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Derogation from Standstill Obligation in Merger Control Regime of India: A Desirable Change?

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ABSTRACT

Corporate restructuring and competition level in the market is very closely intertwined with each other. India, in order to govern both the spheres, has adopted a mandatory and suspensory merger control regime, wherein the standstill obligation forms the most important intersection. As India has embarked its' journey to overhaul the combination and competition law landscape with introduction of novel measures like green channel, failing-firm defense, it has become pertinent to also focus and understand seemingly overlooked concepts like, standstill obligation. In this article, the authors untie the knot on the legal framework of standstill obligation in the Indian Competition Act and matured jurisdictions like the European Union. The article also dwells upon the recent recommendation of the derogation from standstill obligations by the Competition Law Review Committee 2019 and it's reflection in the newly introduced the Competition Amendment Bill 2020. As standstill obligation is the cornerstone of the Indian merger control regime, the impact of derogation from standstill obligation needs a nuanced understanding. Bearing this in mind, the authors also critically and comprehensively analyze the impact of the derogation from standstill obligation in the merger and acquisition landscape of India.

I. FUNDAMENTALS OF MERGER CONTROL REGIME

Corporate restructuring in the form of combinations and arrangement have a significant impact on the fundamental value of the merged/acquired entity and thus resultantly, reorients the competitive advantage in the market. Such reorientation can, however, have a distorted effect on the competitive structure; thus a robust legal structure must be in place to closely scrutinize the impact of the combinations on the level of competition and regulate anti-competitive consequences. In this view, all the developing nations across the globe (including India) are, therefore, striving to establish a nuanced *ex-ante* 'merger control regime'.

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The Indian merger control regime is relatively at a nascent stage as it came into effect on 1 June 2011, emanating from the Indian Competition Act 2002 ("**the Act**")[3]. Notably, India sanctions a mandatory and suspensory merger control regime. According to the Act, any combination which breaches the prescribed asset/turnover threshold is compulsorily approved by the Indian competition regulatory authority, the Competition Commission of India ("**CCI**").[4] In addition to it, the notifiable combinations are subjected to 'standstill obligations' in the interim[5] as the regulatory approvals generally dawdle. The standstill obligation bars the combinations from being implemented prematurely until approved by the CCI, to ensure that the parties maintain competition by operating independently of each other.

However, recently, the Competition Law Review Committee 2019[6] ("**CLRC**") has recommended dilution/derogation from standstill obligations in case of combinations undertaken through 'public bids and hostile takeovers'. To put it simply, it essentially means an exemption from the mandate to not consummate the combination pending its approval by competition authorities.[7] To advocate derogation from standstill obligations, the CLRC has taken cue predominantly from the European Union ("**EU**") merger control framework. However, the recommendation has spurred various debates pertaining to the inefficacy of the standstill obligations and more significantly, how derogation will act as an impetus to instantaneous transactions through public bids and hostile takeovers.

In this article, the authors discuss the legal position on standstill obligations in India and also matured nations with evolved merger control regimes, in order to draw a succinct comparison. The article also critically examines the potential impact of the foregoing recommendations, with a special focus on the intersection between the derogation from standstill obligation and public bid/hostile takeover.

II. LEGAL FRAMEWORK ON STANDSTILL OBLIGATIONS IN INDIA

The Indian merger control regime is largely governed by the Act. Sections 5 and 6 of the Act are the substantive merger control provisions that state which transactions are considered 'combinations' and prescribe the thresholds.[8] Before we proceed further it is important to appreciate the scope of term 'combination'. 'Combination' for the purposes of the Act is

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[3] The Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India).
[4] Section 5, The Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India).
[5] Section 6(2A), The Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India).
[6] Competition Law Review Committee Report (Ministry of Corporate Affairs 2019) [hereinafter CLRC Report].
[7] *Ibid.*
[8] Rahul Singh, Anmol Awasthi, and Ebaad Khan. *The Public Competition Enforcement Review - Edition 12 (India)*. [online] The Law Reviews. https://thelawreviews.co.uk/edition/the-public-competition-enforcement-review-edition-12/1225873/india

defined very broadly, to include any acquisition of shares, voting rights, control or assets or merger or amalgamation of enterprises, where the parties satisfy the prescribed monetary thresholds in relation to the size of the acquired enterprise and the combined size of the acquiring and acquired enterprises with regard to the assets and turnover of such enterprises[9]. This equally includes open market purchases, minority acquisition of listed shares on the stock exchange, including potential hostile acquisitions.

