TESTS OF SIEC AND AAEC IN M&A: A COMPARATIVE STUDY OF COMPETITION ACT, 2002 AND EU COMPETITION LAW

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Abstract

In the European Union (EU), the substantive test for merger control is to ascertain whether a prospective merger would significantly impede effective competition (SIEC) in the common market, while under India's Competition Act, the substantive test for combinations is to determine whether there is an appreciable adverse effect on competition (AAEC) within the relevant market. The two tests therefore play a significant role in fulfilling what is called the aim of any competition law and being the sole criteria in each of the law a clear, definitive and market friendly scope has to be established. This paper therefore discusses and compares the two tests in terms of any similarity or differences and tries to establish a standard

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scope for achieving the objective of the competition law.

I. INTRODUCTION

In the wake of the economic liberalization and growing industrial and trade policies, foreign investment rules, capital controls, etc., a need was felt for a new and modern Competition Law in the place of the old Monopolies Restrictive Trade Practices Act, 1969 (hereinafter "**MRTP Act**").[1] The background to the enactment of the Competition Act was succinctly explained by the Supreme Court in the case of *Competition Commission of India v. Steel Authority of India Ltd*[2] that the main objective of competition law is:

> "*to promote economic efficiency using competition as one of the means of assisting the creation of market responsive to consumer preferences. The advantages of perfect competition are three fold: allocate efficiency which ensures effective allocation of resources, productive efficiency which ensures that costs of production are kept at a minimum and dynamic efficiency which promotes innovative practices.*"[3]

Mergers and acquisitions (*for simplicity* combinations, concentrations or M&A) legally and physically compound the corporate status of the merging company with which it has merged and the merging company's autonomy is lost in its entirety to the merged company. The main rationale behind pursuing such combinations is synergy i.e.

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[1]Ranjit Anantrao Shedge, *Need of Second Generation Economic Reform*, http://www.legalindia.in/need-of-second-generation-economic-reform.
[2](2010) 10 S.C.C. 744.
[3]*Id.*

to acquire the additional advantage of business operations that the merging firms separately could never have achieved. In India combinations are regulated under three different legislations viz. Companies Act, 1956, SEBI Act, 1992, Competition Act, 2002 (also referred to as "**CA**") which aim at fulfilling three different and mutually exclusive objectives. When on the one hand, the Companies Act, 1956 tries to protect the interests of the secured creditors the SEBI Act, 1992 tries to protect the interests of the investors. The Competition Act, 2002 is aimed at "*preventing practices having adverse effect on the competition, and to protect the interests of the consumer and to ensure fair trade carried out by other participants in the market in India and for matters connected therewith or incidental thereto.*"[4]

In the European Union (hereinafter "**EU**") mergers are mainly regulated through the European Council Merger Regulation, 2004[5] (hereinafter "**ECMR**") which replaced the earlier EC Merger Regulation 4064/89[6] ("**Old Merger Regulation**"). ECMR changed the test for prohibition from '*the creation or strengthening of a dominant position*' to a '*significant impediment to effective competition*'.[7] The test is a compromise between the concept of dominance as part of the substantive assessment (particularly Germany) and those who favoured the adoption of a '*substantial*

[4]*Id.*
[5]Council Regulation (EC) No.139/2004 on the control of concentrations between undertakings (2004) O.J. L24/1, http://www.wipo.int/wipolex/en/text.jsp?file_id=181665.
[6]Council Regulation (EEC) No.4064/89 on the control of concentrations between undertakings [1989] O.J. L395/1, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31989R4064:EN:HTML.
[7]Shearman and Sterling LLP, *The New European Merger Regulation*, 1 (April 2004), http://www.shearman.com/files/Publication/f2849061-ee0c-4352-ae1d-0fbdfbf3aadc/Presentation/PublicationAttachment/11539f1e-5e5c-4640-b1e6-22379dbc21bf/AT_0404.pdf.

lessening of competition test' (hereinafter "**SLC**"), used by the UK, Ireland and several other jurisdictions including the U.S.[8]

The purpose based study of the above stated legislations (mainly ECMR and CA for the sake of this paper) is significant so as to recognize the contrasting features of the Significant Impediment of Effective Competition (hereinafter "**SIEC**") under the ECMR and Appreciable Adverse Effect on the Competition (hereinafter "**AAEC**") under the CA.

