Cross Border Merger Control by the Competition Commission of India: Law and Practice

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This article extensively analyses pertinent statutory provisions and critiques certain important recent decisions including, in the highly contentious Jet-Etihad and Mylan-Agila combinations rendered by the Competition Commission of India (CCI) relating to cross-border mergers under its merger control jurisdiction. At the onset the article explores the competition policy dimension of merger control. The improper manner in which the power to impose penalty for non-furnishing of information on combinations is exercised by the CCI under Section 43A of the Competition Act is also elaborately discussed and criticized with the help of decided cases. Thus, this article offers significant insights into the salient aspects pertaining to the Indian competition authority's law and practice in this key area.

I. Introduction

The Indian competition authority, Competition Commission of India (CCI), is relatively in the stage of infancy with only five years of experience,[1] when compared to its counterparts in certain other jurisdictions like, almost a century old US Federal Trade Commission (FTC)[2]. The practice of CCI has become tremendously exciting, and yet it is somewhat intriguing. This article explores pertinent contemporary aspects pertaining to the CCI's powers, conferred under the Indian Competition Law, the Competition Act, 2002, appertaining to the merger control (or combinations)[3]. After discussing 'merger control' from competition policy perspective, this article explores some pertinent provisions of the Indian Competition Act of 2002 and Combination Regulations of 2011, and critiques certain decisions of the Commission in cases concerning cross-border combinations[4]. One of them concerns the aviation sector, the *Jet-Etihad* combination[5], whereas the other relates to the pharmaceuticals sector, the *Mylan inc.* case[6] based on the *Mylan-Agila* deal which, until recently, was the largest pharmaceutical merger in India. The bone of contention in the *Mylan-Agila* deal, so far as CCI is concerned, was the presence of a "non-compete clause" in the relevant transaction document. An element of uncertainty which exists in the current Indian competition law and policy regime pertaining to merger control increases the transaction costs for businesses. This uncertainty may be attributed largely to one reason, the 'inexperience' of the regulator. The interpretation of legal provisions will also become clearer once more decisions have been rendered.

Cross-border mergers may invoke the extra-territorial jurisdiction of the CCI; and so the relevant provision is discussed[7]. Another aspect pertains to the critiquing the manner in which CCI exercises powers under Section 43-A of the said 2002 Act to impose penalty for non-furnishing of information on relevant combinations to the CCI. Some cases discussed herein will highlight the improper and arbitrary exercise of this statutory power by the CCI.

II. Merger Control, the Competition Policy

The ideal merger control review policy is debatable. Two general caveats given by a well-known author must be kept in mind by Competition Authorities:[8]

[1] Notification S.O. 1198(E), Ministry of Finance (Department of Company Affairs) (Government of India), (14 Oct. 2003), http://www.mca.gov.in/Ministry/notification/Notifications_2003/noti_14102003_1198(E).html (last visited August 29, 2014) Though CCI was established with effect from Oct. 14, 2003 but it could not be made functional till May, 2009Competition Act, 2002 replaced the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969, and was based on the recommendations given in the *Report of the High Level Committee on Competition Policy and Law*, https://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf (last visited August 29, 2014) *(SVS Raghavan Committee Report)*.

[2] FTC was set up after enactment of the Federal Trade Commission Act of 1914 by the US Congress. Another major legislation passed in the same year was the Clayton Act. See Debra A. Valentine, *US Competition Policy and Law: Learning from a Century of Antitrust Enforcement*, *in* INTERNATIONAL AND COMPARATIVE COMPETITION LAWS AND POLICIES , 71–79 (YC Chao et al. eds., 2001). Of course, the good old pioneering legislation, Sherman Act of 1890 cannot be forgotten, as the genesis of the anticompetitive law regime in the United States. The most relevant statutory provisions are Sections 1 and 2 of the Sherman Act, Section 5 of the Federal Trade Commission (FTC) Act, 1914 (15 U.S.C §§ 41-58) and Section 7 of the Clayton Act which prohibits mergers if "in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." Both FTC and Department of Justice are the agencies involved under these Federal Antitrust Laws.

[3] In this area the experience of CCI is even lesser as the pertinent provisions of the Competition Act, 2002 were only notified with effect from June 1, 2011, *see* Notification S.O. 479(E), Ministry of Corporate Affairs (Government of India), dated March 4, 2011).

[4] CCI (PROCEDURE IN REGARD TO TRANSACTION OF BUSINESS RELATING TO COMBINATIONS) REGULATIONS, 2011 (INDIA).

[5] *See* CCI Order under Section 31(1) of the Competition Act, 2002 in the matter of Etihad Airways PJSC and Jet Airways (India) Limited (Combination Registration No. C-2013/05/122, dated Nov. 12, 2013), http://www.cci.gov.in/May2011/OrderOfCommission/CombinationOrders/C-2013-05-122%20Order%20121113.pdf (last visited August 29, 2014).

[6] *See* CCI Order under Section 31(1) of the Competition Act, 2002 in the matter of Mylan Inc. (Combination Registration No. C-2013/04/116, dated June 20, 2013), http://www.cci.gov.in/May2011/OrderOfCommission/CombinationOrders/C-2013-04-116.pdf (last visited August 29, 2014).

[7] *See* Section 32 of the Competition Act, 2002, *supra* n. 1.

[8] *See* MASSIMO MOTTA, COMPETITION POLICY: THEORY AND PRACTICE 39 (2004).

Competition policy is not concerned with maximizing the number of firms, and

Competition policy is concerned with defending market competition in order to increase welfare, not defending competitors.

He defines "*Competition Policy*" as "the set of policies and laws which ensure that competition in the marketplace is not restricted in such way as to reduce *economic welfare*[9]." This should be read in conjunction with the objective set up for competition authorities and courts to pursue viz., *economic welfare*[10]*,* which also becomes the yardstick to determine the competitive effects of a merger.[11]*Economic welfare* in an industry is an aggregate of the *consumer surplus (or consumer welfare) and producer surplus*[12].

It is generally agreed that two aspects relating to a merger need to be scrutinized by the Competition/Anti-trust Authorities[13]:

1. whether the merger leads the merged firm to *unilaterally* exercise market power and raise prices (i.e., leading to *single firm dominance) (i.e., the unilateral effects)*, and

2. where though the merged firm may not unilaterally increase prices, whether the merger leads to such industry conditions where the scope of collusion (called *coordinated effects* in the US merger policy) between the remaining firms in the market increases *(*i.e., leading to *joint/collective dominance) (the pro-collusive effects)*.

However, even in mergers the gains in efficiency may be such that they outweigh the enhanced market power and benefit consumers by leading to lowered prices resulting in higher welfare.[14] Though the mergers are generally classified as either *Horizontal Mergers* or *Vertical Mergers*[15] this article focuses on *Horizontal Mergers,* as they primarily cause anti-competitive concerns. The concept of dominance plays a central role in merger review[16]. For the assessment of market power, and its potential increase, the definition and determination of the 'relevant market' is indispensable.