Given the suspensory nature of the regime, it also prescribes a regulation mechanism for combinations, wherein CCI evaluates the likely effects of the proposed combination on competition and regulates them appropriately.[10] Correspondingly, CCI undertakes assessment of all the sweeping forms of combination in an equivalent manner. This assessment, however, contemplates a statutory waiting period for the interested parties, recognized as standstill/ suspensory obligation.

The statutory underpinning of the standstill obligation is guided by Section 6 (2A)[11] of the Act. As per Section 6 (2A), any combination transaction requiring an approval from the CCI cannot be consummated before it is reviewed for any appreciable adverse effect on competition and approved by the CCI under section 31 of the Act or until the expiry of the 210 days mentioned therein, whichever is earlier. The underlying objective of the standstill obligation is well-delineated by the CCI by noting that *"the basic objective of standstill obligations is to ensure 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.[12]"* It ensures that parties to the combination act independently as regards their ordinary course activities and meanwhile maintain the market competition.

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[9] Provisions Relating to Combinations (COMPETITION COMMISSION OF INDIA) (2020), https://www.cci.gov.in/sites/default/files/advocacy_booklet_document/combination.pdf (last visited Nov 26, 2020)

[10] Directorate for Financial and Enterprise Affairs Competition Committee, Suspensory Effects of Merger Notifications and Gun Jumping - Note By India (OECD 2018

[11] "Section *6(2A)- No combination shall come into effect until two hundred and ten days have passed from the day on which the notice has been given to the Commission under sub-section (2) or the Commission has passed orders under section 31, whichever is earlier."*

[12] Bharti Airtel Limited: Combination Regn. No. C-2017/10/531 (India)

Notwithstanding the statutory obligation, parties in certain cases disregard the contemplated obligation through early implementation of a leg of the transaction, colloquially known as ‘gun jumping’. The expression ‘gun-jumping’ is not expressly included in the Act, although it is not alien to the Indian jurisprudence. The CCI in the case pertaining to Ultratech Cement's acquisition of certain cement plants of Jaiprakash Associates Limited, noted that “*gun jumping to imply any action 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.[13]

In response to dissuade parties from gun-jumping, any violation of the standstill obligation triggers heavy imposition of penalties by the CCI under section 43A of the Act. According to section 43A, non-compliance could render them liable up to 1% (one percent) of the total turnover or assets of such combination whichever is higher and could, therefore, significantly derail not just the transaction but the financial health of the enterprises. The CCI’s decisional practice shows that it has and continues to impose significant penalties for gun jumping.

Therefore, what follows from the foregoing discussion is that parties in all form of combination should operate in business-as-usual mode until all approvals are received, and the transaction is closed, to adhere to standstill obligation[14] and avoid heavy penalties.

III. CONTOURS OF CLRC RECOMMENDATIONS AND COMPETITION BILL 2020

In July 2019, the CLRC formed under the aegis of the Ministry of Corporate Affairs, published a report reviewing the competition regime[15]. Amongst other suggestions, the report advocated dilution of standstill obligations for the first time, by laying down a blueprint for the legal changes this would necessitate. At the outset, the CLRC recommended that as “*execution and completion of shares acquisition in public bids is usually instantaneous. Thus, mandating a standstill on acquisition of shares pending the approval of the combination may hamper the viability of acquisitions via public bids*.”[16] It is pertinent to note that derogation is limited only to transactions through public bid and hostile takeover, and no other form of combinations. Also, the CLRC clearly clarified that it will not be an absolute exemption, but only means that parties are free to operationalize the combination while the approval is pending.[17]

