CROSS BORDER MERGER CONTROL REGIME

THESIS

LLM (CORPORATE LAW)

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بسم الله الرحمن الرحيم

DEDICATION

I wish to dedicate this work to my Father, who always supported me and encouraged me throughout my life.

APPROVAL SHEET

CROSS BORDER MERGER CONTROL REGIME

By

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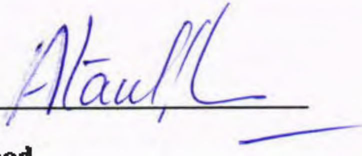
Research supervisor: 

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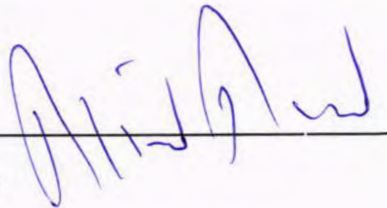
Internal examiner: 

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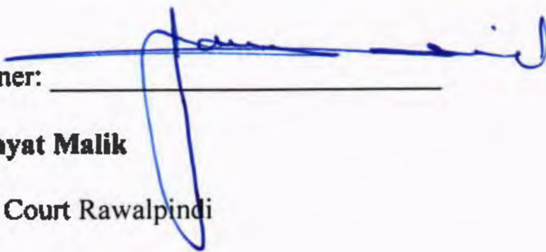
External examiner: 

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DECLARATION

I, Hamza, hereby, declare that this dissertation is original and has never been presented in any other institution. I, moreover, declare that any secondary information used in this dissertation has been fully acknowledged.

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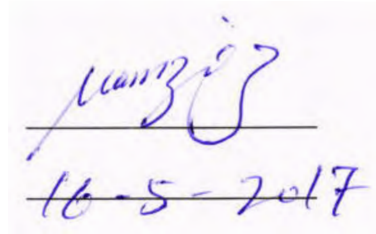
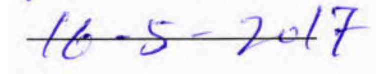
Signature: 

Dated: 

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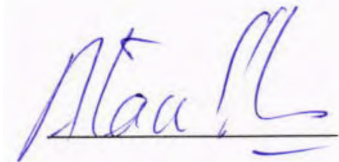
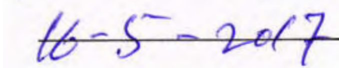
Signature: 

Dated: 

ABSTRACT

Free international trade face may barriers, one of which is the deferent laws of merger control in deferent jurisdictions, in lack of an international regime for cross border mergers, complying with the requirement of deferent merger laws is an obstacle for international trade. This research studies the possibilities of establishing an international regime/institution for controlling cross border mergers and also studies the possible hurdles and challenges of creating an international merger control regime.

Table of Acronyms

E.U	European Union
EC	European Community
EEA	European Economies Area
EFTA	European Free Trade Agreement
ESA	Surveillance Authority
FTC	Federal Trade Commission
GATT	General Agreement on Tariffs and Trade
ICPAC	International Competition Policy Advisory Committee
IMCR	International Merger Control Regime
M&As	Mergers and Acquisitions
MEGs	Merger Enforcement Guidelines
OECD	Organization for Economies Cooperation and Development
WTO	World Trade Organization
DEEs	Developed and Emerging Economies
MRTPO	Monopolies and Restrictive Trade Practices Ordinance
MCA	Monopoly Control Authority
CCP	Competition Commission of Pakistan
ICN	International Competition Network
WB	World Bank
IMF	International Monetary fund
UNCTAD	United Nations Commission of Trade and Development
TEC	Treaty Establishing European Community
SSNIP	Small but significant non-transitory increase in price

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Thesis Statement:

Globalization of the business faces barriers, one of which is different merger control laws of different jurisdictions that should be redressed through international merger control regime.

Introduction:

Competition law aims to facilitate the economic environment of a country by curbing elements in a market economy from working against competitive forces and by devising policies to boost business rivalry among the players in a market.[1]Competition law is law that promotes or maintains market competition by regulating anti-competitive conduct by companies. Competition law is known as antitrust law in the United States and anti-monopoly law in China and Russia. In previous years it has been known as trade practices law in the United Kingdom and Australia.[2] Modern competition law has historically evolved on a country level to promote and maintain competition in markets principally within the territorial boundaries of nation-states. National competition law usually does not cover activity beyond territorial borders unless it has significant effects at nation-state level.[3]

Merger control refers to the procedure of reviewing mergers and acquisitions under antitrust / competition law. Over 60 nations worldwide have adopted a regime providing for merger control. Merger control regimes are adopted to prevent anti-competitive consequences of concentrations.[4]

The need for merger control is widely supported – but the specific principles and tools by which it should be exercised are subject to discussion and debate, and also revision.

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[1]Joseph Wilson," *Antitrust Remedies in Pakistan: Composition and Challenges"* COMPETITION LAW INTERNATIONAL September 2010 at 62

[2]http://en.wikipedia.org/wiki/Competition_law last accessed on 24-09-2013

[3]Taylor, Martyn D. *International competition law: a new dimension for the WTO?*, Cambridge University Press, (2006) at 1.

[4]http://en.wikipedia.org/wiki/Merger_control last accessed on 24-09-2013

The pros and cons of merger control are high on the agenda of policy makers, competition authorities, academics, representatives of industry and labor organizations, and others. The views and concerns on corporate concentrations also span a wide range, covering at one extreme scrapping merger control altogether, and at the other prohibiting all mergers, as well as even proposals for breaking up very large firms, which in some cases have attained economic strength and influence comparable to that of some nations.[5]

The vast majority of significant competition issues associated with mergers arises in horizontal mergers. A horizontal merger is one between parties that are competitors at the same level of production and/or distribution of a good or service in the same relevant market.[6]

Experts believe that aim of competition laws is to promote competitiveness, and to protect public interest. Promotions of competitiveness creates market opportunities (by preventing market dominance by few or one), which in turn encourage foreign investment, because investors also avoid investment in a country where monopolies flourish. Public interest is far broader then the sectional interests of the firm. More so, public interest stretches beyond the interests of consumer, of emerging entrepreneurs, or of labor and community constituencies.[7]

Statement Of Problem:

Cross border mergers are beneficial for the economy of the developed and developing countries but at the same time it can be very harmful for the same. Although the competition institutions are working in all over the world and doing good job to the extent of their country only. When they deal with the international investment all the institutions creates same problems for the merging parties. Different laws of different jurisdiction have different complications is very astonishing for the investor. At the same time, it is also impose duel tax on the single transaction. DEEs faces many challenges in their effort to build effective merger control regime

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[5]http://papers.ssrn.com/sol3/papers.cfm?abstract_id=361761 last accessed on 24-09-2013

[6] International Competition Network - Merger Guidelines Workbook, para. 1.6 http://www.internationalcompetitionnetwork.org/uploads/library/doc321.pdf

[7]http://www.scribd.com/doc/21028435/Competition-Commission-of-Pakistan last access on 24-09-2013

but lack of resources, inadequate legal frame work, absence of proper competition culture, problems with implementation and dominance of industrial policy all are the factors which is leading it towards bad situation of the economy.

Framing Of Issues: Research Questions:

- What is meant by merger control? What is difference between merger control and cross-border merger control regime?
- What is the importance of cross- border merger control?
- How the cross-border merger control can facilitate developing economies to improve?
- What are the merger control regimes in different countries?
- What are the problems due to different laws of different jurisdictions?
- Influence of industrial policy and politics of different jurisdictions?
- What WTO did in this regard and what is the role of other international trade related organizations?
- What are the factors creating barriers against the establishment of international merger control regime?
- Is it possible to establish a cross-border merger control?

Hypothesis:

Keeping in consideration the above mentioned problems it is proposed that corporate mergers should be controlled by an international authority which is empowered by the law and whole world should acknowledge it. There must be proper implementation of merger control regime and regulatory authority like WTO should implement it throughout the world. There should be proper check by the government (ministry of finance).

Objectives Of The Study:

This research results the suggestion and recommendation about the proper working of the merger control due to which a free and fair economy may exist country wise. This may leads to

reduce the legal complication in this regard. This research leads us how to control the monopoly, abuse of market dominance, economic threat, and other harms which may occur inside the country's economic market. It will provide a mechanism to protect the investor from legal complications country wise and reduce fees and taxes and political pressure

Literature Review:

After a long research and inquiry for the literature review I searched the articles, books, competition laws of different jurisdictions and the reports and proposals of WTO in this regard and other materials from which I must mention the related lines paragraphs etc here in this proposal to back my research

DEEs face many challenges in their efforts to build effective merger control regimes, including lack of resources, an inadequate legal framework, the absence of a proper competition culture, the difficult transition towards a market based economy, the dominance of industrial policy, problems with implementation, and the role of foreign direct investment (FDI).[8]

With the growing importance of international markets, many American firms find themselves subject to foreign competition laws, especially those of the European Union's In turn; compliance with those competition rules has become an imperative for American companies.[9]

The principal goals of antitrust should be: first, to deter anti-competitive conduct, and second, to take illegal gains away from the law violators and restore those monies to the victims. If both those goals are achieved, enforcement will restore the competitive market to the state it

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[8] (http://www.oecd.org/daf/competition/mergers/50114086.pdf) last accessed on 15-12-2013

[9] William M. Hannay Transnational Competition Law Aspects of Mergers and Acquisitions, Northwestern Journal of International Law &Business , Volume 20 Issue 2*Winter* Winter 2000 at**20:287** (2000)

was in before the illegal conduct occurred and will create penalties sufficient to deter wrongdoers.[10]

The proposals concerning international competition law have traditionally been focused on cartel behavior rather than structural restraints of competition. Given the political value of merger approval decisions, it was apparent that it would be difficult, if not impossible, to achieve an international consensus on the control of mergers. Recently, however, attention has shifted to the possible regulation of cross-border mergers and acquisitions. This attention is attributable to the high-profile cases such as the 1998 acquisition of McDonnell Douglas by Boeing which created significant political conflict.[11]

Merger control in the EU began with the European Communities Merger Regulation (ECMR), which came into force on September 21, 1990. Since then about 3,500 mergers have been scrutinized by the European Commission. According to the ECMR, a merger has community dimension, hence it is under the jurisdiction of the Commission, if "it takes place between firms with a combined worldwide turnover of at least 5 billion Euros and a turnover within the European Economic Area of more than 250 million Euros for each of at least two of the undertakings unless each undertaking achieves more than 2/3 of its aggregate Community turnover within one and the same member state.[12]

In many other countries, particularly developing countries, the widespread acceptance and adoption of competition law systems can be explained - at least in part- by the isomorphic behavior of these countries.

Many developing countries, in an attempt to stimulate their economies, have adopted laws similar to those of the developed countries.21 It is generally perceived that the adoption of competition laws is necessary to achieve the economic success witnessed in the developed countries which already have laws protecting competition.22 Ultimately, the globalization of

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[10]Robert Pitofsky, 'Antitrust at the turn of the Twenty-First Century: The Matter of Remedies', 91 *Georgetown Law Journal* 169, 170 (2002).

[11] Eleanor M. Fox, Antitrust Regulation Across National Borders: The United States of Boeing versus the European Union of Airbus, 16(1) BROOKINGs REV. 30 (Winter 1998).

[12]http>//papers.ssrn.com/sol3/papers.cfm?abstract_id=920605

business, combined with the spread of competition laws, increases the potential for overlap between the laws.[13]

The first factor is clearly the globalization of business. The process of globalization generally refers to the increase in cross-border trade and investment due largely to the reduction of traditional barriers to such activities? [14]

Research Methodology:

The thesis has a law and economics approach. This will include an analysis of the current legal framework and practices in the world. A normative enquiry will be used to give recommendations on the positive findings in the thesis.

Main source of material will be theory based on academic books and articles along with rulings of court, policy statements and decisions and notices by the competition Commission of Pakistan Online sources will also be used to order to follow progress in recent case law.

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[13] http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1507&context=njilb last accessed on 15-12-2013

[14] MALCOM WATERS, GLOBALIZATION *(1995);* JOHN *H.* DuNNING, THE GLOBALIZATION OF Business: THE CHALLENGE OF THE 1990s (1993).