This paper tries to compare the two tests. The purpose of the paper is to draw differences and thereby establish if there exists a need to modify the current law in India. The idea behind the comparative study is to ascertain the loopholes in the Indian legislation if any and thereby devise plans to overcome it. The paper will be divided into 3 basic subheads. Part I deals with detailed analysis of AAEC regulation in CA, 2002. Part II deals with detailed analysis of test of SIEC. Part III will contrast and compare the two tests in terms of what does each test tries to achieve and whether if the purpose of the tests are same then which test has ultimately served the purpose in a more efficient and effective manner. Thereafter the paper will proceed with the conclusion which will point out the summary of the analysis done in the whole paper with certain intelligible remarks.

[8]Neil Horner, *Unilateral Effects and the EC Merger Regulation – How the Commission Had its Cake and Ate it Too*, 2 HANSE. L. REV. 23, 24 (2006).

II. APPRECIABLE ADVERSE EFFECT ON THE COMPETITION

The phrase Appreciable Adverse Effect on the Competition appears around 23 times in the CA, 2002. However not even once has the legislation tried to define AAEC except in Sec 20 (4) of CA which provides nothing more than tools for the Competition Commission of India (hereinafter "**CCI**") to identify AAEC. The provisions to regulate combinations have been the subject of intense discussion in recent times.[9] The Act defines a "combination" as any M&A in which the firms' combined assets or turnover exceed Rs 1,000 crore (approximately $ 250 million) and Rs 3,000 crore (approximately $ 750 million) respectively in India or $ 500 million and $ 1,500 million worldwide, M&As that fall below these thresholds are not considered in the expression combinations and are outside the ambit of the Act.[10]

The legal debate encircling the provisions of combinations is mainly because of the lacking nexus between the threshold and the test of AAEC. Further, the *domestic nexus test* i.e. only those combinations where at least Rs 500 crore of the combined worldwide assets or at least Rs 1,500 crore of combined worldwide turnover of the merging parties is in India, would come under the purview of the Act has been highly criticized.[11]

The International Bar Association (hereinafter "**IBA**") and the American Bar Association (hereinafter "**ABA**") in their submissions to the government and the CCI have pointed out that a multi-national

[9]Manish Agarwal and Aditya Bhattacharjea, *Are Merger Regulations Diluting Parliamentary Intent?*,43 ECONOMIC AND POLITICAL WEEKLY 10 (2008).
[10]The Competition Act, 2002, § 5, No. 12, Acts of Parliament, 2003 (India).
[11]AGARWAL & BHATTACHARJEA, *supra* note 9, at 10.

firm whose Indian operations are substantial enough to satisfy the *domestic nexus test* would still have to notify its offshore acquisition of a firm with no Indian interests whatsoever, if the combined operations of the parties crossed the threshold for worldwide assets or turnover.[12] They argue that such combinations do not raise any competition concerns and should be kept out of merger review.

The above contention raised by the two international bodies is interesting as it points at an undefined area of law. The question is whether Sections 5 and 6 of the CA, 2002 are independent of each other or inter-dependant or there exists a unilateral dependence of the two sections on each other. The *prima facie* answer may be simple that only when a particular combination attracts Sec 5 can it be further examined as per Section 6.

The study of the correctness and practicality of the answer above is ancillary to the main purpose of this paper because the correct answer will help us in determining the opposite legislative intent behind the suitable scope of AAEC. *Prima facie* relying on the specific threshold limits in Section 5 an implication is deducible that those combinations that exceed the threshold are bound to have AAEC and therefore such combinations will necessarily have to go under the scrutiny laid down in Section 6. Section 5 states that any combination that exceeds the threshold limits specified in the Act in terms of value of assets or turnover can be scrutinized by the CCI to determine whether it will cause or is likely to cause an appreciable adverse effect on competition within the relevant market in India.[13]

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[12]*IBA Memoranda*, http://www.ibanet.org/legalpractice/AntitrustWGIndia.cfm; *ABA Letter*, http://www.abanet.org/antitrust/at-comments/2007/11-07/Comments-lndianCompetition.pdf.

[13]Subhadip Ghosh and Thomas W. Ross, *The Competition (Amendment) Bill 2007: A Review and Critique*, 43 ECONOMIC AND POLITICAL WEEKLY 35 (2008).

