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Scope of Non-Compete Clauses in M&A Transactions

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Since the turn of the century, the world has undergone the effects of globalization and increased progress in technology. Due to the effects of liberalization and rapid globalization, the volume of mergers and acquisitions seen the world over has increased manifoldly. India is no exception to this boom in mergers and acquisitions transactions. It is observed that various agreements are executed and covenants are agreed upon by and between the parties to give effect to such transactions. One of these is the non-compete covenant, which involves restraining the selling entity and its executives from carrying on a similar and competing business to the one that is transferred under the M&A transaction or conducting any activity that will compete with the said business to the prejudice of the buying entity. Non-compete clauses are restrictive covenants that are generally aimed at protecting the buyer's interest after the closing of M&A transactions, but the position regarding these clauses differs according to the various jurisdictions. This article looks at the approach adopted by Europe and the United States of America to non-compete clauses in M&A transactions and attempts to understand the scope and position of such clauses under Indian law.

Keywords: *non-compete, merger, acquisition, competition law, m&a transaction, agreement.*

INTRODUCTION

Mergers and acquisitions (M&A) are among the most effective means for accelerating the implementation of a business plan for rapid growth. Even though the terms 'merger' and 'acquisition' are used interchangeably and in one breath, they denote different legal aspects. A

merger means the collaboration of two or more companies to form a new company in an expanded form. Here, one company will cease to exist, and the other company will absorb the former. Mergers are used by companies to expand their business operations and are usually undertaken to increase market share, revenues, and benefits and expand into new locations while reducing operating costs. While the two entities coming together to form a strong and single new entity in a merger are of approximately the same size, an acquisition differs from a merger in the sense that it involves a larger company acquiring a smaller company or absorbing the business of the smaller company. The acquisition is defined as a process of selling one company to another, or of acquisition of a portion or all of the company's assets for a specified business. In a simple acquisition, the acquiring company obtains the majority stake in the acquired firm, which does not change its name or alter its organizational structure.

Initially, in India, M&A transactions were arranged by government agencies and financial institutions, but since the end of the 20th century, the majority of corporations have begun to opt for M&A transactions to grow in today's market[1]. Over the past few years mergers and acquisitions have increased manifoldly in India, as the spread of globalization from the year 2000 onwards has made India a target of foreign companies, and turned it into a global M&A hub as a result of the increased amount of investment. The M&A climate in India has been further changed due to the increase in digitization and development[2].

Some of the biggest and most prominent mergers and acquisitions witnessed in India include the Zee Entertainment – Sony India Merger, Vodafone and Idea Merger, Bharti Infratel and Indus Towers Merger, Bank of Baroda and Vijaya Bank and Dena Bank Merger, Flipkart and eBay India Merger, Tata Group's acquisition of Air India, Walmart's acquisition of Flipkart, Zomato's acquisition of UberEats, and Tata Motor's acquisition of Jaguar's Land Rover. Indian businesses are using mergers and acquisitions as critical tools of business strategy in areas including, among others, information technology, telecommunications, and business

[1] Divi Dutta et al., 'Mergers and Acquisitions in India – A Brief Overview' (*Mondaq*, 12 July 2022) <https://www.mondaq.com/india/corporate-and-company-law/1210798/mergers-and-acquisitions-in-india--a-brief-overview> accessed 10 February 2023

[2] 'What are Mergers and Acquisitions?' (*Enterslice)* <https://enterslice.com/mergers-and-acquisitions-services> accessed 06 February 2023

processing. In traditional businesses, mergers and acquisitions play a significant role in gaining strength, expanding customer base, cutting competition, or entering new markets or product segments. They can also allow businesses to access markets through established brands, get a market share, eliminate competition, reduce tax liabilities, acquire competence, or set off the accumulated losses of an entity against the profits of another.[3] Not only can companies and firms achieve global consumer influence, but also operate on a global scale through the expansion of portfolios and access to research, development, and other assets.

