of which, the acquirer cannot dispose of or encumber the assets of the target company for a period of 2 years from the date of closure of the public offer.

- **Competitive Bidding/ Revision of offer/bid**: The Takeover Code also allows a person other than the acquirer (the first bidder) to make an aggressive bid, by a public announcement, for the equity shares of the target company. This offer must be made within 21 days from the date of the public announcement of the first acquirer. The aggressive bid must be for at least the number of equity shares held by the first acquirer (along with PAC), plus the number of equity shares that the first bidder has offer for. If the first acquirer wishes to revise his offer, then he/she must make a new public announcement within 14 days from the date of the public announcement by the second bidder. The first acquirer (and any other bidder) is in fact, allowed to revise his/her bid upwards (subject to certain time limitations) irrespective of whether or not an aggressive offer is made.
The following acquisitions/transfers would be exempt from the key provisions of the Takeover Code:

- acquisition by a shareholder pursuant to a rights issue to the scope of his/her right and subject to certain other limitations;

- inter-se transfer of shares between;
  - Qualifying Indian promoters and overseas business partners who are shareholders,
  - Qualifying promoters\(^{19}\), provided that the parties have been possessing shares in the target company for a period of at least 3 years preceding to the intended acquisition,
  - the acquirer and PAC, where the transfer of shares takes place 3 years after the date of winding up of the public offer made by them under the Takeover Code and the transfer is at a price not greater than 125% of the price settled on as per the Takeover Code;

- acquisition of shares by an individual in swap of shares received under a public offer made under the Takeover Code;

- acquisition of shares by way of conduction on succession or inheritance;

- acquisition pursuant to a public issue;

- transfer of shares from venture capital funds or overseas venture capital investors registered with the SEBI. To promoters of a venture capital undertaking or to a venture capital undertaking,

\(^{19}\)Qualifying promoter means any individual who is directly or indirectly in control of the company, or any individual named as promoter in any document for offer of securities to the public or existing shareholders or in the shareholding pattern disclosed by the company under the provisions of the Listing Agreement, whichever is later.
pursuant to an agreement between such venture capital fund or overseas venture capital shareholders, with such promoters or venture capital undertaking:

- acquisition of shares in the ordinary course of business by (I) banks and public financial institutions as guarantors, (b) the International Finance Corporation, International Bank for Reconstruction and Development, Asian Development Bank, Commonwealth Development Corporation and such other international financial institutions;

- change in power by takeover of management of the borrower target company by the secured creditor or by restoration of management to the said target company by the said secured creditor in terms of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

- acquisition of shares in companies whose shares are not listed on any stock exchange, unless it results in the acquisition shares/voting rights/control of a company listed in India; and

- acquisition of shares in terms of regulations concerning delisting of securities framed by the SEBI.

3. **Listing Agreement**

According to clause 40A of listing agreement of BSE (Considered listing agreement of BSE as it is biggest stock exchange of India) entered into by a company with the stock exchange on which its shares are listed,
requires to uphold a public shareholding (Public Shareholding excludes shares held by promote group and held by custodians against which depositary receipts are issued abroad) of at least 25%, as the case may be, on a continuous basis. If the public shareholding decreases under the minimum level following to:

- The transfer of shares (i) in compliance with directions of any regulatory or statutory authority, or (ii) in compliance with the Takeover Code, or

- Reformation of capital by a scheme of arrangement, the stock exchange may provide extra time of 1 year (extendable up-to to 2 years) to the company to fulfill with the minimum necessities.

In order to meet the terms with the minimum public shareholding requirements, the company must either issue shares to the public or offer shares of the promoters to the public. If a company doesn’t succeed to fulfill with the minimum requirements then shares may be delisted by the stock exchange, and disciplinary action may also be taken against the company.

4. **Insider Trading Regulations.**

   Regulation 2 (ha) defines Price Sensitive Information (PSI) as ‘use of PSI for personal advantage at the cost of market is called insider trading’.