The above conclusion attaches an inherent restriction on the powers of CCI as only those combinations which trigger the provisions of Section 5 will stand reviewable under Section 6. In other words Section 6 cannot be triggered independently to review those combinations which first do not invoke Section 5. This conclusion ultimately defeats the purpose of the CA, 2002 which reads:

> "*An Act to provide, keeping in view of the economic development of the country for the establishment of a Commission to prevent practices having adverse effect on the competition…*"

Provisions of CA, 2002 relating to combinations seems to be based on the assumption that combinations with large turnovers/assets ownership can *only* adversely affect the competition. If this premise is true then the scope of the test of AAEC is automatically narrowed down. While if reliance is placed on purposive interpretation i.e. Section 6 can operate independently of Section 5 then the scope of AAEC widens to a great extent and calls for a deeper analysis in giving it a proper structure.

CA, 2002 being a relatively new legislation such questions has not been judicially scrutinized. Therefore this paper for simplicity will proceed on the second interpretation i.e. Section 6 can be triggered independently without application of Section 5 so to promote and safeguard the primary objects of the CA, 2002.

To support this view reliance is placed on the approach under the relevant competition law legislations of US and Canada. Here, *mandatory pre-notification* thresholds has been defined as simply a level at which reporting to the authority becomes an obligation, but this level does not have to limit the authority's ability to review any

combination that it feels might harm competition.[14] This approach realizes that in some markets, competition can be harmed even by the combination of relatively small firms.

Another reason for the reliance on the purposive interpretation is that throughout CA, 2002 there is *only* one specified competition test; it requires that, to be condemned, an action or agreement must have an AAEC. So, it will be against the interests of the consumers and will further restrict the powers of CCI if AAEC is narrowly defined.

The question of defining AAEC revolves around another question i.e., how large must an effect be to be deemed *appreciable*? For example, will it be any effect beyond a *de minimus effect* or will it be more like the 'S*ubstantial Lessening of Competition*' tests of other countries (e.g., Canada, USA),[15] or beyond or equivalent to the opinions laid down for *dominance test* and its successor SIEC under the EU competition law.

There are various approaches which influence the scope and definition of AAEC. Few such factors include:

A. Time centric
B. Money centric
C. Consumer centric
D. Market Centric

A. Time Centric

Time as a factor plays a significant role in determining the scope of AAEC. The Act grants the CCI the power to investigate a combination only up to one year after "such combination has taken

[14] *Id.* at 39.
[15] *Id.* at 37.

effect".[16] This obviously limits the CCI's power to address concerns when a merger results in anti-competitive effects that show up gradually over a few years. In contrast, in Canada for example, the Competition Bureau may make an application to the Competition Tribunal regarding a merger up to three years after the merger has been "substantially completed".[17] Australia also has, in effect, a three-year limitation period.[18] There is no statutory limitation on the US government's authority to review mergers after they have been complete.[19]

So, if only one year limitation is available then the test of AAEC is to be narrowly construed in terms of application within a span of time. If a combination gradually turns out to have AAEC after a period of one year then the CCI's powers will be restricted to inquire into such combinations. This is an area which requires an immediate attention.

B. Money Centric

As have already been discussed the questionable threshold restricts the powers of the CCI to inquire, control and thereafter achieve the purposes of CA.

C. Consumer Centric

Consumers are the ultimate point of judgement of a particular combination. If a combination is adversely affecting the consumers in terms of unfair pricing strategy, deliberate creation of shortage of supply, abuse of the dominant position which the combination intends

[16]The Competition Act, 2002) § 20 (1), No. 12, Acts of Parliament, 2003 (India).
[17]The Competition Act 1985 (Canada), § 97.
[18]Trade Practices Act 1974 (Australia), § 81(2).
[19]GHOSH & ROSS, *supra* note 13, at 39.

to form etc. So, only a broad scope of AAEC can achieve what the consumers' desire.

