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JUMPING THE GUN UNDER INDIAN COMPETITION LAW

AN OVERVIEW

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Background

'Jumping the Gun', the phrase which derives its origin probably from the track and field races, in the context of merger control regime refers to a variety of actions that merging parties might enter into prior to closing to facilitate the merger and expedite the integration of the companies. This assumes specific significance for Indian anti-trust practitioners, as Indian merger control regime covered under the Competition Act, 2002 ("**Act**") is a suspensory one and prohibits implementation of notifiable *combinations*[1] unless approved by the Competition Commission of India ("**CCI"/ "Commission**") or expiry of the 210 days review period following notification[2], with a view to ensure that the parties to the combination continue to compete as they were competing before the proposed combination[3].

This paper aims to provide a general overview of the case law to date on gun jumping, and to indicate trends that may be relevant for practitioners. Finally, it offers suggestions for merger practitioners notifying a transaction to CCI to avoid the pitfalls of gun-jumping consequences.

Gun Jumping – A Brief Overview

The basic objective of standstill obligations contained in the Act is to ensure that the parties to a combination transaction compete as they were competing before the initiation of combination process till the time the transaction is reviewed for any appreciable adverse effect on competition ("**AAEC**") and approved by the Commission. In other words, the standstill obligations essentially require that the parties carry on with their ordinary course activities completely independent of each other and to the fact of the combination transaction. The rationale behind such obligations is that if the parties stop competing as they were competing before, the resulting adverse effect on competition in the interim period cannot be restored even if the Commission based on its review decides that the transaction is likely to result in AAEC and therefore does not approve the same or approve with modifications i.e., even if the transaction is not consummated or at least not consummated in the form as originally envisaged by the parties[4]. It is in this context, assessment of gun jumping instances assume significance.

Whilst the expression 'gun-jumping' has not been defined anywhere in the Act. The expression however is not unknown in the Indian merger control parlance, where CCI itself has referred to the expression in a few of its decisions[5] and refers to breach of those obligations which have been designed to maintain the existing competitive conditions until the CCI is able to evaluate the likely effect of the combination. In fact, in the case involving *Ultratech Cement's* acquisition of certain cement plants of Jaiprakash Associates Limited, CCI explained *gun jumping to imply any action*

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[1] In terms of Section 5 of the Act, the following transactions are combinations if the parties to such transactions meet the asset or turnover threshold mentioned therein.

(a) Acquisition of control, shares, voting rights or assets of an enterprise, and
(b) Merger or Amalgamation between enterprises.

[2] Section 6(2A) of the Act provides that no combination shall come into effect until 210 days have passed from the day on which the notice has been given or unless the CCI passes orders under Section 31 of the Act, whichever is earlier.

[3] See, Paragraph 13.5 of order dated March 12, 2018 issued under Section 43A of the Act in relation to *Combination Registration No. C-2015/02/246 (UltraTech Cement Limited).*

[4] See, Paragraph 8 of order dated August 27, 2018 issued under Section 43A of the Act in relation to *Combination Registration No. C- 2017/10/531 (Bharti Airtel Limited).*

[5] The expression seems to have been first used by the CCI in the case concerning acquisition of Shell India Markets Private Limited by Hindustan Colas Private Limited (See, Order under Section 43A of the Act in relation to the *Combination Registration No. C-2015/08/299*, order dated September 14, 2016) and has subsequently been used in the (a) order dated March 12, 2018 issued under Section 43A of the Act in relation to the Combination Regn. No. C- C-2015/02/246; (b) order dated August 8, 2018 issued under Section 43A of the Act in relation to the Combination Regn. No. C-2018/01/544; and (c) order dated August 27, 2018 issued under Section 43A of the Act in relation to the Combination Regn. No. C-2017/10/531.

pursuant to the proposed combination which has the effect of consummating the combination or any part thereof without approval, express or implied, from the CCI[6].