CHAPTER .1

INTRODUCTION

1.1 Competition Law

Competition law is law that seeks to ensure fair competition in open markets. The law is designed to protect the consumer from the voracious practices of business, by limiting business activates which may lead to unfair profit like market allocation, bid rigging and price fixing.[15]Competition law is also referred to as Antitrust Law. The term antitrust law is used in the U.S., and in other countries the idea of competition law has great worth in policy because the law fosters a healthy economy and the creation of a competitive economic environment. Though the competition law is highly complex, it remains the center of discussion in economic markets. However, enforcement of the law requires a high understanding of the economics of competition and its application in the market place on a case by case basis. In order to be effective, the agency responsible for enforcing the law should be insulated as much as possible from bureaucratic and political influences.[16] Sayyeda Fatima, a well-known economist from Pakistan, is quoted as stating that: "In the case of Pakistan, the government pursues the promotion of sustainable economic development and improvement of well-being of all citizens, with an emphasis on maximizing the welfare of consumers and producers, by protecting and

[15] http://www.investopedia.com/ask/answers/09/antitrust-law.asp last accessed on 24-10-2014

[16] Sayyeda Fatima, Competition law in Pakistan: brief history, aspirations and Characteristics, Commonwealth Law Bulletin Vol. 38, No. 1, March 2012, 1

promoting competition in the economy."[17] In order for Pakistan to achieve the objectives stated by Sayyeda Fatima, it must overcome the hurdles that harm an economic environment, such as cartels and the abuse of dominance, etc. The law dealing with these issues in Pakistan is present within its Competition Act, 2010.[18]

1.2 Historical Background Of The Competition Law In Pakistan

A good place to start reviewing the historical background of the Competition Law in Pakistan would be a review of the: "The Anti-Cartel Law Study Group"[19]. Formed by the government, the group was tasked to examine competition policies and suggest measures to control monopolies that are growing unreasonably and restricting trade practices. The study group began its duties at a time when private sector business in the country was experiencing growth.[20]

Meanwhile, the government continued to maintain an optimistic forecast for continued capital formation in the private sector. Because of this optimistic forecast, the government adopted policies that it thought would increase industrial licensing, as well as provide credits and fiscal concessions. Initially, the policies were successful. However, they ultimately failed because they placed the economic power within the country into to only a few hands. As a result of the failed policies, only a few families and select groups came to dominate the industrial, commercial,

[17] Ibid, 2

[18] The Competition Act No XIX of 2010 (published in the Gazette of Pakistan, Extraordinary, 13 October 2010) (hereinafter CA 2010).

[19] The Anti-cartel Laws Study group was set up by the Government of Pakistan in 1963 in pursuance of announcement made by the Finance Minister in his budget speech for fiscal year 1963–64

[20] http://www.planningcommission.gov.pk/five%20year%20plans/4th/4th5yPlanCH-6editing.pdf last accessed on 25-10-2014

banking and insurance sectors in country. [21]"The trend for overall resources to be controlled by a few created a general feeling of discontent in the country that was not advantageous to the public interest."[22] This report advocated the need for anti-monopoly and anti-cartel laws in the country in order to combat the evils that were beginning to prevail in the market.

Subsequently, "Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance (MRTPO) 1970"[23] became the first Competition Law in the country, followed by "The Monopoly Control Authority (MCA)" set up to serve as the enforcing organization. The ordinance is based on recommendations of Anti-Cartel Laws Study Group.[24] The draft of the ordinance was circulated by the government with budget (1969–70) for attaining public opinion. This draft received comments widely by public, press and chamber of commerce and industry. The President and Chief Marshall Law Administrator took these comments into consideration when promulgating the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance in February 1970.[25]

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[21] Mahbub Ul *Haq*, The Poverty Curtain: Choices for the Third World (Columbia University Press, New York 1974). 115-6

[22] GF Papanek, Pakistan's Development: Social Goals and Private Incentives (Harvard University Press, Cambridge 1967), 41

[23] Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance NO. V OF 1970 (Published in the Gazette of Pakistan, Extraordinary, 26 February 1970)

[24] The Anti-cartel Laws Study group (n 3) submitted its report in April 1964.

[25] The genesis of this legislative measure might be found in the Fundamental Rights and Principles of Policy enunciated in the then Constitution 1973 that reads as follows:

Article 18: Subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business:

Provided that nothing in this Article shall prevent

At the time, the ordinance was considered to be modern legislation. However, due to the changing economic environment, the MRTPO 1970 became inadequate to resolve competition issues. Unfortunately, the MRTPO 1970 also contained chronic deficiencies because it covered only private monopolies, and failed to cover monopolies of state. Furthermore, because the MCA had limited powers, lack of professionals to deal with issues, financial problems and an inadequate infrastructure, its authority became undermined with its entire existence being thrust into a crisis situation. "The MCA simply failed to do anything worth mentioning." Thus, in 70s the ordinance essentially became outdated, ultimately failing to provide the needs for modernization.

Due to the failure of the MCA, in 2005 the government of Pakistan sought out technical assistance in order to develop the frame work for a more comprehensive competition law. The government wanted to create a more effective competition law, competition agency and policy statement in order to obtain better results. As a result, Competition Ordinance 2007[26] was promulgated. The ordinance was the result of a joint effort between the Pakistan Finance

b) The regulations of trade, commerce or industry in the interest of free competition

therein.

Article 38: The state shall a) secure the well-being of the people, irrespective of sex, caste, creed or race, by raising their standard of living, by preventing the concentration of wealth and means of production and distribution in the hands of a few to the detriment of general interest and ensuring equitable adjustment of rights between employers and employees, and landlords and tenants. (see article 18 and 38 of consttution of pakistan 1973)

[26] The Competition Ordinance of 2007 (CO 2007) was promulgated by the President of Pakistan under art 89(1) of the Constitution of Pakistan, on 2 October 2007. The Competition Ordinance No LII of 2007 (published in the Gazette of Pakistan, Extraordinary, 2 October 2007) (CO 2007).

Ministry, the existing MCA, the World Bank, and the UK "Department for International Development (DFID)."[27] [28]

Ordinance 2007, was endowed with the establishment of the "Competition Commission of Pakistan (CCP)"[29] for the proper functioning of law. Additionally, this new ordinance awarded the commission the independent, quasi-regulatory and quasi-judicial powers, in order to provide it with the necessary power to overcome the deficiencies of the MRTPO.

However, despite optimism for the new Competition Law, its legality has been challenged by the Pakistan Supreme Court, ruling in Sindh High Court Bar Association v. Federation of Pakistan that: "[t]he PCO to be unconstitutional. Inter alia, 36 ordinances promulgated prior to 15 December 2007, including the Competition Ordinance 2007, required the approval of parliament."[30]

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[27] *The Department for International Development (DFID) leads the UK's work to end extreme poverty, ending the need for aid by creating jobs, unlocking* the potential of girls and women, working with other countries to reduce global greenhouse gas emissions.

[28] http://cc.gov.pk/index.php?option=com_content&view=article&id=59&Itemid=115 last accessed on 05-11-2014

[29] The Competition Commission of Pakistan (CCP) is an independent quasi-regulatory, quasi-judicial body that helps to ensure healthy competition between companies for the benefit of the economy.

The Commission prohibits abuse of a dominant position in the market, certain types of anti-competitive agreements, and deceptive market practices. It also reviews mergers of undertakings that could result in a significant lessening of competition. Combined with its advocacy efforts, the Commission seeks to promote voluntary compliance and develop a 'competition culture' in the economy.

The Competition Commission of Pakistan (CCP) was established on 2 October 2007 under the Competition Ordinance, 2007, which was re promulgated in November 2009. Major aim of this Ordinance was to provide for a legal framework to create a business environment based on healthy competition for improving economic efficiency, developing competitiveness and protecting consumers from anti-competitive practices.

[30] Supra note 2 at 47

In response to the ruling made by the Supreme Court, the president of Pakistan re-promulgated the ordinance on 18 April 2010: "The Senate's Standing Committee on Finance On the day of 5th May 2010 unanimously approved the draft of the Competition Bill 2010"[31] with minor changes. Under the ordinance 2010 CCP becomes defunct organization."... "Finally, on 23 September 2010, the Parliament of Pakistan unanimously passed the Competition Act 2010."[32]

1.3 The Globalization Of Competition Law

According to a report published by the Asian Development Bank, considered to be an expert on Competition Law, there are more than one hundred countries that have enacted laws that deal with anti-competitive forces. Currently, there are approximately 189[33] competition agencies on the international competition network.[34] Moreover, the organization of the Islamic Conference gives close attention on the competition issues, and has even started engaging its member states to be more active in the area. Additionally, the Korea Policy Center has begun efforts in the area of Competition Law, and the Canadians enacted their countries first Competition Law by passing the Canadian Competition Act 1889. According to the ICN, another organization known for its expertise in the area of competition policies: "The world has come a long way in

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[31] http://www.dailytimes.com.pk/default.asp?page=2010/05/06/story_6-5-2010_pg5_12 last accessed on05-11-2014

[32] Supra note 2 at 49

[33] http://www.internationalcompetitionnetwork.org/members/member-directory.aspx last accessed on 23-10-2014

[34] The ICN provides competition authorities with a specialized yet informal venue for maintaining regular contacts and addressing practical competition concerns. This allows for a dynamic dialogue that serves to build consensus and convergence towards sound competition policy principles across the global antitrust community.
The ICN is unique as it is the only international body devoted exclusively to competition law enforcement and its members represent national and multinational competition authorities. Members produce work products through their involvement in flexible project-oriented and results-based working groups. Working group members work together largely by Internet, telephone, tele seminars and webinars.

globalizing economic and legal principles that affect how businesses rival with each other and how states or supranational bodies, intervene in markets to ensure fair and healthy competition. Competition law has truly become global."[35]

In last decade, there has been a shift in many parts of the world towards what is termed as a "soft legal framework"[36] when it comes to competition laws. This shift is due to the rapid change in the area of law, away from the more traditional diplomatic approach.

With the expansion of business world-wide, the competition law has also expanded, possibly due to the shift internationally towards a soft legal framework. Though this is approach is a relatively new phenomenon for the world, we see where in 1947 a call was made to introduce the competition law, using the platform of the International Trade Organization (ITO) to promote competition law under the Havana charter. However, the ITO ultimately failed in introducing competition law to the world, and subsequent to the ITO's failure, the General Agreement on Tariffs and Trade (GATT) made no mention of competition rules as well.

In 50s, efforts were made by the United Nations Economic and Social Council to internationalize competition law. Similar efforts were made by the UN General Assembly, through Control of Restrictive Business Practices in the 80s.[37] The early efforts made by these

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[35] Syed Umair Javed, Globalization of competition law – Challenges for Pakistan's competition regime, available at http://ssrn.com/abstract=2035813 last accessed on 23-10-2014

[36] Fiammetta Borgia, 'New Governance Mechanisms in International Economic Law: The Role of Soft Law' (2010) Society of International Economic Law Paper 2010/31, 3 http://ssrn.com/abstract=1633984 last accessed on 23-10-2014

[37] Einer Elhauge and Damien Geradin, *Global Competition Law and Economics* (oxford , Hart Publishing 2011) 1239-42.

organizations no doubt has led to the involvement of many other organizations becoming involved in the internationalization of competition law, organizations such as: The World Bank (WB); The International Monetary fund (IMF); The Organization of Economic Conference and Development (OECD); as well as, the United Nations Commission of Trade and Development (UNCTAD).[38] Both the IMF and WB encourage the use of competition laws by imposing conditions that require a State to establish such competition laws within their respective countries before they are able to utilize the fiscal policies available through the IMF and WB.[39] Additionally, the OECD provides technical assistance to States seeking to adopt competition laws within their countries. China is an example of a country that has taken advantage of the technical support offered by the OECD.[40] Moreover, the UNCTAD published its modal law on competition, and the organization also provides technical assistance for developing competition laws, and is also considered to be a good platform for informal discussion about competition and competition policy.[41]

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[38] Mark Williams, *Competition Policy and Law in China, Hong Kong and Taiwan,* (Cambridge University Press 2005) 76

[39] Ibid 84-85

[40] Supra note 7, 7-9 **Fiammetta Borgia, 'New Governance Mechanisms in International Economic Law: The Role of Soft Law' (2010) Society of International Economic Law Paper 2010/31, 3 http://ssrn.com/abstract=1633984 last accessed on 23-10-2014**

[41] Supra note 9, 77-80 **Mark Williams, *Competition Policy and Law in China, Hong Kong and Taiwan,* (Cambridge University Press 2005) 76**

1.4 What Is A Merger?

In general terms, a merger is the consolidation of companies. The United Nations Commission of Trade and Development (UNCTAD) Model Law, defines a merger as a: "[f]usion between two or more enterprises previously independent of one another, whereby the identity of one or more is lost and the result is a single enterprise"[42]. Stated yet another way: "A merger is a combination of two companies to form a new company, while an acquisition is the purchase of one company by another, in which no new company is formed." [43] Regardless as to whether there is one corporation that is formed by the merger with one or more companies, or if a merger results in several different corporations being formed, the loss of competition in a particular sector of the economy is not always a good result. Hence, if mergers and acquisitions are not closely monitored, they can become a great threat against competition within an economic market.