D. Market Centric

When assessing the permissibility of horizontal mergers, one must first establish what the relevant market is. This requires a focus on the demand side to establish whether or not the products are close enough substitutes. On the supply side, it is important to identify the market shares of the firms. It is important to assess how the relevant market is likely to evolve in the near future. This would depend on whether entry is easy and whether there are potential entrants that could easily enter.[20]

Further another factor is whether the higher concentration in the market resulting from the merger will increase the possibility of collusive or unilaterally harmful behaviour. Collusion is more likely in industries producing relatively homogeneous products and characterised by small and frequent transactions, the terms of which cannot be kept secret. The merger is likely to be unilaterally harmful when the two merging firms produce similar products in a concentrated differentiated product market.[21] It has been noted that

[20]S. Chakravarthy, *India's New Competition Act 2002 - a Work Still in Progress*, 5 BUS. L. INT'L 240, 258 (2004).

[21]SVS Raghavan Committee, *Report of High Level Committee on Competition Policy Law*, http://rapidlibrary.com/source.php?file=ulzwbwmxnbi89on&url=http%3A%2F%2Fwww.globalcompetitionforum.org%2Fregions%2Fasia%2FIndia%2FReport_of_High_Level_Committee_on_Competition_Policy_Law_SVS_Raghavan_Committee29102007.pdf&sec=9e890c44eb0d4554.

the definition of market frequently determines whether a particular merger is judged anti-competitive and unlawful.[22]

The core component of any merger control regime is the assessment of proposed mergers to determine their possible effects on competition. Every system of merger control sets out a substantive test to determine whether or not a merger ought to be blocked and must decide upon a standard of proof required before a competition authority can block a merger.[23] A substantive test usually involves the examination of various factors such as:

a) Market Shares and Market Concentration

Market shares of firms are an important factor taken into account in the context of impacts on competition as they can indicate the market power of the firm. Market shares, prior and subsequent to the merger, are also used to determine the level of concentration in the market which in turn indicates the level of competition in the market.[24] Many jurisdictions today however employ the *Herfindahl-Hirshman Index* (HHI) to determine market concentration. This method involves the calculation of the sums of squares of individual market shares of all competitors in the market. A total less than 1000 indicates low concentration and one greater than 1800 indicates high concentration.[25]

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[22]OECD/World Bank, *A Framework for the Design and Implementation of Competition Policy and Law* (1999), http://www.oecd.org/dataoecd/10/30/27122278.pdf.
[23]RICHARD WHISH, COMPETITION LAW 788 (2005).
[24]ALAN H GOLDBERG, COMPETITION LAW TODAY: CONCEPTS, ISSUES AND THE LAW IN PRACTICE100-101(1st ed, 2007).
[25]Neeraj Tiwari, *Merger Under The Regime of Competition Law: A Comparative Study of Indian Legal Framework With EC and UK,* 23 BOND LAW REV.117, 136 (2011).

b) Barriers To Entry

Barriers to entry, as the expression indicates, refers to a situation that makes the costs of a new entrant to the market higher than the cost of firms already in the market which creates a range within which firms in the market can raise their prices above the competitive level without attracting new entry.[26] 'Barriers to entry' finds place among the various factors to be taken into account by the CCI in determining whether a proposed combination has or is likely to have an appreciable adverse effect on competition.[27] The nature and extent of vertical integration in the relevant market is also to be considered by the CCI.[28]

c) Actual And Potential Competition

The determination of the effects of proposed mergers on competition involves the examination not only of the actual levels of competition in the relevant market and the likely consequences of the transaction but also the impacts of the transaction on potential competition.[29] Indian Competition law requires the consideration of 'actual or potential competition' but this is qualified by the words 'through imports'.[30] At the same time, another listed factor is the 'extent of effective competition likely to sustain in the market'.[31]

[26]*Id.* at 137.
[27]The Competition Act 2002, § 20 (4) (b), No. 12, Acts of Parliament, 2003 (India).
[28]*Id.* at § 20 (4) (j).
[29]TIWARI, *supra* note 25, at 137-138.
[30]The Competition Act, 2002, § 20 (4) (a), No. 12, Acts of Parliament, 2003 (India).
[31]T. RAMAPPA, COMPETITION LAW IN INDIA: POLICY, ISSUES AND DEVELOPMENTS 209(2006).

d) Welfare Objective And Benefits To The Customers

While competition law is essentially concerned with economic objectives, social welfare objectives and consumer benefit also constitute an important part thereof. The regulation of mergers may also involve the consideration of such objectives.[32] The CAincludes the nature and extent of innovation among the factors to be assessed in merger regulation and also mentions the benefits of the combination in general. Although as such consumer interest does not find a mention in the law, it is likely that in examining the benefits of the combination or its impact, the effects on consumers would also be taken into account.[33]

The emergence of globalisation and privatisation has increased the need to regulate M&As in a global market perspective. The existence of a sound regulatory mechanism increases the faith of incoming foreign investors.[34] The effect and the efficiency of the functioning of the Act although yet to see, a lot of literature seems to have developed with differing views. The scope and extent of application of AAEC is largely contested.