In its decisional practices, CCI has considered gun jumping to have occurred where the parties have (a) implemented a notifiable transaction *without making* the compulsory filings to CCI; and (b) violation of *suspensory obligations* under the Act, by *consuming* the transaction prior to the expiry of the relevant waiting period following the notification, which may reduce or have the potential to reduce the degree of independence or the incentives of the parties to compete. It is the latter kind of transactions, known as *soft or substantive gun jumping*, where defining or determining what constitutes a gun jumping poses the most difficult questions to a practitioner. That is because, whilst closing of a transaction may signify a definite point and time of action, a transaction may be viewed to have been *consummated* even if there are steps which have taken keeping in mind the prospective and future integration between the parties to the combination.

Gun Jumping – Legal Contour

To understand the basic contours of gun jumping, it may be noted that the Act envisages *ex-ante* regulation of combinations. Section 6(1) of the Act prohibits combination that causes or is likely to cause appreciable adverse effect on combination and Section 6(2) of the Act obliges parties to the combination to give notice to the Commission in respect of their proposed combination. Further, Section 6(2A) of the Act provides that a combination notified to the Commission shall not come into effect for a period of 210 days from the date of notification or the approval of the Commission, whichever is earlier.

In order to enforce the above provisions, including the *ex-ante* obligation of the parties thereunder, Section 43A was inserted into the Act, by way of an amendment in 2007, to empower the CCI to impose penalty in cases where parties fail to give notice in terms of Section 6(2) of the Act. It may not be out of place to mention that, to attract penalty under Section 43A of the Act, *mens rea or dishonest intent to defeat the provisions of the Act* is not relevant[7], as the imposition of penalty under section 43A is on account of breach of a civil obligation, and the proceedings are neither criminal nor quasi criminal[8]. Reference may also be made to the decision of the CCI in the case involving Intellect Design Arena Limited[9], where it was noted that whilst the *proviso* to Section 20(1) of the Act[10] provided a look back period of 1 (one) year on competition assessment of a combination, such provision did not restrict the power of CCI to initiate proceedings under Section 43A of the Act.

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[6] See, Paragraph 7 of order dated March 12, 2018 issued under Section 43A of the Act in relation to *Combination Registration No. C-2015/02/246 (UltraTech Cement Limited).*

[7] See, paragraph 23 of *SCM Solifert Limited v. CCI* [Civil Appeal No(S). 10678 of 2016, decided on April 17, 2018 (SC)], where the Supreme Court noted as follows:

> *23. There was no requirement of mens rea under section 43A or an intentional breach as an essential element for levy of penalty. The Act does not use the expression "the failure has to be willful or mala fide" for the purpose of imposition of penalty. The breach of the provisions of the Act is punishable and considering the nature of the breach, it is discretionary to impose the extent of penalty…..* (emphasis supplied)

[8] See, paragraph 24 of *SCM Solifert Limited v. CCI* [Civil Appeal No(S). 10678 of 2016, decided on April 17, 2018 (SC)].

[9] See, Order dated May 7, 2018 issued under Section 43 A of the Act against Intellect Design Arena Limited.

[10] **Section 20(1)** *The Commission may, upon its own knowledge or information relating to acquisition referred to in clause (a) of Section 5 or acquiring of control referred to in clause (b) of Section 5 or merger or amalgamation referred to in clause (c) of that Section, inquire into whether such a combination has caused or is likely to cause an appreciable adverse effect on competition in India:*
Provided that the Commission shall not initiate an inquiry under this sub-section after expiry of one year from the date on which such combination has taken effect.

Procedural Gun Jumping- Failure to Notify

The most straightforward form of gun jumping occurs when the parties to a merger meeting the applicable jurisdictional thresholds do not notify the transaction to the relevant competition authority.

Examples of such cases, which typically arose in the initial years of operation of the Act, arose on account of lack of awareness regarding the transaction requiring a filing or notification under the Act[11], or due to lack of clarity regarding calculation of relevant threshold when the acquisition involved only a part of the business division/undertaking, as opposed to the entire target enterprises[12].