WHAT ARE NON-COMPETE COVENANTS?

At the time of executing any agreement for business or some other reason, the contracting parties can decide that one of the parties will henceforth be restrained from conducting a similar business or undertaking activities that would give rise to a competing business that goes against the interests of the other party. This requirement is captured in non-compete covenants. Non-compete (or non-competition) covenants can either be in the form of a clause that is part of an overall contract, or they can be contained in separate non-compete agreements in themselves. It is an ancillary agreement to the other definitive agreements that give effect to the M&A deal. They are also sometimes referred to as 'restrictive covenants' since they restrict a party to a contract from acting in a certain way. A non-compete agreement is thus a contract that restricts a business or an individual from participating in a certain market under specific circumstances[4]. A person who is bound by non-compete covenants is obliged to not commence a new business, take up employment in a competing entity, or engage in the said competing entity in any way[5].

Non-compete clauses generally cover two different aspects – employees and business. In employee non-compete agreements, employees are restricted from engaging in any conduct or

[3] Expert Committee, 'Report of the Committee on Company Law' (*MCA*) <https://www.mca.gov.in/content/mca/global/en/data-and-reports/reports/other-reports/report-company-law/mergers-and-acquisitions.html> accessed 10 February 2023

[4] Tathagatha Choudhary, 'Scrutinizing Non-Compete Agreements under the Indian Competition Regime', Competition Committee of India 5 (*Citeseerx*) <https://citeseerx.ist.psu.edu/doc/10.1.1.650.7542> accessed 11 February 2023

[5] Alipak Banerjee & Ors, 'Non-compete Clauses: Protection or Restraint?' (2020) International Bar Association <https://www.nishithdesai.com/fileadmin/user_upload/pdfs/NDA%20In%20The%20Media/News%20Articles/Non_compete_protection_or_restraint.pdf> accessed 11 February 2023

business which competes with the business of the employer, either in the course of their employment or for a specified period following their resignation/termination from employment. In a way, they can be called contracts 'that delay employees' ability to work for competing firms[6].

On the other hand, non-compete clauses are also utilized in business deals and M&A transactions. Non-compete clauses in M&A transactions restrain the selling entity or key employees of the selling entity from competing either directly or indirectly with the business that has been purchased by the buying entity after the closing of the transaction[7]. To prevent further risk to the buyer, senior executives and employees of the seller can also be bound by non-compete restrictions, as they have access to the intellectual property, confidential information, trade secrets, and proprietary information of the acquired business, and in M&A transactions, the buyer loses its competitive advantage when exiting employees start or join a competing entity and the commercial value of the acquisition becomes compromised.[8]

Mergers and acquisitions often lead to complexities and challenges in this fast globalizing and growing world. It has become a common practice for the purchaser to impose few obligations on the seller, including the prohibition of competition, and therefore a majority of company sale and purchase transactions now include non-competition covenants that the seller has to comply with, in favor of the acquired company. The buying party's objective to include such a clause in the purchase agreement is to protect its interest and prevent the selling party from starting an economic activity similar to the one which was the object of the transaction, or from restricting it from negatively influencing other essential aspects of the transaction, such as the company's goodwill, know-how or employees, after the conclusion of the transaction.

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[6] Office of Economic Policy U.S. Department of the Treasury, 'Non-compete Contracts: Economic Effects and Policy Implications' (Treasury, 2016) 3 <https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Econimic_Effects_and_Policy_Implications_MAR2016.pdf> accessed 11 February 2023

7 Jacob Orosz, 'Non-Compete Agreement / Non-Competition Agreement' (*Morgan and Westfield*) <https://morganandwestfield.com/glossary/non-compete-agreement-non-competition-agreement/> accessed 11 February 2023

[8] Alipak Banerjee (n 5)