Appreciable has been defined as capable of being measured or perceived,[35] and adverse is defined as having an opposing or contrary interest, concern, or position.[36] So, in order to attract the CCI's attention a combination must have a negative impact on the free and fair competition. The problem which arises is the impact analysis as the impact can be both quantitative and qualitative. The quantitative

[32]TIWARI, *supra* note 25, at 139.
[33]The Competition Act 2002, §19(3), No. 12, Acts of Parliament, 2003 (India).
[34]Jitheesh Tilak, *Regulating M&As an Insight into Competition Laws in India*, 32 INT'L BUS. LAW. 161, 165 (2004)
[35]BLACK'S LAW DICTIONARY 117 (9th ed. 2009).
[36]*Id*. at 62.

aspect may still be measurable easily but qualitative aspects such as customer satisfaction, fairness of pricing structure etc. may prove to be difficult to measure and if somehow measured, the genuineness of the data will always be doubtful.

The CA has come a long way to establish a sound regulation as far as combination is concerned, but the prevalent ambiguous concepts and tests are preventing the statute from achieving an optimum level of enforcement.

III. SIGNIFICANT IMPEDIMENT ON EFFECTIVE COMPETITION

The Treaty of Rome established the European Economic Community in 1957. It has been known as the European Community (EC) since the Maastricht Treaty of 1992. The Treaty does not contain any specific provisions relating to mergers. Historically, mergers were dealt with by the application of Articles 81 and 82. However, this was considered to be an inadequate way of governing mergers and so, in 1989, the ECMR was introduced. The present rules are contained in Council Regulation (EC) 139/2004.[37]

In the last twenty years, the application of EC competition law by the Commission has been increasingly informed by economics.[38] In the field of merger control it has operated an economically enlightened

[37]George Metaxas and Hector Armengod, *EC Merger Regulation and the Status of Ancillary Restrictions: Evolution of the European Commission's Policy*, 9 E.C.L.R. 500 (2005).

[38]D. Neven, *Competition economics and antitrust in Europe*,21(48) ECONOMIC POLICY 741 (2006); See also, M. Monti, EUROPEAN COMPETITION FOR THE 21ST CENTURY 257 (B. Hawk ed., 2002).

regime as a whole, however its policy on conglomerate mergers and ambiguity over the role of efficiencies have received adverse comment.[39] The most significant reform that resulted from the review of the ECMR that took place between 2001 and 2004 was a change in the substantive test for analysing mergers, and is the focus of this essay.[40] Unlike the reforms noted above, it did not result from any significant criticism of the merger regime, so the need for a new test and its possible impact is uncertain and worth exploring, especially in light of some experience with the operation of the new ECMR.[41]

As originally drafted the ECMR prohibited a merger '*which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or a substantial part of it*' more commonly known as Dominance test.[42] During the review of the ECMR, economists and lawyers debated and raised issue whether the dominance test was sufficiently supple to apply to unilateral effects in oligopoly markets.[43]

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[39]D. E. Patterson and C. Shapiro, *Transatlantic Divergence in GE/Honeywell: Causes and Lessons*, 16 ANTITRUST 18 (2001).

[40]The process began with the *Green Paper on the Review of Council Regulation (EEC)*, No. 4064/89 COM (2001) 745, http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0745en01.pdf.

[41]Giorgio Monti, *The New Substantive Test in the EC Merger Regulation – Bridging the Gap Between Economics and Law?* 2 LSE LAW, SOCIETY AND ECONOMY WORKING PAPERS 10/2008,http://ssrn.com/abstract=1153661.

[42]Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings art.2(3) (1989) OJ L395/13, http://ec.europa.eu/comm/competition/mergers/legislation/regulation/consolidated/en.pdf.