However, some mergers and acquisitions actually encourage market competition. There are different types of tests that can are applied throughout the World to determine whether a particular merger or acquisition has assisted, or detracted from a competitive market place. The different tests usually rely on determining whether the merger or accusation is dependent on dominance in a particular segment of the marketplace, or if it is reliant on restraint. However, many countries prefer a different type of test. The different test they prefer considers

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[42] United Nations Conference on Trade and Development, 'Model Law on Competition' UNCTAD Series on Issues in Competition Law and Policy, TD/B/RBP/CONF.5/7/Rev2 (United Nations Publications, New York and Geneva 2004) 47.

[43] http://www.investopedia.com/terms/m/mergersandacquisitions.asp last accessed on 07-11-2014

the actual effect of a merger on the competitive practice and competition in that countries marketplace. More like a post-merger test that examines the effect of the particular activity in question. The countries that utilize a post-merger test usually possess strong anti-monopoly powers that help prevent negative effects on their marketplace due to the effects of mergers.

Conversely, other countries "[s]tipulate procedures for pre-merger notification to the enforcement authorities, in order to identify and resolve any problems before the merger takes place." For example, the Pakistan's competition law prefers a pre-merger test to examine the validity of an activity for a market. All the activity involved in a merger should be approved by the Competition Commission of Pakistan, prior to the merger taking place.[44] The "Competition (Merger Control) Regulations 2007, recommend that a minimal threshold of the size of a merger be established, beyond which the parties to a merger must obtain clearance from the Competition Commission for the intended merger."[45] The threshold, under which mergers do not need clearance to proceed from the Competition Commission, are those mergers in which "[t]he value of the 'gross assets' of the business' are not less than 300,000,000 rupees excluding, the value of its goodwill, and the combined value of the organizations whose shares are to be acquired, or, which the assets of the merger proposed are not less than one billion rupees."[46] In addition, if the "[a]nnual turnover of the undertaking in the preceding year is not less than five hundred million rupees, and/or, the combined turnover of the undertaking and the number of the undertaking(s) the shares for which are proposed to be acquired are not less

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[44] Competition act 2010 section 11.

[45] Competition (Merger Control) Regulations, 2007 vide order SRO 1188(I)/2007 (Islamabad, 20 November 2007) regulation # 4.

[46] Ibid. regulation # 4 (2)

than five hundred million rupees; or, the undertakings being merged are not less than one billion rupees."[47]

1.5 Merger Control

Defined by two experts in the field of Mergers and Acquisitions, Mr. Michael Egge and Ms. Rita Motta [belonging to or associated with???], Merger Control is a means to provide remedies to preserve the competition in the economic marketplace, which might otherwise be lost due to particular transactions on whom the action was taken by a concerned act institution.[48] The competition, or antitrust laws, are designed to be anticompetitive forces in the economic market in order to facilitate a positive economic environment in country. [49]The enforcement of merger control has continually growing across the world in the past decade, with many jurisdictions enacting legislation for the enforcement of merger control.

1.6 Cross Border Merger

The two most prominent ways to define Cross Border Merger are: 1) On the basis of structure; and 2) On the basis of effect. On the basis of structure, it is considered that a firm involved in a merger is established in two or more different jurisdictions, or in the alternative, has cross border dimensions (i.e., the firm is established in two different countries). When considering the basis of affect definition for Cross Border Merger, one looks at a merger which effects the

[47] Ibid regulation # 4 (2) b.

[48]Michael Egge and Rita Motta on introduction to merger control available at http://latinlawyer.com/reference/article/45941/introduction/ last accessed on 22-10-2014

[49]Joseph Wilson, antitrust remedies in Pakistan : composition and challenges, competition law international September 2010, 62

market in any other jurisdiction, regardless of whether or not the merger affects the jurisdiction where the entity is primarily located.

A third, and less used definition of Cross Border Merge, does not take into consideration either the structure or the basis of affect. One example is called "transnational mergers"[50], or also known as transnational cooperation. "Regardless of the basis on which a cross border dimension to a merger may arise, a number of views may be advanced in relation to how many jurisdictions this dimension should cover."[51] "Or a cross border merger may exist where the merger concerns two or more jurisdictions. Or the view may be taken that a cross border dimension should be wider and will therefore only be found where the merger concerns more than two jurisdictions."[52] Because competition laws have yet to be introduced throughout the world, there are many countries that do not have competition laws. In those countries without competition laws, a good stop gap policy is the cross border merger control system.

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[50] Transnational corporations, one of the sources of foreign investment, have done frequent M&A, hence having some actual and potential influences on industry or even economy security. Multinational corporations or multinational enterprises are organizations that are owned or control productions of goods or services in one or more countries other than the home country. For example, when a corporation is registered in more than one country or has operations in more than one country, it may be attributed as MNC. Usually, an MNC is a large corporation which produces or sells goods or services in various countries. It can also be referred as an international corporation, or a "transnational corporation", or perhaps best of all, as a stateless corporation.

[51] Report on the Costs and Burdens of Multijurisdictional Merger Review last accessed on 07-11-2014 http://www.internationalcompetitionnetwork.org/uploads/library/doc332.pdf

[52] Organization for economic co-operation and development, directorate for financial and enterprise affairs competition committee, global forum on competition roundtable on cross-border merger control: challenges for developing and emerging economies, 13-jan-2011, unclassified daf/comp/gf(2011)1

However, many jurisdictions in developing and emerging economies (DEE's) have introduced the cross border merger system into law as a way to regulate competition. With the global expansion of business, the economic markets of the world are now more closely integrated with each other. The term "world" now means "global village", but with strong boundary lines. Because international business has played such an influential role in the "globalization" of the world's economies[53], new problems have surfaced regarding the recognition of well-established territorial boundaries. Therefore, the need for new international merger control laws and a body to enforce those laws has become essential.[54]

1.7 Nature And Characteristics

The following are key points to consider when analyzing the nature and characteristics of mergers and acquisitions:

- Mergers and acquisitions are a distinct segment of the competition law.[55] Distinctive because of its business nature and its operation. It is also different from other functions of antitrust such as cartels and abuse of dominance.[56] But, it is not categorized as negative competition conduct like others. This is actually good for an economy that is

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[53] Julie Clarke, international regulations for transitional merger, (London law and justice research centre 2010) chapter 3 at 1

[54] Ian Jacobsberg and Cara Shahim, "South Africa: Cross-Border Mergers And Competition Regulations" http://www.mondaq.com/x/276206/M+A+Private%20equity/CrossBorder+Mergers+And+Competition+Regulations last accessed on 07-11-2014

[55] Report produced by the IBA's Global Forum for Competition and Trade Policy, Policy Directions for Global Merger Review. 2010. 13

[56] It is worth noting, however, the overlap which may exist between mergers and these other antitrust phenomena. For example, a merger may be considered to be an abuse of a dominant position where it leads to a strengthening of such position. See Case C-6/72 Europemballange Corporation and Continental Can Company Inc. v. Commission [1973] ECR 215.

healthy and in a good condition. But, it has the potential to change the form of business.[57]

- The merger has considerable commercial and financial risk. Mergers also have the power to affect economic markets, or stock markets by enhancing or decreasing the value of particular share values in affected companies. From a purely business oriented point of view, mergers need to be regulated with a special set of rules and regulations under competition laws.
- The term cross border merger control regime is a multifaceted topic. It has a remarkable relationship between following term: "[c]ompetition policy and other public policy considerations; jurisdictional, procedural and substantive issues relating to merger control; legal regimes and business interests; and, global, regional and domestic interests and considerations."[58] These relationships enhance the significance, as well as the difficulties attached to mergers, especially in the operation of a cross border merger.
- "Merger control is designed to achieve public policy objectives concerned with the structure of industry within a particular jurisdiction."[59] Merger control serves as a check over the merger and the potential consequences it might have on the commercial and economic markets in a particular jurisdiction. The process of controlling the merger will vary from jurisdiction to jurisdiction, and is dependent on the type of transaction and

[57] Maher Dabbah and *Paul Lasok*, Merger Control Worldwide (Cambridge, 2005), chapter 1. 5
[58] Supra note 42. 4
[59] Mussati, Giuliano, mergers, markets and public policy (Dordrecht, kluwer academic publishers, 1995) 81.

particular requirements of the merger.[60] However, merger control used to maintain the efficient and orderly operations of business throughout the world, while protecting the welfare of the consumer, has garnered near universal support.

1.8 Cross Border Merger Control In The European Union

In Europe, the system of merger control is very sophisticated. They have a national, and a supra national legislation that is an enforcement mechanism used in member states.[61] "Since the first Merger Regulation was adopted in 1989, EU merger control has evolved into a system which combines a clear and foreseeable allocation of jurisdiction while allowing sufficient flexibility for efficient work sharing between the supra-national level and national jurisdictions."[62]

To make such a complicated system work within the different European jurisdictions requires a scrutiny of the rules. Primarily based on the one-stop-shop concept, mergers should be processed and controlled by a single jurisdiction under the European system. The regulations on merger control dictate which jurisdiction will be controlling. Hence, mergers conducted within member states of the European Union are controlled by the European Commission. Those mergers completed outside of the European Union are examined by other national competition authorities.

To further clarify, the Directorate for Financial and Enterprise Affairs, Competition Committee, has stated that the principle of one stop shop refers to: "[a] merger should be allocated to the

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[60] for example, protecting local or small and medium size competitors, achieving various socio-economic and socio-political objectives, protecting employment, encouraging enterprise, and achieving various industrial policy objectives including promoting the international competitiveness of the local economy and building strong national firms.

[61] council regulation (ec) no 139/2004 (the merger regulation)

[62] The most important review of the EU merger rules resulted in the adoption of the 2004 Merger Regulation, which replaced Council Regulation (EEC) No 4064/89.

jurisdiction best-placed to handle the case. Even under the assumption that the turnover thresholds enumerated above are set at an appropriate level, it must be recognized that allocation of jurisdiction based on the merging parties' turnover does not always capture transactions with cross border impact and EU relevance."[63]

1.9 Conclusion

Due to the tremendous world-wide expansion of business, the world has become a "business world". Nations which had been warring with each other for hundreds of years, have become closer do to their mutually beneficially business relationships. Moreover, the merger of enterprise is a very old phenomena which has increased exhaustively with industrialization. Furthermore, mergers can be beneficial for an economic market if certain conditions are enforced through competition laws, and merger control systems. Competition law is also known as antitrust law in some jurisdictions. It is primarily designed to protect the consumer, by controlling monopolistic tendencies that occur in a purely competitive economic marketplace. Competition policies are thus designed to maintain a balance between protecting the consumer, and enhancing competition between large corporate entities. The merger can have a positive effect on economic markets, but if not monitored carefully, mergers can create destructive monopolies which are a threat to public policies as well as the market place, potentially creating enormous profits for large enterprises at the expense of the average consumer.

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[63] Directorate for financial and enterprise affairs competition committee, global forum on competition, roundtable on cross-border merger control: challenges for developing and emerging economies contribution from the European union, 10-feb-2011, daf/comp/gf/wd (2011)23.

CHAPTER 2

IMPACT OF GLOBALIZATION ON MERGER CONTROL

2.1 Introduction

Globalization brought a dramatic change in merger control laws and practice. Currently a number of the counties throughout the world have their own merger control regimes. Regardless of the size of the merger or acquisition, parties subject to mergers and acquisitions usually need to submit their proposed transaction(s) to the concerned competition or antitrust authorities. However, the requirements vary from country to country. Some countries set the requirements according to the market share of those entities involved, while other countries set their requirements according to the volume of the sales.[64]

Jonathann Uphoff and Alexis Gillman, two recognized merger control experts, were once quoted as saying: "We live in an age of international commerce, where decisions reached in one corner of the world can reverberate around the globe in less time than it takes to tell the tale."[65] In this chapter we will discuss the impact of globalization on the merger control and its related laws. To deal effectively with this issue, it is first necessary to define the term globalization.