STRUCTURE AND KEY COMPONENTS OF NON-COMPETE AGREEMENTS

Generally, non-compete agreements are not standardized, but most of them have nearly similar restrictive elements[9]. These agreements (or clauses, as the case may be) impose certain limitations on the conduct of employees and selling entities in terms of territory and a fixed period[10]. Every non-compete agreement is uniquely drafted taking into account the circumstances of each deal and industry, and it usually incorporates the following key components following heavy bouts of negotiation[11]:

Geography: The geographic area covers the region where the company does its business and where the seller is prohibited to establish a direct or indirect competing business[12]. Usually, the geographic areas falling under the scope of the non-compete agreement overlap with the market areas of the acquired entity. For example, if the customers of the acquired business are known to be located within a 10-km radius of a particular area, the parties will generally agree to the 10-km radius as the geographic scope. During negotiations, sellers usually try to limit the geographic scope to a narrower area, while buyers try to insist on a wider area in which the buyer or its affiliates can conduct or actively take steps to conduct the acquired business[13].

Duration: Non-compete agreements are in force for specific time frames, within which the seller is precluded from carrying on a competing business[14]. The duration of the agreement or clause is typically negotiated by the parties themselves, as it is more of a business issue rather than a legal issue[15].

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[9] Adam Hayes, 'What Is a Non-Compete Agreement? Its Purpose and Requirements' (*Investopedia,* 10 August 2022) <https://www.investopedia.com/terms/n/noncompete-agreement.asp> accessed 6 February 2023
10 Antonio Amado Ruz, 'Non-compete clauses in company acquisitions' (*AGM abogados*, 18 May 2022) <https://www.agmabogados.com/en/non-compete-clauses-company-acquisitions/> accessed 8 February 2023
[11] Ryan M Mardini, 'To Compete or Not to Compete: The Importance of Non-Competition Agreements in M&A Deals' (*Attorney at Law Magazine,* 29 July 2022) <https://attorneyatlawmagazine.com/public-articles/business-law/mergers-acquisitions/to-compete-or-not-to-compete-the-importance-of-non-competition-agreements-in-ma-deals> accessed 6 February 2023
[12] CFI Team, 'Non-Compete Agreement' (*Corporate Finance Institute,* 25 January 2023) <https://corporatefinanceinstitute.com/resources/management/non-compete-agreement/> accessed 7 February 2023
[13] Ryan M Mardini (n 11)
[14] Adam Hayes (n 19)
[15] Ryan M Mardini (n 11)

Scope: The scope of the non-compete covenants, or, in other words, the nature of the activities prohibited by the non-competition requirements, varies according to the industry. Usually, it is in the sellers' favor to seek as limited a scope as possible to cover only those activities that were directly linked to the acquired business before the closing date of the transaction. However, buyers mostly strive for the inclusion of a wider range of activities, whether directly or indirectly connected to the acquired business, both before and after the closing of the transaction. This would be done, for instance, by including a general statement to the effect of: 'any business that would be directly or indirectly competitive with the company or buyer as of the Closing Date'. Generally, non-competition agreements are drafted in a manner that restricts the seller and its affiliates not only from engaging in business activities that compete with the acquired business but also from direct and indirect methods of competition such as working with competitors or assisting the buyer's competitors against it[16].

Reasonableness: Non-compete restrictions have to be reasonable in terms of their scope, and not go beyond the reasonable levels that are required for the implementation of an M&A transaction. Thus, they must be confined to the buyer's concerns only concerning the merger or acquisition, and not with any concerns outside of the same.

Non-compete obligations are, therefore, generally to be limited to[17]:

- Those goods and services which constitute the area of operation of the economic unit to be acquired;
- The seller's area of operation as existed before the transaction;
- The seller, and its economic units and agencies (but not its dealers or users);
- A duration that would not unjustly prevent the seller from carrying on legitimate business in a fair manner.

[16] *Ibid*

[17] H Ercüment Erdem, '"Non-Compete Agreements" Within Mergers And Acquisitions' (*Mondaq*, 21 January 2013) <https://www.mondaq.com/turkey/maprivate-equity/216310/non-compete-agreements-within-mergers-and-acquisitions> accessed 5 February 2023

The validity of non-competition clauses or agreements differs according to each jurisdiction, and courts have to carefully examine the same in each case.