[43]N. Horner, *Unilateral Effects and the EC Merger Regulation – How The Commission Had its Cake and Ate it Too*, 2(1) HANSE LAW REVIEW 23 (2006); S. Baxter and F. Dethmers, *Unilateral Effects Under the European Merger Regulation: How Big is the Gap?*, ECLR 380 (2005); C.D. Ehlermann, S. Volcker and G.A. Gutermuth, *Unilateral Effects: The Enforcement Gap under the old ECMR*, 28(2) WORLD COMPETITION 193(2005) ; J. Vickers, *How to Reform the EC*

Observing the insufficiency of the test, a need to change the regulation was brought to the fore which was then furthered in the case of *Volvo/Scania* where the EC Commission blocked a merger that would have created a dominant manufacturer of heavy goods vehicles in several Member States.[44] This case gave rise to the following questions: if the merged entity is not the biggest player on the market but it is able to raise price or restrict output unilaterally, how can we block these mergers with the 'dominance' test? Thereafter another concern arose that if the dominance test was to be altered then the EC might end up losing all the case laws, jurisprudence and literature developed in this regard, as the EC proposed to alter the dominance test to SLC test used in USA, UK and Australia.[45]

So a compromise was brought in the new ECMR provides that a merger would be blocked if 'it would significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.'[46]

Regulation 139/2004 introduces a new substantive test, according to which EC may block a transaction, which would significantly impede effective competition (SIEC), in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.

Merger Test? (G. Drauz and M. Reynolds (eds)), EC MERGER CONTROL: A MAJOR REFORM IN PROGRESS (2003).

[44]Volvo/Scania [2001] OJ L 143/74.

[45]Enterprise Act 2002 (UK), § 35; Trade Practices Act 1974 (Australia), § 50; Clayton Act 15 USC 18 (US),§ 7.

[46]Council Regulation (EC) No 139/2004, Art. 2(3) [2004] OJ L24/1. Recital 25 clarifies that the only reason for this is to fill the gap in horizontal merger cases.

The new substantive test will specifically allow the Commission to take into account so-called unilateral effects, that is, price increases arising because the transaction eliminates some existing competitive constraint that had been holding back the price level in the market. Adoption of the Significant Impediment Test will bring EC competition law more in line with standard applied in the USA and Canada.[47]

What exactly does SIEC mean? Is it the same as SLC? One interpretation is that they are synonymous. Another is that 'substantial lessening' relates to how much competition is *lost*, while 'impediment to effective competition' has to do with how much competition *remains* post-merger.[48] Another source to answer the above question can be that the notion of SIEC:

> *"should be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned*".[49]

This says that SIEC extends, in a disciplined way, beyond dominance, and it makes clear that the new test covers non-coordinated effects, thus disposing of the problem of the gap. Thus the key question now relates to how a merger affects competition, not whether it reaches a threshold of dominance.[50]

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[47]Anniek van Zutven and Hans Urlus, *New EU Merger Regulation and Reform of EC Antitrust Enforcement EC Treaty* (Alert, June 2004).
[48]OLIGOPOLIES AND JOINT DOMINANCE IN COMMUNITY ANTITRUST LAW, FORDHAM CORPORATE LAW INSTITUTE(Barry Hawk ed.2001).
[49]*Supra* note 46 at recital 25.
[50]John Vickers, *Merger policy in Europe: retrospect and prospect*, http://oft.gov.uk/shared_oft/speeches/spe0104.pdf.

Dominance, as the Commission acknowledges will remain the main scenario, but the new test will clearly also encompass duopolies and oligopolies and beyond. It thus seems that the test to pass has become stricter and that this will lead to more prohibitions or approvals subject to conditions.[51] The new test is intended to fill a (perceived) gap by covering cases of "unilateral effects" i.e. where the fear is that the merged entity could raise prices even though it will not become the largest player (sole dominance) and without the need of any tacit coordination with other players (joint dominance).[52] It has also been observed that the change is mainly procedural and an attempt to make abundantly clear what was clearly inferred in the dominance test.