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[64] Jonathann. T. Uphoff and Alexis James GilmanManaging Merger Control in the Era of Globalization, *Antitrust, Vol. 24, No. 2, Spring 2010* at 79.

[65] United States vs Nippon paper indus. Co. 109 F.3d 1, 8 (1st circle. 1997), rev'g 944 F. Supp.55 (D. Mass. 1996).

2.2 What Is Globalization?

"Globalization is a process of interaction and integration among the people, companies, and governments of different nations, a process driven by international trade and investment and aided by information technology. This process has effects on the environment, on culture, on political systems, on economic development and prosperity, and on human physical well-being in societies around the world."[66]

In above definition globalization is described as the process which results from the close interaction between the whole world, individuals, companies and governments alike. The purpose of the process called globalization, is to perpetuate the well-being of humanity by making a broad impact on the environment, culture, politics and political systems.

According to Dr. Nayef R.F. Al-Rodhan[67] the "Globalization is the process of international integration arising from the interchange of world views, products, ideas and other aspects of culture."[68]

The exchange of culture between countries is the key point that drives globalization.

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[66] What is globalization, last accessed on 05-12-2014 http://www.globalization101.org/what-is-globalization/

[67] Nayef R. F. Al-Rodhan is a philosopher, neuroscientist, geostrategic, and author. He is an Honorary Fellow of St. Antony's College at Oxford University, Oxford, United Kingdom, Senior Fellow and Centre Director of the Centre for the Geopolitics of Globalization and Transnational Security at the Geneva Centre for Security Policy, Geneva, Switzerland.

[68] Definitions of Globalization: A Comprehensive Overview and a Proposed Definition- The International Relations and Security Network ETH Zurich; June 19, 2006 available at http://www.academia.edu/2969717/Definitions_of_Globalization_A_Comprehensive_Overview_and_a_Proposed_Definition-_The_International_Relations_and_Security_Network_ETH_Zurich_June_19_2006 last accessed on 05-12-2014.

It is quiet accurately defined by Anthony Giddens[69] as: "(t)he intensification of worldwide social relation which links distant localities in such a way that local happenings are shaped by events accruing many miles away and vice versa."[70]

The new era of trade and commerce has been achieved through the liberalization of international trade regimes. As a result, many national markets have been incorporated into international markets. Many enterprises that were once competitors, now find themselves uniting in order to effectively deal with the emerging new requirements of an international marketplace. Moreover, the transitional merger is becoming one of the key features in the globalization of national markets.[71] For example, during the year 2000, the value of cross border mergers and acquisitions increased 50% as compared to the previous year. As the number of transitional mergers continue to increase, regulators and antitrust agencies find themselves having to play catch with the trend in order to protect the consumer by ensuring that the markets remain competitive.[72]

The competition agencies throughout the world are faced with outside entities entering their markets from outside their borders or territorial jurisdiction, making it more difficult to protect

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[69] Anthony Giddens, (born 8 January 1938), is a British sociologist who is known for his theory of structuration and his holistic view of modern societies. He is considered to be one of the most prominent modern sociologists, the author of at least 34 books, published in at least 29 languages, issuing on average more than one book every year. In 2007, Giddens was listed as the fifth most-referenced author of books in the humanities.

[70] *Anthony Giddens, The Consequences of Modernity* (Stanford. Calif *.Stanford University Press,1990*) at 64

[71] R. C Longworth, behind closed doors global regulators mold economic future, Chicago turbine 2000, 2000, WL 7334483, at 5

[72] Leon Rubies, override diligence for M&As, HR Magazine, issue 6, 1st June 2001, at 12.

consumers from unfair competitive practices.[73] "The international trade is carried out on the assumption that market forces will cure most anti-competitive practices engaged in by market players. Recalling the objects of antitrust law, the US Supreme court noted that the Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and un-fettered competition as the rule of trade."[74] The rule of trade, whether national or international, should consist of free and unfettered competition. However, there is little to no legislation to enforce this rule on international trade.

In the absence of global law to control potentially unfair practices in international trade, the potential for international market participants to distort the global market grows. To fill this gap, the WTO raised the need of to promulgate such laws in an address it made at the Fourth Ministerial Conference in Doha from 9-14 November 2001.[75] However, in its Doha Declaration, the WTO failed to include its agenda a multilateral rule to formulize. The merger review laws being the most complex and controversial in the competition law. Nonetheless, the Doha Declarations were important for the globalization of the trade in a systematic way.

It is important to recognize two economic factors which affect mergers, acquisitions and globalization:

- Liberalization of trade
- Technology

[73] Statement by E.U Competition commissioner Mario Monti quoted in Monti cites used of competition policy in integration of E.U states' economics BNA Antitrust and trade regulations daily 3 November 2001 at 5
[74] Northern Pacific Railway Co. vs United States, 356 US 1. 4-5 (1958)
[75] WTO. Doha Ministerial Declaration, WT/MIN (01)/DEC/W/1 (14 November 2001), available at www.heva.wto-ministrial.org/English/thewto_e/minist_e/mindeel_e.html.

The liberalization of trade is addressed in the "General Agreement on Trade and Tariff"[76] (GATT) regime. Generally speaking, under this agreement the member states of GATT formalize an agreement to reduce the trade barriers, as well as import quotas and tariffs. This type of agreement encourages companies to sell their products in another country's market, thereby enhancing international trade. The second factor, technology, has made communications instantaneous in nature, allowing billions of worth to be transferred from one country to another by one click of a mouse. [77]

2.3 Factors Augmenting the Need For Cross Border Merger Control Regimes

The international laws which are currently in effect are insufficient to control unfair mergers and acquisitions throughout the world. Cross Border Merger Controls will assist in the monitoring and control of unfair mergers and acquisitions. There are three important factors to consider when contemplating the effectiveness of a cross-border merger control regime:

- Merger control and limits of national legislation
- Deficiency of vision

[76] The General Agreement on Tariffs and Trade (GATT) was a multilateral agreement regulating international trade. According to its preamble, its purpose was the "substantial reduction of tariffs and other trade barriers and the elimination of preferences, on a reciprocal and mutually advantageous basis." It was negotiated during the United Nations Conference on Trade and Employment and was the outcome of the failure of negotiating governments to create the International Trade Organization (ITO). GATT was signed in 1947, took effect in 1948, and lasted until 1994; it was replaced by the World Trade Organization in 1995.

[77] Roman Terrill, what does the globalization means?, Transnet' LL. & Contemp. Probs. (1999) at 217, 218

- Deficiency of dispute resolution mechanism

2.4 Merger Control and Limits Of National Legislation

The regulators of merger control in a particular nation have a difficult time controlling the effects of mergers that occur beyond their territorial jurisdiction. Yet, there are instances where mergers that occur outside of a particular nations' territorial jurisdiction, still have a negative effect on the economy of the nation that is unable to regulate the merger. Hence, they have no control and power to regulate in the best interest of its people. While regulators are capable of controlling the economic activities within its jurisdiction, they are unable to manage the economic activities within a foreign country. The global economic activities are beyond the control of a particular state, even though those very same global economic activities can have an effect on the entire world.

According to professor Aman[78], "a state cannot exercise effective authority alone when the problem it is trying to solve, or actor it wishes to regulate, are not centered within the state's boarders. To the extent that these issues are state-based, such a location usually is only temporary and easily shifted. Thus, the decrease in the state centered regulatory power is a

[78] Alfred C. Aman, Jr. (born July 7, 1945) is a professor of administrative law, author and the former Dean of Indiana University Maurer School of Law - Bloomington and Suffolk University Law School in Boston, Massachusetts, USA. He stepped down as Dean of Suffolk in 2009 to return to Indiana University as the Roscoe C. O'Byrne Professor of Law. Professor Aman came to Indiana Law as dean in 1991 and served in that capacity until 2002. Previously, he served for nearly 15 years on faculty at the Cornell Law School and was director of its International Legal Studies program from 1988-91. An internationally known scholar and lecturer, Professor Aman held a distinguished Fulbright chair and taught comparative administrative law at the University of Trento in Italy in March 1998. He has been a resident fellow at the Rockefeller Foundation's Conference Center in Bellagio, as well as twice being a visiting fellow at Wolfson College, Cambridge.

result that flows primarily from the nature of global problems, the global reach of the technologies involved, and relative mobility and freedom of the transitional actors to which the law would apply."[79]

The limits of national law to control merger and acquisition activity outside of the jurisdiction of a particular state, causes problems for not only the regulators of the affected state, but for the merging enterprises as well. As listed above, a second factor to consider deals with a Deficiency of Vision.

2.5 Deficiency Of Vision

It is recognized that the primary function of legislation is to deal with domestic issues. However, these domestic issues are very much affected by the integrated global economy. It is next to impossible for law makers to create a level economic playing field through legislation within their particular state without contemplating the global economy. Nonetheless, politicians and policy makers alike continually fail to contemplate the global economy when passing legislation dealing with their own domestic economy. However, even if the politicians and policy makers had the courage to contemplate global economics when legislating domestic economics, the question still remains as to how effective their legislation would be in protecting local enterprises and the local economy from unfair merger and acquisition activities occurring

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[79] Alfred C. Aman, the globalizing state: a future oriented prospective on the public/ private distinction, federalism, and democracy, *31 Vand. J.*VANDERBILT JOURNAL OF *TRANSNATIONAL* LAW Vol. *31*:769-770

outside of its jurisdiction.[80] The third identified factor deals with a Deficiency of a Dispute Resolution Mechanism.

2.6 Deficiency Of A Dispute Resolution Mechanism

This factor is not linked with an individual state actor, but global economic activities brought about the need of an alternate dispute resolution mechanism. Additionally, the role of arbitration is now emerging. Because of the ever changing and growingly sophisticated global economic activities, mechanism previously used by states to regulate merger and acquisition activities became very limited in their ability to effectively regulate. Because of the growing need to become a part of the global economy, states have reluctantly surrendered some of their traditional power and responsibilities in the area of mergers and acquisitions, to the other states and corporate bodies.[81] The best solution for individual states is to look to each other for cooperation. For example, at the time of merger review by the EU commission of the Boeing-McDonnell company, the Vice President of the company expressed the need of an alternate for the swift approval of merger.[82]

The United States Has Experienced Five Distinct Waves Of Merger and Acquisition Activity

The emergence of merger and acquisitions can be traced back to the United States beginning in the late 19th century. During that era, individual business organizations were cooperative with each other.

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[80] **ibid** at 784
[81] **ibid** at 782
[82] Jeffrey A. Miller, the Boeing/McDonnell Douglas Merger: the European Commission's Costly Failure to Properly Enforce the Merger Regulation, Maryland Journal of International Law Volume 22 | Issue 2 Article 7, at 393.

Additionally, since the 1880s, the United States has experienced four distinct waves of merger and acquisition activity, with the country currently experiencing its fifth distinct wave. These waves are triggered by economics "which includes the growth in GDP, interest rates and monetary policies that play a key role in designing the process of mergers or acquisitions between companies or organizations."[83]

The very first wave of merger and acquisition activity emerged in the U.S. emerged around 1895 when companies were beginning to rebound from the effects brought on by the depression which began in 1893 and which would last through 1897 . This first wave ended during 1905, with the peak of the activity occurring during the period of 1898 and 1902. Many historians attribute the Sherman Antitrust Act of 1890 as being the catalyst that spurred the merger and acquisition activity during this first wave. Companies were expanding their production capacity, and thus commanding large market shares from the sale of their products as a result of the expansion in production capacity for many U.S. corporations.[84] The Sherman Act in effect, encouraged monopolistic activities by companies with little interference by regulatory laws, as long as they were not contrived to be anticompetitive in nature. The types of mergers and acquisitions were horizontal in nature, as they were realized by stock to stock transfers. During this wave of mergers and acquisitions, approximately 1800 firms were merged, resulting in approximately 71 new monopolies being formed. There is little doubt that this first wave of mergers and acquisitions dramatically altered the industrial landscape in U.S.[85]

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[83]History of Mergers and Acquisitions, last Modified 10-12-2014, http://www.economywatch.com/mergers-acquisitions/history.html

[84] Joseph E. McCann, Roderick Gilkey, "Joining Forces: Creating and Managing Successful Mergers and Acquisitions", Toronto Prentice Hall publishers 1988, at 57.