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[13] UltraTech Cement Limited: Combination Regn. No. C-2015/02/246
[14] Staying compliant with competition law for M&A, INDIA BUSINESS LAW JOURNAL VANTAGE ASIA, (Nov. 26, 2020, 11:25 AM), https://www.vantageasia.com/staying-compliant-with-competition-law-for-ma/
[15] *Supra* note *4*.
[16] *Supra* note 4.
[17] *Supra* note 4.

Laying down the broad blue-print, the CLRC noted that parties should be allowed to purchase securities, provided they surrender all beneficial rights (of dividend and voting) attached to such securities until CCI approves the proposed combination.[18] Further, such securities should also be placed in an escrow account pending CCI's approval. Before any sanction of such waiver, CCI should undertake an analysis of various relevant factors like the effect of standstill obligations on the enterprises or on relevant third parties, the extent and nature of damage caused to parties, nature of the relevant market of the enterprises involved, likely effect of proposed combination on competition. The CLRC, thus, endeavors to depart from the previous position of the law.

Soon thereafter, the MCA relying on the CLRC recommendations, proposed the Competition Amendment Bill ("**Bill**"), 2020[19] which propounds insertion of Section 6A to the Act and tweaking the standstill period from 210 days to150 days, to provide relief from the standstill obligations. Specifically, Section 6A permits the acquirer to pursue securities with the open offer through (i) series of transactions over secondary markets, and (ii) under the Takeover Regulations,[20] without observing the standstill period. However, the acquirer can purchase securities only after the prior intimation to the CCI and concomitantly, should maintain the securities in the manner specified and not exercise any ownership or beneficial rights or interest in such securities, till approval is pending.[21]

By the way of cons, the Bill creates vacuousness in the regime as it fails to address the implications on the shares acquired, in the case where the CCI rejects the combination. It is important to take into consideration that if the transaction is disapproved or blocked by the CCI, the reversal of the transaction should be eased and calibrated in such a manner that it does not cause any harm to the competition levels. Nevertheless, this issue was clearly addressed by the CLRC by suggesting that securities should be strictly recorded in the escrow accounts because it will ease out the process of reversing the arrangement in case CCI rejects the combination.[22] But, the Bill falls short to throw light on this issue and thus, creates an unwanted anomaly.

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[18] Supra note 4.
[19] Draft Competition (Amendment) Act, 2002, http://feedapp.mca.gov.in/pdf/Draft-Competition-Amendment-Bill-2020.pdf (last visited on November 26 2020)
[20] *Ibid*.
[21] *Ibid*.
[22] *Supra* note 4

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Interestingly, one should note that the recommendation advocated by the CLRC is an attempt to streamline the Indian merger control regime to bring it at par with international best practices. Furthering the same, the legal amendment sought to be introduced by the Bill under Section 6A is already well-tested in the EU Merger Control Regulations[23]. The specific nuances of the international practices are discussed next.

IV. INSIGHTS FROM INTERNATIONAL JURISDICTIONS

More than 146 jurisdictions around the world currently have some form of merger control regime under their antitrust laws[24] as they have acknowledged the need of merger controls laws for the growth of the economy. As noted above, the CLRC recommendations are fundamentally in line with the matured merger control regimes in jurisdictions like European Countries like Norway, Switzerland and some other nations like Brazil[25]. In particular, these jurisdictions have restored legal regimes related to derogation from standstill obligations as they accurately comprehend the extraordinary situations where assets of the target company are susceptible to deterioration if the acquiring company fails to contribute funds, making the merger transaction unviable after the standstill period.