In a recent *Oracle/PeopleSoft* review, for example, any likely adverse finding would not easily fit into the dominance test. Oracle and PeopleSoft are the second and third largest competitors for high-end business software applications and the combined company would only have around 30% of the market. SAP, the market leader, has more than 50%. It is possible that such a transaction could be interpreted as constituting a SIEC but not creating or strengthening a dominant position.[53]

The EC has continued to apply an economics-focused approach to the assessment of mergers, indicating that its policy towards mergers has not changed as a result of the move to the SIEC test; however, it is generally perceived that the SIEC test gives a wider degree of discretion to the EC.[54] SIEC aims to fill the gaps under the old

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[51]Stibbe, *New EU Merger Control Regulation*, http://www.stibbe.be/assets/publications/newsletters/new%20eu%20merger%20control%20regulation.pdf.
[52]*Supra* note 7, at 1.
[53]*Id.* at 1.
[54]Slaughter and May, *The EU Merger Regulation: An Overview of the European Merger Control Rules*,http://www.slaughterandmay.com/media/64572/the-eu-merger-regulation.pdf.

dominance test, in particular if a merger raised serious competition concerns but resulted neither in a firm enjoying a strong No. 1 position of say 40-50% or more in a market (indicative of single-firm dominance) nor in the creation or strengthening of an oligopolistic market structure conducive to tacit collusive between a small group of players (indicative of collective dominance). Some of these concerns were driven by the fact that in 2002 the court of first instance annulled 3 prohibition decisions on the basis that the Commission had failed to prove that the deals were caught by the old Merger Regulation's dominance test.[55]

Following are some of the important criteria taken into account in assessing mergers:

A. Market Shares And Market Concentration

In the EU, the Competition Commission would consider accretion of market power on the buying as well as selling sides. In determining whether a concentration might have adverse horizontal effects, the Commission will look predominantly at the increase in the combined entity's market share through other factors would also be taken into account as this alone would not provide any insight into the loss of potential competition that the concentration might entail.[56] An instance in which market shares were looked into by the commission is that of *Syngenta CP/Advanta*,[57] in which the parties which were engaged in crop protection, breeding, production and processing, etc. of seeds respectively. The Commission took into account the facts that the merged entity would have 15-80 per cent market share in various types of seeds to come to the finding that the operation would

[55]*Id.* at 21.
[56]RICHARD WHISH, COMPETITION LAW 838, 839 (2005).
[57]COMP/M.346 [2004] EC Comm. 53.

give rise to serious concerns of being likely to significantly impede effective competition.[58]

B. Barriers To Entry

In the EU, the EC considers whether the vertical effects of the concentration could foreclose access to markets. In *Skanska/Scancem*[59] where the merged entity would have a very powerful presence in the market for raw materials (cement), construction materials (concrete) and the construction industry, the EC directed Skanska to divest *Scancem's* cement business as well as its entire shareholding in *Scancem*.[60]Article 2 of the ECMR, which deals with the appraisal of concentrations and sets out the factors to be taken into account by the Commission in this process mentions, access to supplies and *'any legal or other barriers to entry'*.

C. Actual And Potential Competition

The Commission must, in making its assessment, look into actual and potential competition from both inside and outside the communities.[61] The EC in *Telia/Telenor*[62] expressed concern over the fact that the merged entity would have an increased ability and incentive to eliminate actual and potential competition from third parties.

D. Welfare Objectives And Benefits To Consumers

The ECMR gives importance to consumer welfare in the process of merger analysis, requiring the Commission to look into the interests of the intermediate and ultimate consumers as well as the

[58]*Id.* at 60.
[59]Case No. IV/. 1157, [2000] 5 CMLR 686.
[60]*Supra* note 57, 840.
[61]ECMR, art.2 (1) (a).
[62]COMP/M. 1439[2001] 4 CMLR 1226.

development of technical and economic progress, provided that it is to consumers′ advantage and does not form an obstacle to competition. Therefore, the above analysis establishes that the SIEC test is an attempt to fill the gaps the old dominance test had created. It was out of abundant caution that the reform was brought in.

IV. SIEC VIS-A-VIS AAEC

The SIEC test overall as discussed earlier in addition to filling the gap in the old dominance test it aims at achieving an effective competition, while the AAEC test aims to prevent any measurable adverse effect on the competition.

The SIEC test allows greater flexibility and gives more powers to the Commission: while it is still based on the concept of dominance, it is only by example and is no longer the primary criterion for assessing a concentration. It has been observed that the SIEC test is a much more powerful economic tool to analyse the costs and benefits of a proposed merger in terms of balancing its pro-competitive and anti-competitive effects.[63] On the other hand, The CA, however does not define or elucidate the meaning of the expression AAEC, merely enumerating various factors, all or any of which are to be taken into account to determine whether a combination has such an effect. It would be up to the CCI, the CAT and the Supreme Court to define how large an effect would qualify as an appreciable adverse effect and whether this term would include any term above the *de minimis*.[64]

[63]TIWARI, *supra* note 25, 136.
[64]*Id.* at 136.