The following shall be deemed to be PSI according to regulation 2 (ha) explanations:

- Planned announcement of dividends (both interim and final);

- Issue of securities or buy-back of securities;
• Periodical financial results of the company;

• Any major expansion plans or execution of new projects;

• Amalgamation, mergers or takeovers;

• Disposal of the whole or substantial part of the undertaking; and

• Significant changes in policies, plans, or operations of the company.

Detailed information that is not publically known or information that has not been published formally is considered as non-public information. Under Regulation 2 (k), the term unpublished is defined as “information which is not published by the company or its agents and is not specific in nature”.

Under the SEBI Insider Regulations, an insider on his/her behalf or on behalf of any other person is forbidden from trading in securities of a company listed on a stock exchange when he/she is in custody of any Unpublished PSI, irrespective of whether or not such a trade was made for the intention of making a gain or minimizing a loss. The existence of profit object is not required while understanding the infringement of SEBI Insider Regulations.

On the other hand, in the case of Rakesh Agarwal v. SEBI, [2004] 49 SCL 351 (SAT- Mumbai) it was held that if an insider based on the Unpublished PSI deals in securities for no benefit to him over others and it is not against the interest of shareholders. Further, it was held that it is true that the regulation does not expressly bring in mens rea as an element of insider trading. But that does not mean that the motive need be unnoticed.

Regulation 3A interprets as “No company shall deal in the securities of another company or associate of that other company while in possession of any unpublished price sensitive information.”
Regulation 3 of the SEBI Insider Regulations forbids trading, communication or counseling on affairs concerning to insider trading. It states that “No insider shall

1. either on his/her own behalf or on behalf of any other person, deal in securities of a company listed on any stock exchange when in possession of any unpublished price sensitive information; or

2. communicate counsel or procure directly or indirectly any unpublished price sensitive information to any person who while in possession of such unpublished price sensitive information shall not deal in securities: Provided that nothing contained above shall be applicable to any communication required in the ordinary course of business or profession or employment or under any law.”

It may be stated that the offence of insider trading or dealing, constitutes of a set of essential components, which are as follows:

- Participation of Insiders/Associated individuals;

- Custody of unpublished PSI; and

- Trading in securities listed on any stock exchange of India.

**Disclosure Requirements:** The SEBI Insider Regulations obliges all directors, officers and substantial shareholders in a listed company to make periodic disclosures of their shareholding as described in the SEBI Insider Regulations.
**Initial Disclosures:** According to regulation 13 of SEBI Insider Regulations;

- Any person possessing more than 5% shares or voting rights in any listed company in India is required to disclose to the company in Schedule III, Form A, the number of shares or voting rights held by such individual on becoming such holder, within 2 functioning days of the receipt of intimation of allotment of shares or the acquisition of shares or voting rights, as the case may be.

- Any individual, who is a director or officer of a listed company in India, shall reveal to the company in Schedule III Form B, the number of shares or voting rights held by such individual and their dependents within 2 functioning days of becoming a director or officer of the listed company.

**Continual Disclosures:**

- Any individual possessing more than 5% shares or voting rights in any listed company in India is required to disclose to the company within 2 functioning days from receipt of intimation of allotment of shares; or acquisition or sale of shares or voting rights in Schedule III Form C, the number of shares or voting rights held and change in shareholding or voting rights, even if such change results in shareholding falling below 5%, if there has been any change in such holdings from the last disclosure made under Regulation 13 (1) of SEBI Insider Regulations or under this sub-regulation and such change exceeds 2% of total shareholding or voting rights in the listed company.
Any person, who is a director or officer of a listed company, shall reveal to the company in Schedule II: Form D, the change in shareholding or voting rights held by him/her and his/her dependents, if the change go beyond ₹5 lacs in value or 25,000 shares or 1% of total shareholding or voting rights, whichever is lower. The disclosure shall be made within 2 functioning days from receipt of intimation of allotment of shares or acquisition or sale of shares or voting rights.