[85] *P.S. Sudarsanam* "The Essence of Mergers and Acquisitions", London: Prentice Hall publishers, (1995) at 23

The second wave of mergers and acquisitions began around 1915, approximately ten years after the first wave and fourteen years prior to the great depression of 1929 which would last approximately until 1939. A significant characteristic of the second wave was not an increase of monopolies, but the emergence of "oligopolies".[86] The economic downfall in just seven countries contributed to the collapse of the U.S. economy. Additionally, U.S. regulatory laws were changed during this time period, with the 1911 United States Supreme Court decision in the landmark case of: *The Standard Oil Company of New Jersey, et al. v. The United States,* setting the precedent for anti-monopoly regulations. [87] Aside from the U.S. Supreme Court ruling and anti-monopoly regulations, advancements in corporate infrastructure and technology made the advancement of oligopolies possible. In the light of the anti-monopoly movement of the period, further legislation was enacted, such as "Clayton act 1914."[88] As a result, U.S. companies continued to reposition themselves in order to remain competitive, thus reshaping the market place once again.

The third wave of mergers was also different in its character. It was named as the "conglomerate mergers."[89] It took place in 1960s, and contrary to the previous two waves, the firms which were acquiring

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[86] An oligopoly is a market form in which a market or industry is dominated by a small number of sellers (oligopolists). Oligopolies can result from various forms of collusion which reduce competition and lead to higher prices for consumers. Oligopoly has its own market structure.

[87] *The Standard Oil Company of New Jersey, et al. v. The United States* 405 U.S. 596 (1972)

[88] The Clayton Antitrust Act of 1914 was a part of United States antitrust law with the goal of adding further substance to the U.S. antitrust law regime; the Clayton Act sought to prevent anticompetitive practices in their incipiency. That regime started with the Sherman Antitrust Act of 1890, the first Federal law outlawing practices considered harmful to consumers (monopolies, cartels, and trusts). The Clayton Act specified particular prohibited conduct, the three-level enforcement scheme, the exemptions, and the remedial measures.

[89] A conglomerate is a combination of two or more corporations engaged in entirely different businesses that fall under one corporate group, usually involving a parent company and many subsidiaries. Often, a conglomerate is a multi-industry company. Conglomerates are often large and multinational.

other firms were smaller than the targeted firms. Moreover, the mergers during this wave were primarily financed by the equities held by the firm being acquired. Thus, the investment banks were vastly left out of this wave of mergers and acquisitions. While there were a few precedent mergers in the 1970's, this third wave came to an end in 1968 primarily due to the poor performance of the conglomerates that were established during the period.

The fourth wave emerged during the late 1970's and came to an end during 1989. "This merger wave exceeded all of the preceeding waves in the size of the deals, as a new generation of financial entrepreneurs promoted an entirely new idea, the Leveraged-Buy-Out (LBO)... partnerships, and the highest degree of hostility existed, as large companies became targets of unwelcome acquisition bids. Almost half of all major U.S. companies during this merger wave had faced the possibility of a hostile acquisition by the 1980s."[90] During the first stage of this wave, it was observed that two types of firms were targeted:

- Owner managed firms
- Subsidiaries spun-off from larger firms

There were many owners of smaller businesses who wished to dissolve their business, seeking to liquidate their assets because of poor performance.

During the second stage, the size of the mergers began to set records for being the largest of their types, with the larger companies being targeted for a merger or acquisition. The motive for the activity during this period was the deregulation by the government of certain industries.

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[90] Mark L. *Mitchell*, J. Harold *Mulherin*, *The impact of industry shocks on the impact of industry shocks on takeover and restructuring activity... Journal of Financial Economics, 1996*, vol. *41*, issue 2, pages *193-229, at 201*

"But behind this, the real motive is that many conglomerates failed entirely, and companies want to concentrate on areas in which they were most profitable and effective."[91] The shifting requirements of the marketplace, combined with the rise in operating costs associated with oil prices and technology costs, fostered this activity. The end of fourth wave was not appreciated universally.

As the fifth wave of mergers and acquisitions began in the year 2000, some would argue that it is currently on going, lasting longer than any of the previous four waves. "It is considered from some researchers that this merger wave lasted until the end of the millennium, while others are claiming that it is still continuing."[92] In spite of the competing theories as to whether or not the fifth wave has ended, it is clear that from the year 2000, merger and acquisition activities are continuing to the present day.

2.7 Conclusion

The globalization of the world economy is a critical factor that enhances merger and acquisition activities worldwide. Additionally, technological advancements in the way that businesses operate have made mergers and acquisitions easier than ever before. With just one click of computer mouse, companies can transfer billions of equity from one country to another. Thus, the overall enhancement

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[91] Andrei *Shleifer, Robert W. Vishny,* "Takeovers in the '60s and the '80s: Evidence and Implications, *Strategic Management Journal* Volume *12*, Issue S2, winter *1991*, (*51–59*) at 55.

[92] Gregor *Andrade*, Mark *Mitchell*, and Erik *Stafford, "New Evidence and Perspectives on Mergers", Journal of Economic Perspectives,* Volume *15*, Number 2, Spring *2001*,*(103–120) at 117*

of business operations has caused a revolution in industries located in virtually every country in the world.

The history of merger and acquisition transactions have been recorded in depth in the U.S. and the U.K. Monitoring merger and acquisition activities over time, has led to different types of anti-trust legislation and enforcement of ant-competition regulations in order to protect the interests of the people from unfair business practices. There can be no doubt that even mergers and acquisitions contemplated in good faith, with a purpose of creating a fair market place, can cause negative effects in a global economy. Therefore, it is almost universally understood that in the absence of regulating mergers and acquisitions, market players either purposely for greed, or un-purposely through a lack of vision or ignorance, could cause harm to not only regional economies, but the global economy as well.

Whether it be by International Merger Control Regimes, International Anti-Competition Regulations, or through International Dispute Resolution Mechanisms, the average citizen and regional market places need protection from the evolving anti-competitive tendencies of growing businesses. The past is often prologue. Therefore, a careful study of the history of mergers and acquisitions should be conducted before acting through regulation or other entities, in order to deal effectively with mergers and acquisitions and their proclivity towards anti-competitive consequences.

CHAPTER 3

INTERNATIONAL MERGER CONTROL REGIME

3.1 Introduction:

The merger control which is the part of the competition law is looked after by the authorities in competition commission of any country. The basic function of merger review or merger control is to prevent the stakeholders from lessening of competition. As already stated the merger control is meant to cheek the effects of the consolidation of the different firms and businesses. The consolidation of businesses by different firms is referred as mergers in U.S[93] and concentration in EU[94].

Merger control laws are negative laws in nature in all over the world. Negative in this sense that these laws are preventive and at the same time merger laws seek a restraint against competition and these laws act as ex post facto[95] laws and requires ex ante[96] assessment of the effects of the consolidation of any business or firm[97] in future on any market.

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[93] herbert hovenkamp, *federal antitrust policy: the law of competition and its practice* (St. Paul, Minn. : West Pub. Co., 1994) 89.
[94] Commission Notice on the Concept of Concentration under Council Regulation *4067/89* on the
Control of Concentrations Between Undertakings, 1998 O.J. (C 66) 5 (EEC).
[95] Ex post facto adj. Latin for "after the fact," which refers to laws adopted after an act is committed making it illegal although it was legal when done, or increases the penalty for a crime after it is committed. Such laws are specifically prohibited by the U. S. Constitution, Article I, Section 9. Therefore, if a state legislature or Congress enacts new rules of proof or longer sentences, those new rules or sentences do notapply to crimes committed before the new law was adopted. Http://legaldictionary.thefreedictionary.com/ex+post+facto last assessed on 12-13-2014.

In order to keep a proper check and balance and know about the very aspect and effect of the merger control laws required that parties which engaged in merger control should notify the authorities about the transaction which they have made while taking into consideration all the legal requirements. The concerned authorities will simply check whether the proposed transaction met with the criteria specified by laws and to review the effects of the merger.

The concerned authorities while reviewing the proposed merger will consider various aspects including the social and the industrial policy of the country. Some of the issues are as follows.

1. Effects of the merger on the market
2. Effects of the merger on the consumers.
3. Effects of the merger on domestic firms
4. Consequences of the merger on employment
5. And effect on the international competitiveness.

The criteria to assess the potential effect of the merger are varying from jurisdiction to jurisdiction. Thus there are greater chances of inconsistency and controversy.

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[96]The term ex ante is a Latin word which means based on assumption and prediction. It also means beforehand or before the event. The term is used generally in the commercial world, where results of a particular action, or series of actions, are forecast in advance. In the financial world ex ante return means future returns or prospects of a company. An example of ex-ante analysis is when an investment company values a stock ex-ante and then compares the predicted results to the actual movement of the stock's price. In the recruitment industry, ex ante is used when forecasting resource requirements on large future projects http://definitions.uslegal.com/e/ex-ante/ last assessed on 12-13-2014.

[97] Donald I. Baker, *Antitrust Merger Review in an Era of Escalating Cross-Border Transactions and Effects, in* policy directions for global merger review, a Special Report by the Global Forum for Competition and Trade Policy (1999), at 71, 72.

3.2 Proliferation Of Merger Control Laws

According to an estimate till that time there are 90 countries which have competition laws and more than 20 countries are considering these laws and legislation is under process there. Among these 90 countries, over 52 countries promulgated and drafted their laws in lat decade and 60 countries require a notification before merger is completed[98].

3.3 Benefits Of Merger Control

Where a merger is normally and cheap and cost savings for the merge ring parties on the same place it could be detrimental for the consumer welfare where the merger leads towards dominant position. Thus, the laws related to merger control give competition authorities the chance and ability to check and assess the competitive effects of the merger and in that way protecting the interests of the consumers.

According to a survey of the US department of justice it has been estimated that merger control laws have saved 4 billion dollars of the consumers[99]. US federal trade commission has claimed that the department is saving 250 million dollars of the consumers annually. This department also claimed that it has prevented the merger of the two drug sells companies thus

[98] A. Douglas Melamed, Promoting Sound Antitrust Enforcement in the Global Economy, Speech before
Fordham Corporate Law Institute, 2ih Annual Conference on International Antitrust Law and Policy, New York, New York, (October 19, 2000) *available at* http://www.usdolgov/atr/public/speeches/6785.htm (visited on April 25, 2001);

[99] Department of Justice, Antitrust Division, FY2000 Congressional Budget Submission, at 64.

saved consumers from 300 million dollars[100]. The welfare and the protection of the consumers are the basis idea which is attracting the jurisdictions to enact the laws related to the merger control and make the system of merger control efficient.

3.4 Deregulation Paved The Way For Competition

The wave of deregulation was started in mid 1980s and almost spread in all over the world. Host of the jurisdictions now have been affianced in transition command and control economies. The deregulation of industries and opening up of markets of competition necessitated that competition laws be put in place that may preserve competitive structure in the market.

3.5 External Pressure For Reform

The legislation in developed countries play a role precedents for developing countries. It is big factor which attracts the nation around the world to legislate on the matters on which developed countries had legislated. At the same time the institution of International standard like Word bank and International Monetary fund and European Union also encouraged countries to legislate on the different matters including competition laws.

Its happened when any country wants to become the part of any organization like EU. These organizations keep the membership conditional on the amendment and introduction of new laws with in national legal system of any country. These kind of requirement are set to

[100] FTC v. Staples, Ine., 970 F. Supp. 1066 (D.D.C. 1997); FTC v. Cardinal Health, Ine., 12 F. Supp. 2d 34(D.D.C. 1998)(enjoining the merger of Cardinal Health Ine. With Brunswig Corp. And mckesson Corp. With Amerisouree Health Corp.).

guaranteed the level playing field or common condition of competition between the markets of the all member countries[101].

For example Indonesia in 1999, was required by the International Monetary Fund to adopt a new competition law as a part of economic reforms on which funds related to rescue were conditional[102].