THE AMERICAN AND EUROPEAN APPROACHES TO NON-COMPETE COVENANTS IN M&A TRANSACTIONS

The validity or enforceability of non-compete clauses varies from state to state in the United States of America. For instance, in California, apart from a few specified exceptions, non-compete agreements are automatically declared void. A reasonable non-compete agreement will be valid if it is made under a sale of the goodwill of a business, or of the owner's ownership interest in or operating assets of a business entity, in respect of a specified geographic area[18]. Similarly, in Colorado, non-compete agreements are void except in the case of a contract for the purchase and sale of a business or the assets of a business, in which case, such obligations will be valid[19]. Under Texan law, a non-compete agreement in respect of reasonable restrictions on time, geographical area, and scope of activity, can be enforced if it is ancillary to an enforceable agreement and is necessary to protect the goodwill or other business interest of the party to the agreement[20].

Since the process of mergers and acquisitions can impact market competition, statutory controls are exercised over non-competition agreements in M&A transactions by government agencies to prevent anti-competitive practices. In the US, the Sherman Antitrust Act, of 1890 prohibits contracts, combinations, and conspiracies in restraint of trade or commerce, and imposes penalties on all persons or corporations who are convicted of entering into such contracts or engaging in such conspiracies or combinations[21]. Furthermore, mergers and acquisitions that tend to substantially lessen competition or create a monopoly are not permitted under the Clayton Antitrust Act of 1914[22].

[18] California Business and Professions Code 2022, s 16601
[19] Colorado Code 2021, s 8-2-113-2(b)
[20] Texas Business and Commerce Code 2022, s 15.50
[21] 15 US Code 2020, s 1
[22] Clayton Antitrust Act 1914, s 7; 15 US Code 2020, s 18

The American antitrust system is such that it considers not only the actual anti-competitive effects of a merger or the non-competition covenants therein but also any adverse effects that are likely to arise in the future on account of the same[23]. The governing authorities and agencies in the US have tried to develop an approach whereby the impact of restrictive clauses in mergers and acquisitions deals is assessed by anticipating the practical conditions prevalent in the markets[24]. Under the Clayton Antitrust Act, entities undergoing a merger or acquisition have to send a premerger notice to the antitrust authorities, i.e., the Federal Trade Commission and the Antitrust Division of the Department of Justice, and the authorities will then evaluate the covenants under the merger or acquisition to ensure that there is transparency and there is no violation of anticompetition laws[25].

Considering the European scenario, Article 101 of the Treaty on the Functioning of the European Union (TFEU) prohibits and declares that all agreements between undertakings which prevent, restrict, or distort competition within the internal market, are incompatible and automatically void[26]. The European Commission (EC) performs adjudicatory functions which involve ascertaining the nature of the clauses incorporated by parties in their agreements for merger or acquisition, and it can assess the ancillary character of restrictive covenants and obligations if requested by the undertakings concerned[27]. Considered concerning concentrations (which involve either the merger of two independent undertakings, acquisition of control by an undertaking over another or a change of control in the acquired undertaking[28]), restrictions should be closely linked to the concentration to be considered as 'directly' linked to it. Such restrictions are economically related to the main transaction and they aim to aid in the transition