In the initial days, a few of the cases also arose due to lack of clarity as to what would be the instrument which would have triggered the filing requirement. This is because, Section 6(2)(b) of the Act mandated filing of the notification with CCI within 30 (thirty) days of execution of any agreement or *other document* for acquisition of control, shares, voting rights or assets and whilst the sub-regulation (8) of Regulation 5 of the *Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011* ("**Combination Regulations**") clarified that to some extent what would qualify as *'other document'*, there was considerable ambiguity as to what would be covered under the ambit of *'other document'*. For instance, CCI found Pension Investment Board and Grupo Isolux Corsan found to be guilty of delayed filing as they failed to intimate execution of a settlement agreement, in spite of the fact that the settlement agreement did not specify certain key elements/conditions of the combination, which were covered in a separate but subsequent document. To arrive at the conclusion that the settlement agreement was a *binding agreement*, CCI relied on the boilerplate clause of the settlement agreement which specified the agreement to be binding in nature. As regards the issue of uncertainties pointed out by the Parties, the CCI observed that generally the agreements which are executed in relation to mergers and acquisitions are cross-conditional and open-ended to some extent. In any agreement, there are issues which are kept flexible to be decided in terms of methodologies provided for in the agreement itself and ordinarily, the presence of such conditions does not impact the status of an agreement or other document as a "trigger document"[13].

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[11] See, Order dated April 2, 2013 issued under Section 43 A of the Act in relation to *Combination Registration No. C-2013/02/109*, where the combination involved indirect acquisition of shareholding in an Indian company (Wheels India Limited) on account of acquisition of the entire share capital of Titan Europe by Titan International. The parties pleaded that at the time of making share offer, Titan International was unaware that a filing or notification under Section 6(2) of the Act with the CCI with respect to the indirect acquisition of shares of Wheels India would be triggered in India. The CCI levied a penalty of INR one crore on the acquirer as penalty under Section 43A of the Act. Also see, order dated December 28, 2011 in relation to *Combination Registration No. C-2011/12/12*, where parties had not intimated about the combination, under the mistaken assumption that exemption relating to transactions involving acquisition of control of shares or voting rights would also be applicable to a combination effected through amalgamation.

[12] See, Order dated July 14, 2016 issued under Section 43A of the Act in relation to *Combination registration no. C-2015/07/289* (acquisition of global veterinary pharmaceuticals business of Novartis AG by Eli Lilly and Company): Order dated August 16, 2016 issued under Section 43A of the Act in relation to *Combination registration no. C-2015/12/347* (acquisition of pharma grade HFC 134a Fluorochemical propellants business of E.I. Du Pont De Nemours and Company by SRF Ltd.); and Order dated August 31, 2016 issued under Section 43A of the Act in relation to *Combination registration no. C-2015/09/313* (acquisition of lab diagnostics and point of care business of Piramal Enterprises Limited by Diasys Diagnostics Systems GmbH, Germany).

[13] See, Order dated December 5, 2016 issued under Section 43A of the Act in relation to *Combination Registration no. C-2015/10//330*. Also see, Order dated January 13, 2017 issued under Section 43A of the Act in relation to *Combination Registration no. C-2015/12/349*, where CCI noted that in case of multi-jurisdictional transactions, the global document, executed prior in time, would be the trigger document even when the same agreement may not be binding upon the Indian party or the Indian party is not a party to the global agreement.

It may, however, not be out of place to mention that requirement of making the relevant filing within the 30 (thirty) days period has been exempted for a period of five years from June 29, 2017[14] and hence, the scope of gun jumping being attracted on account of delayed filing beyond the stipulated period has been considerably reduced.