The EU merger control regime is governed by the EU Merger Regulation enacted in 2004 ("**EUMR**")[26]. The EUMR imposes a suspensory notification regime for notifiable concentrations when the relevant thresholds are triggered, in tandem with the standstill obligation that transaction cannot close until it has been notified to, and approved by, the European Commission.[27] The standstill obligation also applies to public bids, since although the acquisition of shares is allowed, the acquirer is required to notify the concentration without delay and must not exercise the voting rights attached to the acquired securities before the European Commission's decision approving the concentration how they often

[23] "Article 7(3)-The Commission may, on request, grant a derogation from the obligations imposed in paragraphs 1 or 2. The request to grant a derogation must be reasoned. In deciding on the request, the Commission shall take into account inter alia the effects of the suspension on one or more undertakings concerned by the concentration or on a third party and the threat to competition posed by the concentration. Such a derogation may be made subject to conditions and obligations in order to ensure conditions of effective competition. A derogation may be applied for and granted at any time, be it before notification or after the transaction"

[24] Sokol, D. Daniel and Blumenthal, William, Merger Control: Key International Norms and Differences (January 8, 2012). INTERNATIONAL RESEARCH HANDBOOK ON COMPETITION LAW, Ariel Ezrachi ed., Edward Elgar, 2012, https://ssrn.com/abstract=1981794

[25] *Supra note 4*

[26] The EC Merger Regulation, Council Regulation (EEC) No 4064/89 of 21 December 1989.

[27] Gavin Bushell, *EU Merger Control and Implications from the Effects of the Coronavirus Crisis,* KLUWER COMPETITION LAW BLOG, (Nov. 26, 2020, 11:25 AM), http://competitionlawblog.kluwercompetitionlaw.com/2020/03/20/eu-merger-control-and-implications-from-the-effects-of-the-coronavirus-crisis/

account for the special characteristics of on-market share purchases in takeover situations and allow for special dispensations, in the context of standstill obligations.[28]

However, unlike India, Article 7(3) of the EUMR enables the European Commission to grant derogation from standstill provisions. The grant of derogations by the European Commission is, however, subjected to a reasoned application of the party acquiring control and certain conditions to keep a check on the adverse effect on competition. Prior to the grant of derogation, the European Commission will determine; viz. (i) that the transaction has no negative/adverse effect on competition; and (ii) there is no imminent risk to the third parties if derogation is not granted. The burden to satisfy these two conditions lies with the applicant seeking derogation.[29] Nevertheless, it is to be noted that derogation is not the way out from the requirement to obtain applicable competition approvals from the Commission; therefore, parties would still need to get through the merger control review process.

In practice, however, the number of derogations allowed is small compared to the total number of merger notifications[30], which shows its restricted availability and its vulnerability to factual situations. Having said that, some of the derogations, in contrast, were granted in less than a day of the application by the European Commission where the financial failure of the bank would have an adverse effect on the stability of the financial system as a whole. This ground was supported both by UK government & the Commission.[31] Furthermore, during the 2008 financial crisis, the European Commission granted derogations for the acquisition by Santander of Bradford & Bingley and the acquisition of Fortis by BNP Paribas. The European Commission's reasoning in these cases suggests that systemic risk threatening financial stability as a whole was a decisive factor in the assessment of the risks related to the suspension of the transaction.[32] Therefore, depending upon the feasibility of the target company to continue the operations of the company during the merger process, parties have an option to apply for the derogation or to fast-track the merger review process (wherever allowed) and correspondingly, can be granted by the European Commission.

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[28] Bruno Alomar, Sophie Moonen, Gorka Navea and Philippe Redondo, *Electrabel/CNR: the importance of the standstill obligation in merger proceedings*, (Nov. 26, 2020, 11:25 AM), https://ec.europa.eu/competition/ publications /cpn/2009_3_11.pdf

[29] *Supra* note 23

[30] Between Sep 1990 and 31 July 2018, the EC has received a total of 7,037 merger notifications and 124 applications for an Art. 7 (3) derogation (http://ec.europa.eu/competition/mergers/statistics.pdf); in the past 10 years (2008-2017), the EC granted derogations in 25 cases (Arnold & Porter, 2018, p. 23[33])