C. **Companies Act, 1956 for Mergers and Amalgamation:**

A merger of two or more companies preside over by Sections 390 to 394 (Merger Provisions) of the Companies Act under Indian law. The Merger Provisions are worded so broadly, that they would impart for and control all kinds of commercial restructuring that a company may perhaps commence; such as mergers, amalgamations, demergers, spin-off and every other compromise, settlement, agreement or arrangement between a company and its members and/or its creditors.

1. **Procedure under the Merger Provisions:** A merger fundamentally comprises an agreement between the merging companies, their respective shareholders and each of the companies proposing to merge with the others must make an application to the Company Court i.e. the High Court of each Indian State (the Court) having jurisdiction over such company for organizing meetings of its respective shareholders and/or creditors. The Court may then order a meeting of the creditors and shareholders of the company. If the majority in number representing 3/4th in quantity of the creditors and shareholders’ in attendance and voting at such meeting reach
a decision to the merger and authorized by the Court, is binding on all creditors and shareholders of the company. The Court will sanction a merger or any other commercial restructuring only in circumstance when it is satisfied that all material facts have been disclosed by the company. The order of the Court sanctioning a merger does not take effect until a certified copy of the same is reported by the company with the Registrar of Companies.

Under Merger Provisions, Courts have full power to sanction any modifications in the commercial structure of a company that may be essential to have an effect on the corporate restructuring that is proposed, for example, in regular circumstances a company must request the sanction of the Court for carrying out a decrease of its share capital. On the other hand, if a decrease of share capital forms is a part of the commercial restructuring proposed by the company under the Merger Provisions, then the Court has the authority to approve and sanction such decrease in share capital and distinct proceeds for decrease of share capital would not be essential.

2. **Merger Provisions to foreign companies**: Section 394 authorizes the Court with certain authorities to smooth the progress of the reconstruction or amalgamation of companies, i.e. in cases where an application is made for sanctioning an arrangement that is:

I. for the reconstruction of any company or companies or the amalgamation of any two or more companies; and
II. under the scheme the whole or part of the undertaking, property or liabilities of any company concerned in the scheme (referred to as the ‘transferor company’) is to be transferred to another company (referred to as the transferee company).

Section 394 (4) (b) makes it clear that:

I. a ‘transferor company’ would mean anybody corporate (A body corporate in dedes a company incorporated outside India but excludes a corporation sole, cooperative societies and any other body corporate that may be notified by the Central Government), whether or not a company registered under the Companies Act (i.e. an Indian company), implying that a foreign company could also be a transferor, and

II. a ‘transferee company’ would only mean an Indian company.

Therefore, the Merger Provisions acknowledge and authorize a merger or reconstruction where a foreign company merges into an Indian company. But the reverse is not authorized, and an Indian company cannot merge into a foreign company.

D. Companies Act, 1956 for Acquisitions:

The Companies Act 1956 does not make a reference to the term ‘acquisition’ intrinsically. On the contrary, the various techniques utilized for managing an acquisition of a company involve fulfillment with certain key provisions of the Companies Act 1956. The methods most frequently used are a share acquisition or an asset purchase.
1. **Acquisition of Shares.** A share buying may take place by an acquisition of all existing shares of the target company by the acquirer or by means of subscription to new shares in the target company so as to acquire a controlling investment in the target company.

- **Transferability of shares:** An Indian company may setup as a private company or a public company. Membership of a private company is limited to 50 members but not including employees and former employees, and a transferability of its share is restricted by the Companies Act. A restriction on transferability of shares is as a result inherent to a private company, such restrictions being comprised in its articles of association (the byelaws of the company), and by and large in the form of a preventative right in support of the other shareholders. The articles of association may lay down specific procedures concerning to transfer of shares that must be adhered to in order to influence a transfer of shares. While purchasing shares of a private company, it is advisable for the acquirer to make sure that the non-selling shareholders (if any) surrender any rights they may have under the articles of association, and the course of action for transfer under the articles of association is followed, for fear that any shareholder of the company claim that the transfer is void or claim a right to such shares.