Substantive Gun Jumping- Violation of Standstill Obligation

Unlike procedural gun jumping, substantive gun jumping poses a much more difficult assessment of whether the parties had undertaken any actions which has the effect of putting a notifiable transaction "*into effect*" prematurely or has the effect of prohibiting competitive behavior even prior to closing of the combination. What is the nature of such exercise was explained by CCI in the following terms[15]:

> *"7….. The substantive issue involved is that of the conduct of the parties to a combination and not only that of timing of conduct. Going by the arguments of the Acquirer, it would imply that parties, during the stage of negotiations, may enter into cooperation on any commercial/financial/marketing aspects leading to integration of their operations and yet claim that the conduct cannot amount to gun jumping, as it occurred prior to the execution of definitive agreements or filing of notice. Hence, what is critical in such cases is determination of the fact whether the alleged conduct is pursuant to the combination and has the effect of consummating a part of a combination and not the timing of the same…"* (emphasis supplied)

CCI has recognized that whether or not a particular conduct of the parties can be regarded as gun jumping in contravention of Section 6(2A) of the Act is a subject matter of examination as consummating a part of a combination may, in substance, have impact similar to consummation of the combination itself. The basis of examination of a gun jumping contravention is whether the parties have ceased to compete as they were competing earlier or whether they have ceased to act independently as regards their ordinary course activities pursuant to the combination transaction[16]. Some of the instances where CCI found evidence of *consummation* of the transaction prior to the approval of the transaction are as follows:

a) sale of three landing/take-off slots of the target at London Heathrow Airport to the acquire; and lease of the same slots back to target[17].
b) Payment of part of the purchase consideration as refundable deposit on the date of signing of the share purchase agreement was held to have resulted in part-consummation of the combination, as pre-payment of consideration may have the impact of creating a tacit collusion which may cause an adverse effect on competition even before consummation of the combination, as (i) it may lead to a strategic advantage for the Acquirer; (ii) it may reduce the incentive and will of 'target' to compete; and (iii) it may become a reason/basis to access the confidential information of the 'target'[18].
c) Providing corporate guarantee to lending institution of the seller to secure loan to be advanced to the seller, in spite of the fact that loan amount was repayable irrespective of the combination, as CCI considered that such an arrangement may result in the parties to

[14] See, Notification S.O. 2039(E), dated June 29, 2017, issued by Ministry of Corporate Affairs.

[15] See, order dated March 12, 2018 issued under Section 43A of the Act in relation to *Combination Registration No. C-2015/02/246 (UltraTech Cement Limited).*

[16] See, Paragraph 8 of order dated August 27, 2018 issued under Section 43A of the Act in relation to *Combination Registration No. C- 2017/10/531 (Bharti Airtel Limited).*

[17] See, order dated December 19, 2013 issued under Section 43A of the Act in relation to *Combination Registration No. C-2013/05/122 (Etihad Airways PJSC)*

[18] See, order dated September 14, 2016 issued under Section 43A of the Act in relation to *Combination Registration No. C-2015/08/299 (Hindustan Colas Private Limited).*

the combination not acting independently as they are required to do till the combination is approved by a competition authority[19].

d) Advancement of loan to the seller of the target enterprise prior to the approval of CCI[20].
e) Pre-payment of transaction advance which was immediately repayable if the Combination were not to come into effect[21].
f) Existence of interim covenants such as (i) requirement to handover certain inventories to the acquirers, (ii) acquirer's introduction and interaction with the suppliers of the seller, (iii) restriction on promotional spending and (iv) the restriction on seller to enter or exit territories, were all considered to be giving effort to the transaction[22].
g) Existence of contractual obligations which can be a source of potential competition distortions, such as no anteriority clause related to the term of effectiveness of the contract in relation to the date of its execution that brings any integration among parties or clauses allowing direct interference by any party in the other party's business strategies by submitting, for example, decisions over prices, customers, business/sales policy, planning, marketing strategies and other sensitive decisions (that do not constitute a mere protection against deviation from the normal course of business and, consequently, the protection of the value of the business being sold). CCI also held that a number of conditions to be fulfilled before consummation does not militate against coming to a conclusion that parties may be incentivized to coordinate their behaviour in the interim period[23].

Guidance from Other Jurisdictions

In the course of developing its jurisprudence, CCI has often resorted to the decisional practices or statutory guidance issued by jurisdictions having more matured merger control regime[24]. Accordingly, the developments and practices in such jurisdictions may also offer valuable insights as to what may amount to gun jumping.