The traditional approach to analyze the *unilateral effects* has been to define the 'relevant market' and then, to assess the *market power* enjoyed by the merging entities[17]. To determine the scope of the 'relevant market' the SSNIP (i.e., Small but significant non-transitory increase in prices) test a.k.a. the Hypothetical Monopolist Test furnishes a guide to analyze the appropriateness of the relevant market definition chosen in a given case[18].

The next important stage after determining the *relevant market* is to assess the unilateral market power. Though, a theoretical measure of market power is the *Lerner index*[19] its direct application in practical cases may cause problems; and the competition authorities traditionally have given primary importance to the *market shares*, whose crossing the prescribed thresholds leads to an inference regarding dominance of the firm[20]. Despite the central importance of market shares a few other factors like, ease and likelihood of entry and buyers' power are also important in this regard.

The ability of the merging firms to exercise enhanced market power post-merger in respect of their pricing decisions largely depends on the number of rival competitors in the relevant market; and thus concentration of the market becomes important. A merger in a highly concentrated sector will thus, *ceteris paribus*, cause more concern than in a fragmented sector. The most popularly used concentration index used as a screening device to measure unilateral effects of a merger is the *Herfindahl-Hirschman Index* (HHI)[21].

The aspect pertaining to the determination of pro-collusive (or coordinated) effects of a merger may exist even in the absence of any clear finding regarding inimical unilateral effects, requiring stalling the merger on the basis of the unilateral effects review[22]. The concept of joint dominance applies in this scenario as the merger is likely to create the structural conditions for the firms which may not be able to collude pre-merger, to attain collusive outcome, either explicitly or tacitly[23].

In view of the importance given to the efficiency gains objective in mergers, pleading an efficiency defence may be allowed even if a single firm dominance is imminent, as it may lead to price decreases[24].

The final aspect in merger review policy concerns "merger remedies". It is arguable, that despite some apprehensions about the effects of a merger on competition, the competition authorities may approve certain mergers, if the remedies offered by the parties are found acceptable by the concerned anti-trust authority[25]. The US and European Competition Authori-

[9] *Id.* at 30

[10] *Id.*

[11] *Id. at* 231 *et. seq.*

[12] *Id. at* 18. *Consumer surplus* is defined by the author as 'the aggregate measure of surplus of all consumers'. Whereas, *producer surplus* is simply defined as 'the sum of all profits made by producers in the industry'. The *consumer welfare* appears to have much more importance that the producer surplus in an efficiency defence raised in merger review, *see* Article 2.1 of EC Merger Regulation.

[13] *See* MOTTA, *supra* note 8 at 231, and SIMON BISHOP & MIKE WALKER, THE ECONOMICS OF EC COMPETITION LAW 259 (2 ed. 2002).

[14] MOTTA, *id.* at 233, 238.

[15] The basic distinction between the two is, that a *horizontal merger* is between two competitors, and a *vertical merger* is 'between firms operating at successive stages of production process', see id. 231. A third category of merger is known as *conglomerate merger* which doesn't fit in the either description of relationship, *see* BISHOP AND WALKER, *supra* note 13 at 259.

[16] *See id.* at 260.

[17] *Id.*

[18] *See id.* at 102.

[19] *See* MOTTA, *supra* note 8 at 116.

[20] *See id.* at 117-18.

[21] *See id.* at 124, 235.

[22] *See* Gisela Aigner, Oliver Budzinski & Arndt Christiansen, *The Analysis of Coordinated Effects in EU Merger Control: Where do We Stand After SONY/BMG and IMPALA?*, 2 Eur. Competition J. 311 (2006).

[23] *See* MOTTA, *supra* note 8 at 251.

[24] *Id.* at 252.

[25] *Id.* at 265.

ties explicitly incorporate many of these aspects in their Merger Review Guidelines[26].

Competition Law and Policy go hand in hand complementing each other[27].

In a very generic sense however, competition law effectuates the competition policy, and so the latter subsumes the competition law. After understanding the nuances of 'merger control' competition policy, this article now proceeds to examine the Indian Competition Law and Practice dealing with the regulation of 'combinations'.

III. Appreciating the CCI's review of 'Combinations': The Law

The *S.V.S. Raghavan Committee* in its report, pursuant to which the Competition Act, 2002 was enacted, duly emphasized in its recommendations on the competition policy on merger review in India[28]. Though, the Indian Competition law applies to all types of mergers, as discussed previously, the *Raghavan* committee rightly opined on the competition policy focusing on horizontal mergers as they usually provide a cause of concern[29]. This article now examines salient statutory provisions in the Competition Act, 2002 and the CCI (Procedure in regard to transaction of business relating to combinations) Regulations, 2011, to understand the scheme and procedure of merger review in India in nutshell[30].

Section 6(1) of Act imposes a prohibition on a 'combination'[31] 'which causes or is likely to cause an appreciable adverse effect on competition within the *relevant market in India*,[32] and further annuls such a combination by declaring it as 'void'. Subject to this sub-section, Section 6(2) makes it mandatory (by using the word 'shall') for any person[33] or enterprise[34], who or which proposes to enter into a 'combination' which corresponds to one of the three types of combinations specified in clauses (a), (b) or (c) of Section 5 of the Act viz., acquisition of control, shares, voting rights or assets of an enterprise; or acquisition of 'control' of an enterprise when the acquirer 'has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service'; or, a merger or amalgamation respectively, and which crosses the monetary asset or turnover thresholds specified therein, to give *notice to the CCI* disclosing details of the proposed combination, within thirty days of specified events appertaining to these combinations[35].

The provisions pertaining to 'acquisition'[36] viz., clauses (a) and (b) of Section 5 of the Act contextually show that the acquirer is a standalone acquirer. The said assets and turnover thresholds for a 'combination' under different clauses of Section 5, as modified by the Section 20(3) notification[37], are as follows:

> *For both Parties to the acquisition [for clause (a)]/ For enterprise whose control is acquired and the enterprise over which acquirer al-*

[26] *See* '*Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings' (2004/C 31/03), supra* note 29; and US 'Horizontal Merger Guidelines', (DoJ and FTC, August 19, 2010), *supra* note 20. *See* Alan Goldberg, *Merger Control*, *in* COMPETITION LAW TODAY, 93 (Vinod Dhall ed., 2007).

[27] *See* REPORT OF THE WORKING GROUP ON COMPETITION POLICY (PLANNING COMMISSION, GOVERNMENT OF INDIA), (2007), http://theindiancompetitionlaw.files.wordpress.com/2013/02/report-of-the-working-group-on-competition-policy.pdf (last visited August 29, 2014).