- **Transfer of shares:** The transferor and transferee are necessary to carry out a share transfer form, and lodge such form along with the share certificates. The share transfer form is a prescribed form, which
must be stamped in accordance with law. On lodging the same with the company, the company will have an effect on the transfer in its records and sanction the share certificates in favor of the acquirer. It is also necessary for the board of the company to pass a resolution sanctioning the transfer of shares.

- **Squeeze out provisions:** Section 395 of the Companies Act states that if a contract or scheme involving the transfer of shares or a class of shares in a company (the ‘transferor company’) to another company (the ‘transferee company’) is sanctioned by the owners of at least 9/10ths in price of the shares whose transfer is concerned, the transferee company may give notification to the rebelling shareholders that it desires to acquire such shares, and the transferee company is then, not only permitted but also assured to acquire such shares. In computing 90% (in worth) of the shareholders, shares held by the acquirer, nominees of the acquirer and subsidiaries of the acquirer must be excluded.

The contract or scheme referred above should be permitted by the shareholders of the transferee company within 4 months from the date of the offer. The rebelling shareholders have the privilege to make an application to the Court within 1 month from the date of the notice, if they are victimized by the provisions of the offer. If no application is made, or the application is dismissed within one month of issue of the notice then the transferee company is entitled and bound to acquire the shares of the rebelling shareholders.
If the transferee already holds more than 10% (in worth) of the shares (being of the same class as those that are being acquired) of the transferor, then the following stipulations must also be met:

- The transferee offers the same conditions to all holders of the shares of that class whose transfer is entailed; and

- The shareholders holding 90% (in worth) who have approved the scheme of acquisition should also be not less than 3/4ths in number of the holders of those shares (not including the acquirer).

Consequently, if an acquirer already possesses 50% of the shares of the target company, it would need the sanction of 90% (in worth) of the other shareholders of the target company to invoke the provisions of this Section, i.e. the consent of holders of 45% of the shares of the target company. If this consent is acknowledged, the acquirer would then be permitted to acquire the balance 5% of the shares of the target company. As the acquirer in such a case possesses more than 10% of the share capital, then the shareholders holding 45% of the share capital must also constitute at least 3/4ths (in number) of the shareholders holding the balance 50%. Thus, if one shareholder possesses 45% and sanctions the transfer and remaining 5% is held by five shareholders who do not sanction the transfer then the acquirer would not be able to invoke the provisions of Section 395.

If the rebelling shareholders do not submit an application to the Court, or the Court does not provide any relief to the rebelling shareholders on their application, then the acquirer must send a copy of the notice (distributed to the rebelling shareholders) along with an
instrument of transfer, performed on behalf of the rebelling shareholder by any individual appointed by the acquirer, to the target company along with the consideration billed. The instrument of transfer must also be performed by the transferee on its own behalf. The transferor would then be obliged to record and register the transfer in favour of the transferee. The consideration received by the transferor must be credited in a distinct bank account and held in trust for the rebelling shareholders. This course of action is subject to the circumstances and provisions set forth in the Companies Act. The advantage of these provisions is that a complete takeover could be affected without resort to tedious court procedures.

Section 395 requires that the “transferor company” (the target) can be any body corporate whether or not incorporated under Indian law. Therefore the target can also be a foreign company. However, a ‘transferee company’ (the acquirer), must be an Indian company.

- **New share issuance:** The acquisition of a public company concerns the issue of new shares to the acquirer then it would be essential for the shareholders of the company to pass a special resolution under the provisions of Section 81(1A) of the Companies Act. A special resolution is one that is approved by at least 3/4ths of the shareholders in attendance and voting at a general meeting is mandatory for the approval of acquisition. A private company is not mandatory to pass a special resolution for the issue of new shares, and a simple resolution by the board of directors should be sufficient.
The issue of new shares by an unlisted public company to an acquirer must also act in accordance with the Unlisted Public Companies (Preference Allotment) Rules, 2003. Some of the influential features of these rules are as follows:

- Equity shares, fully convertible debentures, partly convertible debentures or any other financial instruments convertible into equity are governed by these rules.