The words '*significant*' and '*appreciable*' seem to be two sides of the same coin. But a close examination establishes a difference in terms of degree i.e. 'significant' applies in cases where the impact on the competition is larger in comparison to appreciable impact. If this is the case then scope of AAEC in contrast with SIEC is wider.

The two tests are equally new and have to undergo a lot of scrutiny to establish the effectiveness of the competition. The only advantage that SIEC has is the presence of abundant jurisprudence in terms of cases and literature due to the old dominance test, while AAEC is a new development under the CA post-MRTP and therefore no such jurisprudence is available.

It may also be interesting to note that in the report of the High Level Committee there is no reference to the dominance test of EC, also the UK and US competition law has been referred but not the SLC. It compels the deduction that the AAEC is an independent test established to regulate combinations in a way not being done by the other jurisdictions. So, a probable conclusion that SIEC and AAEC are one and the same thing is unacceptable at this juncture.

The ultimate purpose of any competition law legislation is the protection and preservation of an independent, effective and efficient market to protect the consumers. SIEC and AAEC are different tools for the same purpose. The question therefore is which of the two tests has done the job better. In order to compare the two tests on this point the differences in the market must be noted i.e. India and Europe. The two markets are absolutely different in terms of tastes, nature, consumer preferences, and market players. So a measure which might prove efficient in one market may fail utterly in the other market.

Emerging market consumers are rapidly becoming more like their affluent market counterparts, is true. But the rate of change is not as rapid as contended. In most emerging markets, the mass market will remain poor well beyond the current planning horizons of most

multinationals. And even as they grow more affluent, it is far from certain that Chinese and Indian consumers' preferences will converge with those of Europeans or Americans.[65] Market as that of Indian is mostly culture driven and as a result the style and pattern differ.

AAEC and SIEC are instruments for two different markets when on one hand the former is a completely new concept with its roots from Russia, US, UK as its source, while on the other hand the latter is merely an extension to a somewhat successful dominance test under the old EC merger code. If the market difference is to be kept constant then based on the available data such as case laws and literature SIEC is most likely to achieve the goals of a competition law more efficiently compared to AAEC. This deduction is mainly on the basis of absence of the judicial scrutiny of the test in India, which compels the author to point that the preliminary judicial examination whenever arises will ultimately first rely on jurisprudence available with regard to SIEC and Dominance test on a reference basis to reach any decision.

V. CONCLUSION

It is as a matter of fact that there appears to be much in common between the competition laws in the European Union and India. EU and Indian competition systems also have similar objectives. They all seek to advance the interests of consumers and protect the free flow of goods in a competitive economy as well as protect the rights of competitor's access to markets and protect to some extent consumer's

[65]Niraj Dawar and Amitava Chattopadhyay, *Rethinking Marketing Programs for Emerging Markets*, 3 Working Paper Number 320, http://deepblue.lib.umich.edu/bitstream/2027.42/39704/3/wp320.pdf.

freedom of choice and seller freedom from coercion to bring about the ultimate aim of total welfare.[66]

However, as discussed, there are also numerous differences in the provisions in the context of definitions, notification, time limits for review of notifications by the competition authorities, and the substantive test applied for determination of impacts on competition. The substantive assessment of mergers in all three jurisdictions involves the same basic steps, namely the identification of the relevant market, the assessment of the merger as per the substantive test set out in the respective laws, and in this process, the consideration of various factors including market shares, concentration, possibility of foreclosure and also welfare objectives.[67]

The basic substantive test for the analysis of mergers differs. EC law requires the determination of whether the merger causes significant impediments to the effective competition, which although it implies the distortion of competition, may not require the impediments caused to be 'substantial'. The test in Indian law requires the assessment of whether the merger is likely to cause 'appreciable adverse effects on competition' in a manner somewhat 'measurable'.

[66]Veena V. Rajes, *Competition Act, 2002 in comparison with the Antitrust/Competition Laws in force in the USA and European Union with Reference to Cartels*,http://cci.gov.in/images/media/ResearchReports/veenafeb12.
[67]TIWARI, *supra* note 25, at 140.