For instance, *the Guidelines for the analysis of previous consummation of merger transactions issued by Conselho Administrativo de Defesa Economica* (Academic Council for Economic Defense of Brazil or CADE) ("**CADE Guidelines**") identifies the gun jumping activities into three major groups: *(i) the exchange of information between economic agents involved in a combination; (ii) the definition of contractual clauses governing the relationship between economic agents; and (iii) the activities of the parties before and during the implementation of the combination*.

As to the exchange of information between economic agents involved in a combination, CADE Guidelines advocates avoiding of any unnecessary exchange of competitively-sensitive information between the parties[25], as such exchange can harm competition between them if the

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[19] See, order dated March 12, 2018 issued under Section 43A of the Act in relation to *Combination Registration No. C-2015/02/246 (UltraTech Cement Limited).*

[20] See, order dated July 30, 2018 issued under Section 43A of the Act in relation to *Combination Registration No. C-2018/01/547 (Adani Transmission Limited).*

[21] See, order dated August 8, 2018 issued under Section 43A of the Act in relation to *Combination Registration No. C- 2018/01/544 (Chhatwal Group Trust, Shrem Infraventure Private Limited and Shrem Roadways Private Limited).*

[22] See, order dated May 11, 2018 issued under Section 43A of the Act in relation to *Combination Registration No. C-2016/04/387 (LT Foods Limited and LT Foods Middle East DMCC).*

[23] See, Order dated August 27, 2018 issued under Section 43A of the Act in relation to *Combination Registration No. C- 2017/10/531 (Bharti Airtel Limited).*

[24] For instance, CCI drew support of its decision in *Bharti Airtel Limited* case from the decision of United States of America v. Atlantic Richfield Company and Others (Civil Action No. 910205, United States District Court for the District of the District of Columbia).

[25] Such competitively-sensitive information may contain specific data about

a) costs of the companies involved;
b) capacity level and plans for expansion;
c) marketing strategies;

merger is not yet consummated (either for the lack of CADE's approval or issues related to the negotiation itself).

As far as *contractual clauses governing the relationship between economic agents* is concerned, CADE Guidelines lists the following as those demanding greater attention and that can result in a premature integration of the activities of the merging parties:

a) anteriority clause related to the term of effectiveness of the contract in relation to the date of its execution that brings any integration among parties;
b) prior non-compete clause;
c) clause for full or partial payment, non-reimbursable, in advance, in consideration for the target, except in case of (c.i.) typical down payment for business transactions, (c.ii.) deposit in escrow accounts, or (c.iii.) breakup fee clauses (payable if the transaction is not consummated);
d) clauses allowing direct interference by any party in the other party's business strategies by submitting, for example, decisions over prices, customers, business/sales policy, planning, marketing strategies and other sensitive decisions (that do not constitute a mere protection against deviation from the normal course of business and, consequently, the protection of the value of the business being sold);
e) in general terms, any clause providing for activities that cannot be reversed at a later time or which imply the expenditure of a significant amount of resources by the agents involved or the authority, etc.

Lastly, as to the *activities of the parties before and during the implementation of a merger*, following indicative practices have been highlighted which may raise concerns to CADE:

a) transfer and/or usufruct of assets in general (including voting securities);
b) exercise of voting right or relevant influence on the counterparty's activities (such as decisions regarding prices, customers, business/sales policy, planning, marketing strategies, interruption of investments, discontinuing of products and others);
c) receipt of profits or other payments connected to the performance of the counterparty;
d) development of joint strategies for sales or marketing that set up an unified management;
e) integration of the sales force among the parties;
f) licensing the use of exclusive intellectual property to the counterparty;
g) joint development of products;
h) appointment of members to a decision-making body; and
i) interruption of investments, etc.

As far as decisional practices are concerned, recent decisions of European Court of Justice ("**ECJ**") rendered in the case of *Altice / Pt Portugal*[26] and *EY/KPMG*[27] are significant.