More ever the world developed economics like US and EU consistently preaching nations to adopt competition laws as these laws are good for them and these presence of these laws in any market makes the business efficient and bring the country in a position to compete internationally on one hand and on other hand competition laws attracts investment and creates job opportunities. Competition laws thrives economic activities and allowing people to increase enterprises and work efficiently[103].

Around the world, many countries of Eastern Europe[104] and Latin America[105] have adopted competition laws, due to the encouragement of the developed economics[106]. Many

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[101] Fox, *Antitrust ond Regulatory Federolism, supra* note 41, 1792; *see also* john fingleton, et al., competition policy and the transformation of central europe 54-56 (1996).
[102] Eleanor M. Fox, *Equality, Discrimination, ond Competition Law: Lessons From and For South Atica and Indonesia,* 41 HARY. INT'L *L.I.* 579, 588 & n.49, 589 (2000).
[103] Eleanor M. Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways,* 75 N.YD. L. Rev. 1781, 1801 (2000). [Hereinafter "Fox, *Antitrust and Regulatory Federalism* "
[104] MARJO OJALA, THE COMPETITION LAW OF CENTRAL AND EASTERN EUROPE (1999); Michael G.Cowie and Monica Novotna, *Premerger Notification in Central and Eastern Europe,* 12 ANTITRUST 19 (Summer 1998); Carolyn Brzezinski, *Competition and Antitrust Law in Central Europe: Poland, the Czech Republic, Slovakia and Hungary,* 15 MICH. 1. INT'L L. 1129 (1994); Georghe Oprescu and Eric D. Rohlck, *Competition Policy in Transition Economies: the Case ofromania,* 1999/3 EC COMP. *Pocy* NEWSL. 62.
[105] William E. Kovacic, *Institutional Innovations in Competition Policy in Peru: INDECOPI After Five Years,* 1 INT'L ANTITRUST BULL. 34 (Summer 1998); Gabriel Castaneda and Fernando Sanchez Ugarte, *Mexico Still Setting the Pace for Latin America,* 1 GLOBAL COMPETITION rev. 12 (Feb./March 1998).

countries which developing economics like Southeast Asia[107] are considering promulgating competition laws for the enhancement of business.

3.6 Gaps In Global Governance And The Need For An IMCR:

World has now become a global village. Due to the effect of the global village the domestic markets are rapidly transited into global markets. Because of this globalization merger control regime is witnessing certain gap in institutional managements for arranging global markets.

Globalization has shacked the power of the nation states to regulate business matters effectively across the world. Even it is no more possible for the nation states to control the business at domestic level. Secondly the nation states are far behind in the race of globalized business in developing rules to meet the challenges.

It comes under observation rarely that the domestic policy makers ever address the welfare of global consumer. On the other hand globalization promotes and enhanced the

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[106] Karel Van Miert, *Competition Policy in Relation to the Central and Eastern European Countries Achievements and Challenges,* 1998/2 EC COMP. POL'y NEWSL. 1; Robert Rice, *brwan Urges Basic Competition Rules,* FIN. TIMES, Nov. 8, 1993, at 3; Kathleen E. Mcdermott, *US officiais Provide Competition counseung to Eastern Europe,* 5 ANTITRUST 4 (Fall/Winter 1991); Shanker Singham, *US and European Models Shaping Latin American Competition Law,* 1 GLOBAL COMP. REY. 15 (Feb./March 1998).

[107] William E. Kovacic, *capitausm, sociausm, and Competition poucy in Vietnam,* 13 ANTITRUST 57 (Summer 1999); William E. Kovacic, *Merger Enforeement in Transition: Antitrust Controls on Acquisitions in Emerging Economies,* 66 U. CIN. L. Rey. 1075 (1998); William E. Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition Economies,* 23 BROOK. J. INT'L L. 403 (1997); Normin Pakpahan, *Indonesia: Enactment of Competition Law,* 27 INT'L Bus. LAW 491 (1999); Whie-kap Cho, *Korea 's Economie Crisis: The Role ofcompetition poucy,* 27 INT'L Bus. LAW 495 (1999); Sutee Supanit, *Thai/and: Implementation ofcompetition Law,* 27 INT'L Bus. LAW 497 (1999).

welfare of the consumer globally[108]. Markets are good in producing private goods. However when it comes to goods used by public they produce it at sub-optimal level, which somehow justify the intervention of the state in rectifying production level. The global market, like national markets may not guaranteed optimal provision of public goods globally[109] without taking additional measures like cooperation and coercion together[110]. The concept of " local public goods" that provide the roots for the allocation of competition between the governments at various level defines the optimal size of region for the delivery of public gods. Thus, where the supply of the public goods is made through global traders, the nation working jointly or a supranational authority will be a proficient authority to ensure the supply of the public goods[111].

However, "nations dwell in perpetual anarchy, for no central authority imposes limits on the pursuit of sovereign interests.[112]" Thus, any agreement which nations want to implement among themselves has to be enforced by using coercion up to some extent[113]. In a situation like that an international organization may play a vital role but to plan to prepare such organization to act as an enforcer of the agreement would be a mistake. Instead of this the international

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[108] Aman, *The Globalizing State, supra* note 3, at 787. ("Despite the global nature of the forces that create and limit the choices astate can make, domestic politics often ignore the larger, global dimension in which 'local' issues are debated").
[109] J. Mohan Rao, *Equity in Global Public Goods Framework, in* global public goods, *supra* note 21, at 73.
[110] Kaul, *Defining Global Public Goods, supra* note 21, at 7. *See also* Joseph E. Stiglitz, *Knowledge as a Public Good, in* global public goods, *supra* note 21, 308 at 320;
[111] Hilde Smets and Patrick Van Cayseele, *Competing Merger Policies in a Common Agency Framework,* 15 INT'L rev. L. & eeon. 425, 426 (1995).
[112] Lisa L. Martin, *The Political Economy ofinternational Cooperation" in* global public goods, *supra* note 21, 51 at52.
[113] Mohan Rao, *Equity in Global Public Goods Framework, in* global public goods, *supra* note 21, at 73. Supra note 52.

organization should play role of increasing cooperation by creating such an environment that make the agreements self-enforcing.

Any international agreement which is concluded under the patronage of any international organization, such an institution should not be act as supranational position. The institution should not issue directives for the enforcement of agreements. Instead the coercive power of such institution should be seen a power delegated by the nation states which are parties to the agreement. Most oftenly, these powers delegated comes under the umbrella of information provision. All of the international institution like International court of justice, WTO, European court of justice which has gained reputation as in dispute resolution should regard themselves as assisting the states in resolving their disputes rather than act as authoritative authority. These organizations should play their role by providing guidance in the interpretation of international agreements[114].

To fill the gap which is widening on international level in global governance nations need a multilateral cooperation agreement on merger control law? To enforce the agreement agreed by the nation states the cooperation of the institution with international reputation, like WTO is required.

[114] Ibid.

3.7 Conclusion

Due to the expansion of business and sources of communication the world becomes the global village. The nations which were at war from hundred years came closer to each other and credit goes to the business. The merger of business enterprises is very old phenomena and increased exhaustively with industrialization. The term merger is very helpful for an economic market but under certain conditions due to which it is subject to the competition law and the term merger control came into operation. The competition law is also known as antitrust law in some jurisdictions. It is designed to control all those evils which are harmful for the market and to consumer. The competition policy aims to put things on there right place to maintain the flow of market and ensure the enhancement of competition. The merger itself is very good for the market but if it creates the monopoly then the same becomes the danger to the public policy as well as to the market. The monopoly leads the enterprise to unfair profit and the prices go higher than in its original price.

As we mentioned that in its essence it is good for market because a portion of foreign investment came through this and meanwhile international merger face many jurisdictional issues which some time frustrate the business men.

Europe make their system convenient for both national mergers and international merger as well. They make the laws and a separate body to take reviews when the merger is going to take place with the member states within Europe and have different system for the outer party not belongs to the Europe and then they have national authorities to take measures to control mergers and make that healthy for market and consumer. There must be a common antitrust body works for the mergers as the Europe shaped their own.

CHAPTER 04

4. MERGER REGULATIONS: INSTRUMENT FOR TRANSNATIONAL MERGER REVIEW

The Merger regulations have come in to force on Dec 21-1990. It is pertinent to mention here that the permeable of the merger regulation recognize that there was a regulatory gap in TEC that was causing disturbance in business competition. The mentioned gap was covered by the merger control regime which claimed that by the end of 1992 the competition in market will not suffer any damages within European community[115]. Thus, merger regulation was developed the only instrument through which the commission would look after concentrations leading to noteworthy structural changes which has deep impact on market beyond the national boundaries of the member state[116].

4.1. One Stop Shop

The main problem which has been highlighted by experts was multiplicity of the regulatory measures but the regulations avoid duplication by providing one stop shop. The facility of one stop shop render exclusive jurisdiction to the commission over the community. For merger regulations point of view a concentration is arises when

- When two or more undertakings merge after working independently

[115] Lucy Kellaway, *EC Ministers Hand Brussels the Power to Vet Large Mergers,* FIN. TImes, Dec. 22, 1989, at 2.

[116] Eleanor M. Fox, *Can We Control Merger Control? - An Experiment, in* policy directions for global merger review 79 (Special Report, Global Forum for Competition and Trade Policy, 1999)

- When one person who is the owner of one undertaking acquire one or more undertaking by bund securities or by contract or by acquiring direct or indirect control on whole or on parts of other undertaking.

4.2. Community_Dimension: Notification_Threshold:

A merger will be deemed to be community dimension where:

- When the world wide turnover of any undertaking in aggregate is more than 5,000 million
- When the aggregate turn over in community wide is more than 250 million.

In June 1997 the commission set some additional criteria for the concentrations which fail to meet the above mentioned criteria

- The worldwide aggregate turnover of all undertakings concerned is more than 250 million.
- In three member states separately, the collective aggregate turnover of all concerned undertakings are more than 100 million.
- In three member states separately, the collective aggregate of two undertakings is more than 25 million.

These are the threshold which has been set by the merger regulation and divided into primary and secondary thresholds. When the merger satisfies any of the thresholds and does not fall in the ambit of any proviso the merger will be deemed to be community dimension. Once merger falls in community dimension the commission would assume jurisdiction over concentration

without taking into consideration the place of business[117]. Two third of the roles ensures that where community turnover is drawn in and it is earned in 1 member state by 1 member state the merger will be subject of the jurisdiction of that in which undertaking has earned turnover member state. Up to some extent merger remains the subject of national authorities where it has no effect of international market and it is only limited to the domestic or local markets.

4.3. Premerger Notification

If the merger fulfills the above mentioned qualification which is community dimension threshold then the party is under obligation to inform the commission within one week, when the agreement between the parties has been concluded and it has been publically announced or when the interested party obtains control over his interest. Where a transaction involves more elements than one the period of notification will be started when the first event happens. Merger regulations has fixed the time period for notification. It is mandatory for the parties to give the notice and parties are free to file the notification before commission, before the happening of events[118].

The merger's parties are required to file the notification or the party who has acquired control[119]. The party is required to submit 24 copies of form CO and all the documents related to the merger to the commission through merger task force. After that commission will come into motion and

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[117] The Commission has exercised its jurisdiction on: the acquisition of joint control over a non-EU undertaking by n EU undertaking and a non-EU undertaking, See, e.g., Commission Decision 97/26/EC, 1997 0.1. (L 11) 30,

[118] Cook & kerse, *supra* note 96, at 98; form co relating to the notification of a concentration pursuant to regulation (eec) no 4064/89, annex 1 to commission regulation (ec) no 447/98 of march 1,1998,

[119] Merger Regulation,Art. 4(2).

provide copies for all member states within three days[120]. The parties are also required to wait for three weeks before they start business transactions.

4.4. Merger Analysis

4.4.1. Merger evolution:

The commission appraises the merger with a view to obtain and evaluate that whether the merger creates a dominant position or not and what are the effects of the merger on the market, whether in result of merger competition would be considerably impeded in the market or not. According to the Article 2(1) of the merger regulation the commission will assess the effect of the merger while keeping in view the guidelines to assess the compatibility. While assessing the merger, the commission will take into consideration the following things:

1. The need to develop and preserve competition in common market.
2. The potential and actual competition around the world and in EC.
3. What are the financial and the economic power of the undertakings?
4. To assess the users and suppliers in the market.
5. What are the barriers in entry in market and the nature of the barriers?
6. What are the demands and the supply trends for the relevant goods?
7. The interest of the consumer
8. The economic progress and technical development provided which shall be consumer and friendly competition[121].