[31] Santander/Bradford & Bingley assets, Case M.5363 (European Commission)

[32] BNP Paribas/Fortis, Case No COMP/M.5384 & Santander/ Bradford & Bingley Assets, Case No COMP/M.5363 (European Commission)

Conversely, the USA merger control laws do not provide any provision allowing grant derogations of suspensory norms. But the US agencies, with an intent to speed up the process of merger review do provide an expedite mechanism to reduce the standstill period to enable the merging parties to close the transactions in the considerate time. This can be attained by early termination of the waiting period which can be granted at any point during the pendency of the merger review process. The USA agencies, after determining that there will be no adverse effects on the competition, grant the early termination usually within 15 days from the date of the formal application. Many other jurisdictions like Japan, Canada prefer a similar approach of granting early termination.

To encapsulate, derogation or early termination of the standstill obligations forms the heart of the sophisticated merger control system, like EU or the USA, respectively. This procedural merger clearance norm in exceptional circumstances is an important concept in regulation of mergers when the parties successfully justify the need of derogation from standstill obligations.

V. NEED AND IMPACT OF THE DEROGATION FROM STANDSTILL OBLIGATIONS

Standstill obligations significantly impact the combination and arrangement transactions in many ways. The primary concern that underpins criticism of the standstill obligations is the delay in the consummation of the transaction because it leads to an interval period between parties signing a deal and finally closing it. By the virtue of the standstill obligation, the implementation process and therewith the efficiency benefits from a merger is delayed and jeopardized if firms are too restricted in effective preparatory activities during the standstill period.[33] Hence, it was important for the legislative authorities to understand that the time and cost is a crucial element in combination cases, and hence a provision to expediate the process in any manner was the need of the hour.

Keeping in mind this impediment, the CLRC recommended derogation from standstill obligation in the prompt transactions such as public bids, open market purchases and hostile takeover. At the outset, one may effortless recognize that the negative impact of the standstill obligation is exacerbated in these instantaneous transactions as time is a perennial issue in these transactions.

(a) <u>Open Market Purchase</u>: In case of open market purchase of publicly listed companies, when a real-time bulk/block deal of shares becomes available on stock exchange, the

[33] Pauline Kuipers, Hera Butt, *Double Caution: Gun Jumping Risks in M&A Transactions*, BIRD & BIRD, (Nov. 26, 2020, 11:25 AM), https://www.twobirds.com/en/news/articles/2020/global/double-caution-gun-jumping-risks-in-m-and-a-transactions.

seller and the buyer wants to act quickly to complete the purchase since the market price of shares is highly susceptible to fluctuations which can impact the agreed value of consideration.[34] However, the presence of the standstill obligations inevitably delays the process and such delay defeat the entire purpose of a market purchase as stock prices fluctuate. Also, it raises substantial commercial risks, such as devaluation of shares, depletion of investment value during this interval[35] because of the impending approval. As a result, an acquirer in every open market purchase transaction faces a grave conundrum, either wait for the CCI approval (which may take 210 days) and bears the risk of losing the viability of the agreed value of the transaction[36]; or given submits to the sensitive time-nature of the transactions by gum-jumping the standstill obligations.

Despite the inherent risk of levying heavy penalties for gun-jumping, the parties have consummated the leg of the open purchase transactions in the past because the short-delivery and settlement period of the publicly trade securities often make it unfeasible to secure the CCI approval in advance of purchasing in shares on time.[37] In the case of Thomas Cook India Ltd.[38], the CCI noticed that the acquisition of 9.93% shares of Sterling by Thomas Cook Insurance Services Limited through open market purchases were consummated without any notification. Thereby, the CCI imposed a penalty of INR 1 Crore on the relevant parties under Section 43A of the Act, for failing to notify and consummating certain non-reportable but inter-connected transactions before taking the approval of the CCI.[39] Similarly, in the case like Deepak Fertilizers[40] and the UB/Adventz Group, the CCI levied a heavy penalty on both the groups for consummating parts of the transaction by the open market purchases without the prior approval of the CCI resulting in gun jumping.