[23] US Department of Justice and the Federal Trade Commission, '*Horizontal Merger Guidelines*', (19 August 2010) s 2.1.1. <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010#2b> accessed 15 February 2023
[24] Shivam Bhardwaj & Samyak Sibasish, 'Treatment of A Non-Compete Clause In M&A: Finally Clarifying the Indian Position?' (2014) 7 NUJS L Rev 263, 282
[25] Clayton Antitrust Act 1914, s 7a; 15 US Code 2020, s 18a
[26] 'Treaty on the Functioning of the European Union (TFEU) 1957' Art 101 (*Eurlex*) <https://eur-lex.europa.eu/resource.html?uri=cellar:9e8d52e1-2c70-11e6-b49701aa75ed71a1.0006.01/DOC_3&format=PDF> accessed 11 February 2023
[27] Official Journal of the European Union, *Commission Notice on restrictions directly related and necessary to concentrations* (2005/C 56/03), s 3
[28] LexisNexis Glossary, 'Concentration' (*LexisNexis*) <https://www.lexisnexis.co.uk/legal/glossary/concentration> accessed 15 February 2023

process after the change in a company structure posts the concentration[29]. Such restrictive agreements have to be 'necessary' to the concentration, in the sense that without these agreements the concentration cannot be implemented, or can be implemented but only with great difficulty – such as at a higher cost, or under uncertain conditions, or over a noticeably longer period[30]. The reasoning behind a non-compete clause is that it aids the buyer in deriving the complete worth of the business that it is acquiring from the seller, as the seller is restrained from competing with it in terms of the said business in relevant markets.

In Vodafone Group PLC / Eircell, the case was such that Eircell was subject to a non-compete obligation extending for up to three years in Ireland following the acquisition deal between the parties. The EC declared the non-compete clause to be compatible as it was ancillary to the concentration and was necessary to effectively transfer the value of Eircell's goodwill and know-how to Vodafone[31]. The non-compete clause should operate within the reasonable confines of the subject matter of the transaction undertaken by the entities, the duration, and territorial coverage of the transaction. The EC can, however, also permit the duration or the geographical limit to be extended in exceptional cases. Thus, in Delphi Automotive Systems/Lucas Diesel, the five-year duration of the non-compete clause was justified because the buyer required some time to assimilate the new technology and the anticipated life cycle of the technology[32]. The case of Telefonica/Portugal Telecom was significant in the European competition law regime, as it clarified that the EC could take action against the parties merely on the inclusion of illegal or incompatible non-compete clauses, and not did require any actual effect of the same on the market conditions[33].

POSITION OF NON-COMPETE CLAUSES IN M&A TRANSACTIONS IN INDIA

Non-compete obligations in India derive their enforceability from the exception to Section 27 of the Indian Contract Act, 1872, which states that 'every agreement by which anyone is restrained

[29] Official Journal of the European Union, *Commission Notice on restrictions directly related and necessary to concentrations* (2005/C 56/03), s 12
[30] *Ibid* s 13
[31] *Vodafone Group PLC/Eircell* Case No COMP/M.2305 (2001)
[32] *Delphi Automotive Systems / Lucas Diesel* Case No COMP/M.1784 (2000)
[33] *Telefonica/Portugal Telecom* CASE AT.39839 (2003)

from exercising a lawful profession, trade or business of any kind, is to that extent void'[34]. While the provision declares all agreements that restrict a person or an entity from carrying on their profession, trade, or business to be void, Section 27 of the Act does provide for one exception under which such agreements would be legally valid. The exception under Section 27 permits agreements that restrict a person or an entity to carry on a business similar to the business of which the goodwill is sold, provided such a restriction only pertains to a specified local limit and so long as the buyer, or any person deriving title to the goodwill, carries on a like business therein. However, the enforceability of such clauses is further subject to the scrutiny of a court to determine whether the restrictions are reasonable having regard to the nature of business[35]. For this purpose, it is important to examine various judicial pronouncements to understand how the courts have interpreted the contractual provisions about restraint of trade.