[28] *See SVS Raghavan Committee Report, supra* note 1, ¶ 4.6.1. *See also* Dr. S. Chakravarthy, *Indian Competition Law on the Anvil*, World Competition 24(4): 571 (2001) (offering useful historical insights and perspectives on the then draft Indian Competition Act, and comparisons with the then extant Monopolies and Restrictive Trade Practices (MRTP) Act, 1969, the (in)famous predecessor of the Competition Act, 2002); and Avinash Sharma, *Revisiting Competition Law in India: Challenging Dimensions in the Era of Globalized Economy,* World Competition 31, no. 4 (2008) 607 (extensively analyzing both the MRTP Act and the Competition Act regimes).

[29] *Id. See also,* S.M. DUGAR, 1 COMMENTARY ON MRTP LAW, COMPETITION LAW & CONSUMER PROTECTION LAW 844–46 (4 ed. 2006)., and T. RAMAPPA, COMPETITION LAW IN INDIA 190 (2 ed. 2009).

[30] *See also* Tony Reeves & Dan Harrison, *India's New Merger Control Regime: When Do You Need to File?*, 26 ANTITRUST 94 (2011).

[31] Regulation 2(1)(b) of the 2011 Regulations reads: '"Combination" means and includes combination as described in section 5 of the Act and any reference to combination in these regulations shall mean a proposed combination or the combined entity, if the combination has come into effect, as the case may be." Though there was some skepticism regarding review of Joint Ventures under CCI combinations review, the position seems to have been settled by Section 31(1) Order in Combination Registration No. C-2011/07/01, dated July 26, 2011 approving acquisition by RIL and RIIL (which was held by CCI to fall under Section 5(a) of the Act), http://www.cci.gov.in/May2011/OrderOfCommission/CombinationOrders/RILOrder270711.pdf (last visited August 29, 2014). *See also,* RAMAPPA, *supra* note 45 at 224.

[32] 'Relevant Market' is defined in Section 2(r) of the Competition Act, 2002, *supra* note 1, as: '"relevant market" means the market which may be determined by the Commission with *reference to the relevant product market or the relevant geographic market or with reference to both the markets*.' Section 2(s) defines "relevant geographic market"; and Section 2(t) defines "relevant product market". (*emphasis supplied)*

[33] 'Person' is defined in Section 2(l) of the Competition Act and provides for a very wide inclusive definition including, an individual, a firm, a Company and any body corporate by or under the laws of a country outside India.

[34] 'Enterprise', defined in Section 2(h) of the Competition Act, includes both a 'person' and a 'government department' under its ambit, which is or has been engaged in an (economic) activity of the description and in the manner prescribed therein.

[35] These events are: in case of a proposal for a merger or amalgamation, approval of the proposal by the board of directors of the enterprises concerned with such merger or amalgamation; and in case of acquisitions covered by Sections 5(a) or 5(b) execution of any agreement or other document for acquisition. Furthermore,
Section 6(2-A) of the Competition Act states: "No combination shall come into effect until two hundred and ten days have passed from the day on which the notice has been given to the Commission under sub-section (2) or the Commission has passed orders under Section 31, whichever is earlier."

[36] The statutory definition of 'acquisition' as given in Section 2(a) of the Competition Act reads: "'acquisition' means, directly or indirectly, acquiring or agreeing to acquire—
shares, voting rights or assets of any enterprise; or
control over management or control over assets of any enterprise."

[37] The last Section 20(3) notification was S.O. 480(E), dated Mar. 4, 2011 (Ministry of Corporate Affairs, Government of India), http://www.mca.gov.in/Ministry/notification/pdf/Notifications_4mar2011.pdf (last visited August 29, 2014), whereby the Central Government in consultation with the CCI enhanced, on the basis of wholesale price index, the value of assets and turnover, by fifty percent for the purposes of Section 5 of the Act. Though, Section 20(3) prescribes for a fresh notification after every two years no fresh notification has been issued subsequent to the said Mar. 4, 2011 notification till date.

ready has control jointly [for clause (b)]/Enterprise remaining after Merger or Created after amalgamation [for clause (c)]

Criteria	Location	Monetary Value of Threshold
Assets OR	In India OR In or Outside India	More than (Indian Rupees) INR. 1500 Crore[38] (Aggregate)USD 750 Million including, INR 750 Crore is in India
Turnover	In India OR In or Outside India	More than INR4500 Cr. USD 2250 Million including, INR 2250 Crore is in India

OR,

For Groups to which the above parties/enterprises belong post acquisition/merger or amalgamation:

Criteria	Location	Monetary Value of Threshold
Assets OR	In India OR In or Outside India	More than INR6000 Crore (Aggregate) USD 3 Billion including, INR750 Crore is in India
Turnover	In India OR In or Outside India	More than INR18000 Crore USD 9 Billion including, INR 2250 Crore is in India

Schedule I to the 2011 Regulations (read with its Regulation 4) currently lists ten categories of combinations which are 'ordinarily not likely to cause an appreciable effect on competition in India' and thus in such cases notice under Section 6(2) 'need not normally be filed.'[39]

The inquiry into whether a 'combination', referred to in Section 5, has caused or is likely to cause an appreciable adverse effect on competition in India may be done by the CCI, as per Section 20 of the Act, on its own initiative; but the initiation of this inquiry can only be done within one year from the date on which the combination has taken effect[40]. Further, sub-section (2) of Section 20 prescribes for the usual mode of said inquiry by the CCI upon receipt of notice under Section 6(2).Sub-section (4) of Section 20 lists various factors which the CCI will have 'due regard' to in its above determination in the said inquiry.

The notice is to be filed in Form I or Form II, appropriately drafted, by the acquirer or jointly by the parties along with the requisite fee, as prescribed[41]. Within 30 days of receipt of the notice the CCI forms a *prima facie* opinion under Section 29(1) of the Act, 'as to whether the combination is likely to cause or has caused an appreciable adverse effect on competition within the relevant market in India.'[42] Before forming this *prima facie* opinion the CCI may call for additional information from the parties concerned or examine and accept any modification offered by the parties[43]. If the *prima facie* opinion is against the combination, show cause notice is issued to the parties for them to respond within 30 days of its receipt, 'as to why an investigation in respect of such combination should not be conducted'[44]. After receiving response from the parties concerned, the CCI may call for a report from the Director General, within the directed time[45]. Where the *prima facie* opinion is against the combination, parties are directed to publish the details of the combination, as directed, so that the affected stakeholders including, members of the public have the knowledge of the combination and can be permitted to file written objections before the CCI[46]. The culmination of combination review results in a Section 31 order under its relevant sub-section. Three courses are provided for by that provision. If the CCI opines against the combination on the basis that it is likely to cause or has caused an appreciable adverse effect on competition (AAEC) it results in a Section 31(2) order, ordering that the combination shall not have effect, resulting it to be void[47]. However, if in addition to this finding the CCI is also of the opinion that 'such adverse effect can be eliminated by suitable modification to such combination', under Section 31(3), the CCI may propose appropriate modification to the parties, to be carried out within the time specified by the CCI. The third course of action open is to render a Section 31(1) order approving the combination. Subject to statutorily prescribed relaxations, a period of two hundred and ten days from the date of Section 6(2) notice is prescribed under Section 31(11) for the CCI to pass an appropriate order under sub-sections (1), (2) or (7) of Section 31.