[120] Merger Regulation, Art. 19(1).
[121] Merger Regulation, article 2 (01)

4.4.2. Pure Competition Standards And Industrial Policy

All the factors which commission will take into consideration in appraising a merger are based on competition law, except the economic progress and technical development. This criteria arises a serious question that whether mandate of the commission while assessing the computability with common market is to take into consideration the grounds of industrial policy and like prohibiting a company which is based in foreign country from getting control the interest of the Key EC company and prohibiting a merger that would effect and lead the community towards unemployment or to compete effectively with a competitor who is foreign[122].The idea of economic progress and technical development as envisaged by the commission is an exception to article 81(1) preventions listed in article 81(13)[123].

If a merger creates dominant position or impedes competition, the merger control regulation always discouraged this kind of merger. A well-known role of statutory interpretation is *ejusdem generis* according to this rule the economic progress and technical development is viewed as a factor to be seen in assessing the merger effects on competition. In a well-known case MSG media services the commission held that,

"The reference to this criterion [development of technical and economic progress] in Article 2(1)(b) of the Merger Regulation is subject to the reservation tha t no obstacle is formed for competition. As outlined above, however, the foreseeable effects of the proposed concentration suggest that it will lead to a sealing-off of and early creation of a dominant position on the future markets of technical

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[122] Van bael & j. Belus, competition law of the european community ~ 639(6), at 468 (oxfordshire: cch, 3rd ed., 1994

[123] C. J. Cook & c. S. Kerse, e.c. Merger control 61 (london: sweet & maxwell, 2nd ed 1996.

and administrative services and to a substantial hindering of effective competition on the future of market of Pay-Tv.![124] "

The commission has also discussed a for seen issue that the merger has been created and while achieving the economic development and technical progress of merger creates dominant position or strengthens than what will be the solution of that position. The commission expressed its opinion on it and said the dominant position and development in economic technical expertise is apparently inconsistent with each other.

4.4.3. Dominant Position

The commission uses the above mentioned criteria to determine whether a merger would create the dominant position and that would create obstacles in competition in common market. The merger regulation has not defined the dominant position anywhere. However the court of justice in Hoffmann La Roche[125], has defined the dominant position as a capability of the business firm or the group of the business firms to act as an independently considerable extent of the consumers, customers and competitors. The commission has accepted this definition of dominant position as stated in Hoffmann La Roche[126].

4.4.4. Relevant Product And Geographic Markets

In order to ascertain that parties to a merger enjoy the dominant position the commission needs to define relevant market. Here again the merger regulations are silent on defining the relevant product and geographic market, but CO has defined it in section 06 in the following words

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[124] Ibid at 165-166

[125] Hoffmann La Roche & Co AG v. Commission, Case 87176, [1979] E.C.R. 461.

[126] Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law. 1997 O.J. (C 372).

"Market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use, Factors, such as substitutability, conditions of competition, prices, cross-prices elasticity of demand, should be considered in including or excluding the products/services within the relevant product market. In 1997, the Commission issued a notice on the definition of relevant market, wherein it applied a "small but significant non-transitory increase in price" (SSNIP) test. "Under the SSNIP test, two products are deemed to be in the same market if a hypothetical non-transient 5-10 percent price increase for product A would cause sufficient number of customers to switch to product B to make the price increase unprofitable for the supplier of product A. [127]"

In the same way the geographical market is defined as "the area in which the undertakings concerns are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighboring areas because the conditions of competition are appreciably different in those areas."

In ascertaining the relevant market factors such as the characteristics and nature of the products or services concerned, the appreciable differences in the undertakings, the presence of the barrier on entry or the preferences set by the consumers, the price difference, and the market shares should be taken into consideration.

[127] Ibid.

4.4.5. Market Shares

Now we are familiar with the definition of the geographical market and relevant product, the commission estimated the firm dominant position in the relevant market by conniving its market share. The merger regulations are once again silent on defining the market share. However we may recourse towards the permeable of the merger regulation which guides us as any merger which resulting in below 25% of the market share is compatible with common market[128].

However the commission has used the market share in another context and uses market share to assess and analysis of potential and actual competition with the relevant market. In Mannesmann / Hoesch the commission noted

" Market shares characterize the current market position of an undertaking. High market shares represent an important factor as evidence of a dominant position provided not only reflect current conditions but are also a reliable indicator of future conditions. If no other structural liable factors are identifiable in due course to change the existing conditio ns of competition, market share have to be viewed as a reliable indicator of future conditions.[129]"

4.4.6.Significant Impediment To Effective Competition

Commission has assumed that the merger which creates dominant position and analyzes the significant consequences emerging from the firm dominant position may badly effect the competition in the common market.

[128] Merger Regulation permeable,

[129] *Mannesmann/Hoesch*, 1993 O.J. (L114) 34, ˜ 91 at 45.

4.4.7. Failing Firm Defense

Merger regulations did not provide any defense to the firm, but now the commission has considered the right of defense of the firm. The European court of justice in Kali and Salz[130] approved the commission practice of firm defense and permitted consolidation in Germany even the merger was clearly establishing dominant position. The defense can be invoked only when:

1. The acquired company is forced out of market in near future if not merged by any other company.
2. The company which is going to acquire other company would gain the market share of the company which will be forced out from the market.
3. And there is no alternative purchase which is less anticompetitive[131].

4.4.8. Initial Review

The commission after getting the notification of the merger initiate initial review process, using the criteria mentioned above to verify the compatibility of the merger with existing market. At the completion of this process the commission will give its findings that whether the merger fall into the ambit of merger regulations or not and if it fall in ambit of merger regulation but there are no chances which give rise on possibility about its compatibility with common market. If the findings of the commission are contrary and merger fall within the scope of the merger regulation then the commission will conduct an in detail inquiry.

The process of the initial inquiry will be completed by the commission with one month of the receipt of the notification[132]. If commission fails to conclude the matter within time merger will deemed to be valid.

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[130] Kali und Salz, cases 68-94 and 30-95, ECR 1998 p. 1 1375; 1998 O.J. (C 209) 2.
[131] Ibid.

4.4.9. Second Phase Investigation

If it is required by the commission to initiate an in detail investigation, it must start proceedings of investigation within the four month of the final decision. The detail investigation of the commission consists of four stages.

At the very first stage the commission after a care full examination of the merger will issue the points of objections. At the second stage, the commission will ask the parties concerned to submit response on the point of objections. At the third stage, the commission will pronounce its decision and will submit it before the members of advisory committee which is consist of representative of member states[133]. The mentioned committee will deliver its decision after considering the draft decision. After giving consideration to the decision of the committee, the commission will pronounce its final decision. The final decision of the commission should contain the following elements 1) The merger is not going to create dominant position and that will not affect the competition in common market, 2) The merger is compatible with the common market and it will not create dominant position[134] 3) or it will affect the competition in common market and will create dominant position[135]. Finally the decision of the commission will be published in the journal of the European community. The merger regulation has also set a time period in which all the proceedings from notification to final decision would have to be completed in five month.

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[132] Merger regulations article 10.
[133] Ibid article 18(1)
[134] Ibid article 19(3)
[135] Ibid article 19(7)

4.5. Extraterritorial Jurisdiction Of The Merger Regulation

EC competition law like US antitrust law works beyond the territorial jurisdiction of the European boarders to enhance competition in its markets. The court and the commission have mentioned 3 grounds I) the place of implementation ii) single economic entity[136] iii) the effects of the doctrine to ascertain jurisdiction on companies which are running their business beyond the territorial jurisdiction of the Europe[137]. There is nothing in the merger regulation which deals with the exterritorial jurisdiction of the merger regulation.

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136 Imperial Chemical Industries Ltd. v. Commission, Case 48/49, [1972]

137 *Wood Pulp*, 0.1. L85/l, [1985] 3 CMLR 474, *on appeal* A. Ahlstrôm Osakeyhtiô v. Commission, Cases 89/85

CHAPTER 05

5. CREATING AN INTERNATIONAL SUPRANATIONAL INSTITUTION FOR MERGER CONTROL: POSSIBLE HURDLES

The level of global trade and economy is at the same level as was in Europe in 1980 when merger regulation was adopted. The basic factors which was considerably helpful in creating and adopting merger regulations was the creation of common market and many agreements on trade between the European countries. If we talk about any possibility of creating a global institution which covers the overall competition situation around the world, we will first have to see whether there is any agreement and common market established by the countries around the world. The answer is No.

There is no agreement between countries to establish a common market. Another fact which is somehow encouraging is that the nations are trying to dismantling trade barriers under the patronage of WTO and a flawless market is emerging. Till that time the global cooperation among states is nowhere and world fails to establish a custom union and creating a free trade area and common currency is too far. Another problem is the attitude of the developing economies that have no wish to create a supranational institute because somehow they want to let their firms be ruled in the world economy. The worst problem is that there is no institute like

European commission who can look after the competition affairs and had experience of administering the competition at international level.

Another possible hurdle before the world is the authority that will have an ultimate jurisdiction in transnational mergers. It took 23 years to the European community to achieve the objective of creation of commission. To achieve this the nations have worked like family and after that they achieved their aim of common market. It is now an established fact that control over merger is a government policy tool for making economy and market stable within borders[138].

Members' states of European community were extremely unwilling to surrender authority to the commission which was initially a political institute rather than independent regulatory authority. Yet to achieve the purpose of merger control and ensure the better competition position in market agreed to surrender.

Protocol 24 of lead jurisdiction model is also relevant in this regard. According to protocol, creation of a supranational model institution for merger control is not possible in short term. The said protocol indicates that nations may agree on creating a common market but the thing which is problematic is surrendering authority over merger control for an institution. Lead model also suggest a way out to work on merger control authority which would look after the merger affairs around the world is cooperation and coordination agreement among the member states rather than establishing an authority for merger control.

In a nut shell, apparently, it seems difficult the nation states will surrender their authority before any authority to check the validity of the merger review to transnational merger control. Secondly the nation sates are long way to achieve the target of trade liberalization and because of

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[138] Ethan chwartz, *PoUties As Usual: The History of European Community Merger Control,* 18 Yale J. Int'! L. 607, 613 (1993)

that reason conditions are not supportive to create an institution for transnational merger review. Further as suggested by the leads jurisdiction model coordination and cooperation is essential irrespective of the level of economic integration. For this purpose nations may establish electronic network for information exchange. Last but not least as experienced by merger regulations premerger notification creates unnecessary burden on the parties on experiencing merger control institution on global level. These kinds of burdensome process should be avoided. Another overburdened requirement by the merger regulations is providing copies of documents to all member states that should also be banned in transnational merger control regime.

5.1. International Merger Control Regime

It has been stated in previous section that it would be a difficult task to establish an institution to manage the International merger control regime. There are host of the proposal which has been discussed and put forwarded by the different stake holders some of them allocate central role to the OCED and other suggested that the WTO is a body which can play vital role in forming merger transnational merger control regime. In the coming lines we will see the procedural elements of International Merger Control Regime.

5.2. Premerger Filling Stages:

A number of proposals suggested that there should be two-tier filling system[139]. Two tier filling system is beneficial for merging parties as well as for competition authorities and this system has been successfully implemented in U.S. It has been suggested in various studies that the two-tier filling system would be beneficial for ICMR.

[139] Adre Fiebig's proposal has not been compared here, as it was too radical for comparison with the other proposals.

5.3. Premerger Notification Form:

This very point is agreed upon by all proposals of International Merger Control Regime. Premerger Notification form can only be prepared after bring harmonization in merger control laws. With brining harmonization in laws it would be impossible to generate a harmonized form. For example, how it will be possible to generate a form where one jurisdiction require filling of premerger forms in two stages and other in one stage. Nations has to amend the procedural and substantive laws of merger control. International Merger control Regime would only operate if there would be a harmonized law.

5.4. Requirement To Disclose Other Agencies Involved:

Two proposal required mandatory disclosure while other three proposal of International merger control place it on the disposal of the parties concerned. The requirement to disclose the agencies involved is supported by the idea that this thing will increase the coordination and cooperation between the reviewing agencies. It is proposed that it should be declared mandatory for International Merger Control Regime to disclose involvement of the other agencies.