In the case of Affle Holdings Pte Limited v Saurabh Singh and Others[36], the Delhi High Court had passed an interim order, whereby it was held that a non-compete clause in a share purchase agreement restraining a promoter from engaging in a business similar to that of the target company for a period of 36 months was valid, and the same was further upheld and confirmed by the Court in its judgment dated January 22, 2015. In arriving at this conclusion, the Court had noted that the promoter had received the total consideration for the sale share and had also transferred the goodwill in the business to the investor, which is a key requirement under Section 27 of the Indian Contract Act. Another judgment that examined the scope of Section 27 of the Act was the Delhi High Court decision of March 26, 2015, in the case of Arvind Singh and Another v Lal Pathlabs Private Limited and Others[37]. In this case, the respondent, i.e., Lal Pathlabs Private Limited had acquired 100% of the shareholding of M/s. Amolak Diagnostics Private Limited and its goodwill from the appellants, i.e., Dr. Arvind Singh and another person, under which the appellants were restricted, under a provision in the share purchase agreement, from engaging in any business that competed with Lal Pathlabs Private Limited. A single bench

[34] Indian Contract Act 1872, s 27
[35] Vivek Bajaj & Sampriti Sridhar, 'Scope of non-compete clauses in private M&A transactions' (*AZB & Partners*, 1 June 2020) <https://www.azbpartners.com/bank/scope-of-non-compete-clauses-in-private-ma-transactions/> accessed 14 February 2023
[36] *Affle Holdings Pte Limited v Saurabh Singh & Ors* OMP 1257/2014, IA No. 23684/2014
[37] *Arvind Singh & Anr v Lal Pathlabs Pvt Ltd & Ors*, CM No 20860/2014

of the High Court had held that such a clause was enforceable and passed an injunction order restraining the appellants from practicing as radiologists or pathologists in the city of Udaipur, India for a period of 5 years. This decision was reversed by the Delhi High Court subsequently on the premise that the activity of a profession is not akin to that of the business of Lal Pathlabs Private Limited and will therefore not fall within the exception under Section 27 of the Act. Having said that, the court did succinctly note that the appellants would not be able to "overtly or covertly carry on a business of running a path lab or an X-ray Diagnostic Centre by forming a venture where the organizational structure has the essential attributes of a business"[38].

Additionally, it is material to ensure that any restraints under non-compete clauses to M&A transactions do not restrict fair competition in the market. The Competition Commission of India is the authority that regulates mergers and acquisitions under antitrust law in India, under the ambit of the Competition Act, 2002, and the related regulations. As per Section 5 of the Competition Act, the acquisition of one or more enterprises by one or more persons, or merger or amalgamation of enterprises is considered as a combination of such enterprises or persons if it falls under any of the financial thresholds given under the said Section[39]. Combinations which cause, or are likely to cause, noticeable adverse effects on competition within the relevant Indian market are void and are not permitted. The person or enterprise proposing to enter into a combination will send a notice to the CCI in the specified form and fee along with the details of the proposed combination within thirty days of approval of the proposal by the board of directors of the enterprises, or the execution of any agreement or document for acquisition or acquiring control[40].

The form for the notice to be sent to the CCI is contained in the Competition Commission of India (Procedure regarding the Transaction of Business relating to Combinations) Regulations, 2011[41]. The original form was substituted by an Amendment to the Regulations in 2019 with a

[38] *Ibid*
[39] Competition Act 2002, s 5
[40] Competition Act 2002, s 6
[41] Competition Commission of India (Procedure in regard to the Transaction of Business relating to Combinations) Regulations 2011, sch II, Form I

form that listed the information and details to be provided while describing the combination[42]. Thus, under Paragraph 5.7 of Form I under Schedule II, the parties to the combination were required to furnish details of their non-compete obligations in terms of duration, scope (persons, products or services, and territory), and justification for the same.