IV. Analyzing Jet-Etihad Combination Review

Let us now proceed to the discussion of the *Jet-Etihad* 'combination' review by the CCI. In this 'combination' Jet Airways (India) Ltd. proposed a sale of 24% of its equity to Abu-Dhabi based Eithad Airways PJSC for US Dollars (USD) 379 million [price per share of Indian Rupees (INR) 754.74] along with some other rights. Pursuant to entering the three transaction documents viz., Investment Agreement ('IA'), a Shareholder's Agreement ('SHA') and a Commercial Cooperation Agreement ('CCA'), all executed on April 24, 2013 the notice under Section 6(2) was given by the parties to the CCI on 1 May, 2013. The review of this combination resulted in two orders.

[38] 1 Crore = 10 Million; and 1 Crore= 100 Lakhs.

[39] *See* Regulation 4 of the 2011 Regulations, *supra* note 4.

[40] *See supra* note 1, proviso to Section 20(1) of the Competition Act.

[41] *See* Regulations 9 to 13 of the 2011 Regulations, *supra* note 4.

[42] *See id.* Regulation 19(1) of the 2011 Regulations, and Section 29 of the Competition Act, *supra* note 1.

[43] *See id.* Regulation 19(2) of the 2011 Regulations.

[44] *See* Section 29(1) of the Competition Act, *supra* note 1. The section bears the heading "Procedure for investigation of combinations".

[45] *See* Section 29(1-A) of the Act, *id.,* and Regulations 20 and 21 of the 2011 Regulations, *supra* note 4.

[46] *See id.,* sub-sections (2) and (3) of Section 29 of the Act.

[47] *See id.* Section 31(13) of the Act.

The majority order granted approval under Section 31(1), and the minority order under Section 29(1) by the sole member, Mr Anurag Goel, found *prima facie* that the proposed combination is likely to cause appreciable adverse effect on competition (AAEC), and thus suggested further investigation[48].

Etihad, the national airline of UAE is a wholly owned company of the Government of Abu Dhabi, and its hub airport is Abu Dhabi, the capital of UAE. Whereas, Jet, a listed Indian company incorporated in 1992 primarily engages in the business of 'low cost and full service scheduled air passenger transport services to/from India.'[49] The CCI order began by emphasizing the sovereignty of nations over their airspace and then went on to discuss the significance of bilateral air service agreements (BASAs) between two countries in this regard[50].

The importance of the definition of the relevant market in an industry like the 'airline industry' in a given fact situation is well highlighted by this case. The majority on basis of the demand based approach to the market definition used the popular Origin & Destination (O&D) pair approach in airline industry for defining the relevant market. The relevant market for international passengers in this way, as per the majority comprised of: (a) on the O&D pairs originating from or ending in nine specified pertinent cities in India, and (b) on the O&D pairs originating from or ending in India to/from international destinations on the overlapping routes of the parties to the combination[51]. It however went further than the O&D approach and covered the potential 'network effects' in its analysis[52]. Through both the aforementioned approaches the CCI (i.e., the majority) was of view that this combination did not cause AAEC in the relevant market in India. The minority order defines the relevant market to be the international air passenger transportation from and to India[53], and assessed the impact on macro and micro levels as follows[54]:

a) Macro level impact on the different sectors of international air passenger traffic from and to India; and

b) Analysis of the extent of overlaps of flights of the two airlines between specific points of origin and destination (O&D pairs or routes).

One important study in this sector commissioned by the CCI and FIAS of the World Bank Group was conducted in the year 2008 by the Administrative Staff College of India (ASCI) entitled "*Competition Issues in the Domestic Segment of the Air Transport Sector in India*"[55]. This study observed on the basis of the 1997 OECD Report on "Competition Policy and International Airport Services" that: "the provision of air services between any two given cities requires two complementary inputs: aircrafts services and airports services. Therefore there must be effective competition in both these markets if we want effective competition in the air transport sector."[56] The relevant market was defined in this study as "the route between city pairs at a *particular time on a particular date*".

The crux of CCI's approach has been to proceed to its analysis for each O&D pair on two presumptions: incorporating indirect flights in its analysis on the presumption of price sensitive Indian customers, and airport substitutability in the same catchment area particularly, considering Abu Dhabi, Sharjah and Dubai to be substitutable mainly due to free shuttle service by Emirates and Etihad between Abu Dhabi (AUH) and Dubai and public transport between them (each being within two hours distance of each other). Wherever, existing competitor had credible market share this fact, without much analysis, was simply taken in favor of the proposed combination.

The above ASCI study indulged in an analysis incorporating therein *inter alia* the discussion on slot allotment policy in airports and slot dominance and barriers to new entrants into the already oligopolistic market; HHI analysis on various O&D pairs to calculate market concentrations, as explained above; scope of demand substitution; price data analysis and analyzing price parallelism between dominant market players; fleet size and average fleet age of players and other factors affecting their competitiveness. Going by these parameters discussed extensively in the ASCI study it may appear, that particularly in view of an adverse order under Section 29(1), the remaining members of the CCI could have done a more elaborate investigation before forming its *prima facie* opinion resulting in passage of Section 31(1) order.

To the credit of the minority it showed more pragmatically, skepticism about Air India's (AI) capacity to pose significant competitive restraints post combination.[57]It examined at least one transaction between the parties concerning slots at one of the busiest airports, London Heathrow Airport ('LHR Airport')[58]. But, detailed slot and time analysis of each relevant airport in O&D analysis was not done by the minority also, though it did point out to the relevance of availability of slots in its analysis[59]. The minority did not appear to be convinced with the independence of the data provided by the parties to the

[48] Majority order under Section 31(1) of the Act, dated Nov. 12, 2013, *supra* note 5; and the Minority Order was passed on Oct. 14, 2013 under Section 29(1) of the Act, http://cci.gov.in/May2011/OrderOfCommission/CombinationOrders/FINAL%20Order%20M(AG)%20-%20141013.pdf (last visited August 29, 2014); a kind of supplemental order to this Oct. 14, 2013 order was again passed by the same CCI member on 5 Feb., 2014, taking note of the majority Section 31(1) order of Nov. 12, 2013, but still reiterating succinctly its said earlier minority order, http://www.cci.gov.in/May2011/OrderOfCommission/CombinationOrders/C-2013-12-144%20M(AG)%20Minority.pdf. It is submitted that this later Feb. 2014 minority order was unnecessary in view of the prior majority order, and subsequent references to the minority order in this case refers only to the Oct. 14, 2013 order of dissent.