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[34] Anisha Chand & Anmol Awasthi, *Open Market Purchases – India Plans to Dilute Standstill Obligation*, COMPETITION POLICY INTERNATIONAL, https://www.competitionpolicyinternational.com/open-market-purchases-india-plans-to-dilute-standstill-obligation/

[35] AZB & Partners, *India - Gun-Jumping Concerns Raised By Interim Covenants*, CONVETUS LAW, http://www.conventuslaw.com/report/india-gun-jumping-concerns-raised-by-interim/

[36] Anisha Chand, *Market purchase conundrum: How the amendments to CCI rules affect M&A deals*, CNBC, https://www.cnbctv18.com/ views/market-purchase-conundrum-how-the-amendements-to-cci-rules-affect-ma-deals-4871821.htm.

[37] *Open Market Transactions by Competitors in India- A feasibility Study*, AZB, https://www.azbpartners.com/bank/open-market-transactions-by-competitors-in-india-a-feasibility-study/

[38] Thomas Cook (India) Limited, Combination Registration No. C-2014/02/153

[39] Dr. Ravikant Bhardwaj, *Working Paper on Business Implications of Gun Jumping in Combination Regulations*, IICA, https://iica.nic.in/images/Working%20Paper%20on%20Business%20Implications%20of%20Gun%20Jumping%20in%20Combination%20Regulations.pdf

[40] Competition Commission of India, Order u/s 43A of the Competition Act, 2002 (“Act”) in the notice given u/s 6 (2) of the Act given by SCM Soilfert Limited, https://www.cci.gov.in/sites/default/files/C-2014-05-%20175-43A_0.pdf

(b) Hostile Takeover: It is also important to note that this quagmire even arises in hostile bids takeovers because of two-fold reasons: time is of paramount importance and the window of opportunity to complete the transaction is small.[41] But, if the derogation from standstill obligation is effectuated in hostile takeovers, one may argue that it will be detrimental. In the hostile takeover, the acquirer generally extends hostile tender offers directly to the shareholders of the target company, without any intimation to the management. To mitigate the impact of hostile offer, often it is witnessed that the target companies utilize this standstill period to derail the attempt of hostile takeover by adopting various defences. In particular, to make the company adopt measures to look less appealing and to make takeover more difficult, companies tend to deploy self-fortifying defensive measures during the standstill period. These defensive mechanisms include anti-takeover constitutional amendments, adoption of poison pill rights plans, asset & ownership restructuring and so on. By taking away this defensive window from the companies, may be worrisome for the companies struggling to safeguard themselves from any potential takeover.

Despite the limitations, the market sentiment perceives it as a welcome move as it eases the burden on stakeholders looking to close a deal at the most attractive price and protects the element of spontaneity that is the essence of a market transaction.[42] More importantly, it is worth noting that two important safeguard strategies have been adopted. First, the proposed derogations will be limited in scope, allowing only for a partial implementation prior to clearance, sufficient to prevent the irreparable damage to the viability of a merging party and, consequently, to the feasibility of the transaction; and second, in any case, as per Section 230-232 of the Companies Act 2013 all mergers all approved/sanctioned by the National Company Law Tribunal in order to protect the shareholder's interest.

Moreover, the legal recognition of the derogation from standstill obligation in Section 6A of the Bill, unarguably, holds potential of achieving three objectives, if it is approved by the parliament. *Firstly*, Section 6A will enable the CCI to monitor open offers transactions while ensuring that the acquirer is not in a position to exert successful control over the target in the meantime. *Secondly*, it assures that the target company is not in position to use the standstill period to its advantage in deploying defensive measures in hostile takeovers. *Finally*, by allowing some versatility for hostile takeovers, the Indian competition law can alter the present market into attractive landscape for corporate control.