In the Altice / Pt Portugal case, ECJ noted that the parties had implemented the transaction partially in violation of the standstill obligation due to the following reasons:

a) The transaction agreement between the parties contained a number of covenants, including veto rights, which granted Altice the possibility of exercising decisive influence on PT Portugal, such as appointment of PT Portugal's senior management staff, the setting of PT Portugal's pricing policies and the entering into, termination and

d) product pricing (prices and deductions);
e) main customers and deductions ensured;
f) employees' wages;
g) main suppliers and the terms of the contracts signed with them;
h) non-public information on marks and patents and Research and Development (R&D);
i) plans for future acquisitions;
j) competition strategies, etc.

[26] See, ECJ's decision in Case M.7993 – Altice / PT Portugal, on April 24, 2018.

[27] EY / KPMG case (rendered on 31 May 2018, C-633/16)

modification of PT Portugal's contracts. The ECJ noted that the covenants both individually and collectively gave Altice the possibility of exercising decisive influence on PT Portugal and went beyond what was necessary to protect the value of PT Portugal between signing and closing[28].

b) Altice was found to have exercised decisive influence on PT Portugal by being involved in the decision making process concerning PT Portugal's *"post-paid mobile campaign",* in the renewal of a distribution contract with Porto Canal and in establishing the selection process of a RAN supplier.

c) A systematic and extensive disclosure of competitively sensitive information by PT Portugal to Altice without the appropriate safeguards (such as *clean team*) which was not necessary to preserve target value but rather gave Altice considerable insight into and influence over the day-to-day operation of the target business and its commercial and strategic policy at a time when the two parties were competitors in the same market[29]. In addition, the exchanges involved the entire management of Altice, including operational employees and it took place after the due diligence phase and without any safeguards such as clean teams or confidentiality agreements[30].

ECJ's decision in *EY/KPMG*[31] was again significant in laying down the contours of when certain actions may not amount to be violation of the *standstill obligations*, in so far as ECJ noted that steps taken by merging parties to implement or close a transaction before clearance will only amount to gun jumping if such steps can be viewed as "*contributing to a lasting change in control of the target undertaking*"[32]. The ECJ also clarified that, where steps taken to implement or close a transaction prior to clearance are "*not necessary to achieve a change of control of an undertaking*," they fall outside the scope of the standstill obligation[33].

Finally, the ECJ held that an assessment of whether a transaction has had an effect on the market is largely irrelevant to establish a violation of the standstill obligation, because (i) such assessment is carried out in the context of the substantive review of the transaction[34], and (ii) it could not be ruled out that a transaction "*having no effect on the market might nevertheless contribute to the change of control"*[35].

Mitigating Measures against Gun Jumping

In the case involving Bharti Airtel Limited's acquisition of 100 percent of the consumer mobile business run by Tata Teleservices Limited and Tata Teleservices (Maharashtra) Limited, CCI recognized the necessity of imposing customary standstill and interim arrangements on the target. However, it was quick to point out that it is incumbent on the acquirer to ensure that the form and scope of the aforesaid customary arrangements imposed by it on the target is inherent and proportionate to the objective of ensuring certainty in business valuation and preservation of the same and that such conditions do not violate standstill obligations as envisaged in the Act[36].

Accordingly, the parties need to tread a fine balance before giving effect to a combination as well as ensuring the value and future activity of the target is preserved. As to how such balance may

[28] See, Paragraph 73 of ECJ's decision in Case M.7993 – Altice / PT Portugal, on April 24, 2018.
[29] See, Paragraph 53 of ECJ's decision in Case M.7993 – Altice / PT Portugal, on April 24, 2018.
[30] See, Paragraph 422 of ECJ's decision in Case M.7993 – Altice / PT Portugal, on April 24, 2018.
[31] EY / KPMG case (rendered on May 31, 2018, C-633/16)
[32] See, Paragraph 46 of ECJ's decision in Case C-633/16– EY / KPMG, on May 31, 2018.
[33] See, Paragraph 49 of ECJ's decision in Case C-633/16– EY / KPMG, on May 31, 2018.
[34] See, Paragraph 50 of ECJ's decision in Case C-633/16– EY / KPMG, on May 31, 2018.
[35] See, Paragraph 51 of ECJ's decision in Case C-633/16– EY / KPMG, on May 31, 2018.
[36] See, Paragraph 10 of order dated August 27, 2018 issued under Section 43A of the Act in relation to *Combination Registration No. C- 2017/10/531 (Bharti Airtel Limited).*

be achieved would require careful planning and strategy. However, the following precautions may be taken:

Sharing of Confidential Information: In so far as sharing of confidential and commercially sensitive information is concerned, the parties to the combination may follow the following suggestions offered by CCI in "*Compliance Manual for Enterprises*"[37]:

> *"To mitigate such risks, it is recommended that while conducting due diligence / integration planning, parties constitute a limited team of individuals, comprising preferably members of the senior management, internal legal team as well as external legal counsel ("**Clean Team**"). Commercially sensitive information of the other party should only be accessible to such Clean Teams. The Clean Teams should not include personnel who are involved in pricing, marketing, sales, etc. in order to ensure that such personnel are not (consciously or unconsciously) influenced by any competitively sensitive information in the course of the day-to-day operations of the business (such as determining pricing, pricing strategy, sales quantity, marketing strategy, terms of consumer contracts, etc.)."*

Management control of the target: Before the receipt of the approval, the buyer must not exercise or be in a position to exercise effective control of the target, whether through veto rights or through ''ordinary course'' covenants limiting the target's freedom to manage its business during the pre-closing period or by issuing instructions as regards business operations or business plans, or by requiring the target to perform or abstain from performing certain activities. Any restriction on unusual operations or material changes to the target's business, however, may find acceptance from CCI, as long as the scope and ambit of such restriction is reasonable.

Premature Integration: The parties should avoid engaging in physical acts of implementation of the transaction such as transfers of personnel or the target's employees holding themselves out as representatives of the buyer and vice versa, merging IT systems, merging accounts or financial reporting, engaging in joint procurement or tendering before clearance.

Co-ordination of competitive behaviour: the parties should avoid implementing coordinated business strategies, such as by bidding jointly for contracts, or by allocating contracts between themselves, for which they would otherwise have competed, agreeing on prices or allocating products, territories or customers or entering into negotiations or commitments on behalf of the other party prior to closing.

What Lies in Future

On July 26, 2019, the Competition Law Review Committee, set up under the aegis of the Ministry of Corporate Affairs, has submitted its report[38] containing certain suggestions and amendments to the Act, including on the aspect of *gun jumping*.

Amongst the various measures that the Committee has suggested, the following may be noted:

Dilution of standstill obligations in case of public bids and hostile takeovers to allow parties to the transaction to purchase securities, subject to they surrendering all beneficial rights

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[37] *Compliance Manual for Enterprises* Available at https://www.cci.gov.in/sites/default/files/whats_newdocument/Manual%20Booklet.pdf (last accessed on August 19, 2019).

[38] *Report of the Competition Law Review Committee* (July 2019), Available at http://www.mca.gov.in/Ministry/pdf/ReportCLRC_14082019.pdf (last accessed on August 19, 2019).

(of dividend and voting) attached to such securities until the approval and placing such securities in an escrow account[39]; and

Empower CCI to allow derogation of standstil obligations in appropriate cases, which power to be exercised only in exceptional circumstances and after analysis of various factors[40].

Due to the restricted nature of the alternatives offered, once implemented, the changes may not have far reaching impact on the development of jurisprudence relating to the gun jumping. However, with each passing decision, one may hope that the judicial landscape on the issue of *gun jumping* would attain more clarity.

This paper has been written by Arka Majumdar (Partner).

[39] See, Paragraph 7.3 of *Report of the Competition Law Review Committee* (July 2019).

[40] See, Paragraph 7.8 of *Report of the Competition Law Review Committee* (July 2019).

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