[49] *See* Jet-Etihad CCI Order, *supra* note 5, ¶ 12.

[50] *See id.,* ¶ 21.

[51] *See id.,* ¶ 32.

[52] *See id.,* ¶ 39 and note 9 therein.

[53] *See* Jet-Etihad Minority Order, *supra* note 48, ¶ 11.

[54] *Id.*

[55] ADMINISTRATIVE STAFF COLLEGE OF INDIA (ASCI) RESEARCH & CONSULTANCY, COMPETITION ISSUES IN THE DOMESTIC SEGMENT OF THE AIR TRANSPORT SECTOR IN INDIA (2008), http://www.cci.gov.in/images/media/completed/transport_20090421133744.pdf (last visited August 29, 2014).

[56] *See id.* at 99.

[57] *See* Jet-Etihad Minority Order, *supra* note 48, ¶ 17.

[58] *See id.,* ¶ 47.

[59] *See id.,* ¶ 13.

CCI[60], and seemed to underestimate other competitors and somewhat overestimated the parties' market power post-merger, particularly on the basis of seat allocation enhancement under the then recent MoU between India and UAE (Abu Dhabi) to 50,000 from 13,330[61]. A few other salient aspects from the minority order which reveals some chinks in the CCI Order are as follows:

> *1. It rubbished the parties claim regarding substitutability of Abu Dhabi with Dubai on the basis of the analysis of data of the overlapping routes provided by the parties, which showed that "passengers travelling to Dubai are not using Abu Dhabi as a substitutable option[62]. Furthermore, it was also pointed out that website of none of the Indian carriers including, Jet showed Dubai as substitutable to Abu Dhabi or vice versa.*
>
> *2. Furthermore, the inclusion of indirect flights in its analysis by the majority on the basis of price sensitivity of the Indian consumer was effectively challenged in the minority order which said that[63]*
>
> *[A] premium customer who travels business/executive class is time-sensitive and will therefore prefer a direct point-to-point connection over a connecting one-stop or two-stop flight. For the remaining passengers who are not time-sensitive but may be fare-sensitive, again the direct point-to-point flight may be the preferred option over connecting flights for the routes Mumbai-Abu Dhabi and Delhi-Abu Dhabi, as the direct flights are found to be cheaper on average as compared to connecting flights. (emphasis supplied)*

Another important aspect in this matter concerns one of the CCA clauses which restricts Jet not to code share[64] with other airlines in certain O&D pairs. Though the majority anticipated the anti-competitive effects that such cancellations of code sharing agreements may have, it was of the view that the competition which the parties will face from the 'credible' airlines named therein would constrain their combined power[65]. The minority order however views this clause leading to a *prima facie* conclusion about its having AAEC *inter alia* due to resultant weakening of inter-hub competition which may restrict passengers' choices in their journeys from/to certain destinations[66]. Finally, though the majority saw this combination resulting in enhanced efficiency and price reduction for consumers,[67] and sort of incorporated a failing firm defense, appreciating benefits of it for Jet, which was beleaguered with huge debt;[68] the minority on the other hand was not convinced by these efficiency claims, as they were not quantified[69]. This concludes the analysis of both the majority and minority orders in the *Jet-Etihad* Combination Review.

V. Critiquing the Mylan-Agila Combination Review

5.1 Discussing generally the Section 31(1) Order

In the *Mylan-Agila* deal, *Mylan Inc.*, a US Corporation acquired *Agila India* for INR 94.8 billion in cash and contingent buyout.[70]The main problem with this combination was the presence of the non-compete obligation contained in both the Share Purchase Agreement (SPA) and the restrictive covenant agreement (RCA) signed between the acquirer, *Mylan Inc.*, and *Strides Arcolab Limited* (SAL) with its promoters. *Agila India*, which was a wholly owned subsidiary (WoS) of SAL, and *Onco Therapies Ltd.* (OTL), which was a WoS of *Agila India* were the 'Target Enterprises' in the deal. We shall first turn to certain aspects examined by the CCI in this matter resulting in its Section 31(1) approval order.

Agila India was involved in the development and manufacturing of various injectable products. OTL's core business concerned R&D and manufacturing of oncology related pharmaceutical products including, injectables. *Mylan* with its subsidiaries was involved in generic and specialty (viz., respiratory, allergy, psychiatric and anti-retroviral therapies) pharmaceuticals with presence in around 140 countries. Its Indian subsidiaries were manufacturing Active Pharmaceutical Ingredients (APIs). The CCI importantly noticed, that both the Acquirer and Target Enterprises had limited presence in the domestic market in India; and Targets' sale in domestic market were less than 5 per cent of their consolidated sales in the year 2012[71]. Further, it noted that the products offered by the acquirer and the target entities to the consumers in the Indian market fell in different therapeutic categories except for a few products, that were also entirely different in their characteristics and intended use[72]. Another significant observation in favor of the combination was, that the majority of the domestic sales in India of the acquirer were in APIs and of the target enterprises were in injectables[73]. Furthermore, the majority of these APIs were non-sterile which cannot be used to formulate injectables[74]. These facts went in favour of the proposed combination.

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[60] *See id.,* ¶ 22.
[61] *See id.,* ¶¶ 14, 15.
[62] *See id.,* ¶ 33.
[63] *See id.,* ¶ 37.5.
[64] Jet Airways website itself explains code sharing as: "A Codeshare is an arrangement between two airlines (Airline A & Airline B) whereby Airline A will market and sell the flights of Airline B as though they were the flights of Airline A and / or vice versa. This arrangement allows us to provide you with a greater choice of destinations with seamless connections.", *see* Codeshare Partners, JET AIRWAYS, http://www.jetairways.com/EN/IN/AboutUs/CodeShare.aspx (last visited August 29, 2014).
[65] *See supra* note 5, ¶ 43.
[66] *See* Jet-Etihad Minority Order, *supra* note 68, ¶ 25.
[67] *See supra* note 5, ¶ 6, ¶¶ 46-50.
[68] *See id.,* ¶ 51.
[69] *See supra* note 68, Jet-Etihad Minority Order, ¶ 42.
[70] *See* Mylan-Agila Transaction Summary (Deal No. 730521) on Mergerstat M&A Database (on LexisNexis Academic).
[71] *See* Mylan Inc. Section 31(1) Order, *supra* note 6, ¶ 14.
[72] *See id.,* ¶ 15.
[73] *See id.,* ¶ 16.
[74] *See id.*

5.2 The CCI's Concerns in relation to the Non-compete Clauses

Despite the CCI's approval, the non-compete obligation in the SPA and RCA initially created concerns, as the CCI observed[75]:

> *SPA and the RCA provide that for a period of six years from the date of closing of the proposed combination, each of Arun Kumar, Pronomz Ventures LLP, SAL and any of SAL's group companies (collectively known as the "Promoters") shall not (whether alone or jointly with another and whether directly or indirectly) carry on or be engaged, concerned or interested economically or otherwise in any manner in the business of developing, manufacturing, distributing, marketing or selling any injectable, parenteral, ophthalmic or oncology pharmaceutical products for human use, anywhere in the world.*

The acquirer justified these clauses imposing non-compete obligations on promoters of target enterprises and the selling shareholders, at the time of their exit, to protect business interests of the acquirer and target entities.[76]The CCI quoted its following view on non-compete obligations from its former order in the matter relating to combination of *Hospira-Orchid* (Comb. Reg. No. C-2012/09/79)[77]:

> *"non compete obligations, if deemed necessary to be incorporated, should be reasonable particularly in respect of (a) the duration over which such restraint is enforceable; and (b) the business activities, geographical areas and person(s) subject to such restraint, so as to ensure that such obligations do not result in an appreciable adverse effect on competition."*

Actually in the *Hospira-Orchid* deal the Business Transfer Agreement (BTA) in its non-compete clause stipulated that *Orchid Chemical and Pharmaceuticals Ltd*. (OCPL) and its promoter cannot undertake certain business and R&D activities pertaining to the transferred business for a period of eight and five years respectively[78]. As a justification for the same the parties to the *Hospira-Orchid* combination review contended that the incorporation of such non-compete clauses was a standard industry practice, which was 'generally considered necessary for the effective implementation of the proposed combination and allows the acquirer to obtain full value from the acquired assets'[79]. Being questioned by the CCI, the parties suggested certain modifications in the *Hospira-Orchid* matter by offering to reduce the time period to four years in relation to the domestic market in India and removed certain R&D restrictions, which were accepted by the CCI[80].

In *Mylan-Agila* the CCI observed that 'in spite of the fact that the Target Enterprises are engaged in the business of injectable products belonging to a few therapeutic categories, the non-compete covenant sought to impose a blanket restriction covering injectable products across all the therapeutic categories'. It went on to say, that 'the scope of the non-compete covenant covered all products under the oncology and ophthalmic categories even though there are products under these categories which are not being currently manufactured by the Target Enterprises'[81]. In view of the CCI, the non-compete clause should only cover those products which are being currently developed, manufactured or sold by the target entities; and thus acquirer was issued notice to provide a justification for the above non-compete clauses[82]. In response the parties offered to: modify the non-compete covenant by reducing the time period to four years (like in *Hospira-Orchid* case); curtailing the scope of the non-compete obligation to the Indian market, and only to the products either manufactured by the target entities or which are in the pipeline or development phase, which were accepted by the CCI before passing its favorable Section 31(1) order[83]. However, in the US this deal raised concerns with the FTC which initiated an investigation of the proposed acquisition leading to the respondents *Mylan* and *Agila* to enter into a consent agreement with the FTC, in terms of which it also conditionally approved the *Mylan-Agila* transaction. *Agila India* was to divest its eleven generic injectable drugs to its competitors as there were less competitors in these eleven markets[84].

There is a view that the CCI is skeptical about non-compete clauses in Brownfield pharmaceutical sector combinations, and combinations in other sectors with non-compete clauses were cleared by the CCI without objections. As an example, lawyers point to the *SunCoke-VISACoke* combination approved by CCI in Jan. 2013[85]. Thus, in absence of a clear policy regarding such ancillary restraints, the CCI practice in this regard may become subjective and arbitrary with passage of time[86]. The CCI can evolve general guidelines regarding non-compete clauses in combinations, like the ones contained in the European Commission's 'notice on restrictions directly related and necessary to concentrations', lending its analysis more objectivity and predictability for the parties concerned[87].

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[75] *Ibid.,* ¶ 17.
[76] *See id.,* 18.
[77] *See id.,* 19 (citing from 10 of *Hospira-Orchid,* Section 31(1) Order dated Dec. 21, 2012).
[78] *See* Hospira-Orchid, Section 31(1) CCI Order dated Dec. 21, 2012, 9, http://www.cci.gov.in/May2011/OrderOfCommission/CombinationOrders/C-2012-09-79.pdf (last visited August 29, 2014).
[79] *Id.*
[80] *See id.,* 10-12.
[81] *See* Mylan Inc. Order, *supra* note 6, 20.
[82] *See id.,* 20.
[83] *See id.,* 21-23.
[84] *See* Decision and Order In the Matter of Mylan Inc.,(Docket No. C-4413) FTC Order dated Dec. 12, 2013, *available at:* http://www.ftc.gov/sites/default/files/documents/cases/131218mylando.pdf (last visited August 29, 2014); and Mylan-Agila Transaction Summary (Deal No. 730521) on Mergerstat M&A Database, *supra* note 70. (on LexisNexis Academic).
[85] *See* CCI's Non-Compete Concerns!, THE FIRM (2013), http://www.moneycontrol.com/video/management/ccis-non-compete-concerns-_912663.html (last visited August 29, 2014).
[86] *See* Payaswini Upadhyaya, HOSPIRA, MYLAN MODIFY CLAUSES FOR CCI NOD ON BUYS MONEYCONTROL.COM (2013), http://www.moneycontrol.com/news/cnbc-tv18-comments/hospira-mylan-modify-clauses-for-cci-nodbuys_912570.html (last visited August 29, 2014).
[87] *See* COMMISSION NOTICE ON RESTRICTIONS DIRECTLY RELATED AND NECESSARY TO CONCENTRATIONS, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:056:0024:0031:EN:PDF (last visited August 29, 2014).

Probably as a response to the background concerns post *Mylan-Agila* deal the 2014 FDI Policy the Government though continuing to allow 100% FDI in the Brownfield Pharmaceuticals sector introduced the following two new restrictive conditions[88]:

> *(i) 'Non-compete' clause would not be allowed except in special circumstances with the approval of the Foreign Investment Promotion Board.*
>
> *(ii) The prospective investor and the prospective investee are required to provide a certificate along with the FIPB application as per* ***Annex-11****.*

Interestingly but unfortunately, they are self-contradictory. This 'certificate' in 'Annex-11' expressly mentions in one of the clauses: "It is also certified that none of the inter-se agreements, including the shareholders agreement, entered into between foreign investor(s) and investee Brownfield pharmaceutical entity contain any non-compete clause in any form whatsoever." Since, the above condition (ii) requiring submission of certificate in Annex-11 precludes presence of non-compete clauses in the transaction documents the exception in the preceding condition (i) is rendered nugatory and otiose.