[41] *Supra* note 32
[42] *Supra* note 34

On the less green side of things, the broad sweep of the recommendation by the CLRC[43] evidently raises questions on the discretion to be exercised by the CCI to grant derogation in case of public bids/hostile takeover. In this regard, the Organization for Economic Cooperation and Development ("**OECD**") in May 2020, astutely guided the grant of derogation. OECD noted "*For instance, competition authorities may consider derogations limited to the 'sufficient control' needed to be able to take specific strategic decisions such as securing immediate financing or allowing for the transfer to the acquirer of certain contracts between the target and third parties (e.g. lease agreements). Such derogations may also be used for cases where the transaction cannot be consummated until a remedy is implemented (e.g. a divestiture) and the target needs to adapt its commercial strategy to ensure its viability during the divestiture phase. Nonetheless, such derogations are unlikely to allow acquirers take strategic control over the whole target's business until the clearance is obtained – and if such full derogations are conceded this requires that the competition authority has the legal powers to unwind the merger post-implementation.*" Taking a cue from the suggestions by OECD, the Indian regime should streamline a uniform framework to grant exemption from the standstill obligation in tune with the OECD recommendations.

Without prejudice to the above discussion, it can be contented that the best arrangement would have been the expedition of the CCI's approval mechanism as adopted by the USA merger laws. Enunciating the same, the Bill has proposed to shorten the prescribed timeline from 210 days to 150 days[44] for all the form of combinations which will be a huge breather for the parties; thus there exist no need of the derogation. In our opinion, the expeditious clearance mechanism will not be entirely capable of resolving the time sensitivity issue in the case of instantaneous transactions like public bids and hostile takeover, and hence amendments like derogation is very important and crucial for the India merger control regime.

VI. WAY FORWARD AND CONCLUDING REMARKS

At the end, it is important to understand that the main rationale behind the Indian merger and acquisition landscape is increasing efficiencies that enhance welfare for society, and such stern regulatory delays indubitably hampers the vital process of corporate restructuring. These bold steps to streamline the process for approving open market purchase and

[43] *Supra* note 4.
[44] *Supra* note 20.

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hostile takeover will go a long way in enhancing the certainty and confidence of investors to undertake transactions in India and encourage ease of doing business. Moreover, the CCI espouses a mandate of facilitation rather than obstruction to ease of doing business.

In our opinion, the relevance of standstill obligations has been intensified because of the economic crisis caused by the outbreak of the coronavirus pandemic. The current crisis has threatened the stability of the world's economy. As a result, the crisis-driven and rescue merger and acquisition activity will be heavily relied upon by the distressed entities for the revival and consequently, competition authorities are likely to face increased pressure to speed up their merger reviews. As a white-knight, the derogations in public bids and hostile takeover might prove helpful to competition authorities when dealing with transactions requiring immediate implementation pending the merger review[45] and unarguably, will quicken the process of combinations.

As a testimony to the fact, in the EU, derogations were considerably utilized during the global economic downturn in 2008 and 2009. Keeping in mind the unprecedented hardships levelled by the outbreak of the coronavirus, the stage is now ripe for India for such relaxation in standstill obligation norms for the corporate entities. The benefits to stakeholders and to the stability of the markets, of critical transactions are likely to outweigh any competition detriment arising from them[46] as it will facilitate and promote the ease of doing business in India. As a concluding thought, India being at a nascent stage in the jurisprudential development of competition law, a lot has left to be tested and evolved through friendly merger control mechanisms to circumvent poor economic outcomes.

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[45] *Merger control in the time of COVID-19*, OECD, http://www.oecd.org/competition/Merger-control-in-the-time-of-COVID-19.pdf.

[46] Gavin Bushell, *EU Merger Control and Implications from the Effects of the Coronavirus Crisis*, (Nov. 26, 2020, 11:25 AM) http://competitionlawblog.kluwercompetitionlaw.com/2020/03/20/eu-merger-control-and-implications-from-the-effects-of-the-coronavirus-crisis/