- The issue of new shares must be sanctioned by the articles of association of the company and approved by a special resolution passed by shareholders in a general meeting, permitting the board of directors of the company to issue the new shares. The authenticity of the shareholders’ resolution is 12 months, necessitating that if new shares are not issued within 12 months of the resolution, the resolution will come to an end, and a fresh resolution will be required.

- The descriptive statement to the notice for the general meeting should contain key disclosures concerning the object of the new issue, pricing of shares including the relevant date for calculation of the price, shareholding pattern, change of control if any, and whether the promoters/directors/key management persons propose to acquire shares as part of such issuance.

- **Limits on investment**: Section 372A of the Companies Act communicates certain limits on inter-corporate loans and investments. An acquirer may acquire by way of subscription, purchase or otherwise, the shares of any other body corporate up-to 60% of the
acquirers paid up share capital and free reserves, or 100 % of its free reserves, whichever is more. However, the acquirer is allowed to acquire shares beyond such limits, if it is sanctioned by its shareholders vide a special resolution approved in a general meeting. It may be noted that the limitations under Section 372A are not relevant to private companies. Further, Section 372A would not be relevant to an acquirer which is a foreign company.

E. Exchange Control

1. Foreign Direct Investment:

India’s action concerning exchange control is sluggish, conscious, and monitored with awareness towards full capital account convertibility. However, substantial controls have been detached and allowed foreign companies to acquire Indian companies across the sectors, subject to strict pricing and reporting requirements imposed by the central bank, the Reserve Bank of India. Investments in, and acquisitions (complete or partial) of Indian companies by foreign companies are controlled by the terms of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 (the FDI Regulations) and the provisions of the Industrial Policy and Procedures published by the Secretariat for Industrial Assistance (SIA) in the Ministry of Commerce and Industry, Government of India.

- Automatic Route: Schedule 1 of the FDI Regulations encloses the Foreign Direct Investment Scheme (FDI), which allows a Non-Resident of India (NRI) to acquire equity shares or compulsorily convertible preference shares/debentures in an Indian company equal to the investment limits for each sector provided in Annexure B to the FDI Scheme. According to
Annexure B, sectoral cap on Investments by persons residents outside India are as follows;

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<th>Sr. No</th>
<th>Sector</th>
<th>Investment Cap</th>
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<tbody>
<tr>
<td>1</td>
<td>Telecommunications</td>
<td>49%</td>
</tr>
<tr>
<td></td>
<td>Telecommunications (Manufacturing activities)</td>
<td>100%</td>
</tr>
<tr>
<td>2</td>
<td>Housing and Real Estate</td>
<td>100%</td>
</tr>
<tr>
<td>3</td>
<td>Coal and Lignite (Public Sector Undertakings (PSU))</td>
<td>49%</td>
</tr>
<tr>
<td></td>
<td>Coal and Lignite (other than PSUs)</td>
<td>50%</td>
</tr>
<tr>
<td>4</td>
<td>Drugs &amp; Pharmaceuticals</td>
<td>74%</td>
</tr>
<tr>
<td>5</td>
<td>Hotel &amp; Tourism</td>
<td>51%</td>
</tr>
<tr>
<td>6</td>
<td>Mining (diamonds and precious stones)</td>
<td>74%</td>
</tr>
<tr>
<td></td>
<td>Mining (Gold, Silver and Minerals)</td>
<td>100%</td>
</tr>
<tr>
<td>7</td>
<td>Advertising</td>
<td>74%</td>
</tr>
<tr>
<td>8</td>
<td>Films</td>
<td>100%</td>
</tr>
<tr>
<td>9</td>
<td>Any other sector/activity (other than those included in Annexure A)</td>
<td>100%</td>
</tr>
</tbody>
</table>