Before the 2019 Amendment, in 2017, the CCI had issued a non-binding Guidance Note on non-compete restrictions to grant clarity and certainty to the parties to a combination about the drafting of non-compete clauses in such transactions[43]. The Note highlighted CCI's general approach to non-compete clauses entered into by parties to transactions requiring CCI approval. In keeping with the principles of the EU Commission Notice on restrictions for concentration, CCI's Guidance Note required a non-compete restriction to be directly related (i.e., economically linked) and necessary to the combination. Though it was to be directly connected to the combination, it still had to be ancillary or subordinate to the main object of the transaction. Non-compete restrictions which were merely entered into at the same time or in the same context as the combination, or were "merely stated" to be directly related to the combination would not sufficiently fulfill the criteria[44]. Besides this, the restriction would be 'necessary' if the combination would become impossible in its absence or its implementation would be affected by uncertain conditions and it would be considerably more difficult and expensive. Non-compete restrictions which were not directly related or not necessary would be considered as 'not ancillary'. The scope of the restriction should not exceed reasonable requirements, and the restriction should assist in the transition following the combination. The Note further clarified that if there were alternatives to the non-compete clause which had the same result, parties should choose the alternative that least restricted the competition[45].

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[42] Competition Commission of India (Procedure in Regard to the Transaction of Business relating to Combinations) Amendment Regulations 2019, r 2(3)

[43] CAM Competition Team, 'Non-Compete Clauses: CCI Issues Guidance Note' (*Cyril Amarchand Mangaldas Blogs,* 4 July 2017) < https://competition.cyrilamarchandblogs.com/2017/07/non-compete-clauses-cci-issues-guidance-note/> accessed 17 February 2023

[44] Cyril Amarchand Mangaldas, 'CCI Issues Guidance Note on Non-Compete Restrictions' (*Cyril Amarchand Mangaldas,* 3 July 2017) 1 < https://www.cyrilshroff.com/wp-content/uploads/2017/11/Insight-Alert-CCI-guidance-note-on-non-compete-restrictions.pdf> accessed 17 February 2023

[45] CAM Competition Team (n 43)

The CCI suggested a maximum period of 3 years as the duration of the non-compete restriction in case the transaction involved the transfer of goodwill and know-how, and 2 years if only goodwill was to be transferred. Apart from this, any longer durations could be justified under limited circumstances. The non-compete obligation had to be limited to the area where the seller offered, or where it had planned and made investments to offer, its products or services before transferring the business, and it had to cover only those products and services that comprised the "main activity" of the transferred business. Furthermore, the Note specified that the non-compete obligation could be imposed only on the seller, its subsidiaries and agents, and on controlling shareholders of an enterprise. The Note also clarified that if the CCI did not find a restriction to be directly related or necessary to the combination, it would not cover the said restriction in its order for approval of the combination, but at the same time, this did not raise a presumption of the Competition Act being infringed.[46]

The CCI's approach to non-compete obligations in the case of M&A transactions has evolved gradually on a case-by-case basis. The legality of a non-compete clause has been upheld if such a covenant is necessary to implement the proposed combination if it qualifies as an ancillary restraint and complies with the CCI's Guidance Note on non-compete restrictions wherein, *inter alia*, the test of necessity and proportionality has been prescribed[47]. In the Power and Energy International (Mauritius) Ltd. case[48], the CCI categorically pronounced a covenant to be void when it went beyond what is necessary for the implementation of the proposed combination. Further, in the Orchids Chemicals and Pharmaceuticals Limited case[49], the CCI held that for a non-compete clause to be enforceable it has to satisfy the test of 'reasonability' in terms of spatial and geographical limits. Conclusively, while drafting a non-compete clause, the legitimacy of business interest ought to be protected for the non-compete restriction to be valid, and the purpose of the covenant cannot be greater than what is necessary to protect the such business.

[46] Cyril Amarchand Mangaldas (n 44) 2-3
[47] Anushka Mehul Shah & Gaurang Mansinghka, 'Enforceability of Non-Compete clauses: Legal position in India' (*Corporate Law ILNU,* 25 April 2021) https://corporatelawilnu.wordpress.com/2021/04/25/enforceability-of-non-compete-clauses-legal-position-in-india/> accessed 10 February 2023
[48] *Power and Energy International (Mauritius) Ltd* Case No.-2016/06/404
[49] *United Biotech Pvt Ltd v Orchid Chemicals & Pharmaceuticals Ltd & Ors* 2011, LPA No.679 of 2011