VI. Extraterritorial Application:

The cross-border combinations review with an Indian nexus due to the target being an Indian company has been elaborately discussed above through the *Jet-Etihad* and *Mylan-Agila* combinations reviews conducted by the CCI. However, if say, the combination between foreign companies takes place outside India, the CCI's jurisdiction to review such combination may be questioned on the basis of territorial scope of the Act as provided in Article 1. Although, Section 5 incorporates the 'effects doctrine'[89] and the relevance of the AAEC in India, to put doubts to rest, Section 32 confers extraterritorial jurisdiction to the CCI to *inter alia* inquire in accordance with Sections 20, 29 and 30 in respect of a combination outside India[90] or where all the parties to the combination are located outside India[91] provided the concentration has or is likely to have an AAEC in the relevant market in India, and to pass such orders as it may deem fit in accordance with the provisions of the Competition Act, 2002.

In both cross border 'combination' cases, *Jet-Etihad* and *Mylan-Agila* Section 32(e) was applied. Perhaps the only matter where both clauses (d) and (e) of Section 32 become pertinent is the 2013 *Titan* Combination,[92] whose Section 43A order is discussed below. Both parties to the combination were foreign corporations, *Titan International, Inc*. (a US Corporation) and *Titan Europe Plc*. (a UK Company), with the former acquiring the entire share capital of the latter, resulting in indirect acquisition of 35.91 per cent share capital of an Indian Company, *Wheels India* from *Titan Europe*. It was observed by the CCI that 'there is no horizontal overlap in the business activities of *Titan International* and *Wheels India*, as *Titan International* has no significant presence in India except its indirect stake in *Wheels India'* and 'that post combination, there is no change in the number of players in the market for steel wheels in India', and thus the CCI passed a favorable Section 31(1) order[93].

VII. Imposition of Penalties under Section 43A

This penultimate section examines the manner of exercise of an important power conferred upon the CCI under Section 43A. This section reads as follows:

> *If any person or enterprise fails to give notice to the Commission under sub-section (2) of section 6, the Commission shall impose on such person or enterprise a penalty which may extend to one percent of the total turnover or the assets, whichever is higher, of such a combination.*

Though a 'belated notice' beyond the time prescribed under Section 6(2) may be admitted by the CCI under Regulation 7 of the 2011 Regulations, both the belated notice and failure to file notice, which is dealt under Regulation 8[94], attract proceedings under Section 43A. The use of the word 'shall' suggests mandatory imposition of penalty. This interpretation is also supported by the mandatory duty to serve a notice imposed under Section 6(2), when falling within its purview and unless excepted out, due to the use of the word 'shall' therein, which was substituted for the words 'may, at his or its option' by the Competition (Amendment) Act, 2007; one of consequences of whose non-compliance is given in Section 43A[95].

The first Section 43A order sought to be examined was rendered in the *Jet-Etihad* matter discussed above[96]. CCI imposed the penalty of INR One Crore on Etihad for consummating and implementing certain parts of transaction, LHA Transaction and CCA without giving notice in accordance with Section 6(2), as imposed on it under Regulation 9 of the 2011 Regulations. The CCI, keeping in view the facts and circumstances as summarized by it in its order, opined that the penalty imposed served the ends of justice said[97].

Although the penalty of INR one crore imposed on Etihad in an apparently well-reasoned order may not appear excessively harsh to many, this opinion may change in light of another

[88] *See* Consolidated FDI Policy, 2014 (DIPP, Government of India), 6.2.18.3.

[89] *See* Vinod Dhall, *The Indian Competition Act, in* COMPETITION LAW TODAY, 530–31 (Vinod Dhall ed., 2007).

[90] *See* clause (d) of Section 32 of the Competition Act, *supra* n. 1.

[91] *See id.*, clause (e) of Section 32.

[92] *See* Titan-Titan CCI Order under Section 31(1) (Combination Registration No. C-2013/02/109), April 2, 2013, http://www.cci.gov.in/May2011/OrderOfCommission/CombinationOrders/C-2013-02-109.pdf (last visited August 29, 2014).

[93] *See id.,* ¶ 5.

[94] Regulation 8, *supra* note 4, prescribes that in case of failure to file notification for a combination the Commission, upon its own knowledge or information regarding the same, shall direct parties to file notice in Form II and inquire into the same.

[95] *See* FRANCIS BENNION, BENNION ON STATUTORY INTERPRETATION 44–57 (5 ed. 2008).

[96] Order under Section 43A in Combination Registration No. C-2013/05/122 (CCI, Dec. 19, 2013), http://www.cci.gov.in/May2011/OrderOfCommission/CombinationOrders/Order%20191213.pdf (last visited August 29, 2014).

[97] *Id.,* ¶ 12.

previous Section 43A order passed in *Zulia-Kinder* matter[98] where for a very serious and inordinate delay of 399 days the penalty imposed by the CCI was only INR Fifty Lakhs i.e., half of penalty imposed in *Jet-Etihad* matter just discussed. The latter also concerned a cross border combination, based on the Share Purchase Agreement (SPA), dated April 2, 2012 yet the belated Section 6(2) notice was filed on June 6, 2013, with a delay of around 399 days[99]. This matter highlights the failure on the part of the CCI, in spite of internal mechanisms, to detect the proposed combination in time. Had it been consummated, the CCI would have lost its power to inquire into the same after one year from the date on which such combination has taken effect, as discussed earlier[100].

In *Zulia-Kinder* the main justifications for the delay, which was rejected by the CCI, were: incomplete and hence erroneous legal advice given by the first set of Indian counsel on the applicability of the Competition Act, the proposed transaction being entirely offshore, and the fact that this is the acquirers' first merger notification in India[101]. There was a previous Section 43A in an intra-group merger in *Dewan Housing* case[102]. In this case the delay was that of 388 days, similar to *Zulia-Kinder*, and a similar plea of incorrect legal advice leading to this delay was raised. Despite the apparent absence of *bad faith,* and although the CCI considered that the delay was due to a *bonafide* mistake and consequently to be a mitigating factor, it did not exculpate the parties. The CCI however imposed a fine of INR 5 Lakhs only, although it could have imposed a fine of up to around INR 230 Crores, 4600 times the amount actually fined[103]. Notably, intra-group mergers are excluded from the notification requirements in several jurisdictions and so even this decision in *Dewan Housing* has been subject to criticism[104]. In April, 2013 an exemption from notification for certain intra group mergers was introduced in the Schedule I to 2011 Regulations[105]. Later amendments to the 2011 Regulations in March 2014 *inter alia* added sub-regulation (5) to regulation 9 providing for determination of requirements for filing notice to be 'determined with respect to the substance of the transaction', and omitted category (10) in its Schedule I which previously exempted a combination 'taking place entirely outside India with insignificant local nexus and effect on markets in India' from notice requirement. Apart from questioning the legality of the CCI Section 43A orders imposing fines in intra-group mergers, as arguably infringing Public International Law, an article also criticizes the above March 2014 amendments as exacerbating this issue further[106].