- Investment under the FDI Scheme is normally referred to as an investment under the ‘automatic route’ as no authorizations or consents are required. Part-A of Annexure-A to the FDI Scheme lists the events for which general permission is not available for a NRI, which include events such as defense, postal services, broadcasting, print media, courier services etc. Investment in these sectors requires the prior permission of the Foreign Investment Promotion Board (FIPB) of the Government of India, which is approved on an instance-to-instance basis. Part-B of Annexure-A lists the sectors in which foreign direct investment is prohibited i.e., retail trading, atomic energy, lottery business, gambling and betting, housing, and real estate (permitted subject to compliance with certain conditions). All investments beyond ₹600 crores need a prior approval.
• **Indirect Foreign Investment**: If an Indian company is “possessed” or “controlled” by “non-resident legal entities”, then the complete investment by the investing company into the business downstream Indian investee company would be contemplated as indirect foreign investment. Provided that, as an exception, the indirect foreign investment in completely owned subsidiaries of operating-cum-investing companies will be limited to the foreign investment in the operating-cum-investing company. The exception was made since the downstream investment of a 100% owned subsidiary of the holding company is similar to investment made by the holding company and the downstream investment should be a mirror image of the holding company.

• **Portfolio Investment Scheme**: FIIs enrolled with the SEBI and NRIs are allowed to invest in listed securities through the respective stock exchange.

• **Downstream Investment**: Foreign investment, whether direct or indirect, into a company that is not equipped shall need prior authorization of the Government of India / FIPB.

• **Acquisition of rights shares/bonus shares**: NRI may subscribe to shares issued on a rights basis by an Indian listed company provided that the bid of shares doesn’t result in increase in the percentage of foreign equity authorized for such company. The price at which the shares are offered to NRI is not less than the price offered to the resident shareholders. NRI may also acquire bonus shares under the FDI Regulations. The rights or bonus shares will however be subject to the same situations as those pertinent to the original shares.
• **Foreign venture capital investors (FVCI):** An FVCI listed with the SEBI and can invest in Indian venture capital endeavors, venture capital funds or in schemes put forwarded by venture capital funds under the terms of Schedule 6 of the FDI Regulations. One of the vital paybacks of investing as an FVCI is that an FVCI is not essential to stick to the pricing necessities that are otherwise required to be met by a foreign investor under the automatic route when purchasing to shares or when selling such shares.

• **Pricing under the automatic route:** The price of shares delivered to non-residents can’t be less than the fair value of the shares as decided by the procedure released by the erstwhile Controller of Capital Issues, or if the Indian company is listed with stock exchange then the price can’t be less than the price calculated in accordance with the SEBI procedures.

• **Issue of Shares under merger/ amalgamation / demerger:** A transferee company may issue shares to the shareholders of a transferor company under a scheme of merger or amalgamation sanctioned by an Indian court, provided that the industrial limits mentioned above are not exceeded.

• **Foreign Technology Collaborations:** Indian companies are allowed foreign technology collaboration under the automatic route subject to obedience without any limits. Under the Research and Development Cess Act 1986, an Indian company importing any technology from outside India then required paying a research and development cess of about 5% under the Research and Development Cess Act, 1986.
• **Existing joint ventures:** In the past, the automatic route for foreign direct investment or technology collaboration was not accessible to foreign investors who had any prior joint venture or technology transfer or trademark agreement in the same or associated domain in India. The responsibility was on the foreign investor or technology providers to demonstrate to the fulfillment of FIPB or Project Approval Board that the new investment would not in any way endanger the benefits of the existing joint venture or technology/trademark partner. On the other hand in 2005, the Government of India issued Press Note 1 of 2005 and amended this prerequisite as follows:

I. If the foreign investor has an existing joint venture or technology transfer/trademark agreement in the ‘same’ field (4 digit National Industrial Classification Code), then the prior sanction of the government is essential. The Government of India went on to clarify vide Press Note 3 of 2005, that joint ventures or technology transfer/trademark agreements existing on the date of issue of Press Note 1 of 2005, i.e. January 12, 2005, only, would be considered as existing joint ventures and technology transfer/trademark agreements for the determinations of Press Note 1 (2005 Series), and not any consequent joint ventures or technology transfer/trademark agreements;

II. Even where the foreign investor has a joint venture or technology transfer/ trademark agreement in the ‘same’ field, prior permission of the Government of India will not be required in the following cases:
• Investments by venture capital funds registered with the SEBI; or

• Where in the existing joint-venture investment by either of the contributors is less than 3%; or

• Where the existing venture or collaboration is dead or sick.