On 15 May 2020, the CCI released a press note inviting public comments concerning the scrutiny of non-compete restrictions in the regulation process of combinations[50]. Observing that it was not appropriate to prescribe a general set of standards to assess non-compete restrictions in the modern business environment, and a detailed case-by-case analysis, though possible, would be unfeasible due to the timelines of the combined cases, the CCI proposed to delete Para 5.7 of Form I in the Combination Regulations of 2011, which required parties to submit to CCI for examination the details of their non-compete obligations under a combination deal. This would grant parties the requisite flexibility to determine their non-compete obligations while reducing their information burden.[51]

Consequently, the requirement for providing information on the parties' non-compete obligations under Para 5.7 of Form I of the Combination Regulations, 2011 has been done away with[52], and the Guidance Note of 2017 has also been withdrawn[53]. Thus, by dispensing with its duty of prior assessment of non-compete clauses under the combination review process, the CCI has made the parties themselves responsible to assess their non-compete obligations and ensure that they are not anti-competitive. Any concerns related to the non-compete obligations are to be scrutinized under Sections 3[54] and 4[55] of the Competition Act[56].

CONCLUSION

Non-compete covenants in M&A transactions are vital to protect the buyer's ability to effectively run the acquired business and preserve or grow its value after the sale. They provide buyers

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[50] Competition Commission of India, 'Inviting Public Comments Regarding Examination of Non-Compete Restrictions under Regulation of Combinations' (*CCI*, 15 May 2020) <https://www.cci.gov.in/search-filter-details/1118> accessed 17 February 2023

[51] *Ibid*

[52] Competition Commission of India (Procedure in regard to the Transaction of Business relating to Combinations) Amendment Regulations 2020, s 2

[53] Press Information Bureau, 'CCI amends one of the formats prescribed for notification of proposed combinations in Form I' (*PBI*, 31 December 2020 <https://pib.gov.in/Pressreleaseshare.aspx?PRID=1685061> accessed 16 February 2023

[54] Competition Act 2002, s 3

[55] Competition Act 2002, s 4

[56] Vishal Rajvansh, 'CCI's Decision to Eliminate Non-Compete Restrictions in Combinations' (*IndiaCorpLaw*, 4 July 2020) < https://indiacorplaw.in/2020/07/ccis-decision-to-eliminate-non-compete-restrictions-in-combinations.html> accessed 16 February 2023

with some level of protection against direct competition from sellers, and can also aid them in gaining customer loyalty and full utilization of the acquired know-how[57]. The non-compete restrictions in M&A transactions thus are aimed at preserving the value of the buyer's investments and protecting its economic interests.

A possible effect of non-compete covenants between entities is that the options available to the ultimate customers can be affected as the number of competing entities in the market is thereby reduced, and a dominant entity in the market is instead created. Considering these far-reaching consequences, it is inevitable that competition agencies actively investigate the non-compete covenants in M&A deals. In India, the CCI used to examine such non-compete restrictions of the parties before approving combination deals, but following the 2020 Amendment to the Combination Regulations, the onus has been shifted to the parties themselves, and they have to ensure that their non-compete agreements comply with all the relevant competition provisions. Through the Amendment, the CCI has relaxed disclosure requirements regarding non-compete restrictions which are a part of combinations and reduced its burden by vesting the responsibility of drafting balanced non-compete clauses and self-assessing the said clauses on the parties. The parties to combinations, and in this instance, to M&A transactions, have been given greater autonomy while drafting the non-compete agreements in their transactions. However, the non-compete agreement should be in the form of an ancillary restraint, which creates a balance between a healthy environment for business transactions, and the maintenance of effective competition in the market. Parties in India, therefore, should make sure that the non-compete restrictions do not go beyond the reasonable parameters which are required strictly to protect their interests under the M&A transactions. At the same time, in case of any violation, the CCI should also consider the non-compete restrictions given both the benefits and the harm that they may cause.

[57] *Ibid*