In the same year, before the *Zulia-Kinder* matter, in the *Titan* combination the CCI through its Section 43A order imposed a penalty of INR One Crore, although the delay was of around six months[107]. As per a view, the fine in *Dewan Housing* is justified on comparison with *Titan* on the basis, that the transaction in *Titan* unlike in *Dewan* had been implemented[108]. A similar justification may be given on comparison between *Zulia-Kinder* with *Titan*. However, it is contended that the quantum of the fine in *Titan,* which is double to that imposed in *Zulia-Kinder*, with arguably much more serious lapses in respect of serving Section 6(2) notice suggests unjustified leniency on the part of the CCI in *Zulia-Kinder* matter. If however, the *Zulia-Kinder* decision serves as a yardstick, then the quantum of the fine in *Jet-Etihad* is also unjustified.

This inconsistency in approach of the CCI in regard to the imposition of a penalty under Section 43A is reinforced by another case, where discretion is used by the CCI in not imposing a fine. This discretion was exercised on a flimsy and unjustifiable ground. In a Section 43A order of April 2012 in the matter of a combination concerning *Siemens Ltd*. (SL) and *Siemens Power Engineering Pvt. Ltd*. (SPEL), although the Section 6(2) notice was served belatedly approximately forty days after the Board Resolutions approving the scheme of amalgamation between the parties, the CCI condoned the delay and did not impose any penalty[109]. Paragraph 4 of the order, reproduced below, gives these reasons for this decision: "Considering the facts and circumstances of the case *coupled with the fact that this is the first year of implementation of enforcement provisions relating to combinations in the Act*, the Commission is of the opinion that no penalty is required to be imposed on SL and SPEL in terms of Section 43A." These reasons forming the basis of this Section 43A order can be challenged on the following grounds:

> *(1) As discussed above, once the condition of notice or failure to serve notice under Section 6(2) is fulfilled, as per Section 43A, it is mandatory for the CCI to impose a penalty.*
>
> *(2) The CCI in its order has not been able to justify reading of 'shall' in Section 43A as 'may', giving it discretion in not imposing a penalty thereunder.*
>
> *(3) Even if assuming, although not conceding, such a discretion is read into Section 43A, the CCI has not given a speaking order with due appreciation of the facts and circumstances of the case. Merely to state, that 'considering the facts and circumstances…" does not provide any insight in the adjudicatory reasoning adopted by the CCI in deciding this issue.*

[98] Order under Section 43A in Combination Registration No. C-2013/06/124 (CCI, Aug. 1, 2013), http://www.cci.gov.in/May2011/OrderOfCommission/CombinationOrders/P-C-2013-06-124.pdf (last visited August 29, 2014).
[99] *See id.,* ¶ 4.
[100] *See id.,* ¶ 15.
[101] *See id.,* ¶ 8.
[102] CCI Order under Section 43A in Combination Registration No. C-2012/11/92 (CCI, Jan. 3, 2013), http://www.cci.gov.in/May2011/OrderOfCommission/CombinationOrders/P-C-2012-11-92.pdf (last visited August 29, 2014).
[103] *Id.*, ¶ 11.
[104] *See,* Ruchit Patel, *The Treatment of Late Filings in Indian Merger Control*, World Competition 37 no. 2 (2014) 249, 255-56.
[105] *See* Category 11 of the Schedule I to the Combinations Regulations, *supra* note 4.
[106] *Supra* note 104, 256-57.
[107] CCI Order under Section 43A in Combination Registration No. C-2013/02/109 (CCI, 2 Apr. 2013), http://www.cci.gov.in/May2011/OrderOfCommission/CombinationOrders/P-C-2013-02-109.pdf (last visited August 29, 2014).
[108] *Supra* note 104 at 254.
[109] Order under Section 43A in Combination Registration No. C-2012/03/43 (CCI, Apr. 19, 2012), http://www.cci.gov.in/May2011/OrderOfCommission/CombinationOrders/NP-C-2012-03-43.pdf (last visited August 29, 2014).

(4)The only adjunct reason to support its order is, that 'this is the first year of implementation of provisions relating to combinations in the Act'. This is an extraneous consideration for rendering this decision, and may raise questions about the competence of the CCI to handle such issues given its inexperience. Imposing optimal penalties which are not disproportionate to the violation most certainly is important in order to reduce recidivism and to have a deterrent effect on future violators[110].

In fact, this is not the only case where such condonation was done by the CCI. In the *Dewan Housing* penalty order the CCI admittedly states, that subsequent to its order dated 28 December 2011, clarifying the notice requirements for intra-group mergers, in several cases, 'belated notices' were received in response in respect of mergers between parent and subsidiary companies; and the CCI in such cases decided not to impose any penalty as it was the first year of enforcement of the pertinent provisions of the Competition Act[111]. The CCI's adjudication in these cases can also be subject to the above criticism. The CCI may also contemplate evolving guidelines in this regard to lend more objectivity and certainty in this regard, thereby more efficaciously enforcing the provisions of the Competition Act, 2002 furthering its objectives[112]. The 2006 EC 'Guidelines on the method of setting fines'[113]may be instructive in this regard.

VIII. Conclusion

This article analyzed the Indian competition law pertaining to the 'combination' review, giving special emphasis on the mergers with a cross-border component, and critically commented on the CCI's merger control practice in this regard. After discussing competition policy issues, the article discussed 'combinations' review mechanism as contained under the pertinent provisions of the Indian Competition Act, 2002 read with the Combinations Regulations, 2011.The merits and demerits of the CCI's majority and minority's *Jet-Etihad* combination review orders were discussed next. The *Mylan-Agila* combination review order of the CCI threw some interesting issues, particularly regarding the manner in which 'non-compete' clauses in the transaction documents are being viewed by the CCI. The CCI's inconsistent practice in restricting these 'non-compete' clauses was discussed there. The last issue curiously revealed inconsistent and somewhat arbitrary practice of CCI in the imposition of penalties under Section 43A of the Competition Act, 2002 as demonstrated through the Section 43A orders discussed therein. By and large, this article objectively reveals the relative inexperience of the CCI in combinations review, but apparently shows its zeal in enforcing the legal provisions applicable. If there is a competence problem too, that needs to be thoroughly researched into by researching into law and practice concerning appointments of the members of the CCI, preferably through a comparative law study, but the same falls outside the scope of this research article.

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[110] *See* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 491–517 (5 ed. 2007).; and Wouter P.J. Wils, *Optimal Antitrust Fines: Theory and Practice*, 29 WORLD COMPETITION 183 (2006).

[111] *See supra* note 102,¶ 8.

[112] *See also supra* note 104, at 258 (making a similar suggestion); and at 257-58 (demonstrating through analysis of *Dewan, Titan and Zulia-Kinder ('Temasek')* how the 'level of fine imposed by the CCI is not necessarily linked to the length of delay', and is 'heavily influenced' by other more non-quantifiable factors).

[113] *Guidelines On The Method Of Setting Fines Imposed Pursuant To Article 23(2)(A) Of Regulation No 1/2003* (EC, 2006/C 210/02), http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52006XC0901(01) (last visited August 29, 2014).