Foreign investments in the Information Technology (IT) sector, investments by multinational financial institutions and in the mining sector for same area or mineral were, and continue to be exempted from the necessities pertaining to existing joint ventures referenced above.

2. Overseas Direct Investment:

An Indian company that desires to acquire or invest in an overseas company outside India must comply with the Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004 (ODI Regulations).

The ODI Regulations are an expansion of the procedure of liberalization started by the Government of India in the late 1990s. The regulations have detailed provisions governing investments made by an Indian company in an overseas company by contribution of ‘general authorization’ to make a ‘direct investment outside India’ in legitimate business activities, subject to acquiscencence with the regulations. The phrase ‘direct investment outside India’ has been defined as ‘investment by tactic of contribution to the capital or members to the Memorandum of Association (MOA) of a foreign body or by way of purchase of existing shares of a foreign body either by market buy or private placement or through respective stock exchange, but does not comprise portfolio investment’. An Indian company is not allowed to make any direct investment in a foreign company connected in real estate or banking business without the prior approval of the RBI.
The Indian individual may choose to fund the aforesaid investment out of balances held in the Exchange Earners’ Foreign Currency (EEFC) byway of drawing funds from an authorized dealer subject to certain limits, or using the proceeds of an ADR/GDR issue. There are numerous ways accessible to an Indian company which proposes to invest in a foreign company.

4.5. **M & A and Consumer Protection:**

For Indian economy, long concealed by the license and domination regime, this is a completely new experience and has been escorted with a common sense of patriotic jubilation. The air over corporate India is thick with the heady scent of M & A. Certainly a lot of these mergers present much for the country to be proud of.

Competition law is customarily conceived as directive of the marketplace to make sure confidential conduct does not repress free trade and competition. It has as its objective of safeguarding competition in marketplace. Competition ensures consumers’ welfare. Consumer protection regulation represents a body of law designed to safeguard consumers’ interest at the level of the individual transaction. The two are essentially different. The consumer courts deal with individual consumer cases, and their total methodology and systems are different. Competition Act deals with competition in the market that affects consumers. So in a way it is like a class action rather than an individual action or grievance.

From the consumers’ point of view, on the whole, a dissimilar issue arises and that is how good the merger is for them and for the economy. At this juncture the competition authorities and the competition law come into picture. The majority M & A do not give mount to a competition concern and
competition authorities perceive no grounds for interfering with them. The apprehension frequently arises in the case of horizontal or vertical mergers between competitors functioning in the same market, i.e. trading with same goods and services in the same region. The Indian Competition Act, 2002 also has prerequisites for regulating mergers – these are known as ‘combinations’ section 6 which include mergers and amalgamations, acquisition and acquisition of domination.

On the other hand, the merger rule is moderate. There is a high upper-limit below which mergers are outside the authority of the Competition Commission. The threshold is ₹1,000 crores of assets and ₹3,000 crores of turnovers. In respect to group o: companies, the upper-limit is ₹4,000 crores of assets or ₹12,000 crores of turnovers. In the case of enterprises operating in or outside India, the corresponding thresholds are $500 million of assets or $1500 million of turnover and for groups $2 billion of assets or $6 billion of turnover. Further, pre-notification to the Competition Commission before the merger is not mandatory, but optional. If pre-notification is given, the Commission must dispose of the matter within 90 working days from a particular stage, or else the merger is deemed approved.

In inquiring into a merger, the Competition Commission has to see whether a merger has caused or is likely to cause an “appreciable adverse effect on competition” (AAEC) and there is a ‘rule of reason’ approach to the inquiry. The Act provides a large number of factors which the Commission must take into account in the inquiry. Most importantly, these include the market share of the enterprises, barriers to entry, level of concentration in the market, likelihood of increase in prices or profit margins, removal of an
important competitor, and so on. The Commission must also consider the gains from the merger such as the possibility of failing business, nature, and extent of innovation, and Essays on contribution to the economic development. Enterprises may claim efficiency gains or that one of the enterprise was a sick or dying business and would have exited the market anyway. Thus, the Commission must carefully weigh the positive and the negative consequences of the merger. This approach is not much different from other competition regimes such as the European Union and USA.

At the start of the inquiry, the Commission must determine the ‘relevant market’ in which the AAEC is to be assessed. The relevant market comprises of the “relevant product market” and the “relevant geographic market”. The relevant product market broadly comprises of those products or services which are regarded by the consumer as interchangeable or substitutable. For example, a question can arise whether aerated drinks and fruit drinks are in the same product market or not. The factors to be considered by the Commission include physical characteristics or end-use, price, consumer preference and so on. A low priced Maruti 800 may not be in the same product market as a luxury BMW. The relevant geographic market comprises the area in which the conditions of competition for supply or demand are homogenous. For example, in the case of cement, a relatively heavy but low-value product, a question can arise whether the relevant market is the whole country or only a local area or region. The relevant geographic market can be influenced by inter-state restrictions. The factors for determining the relevant product and geographic markets are specified in the
Act. The determination of the relevant market calls for economic analysis and use of certain economic tools. If the Commission finds, which going by historical experiences could be in a small proportion of cases, that the merger is likely to have AAEC, the Commission may refuse approval or may approve it with certain modifications. For example, in the case of the P&G-Gillette merger, the authorities stipulated that a certain part of the business must be divested. The process of inquiry set out in the Act provides full opportunity to the merging enterprises to defend the merger and also to consider any modifications proposed by the Commission. It also provides an open opportunity to opposing parties to present their position to the Commission.

4.6. Conclusion:

M & A are indicators of a dynamic and growing free market economy. The officially permitted structure for such commercial restructuring must be painless, facilitative, encouraging and should not be held up in bureaucratic and authoritarian hurdles. The principal obstruction in the way of completing a combination remains the often long and exhausting procedure required for the sanction of a scheme of arrangement by court.

In the foregoing discussion, we have stated the position of law as it has evolved over a period of time specifically the Competition law. On the other hand, an Abuse of Dominance is mandatorily prohibited under the law. As a result, every acquirer (not the target) has to be meeting the requirements of Competition Law even post combination and has to refrain so enduringly if it needs to remain in healthy business practice.
The Commission needs to swing into action carrying out significant proficiency building to put into practice the extra territorial authority that is embodied in the Competition Act, 2002. As India Inc takes a high-speed with the worldwide financial systems, there is a need to make sure that global collaboration is painless by tackling cross border challenges. However, the Act demonstrates the ‘effects’ doctrine.

Practical experience has shown that the majority of combinations notified are cleared quite quickly. The Act, itself lays down stringent time lines - the Commission must take a view within 90 working days from the day it has obtained complete information failing which the combination is deemed to have been approved. Further, the Commission may initiate suo-motu enquiry into combination only within a period of one year from the day the combination has taken effect. These provisions adequately dispel any apprehension of inordinate delay or unbridled scrutiny into combinations. Further global experience suggests that hardly four per cent of the all notified combinations are taken up for a detailed scrutiny by the competition authorities, of which 50% are approved, and a further 25% are approved with modifications.

Indian companies have often surpassed their foreign counterparts in corporate restructuring both within and beyond the national frontiers. To sum up, as George Bernard Shaw is reputed to have said “We are made wise not by the recollection of our past, but by the responsibility for our future”.

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20\textsuperscript{Competition Act, 2002, s. 31(11)}
21\textsuperscript{Competition Act, 2002, s. 20(1), this is on the other hand a great incentive for parties to notify their intended merger prior to going ahead with the agreement}
References


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www.cci.gov.in


www.sebi.gov.in