5.5. Waiting Period For Consummation

Two proposals[140] for International Merger Control Regime suggest for compulsory waiting period. While three proposals[141] suggest the eradication of compulsory waiting period. On the other hand, host of the experts are of the view that in multijurisdictional merger review, compulsory waiting period should be mandatory as it will be useful to assure that all related agencies have surety in which a transaction will not be consummated. Transaction will be

[140] ICPAC; Munich Group; Fox & Ordover
[141] Campbell & Trebilcock; and ABA.

allowed without any hindrance once all concerned jurisdiction give clearance to proposed transaction. Waiting period will be waived automatically once all reviewing agency gave clearance.

5.6. Discloure Of Confidental Information

Most of the models suggested that the all the nation states should amend their domestic laws to allow competition agency to exchange confidential information with some exceptions. ICPAC merger control model suggest exchange of information only with the permission of concerned parties.

Experts suggest that it is not possible to attain a working environment and enhance cooperation and coordination between different agencies without exchanging and sharing confidential information. The main focus of the competition authority is to ensure the competition in the market and work for the welfare of public. Competition authorities are in no way required to seek permission from merge ring parties to perform their basic function, but one thing which is important with all respects is that the sharing of confidential information should be subject to some safeguard.

5.7. Notification Threshold

Notification threshold is discussed by only four proposals and among these three proposals threshold based on assets and sales. It seems notification threshold based on assets and sale is more compatible and captures successful transactions that raise competition rather than threshold based on cumulative revenue or turnover of the parties. Some experts are of the view that the merger control based on the turnover threshold will necessarily capture mergers that don't raise

any competition concern[142]. At the same time threshold based on turnover will not be able to capture the firms that occupy potentially important position in market but generate low turnover. It is also required by the International law to assume the jurisdiction upon any transaction, it should effect within the borders of that state irrespective of that fact that it will met threshold or not. [143] It is proposed that the International Merger Control Regime should be based on assets and sale within nation state.

5.8. Transparency And Merger Enforcement Guidelines

Four proposals[144] recommended that the merger control enforcement guideline should be published for transparency in the application of merger review. Transparency is the basic point of international merger control regime and it will be embodied in multilateral treaty.

5.9. Central Filling System

Some proposal recommended a central filling system for International Merger Control Regime. Central filling system parallel to domestic filling is a good idea to improve coordination and cooperation between states.

5.10. Dispute Resolution Mechanism

In case of dispute, experts suggest that there should be mediation process between the parties in the presence of expert lawyers. The Munich group is of the view that International Merger

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[142] Rachel Brandenburger & Thomas Jassens, European Merger Control: Do the Checks and Balances Need to be Re-set", Speech Before Fordham Corporate Law Institute's 28th Annual Conference on International Antitrust Law and Policy 22.

[143] Genor v. Comm'n, Case T-I02/96, 1999 ECR II 7153 (CFI), at 90. ("Application of the Regulation is justified under public international law when it is foreseeable that a proposed concentration. will have immediate and substantial effect in the Community")

control body should be vested with the powers of dispute resolution. Dispute settlement is a part of coordination and cooperation mechanism. As already been noted in previous chapters that the International Organization performing dispute resolution role should be viewed as resolving disputes and enhancing cooperation rather than an authoritative enforcer of rules. A proper system for dispute resolution would be required for International Merger Control Regime.

5.11. Pre Filling Consultation

Pre filling consultation is required by only two proposals which suggest that there should be consultation between parties and competition authorities before starting of merger procedure. Some of the experts are of the view that it should not be necessary that parties should make the process of notification threshold as transparent as possible[145].

5.12. Public Notification Of Filing And Decision:

One of the proposals recommends that competition authority should inform the public of premerger notification and subsequent decision. While some other proposals suggest that parties should be responsible for publishing the merger to public, but it is recommended for the International Merger Control to abide by this requirement because of other burdensome procedure.

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[145] lisa l. martin, *the political economy of international cooperation, in* global public goons, international cooperation in 21st century 51, 52 (inge kaul et al. eds., new York: oxford university press, 1999).

CHAPTER 06

6. RECENT TRENDS AND CONTROVERSY IN MERGER

There has been an increasing trend in global merger activities throughout the world and in 1999 the value of announced merger was estimated 3.4 trillion. The interesting fact about mergers is that it has impressed almost every growing industry such as defense, telecommunication, airlines, automobile and pharmaceutical companies[146]. For instance, in 1999 Olivetti SPA and Telecom Italia SPA, telecommunications industry, has agreed on 35 billion dollars merger. Another example of telecommunication industry is merger of Mannesmann AG and Vodafone Airtouch Plc which is about 410 billion dollars. An example of services industry consolidation is the merger of Travelers group and Citicrop agreed to a 73 billion dollar deal.

There are various reasons why these growing industries are inclined towards mergers and consolidations. One of the main reasons is the reduction of investment barriers and increasing flexibilities in multilateral trade. Other reasons includes the reduction of transport and transaction cost of trade in the recent years. It has been estimated that in the year of 1981 to 1991 the cost of rail transportation is substantially decreased up to 30 % likewise the transportation cost of airline fallen up to 3 % every year[147]. Decrease in the cost motivated the large corporations to increase and expand their market. Another important factor is the interaction of information technology with industry which has helped the companies to explore

[146] Michael S. Jacobs, *Symposium: "Morph Mania: A Recipe for Mergers and Acquisitions": Foreword: Mergers and Acquisitions in a Global Economy: Perspectives from Law, Politics, and Business*, 13 DEPAUL BUS. L.J. 1, 2 (2001)
[147] Ibid at 03

their customers globally. The total internet sale of different companies was 200 billion dollar in 1995 whereas, it increased up to 400 billion dollar in 2002[148].

Resultantly, firms targeted multi domestic global markets rather local customers. Global market has been defined by the expert of international competition Michael Porter as a market where a firm's position in one country affected greatly by its position in other countries. Consequently, the competition in multi domestic industry of each country is almost independent of competition in other countries[149].

Reduction of trade barriers has encouraged the transition towards global industry. Merger and acquisitions are used as a tool to break through in international market. It has also been used to serve the global costumer more efficiently. One of the main advantage of the merger is provide experts on capital management and to expand and explore their business without worrying about infrastructure. In addition to this firm many other advantages like distribution networks, local marketing system, and sales forces can be obtained easily and efficiently as compared to building new infrastructure.

Merger and consolidations of firms may cause harm to the consumers to determine the harmful effect of the merger is task which is to be tackled by the legislators, regulators and enforcement agencies. Merger, which results into monopoly, likely to disturb competition in

[148] Press Release, Int'l Data Corp, Buyers on the Web to Increase Nearly Tenfold by 2002 (Aug. 17, 1998).

[149] MICHAEL PORTER, COMPETITION IN GLOBAL INDUSTRIES 2-3 (1986)

the market and ultimately has to pay the price. This is the reason that the competition laws is emerging on international level to protect the consumers[150].

The globalization of industries, however, had made it difficult to define the geographic and product market. For instance, in financial industry, substantial consolidation took place due to deregulation, but now bank compete in other sectors like insurance, brokerage and securities[151]. In U.SS Oligopoly market has become the norm to provide many services like energy, airlines, pharmaceuticals, hospitals, department store chain and super markets. These types of markets try to adjust the price in a manner that creates cartels and ultimately count huge profits competitions laws that made to regulate the behavior of these type of firms. However, where the merger do not disturb the competition these types of mergers are welcomed.

Although antitrust policies are meant to protect the competitive environment at the whole rather to trace individual competitors. In an international setting where foreign competitor harm the domestic competitor policy makers are seems to be politically pressurize. As the society has now been changed into an agrarian society the competitive process has also changed through the transportation of society into knowledge of the 21st century.[152] Merger regulations are framed to protect the consumer's interest in the era of open markets and free trade, but the merger control authorities are subject to pressure from national procedure. The pressure brought on competition by the free trade and from international trend of reduction,

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[150] MICHAEL R. CZINKOTA ET. AL., GLOBAL BUSINESS 400-03 (3d ed. 2001) (1995)
[151] Ibid 01, at 8
[152] Ky P. Ewing, Jr., *Introduction: Perspectives on Competition*, 69 ANTITRUST L.J. 349 (2001).

trade barrier allows for large markets. The ultimate goal, according to the economists, of the competition law is efficiency not competition[153]. This is the reason that the policy makers are at divergence that what should be the basic aim of competition law policy.

6.1 The Creation Of Premerger Control Regime

The politicians and economists' consensus have been developed that there is a need of super national premerger control regime. So far as many proposals have been put forwarded but to create a premerger control office in the framework of the WTO is most famous and one which remains debatable on many forum. The office would be vested an authority to review international mergers. That would not in any case be the purpose of the merger control office to gain sovereignty over national merger control authorities[154]. The authority of such office would not extend up to the limit of substantively review the merger. The premerger control office would assist the national authorities to determine that a certain merger has no significant effect on the competition.

Premerger control office could operate independently without the supervision of the any other institution. However, WTO is considered as suitable institution with proper framework which could be used. The WTO is an established institution have professionals of all fields and experience of international working thus it is most suitable institution than any institution

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[153] Ibid at 358

[154] Andre Fiebig, A role for the WTO in international Merger Control, North-western university school of law, volume 20. NO. 2, at 247.

including OECD. Furthermore with a passage of time, WTO may creates international competition law regime governing international trade[155].

6.2 Essential Components Of Merger Control Regime

There establishment of merger control regime under WTO required some essential components which are as follows:

The first and the foremost thing which is to be determine by the merger control office is to specify the jurisdictions in which mergers have no effect on competition. In other way, we may say merger control office would act as a filter. The task of the WTO merger control office would be to minimize public and private cost which is unnecessarily linked with merger and have nothing to do with competition law. That would be out of scope of the merger office to prevent the relevant state form reviewing a merger and to give its observations on merger, but the task of the merger office would be to relieve the relevant parties from the burden of reviewing inconsequential mergers[156]. It is much easier to identify the transactions which pose no threat on the competition and that is the reason that the proposal of merger office under auspicious of the WTO seems more successful than any other proposal.

The second essential component of the merger control office established on international level is to determine the jurisdiction of the office and the rules governing its jurisdiction. One thing is clear that the jurisdiction of the merger control office will extend to only those mergers which is subject to more than one jurisdiction. The parties would notify the merger to the merger

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[155] Ibid 248

[156] G6tz Drauz & Thalia Lingos, *The Treatment of Trans-Border mergers in the 1990's: A European Perspective,* POL'Y DIRECTIONS FOR GLOBAL MERGER Rv. 55, 58 (1999).

control office before notifying national agency. Other decision of the national authorities may affect the decision of the WTO merger control office.

The most important thing is the agreement between the parties to accept the decision of the WTO merger control office. Many European countries have incorporated the provisions in favor of the European Merger Control Regulations[157]. Although the signatory states have to surrender their sovereignty up to some extent but this should not be the reason of discouraging this proposal.

An exemption could be incorporated in the rules giving ample freedom to the signatory states to review a transaction on certain legal grounds that had been notified to the WTO merger control office. Incorporation of this type of provision would made the proposal acceptable for the signatory states[158]. Further it would also be necessary to identify the real and legitimate interest in case of merger. In certain cases participating state may overrule the decision of the WTO merger office. Such as where a merger harm the competition in one country and merger control declare it, otherwise national office may declare that transaction void. In addition, there are other factors which national institution may take into consideration to overrule the decision of the Merger control office like environmental, employment and industrial policies. For say, if a merger notified to the merger control office declared have no effect on the competition market of a country but national reviewing authority deem that merger against the environmental policy that could apply its own rules on that transaction.

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[157] *67See, e.g.*, Finnish Act on Competition Restrictions 480/1992, art. 11 a(2)(3); Dutch Competition Act of May 22, 1997, art. 33(1), English translation, 18(6)

[158] Simon Hirsbrunner, *Referral of Mergers in E.C. Merger Control*, 20(7) EuR. CoMp. L. REv. 372 (1999).

There are argument against that component and some stake holders consider that the participating states would abuse that exemption. Other side argued that participating state before overrule the decision made by the merger control office would have to show that there legitimate interest are at stake. Secondly overruling state has no hidden interest or incentive in overruling the decision. However, for the sake of protection WTO merger control office may have certain procedure to prevent this abuse. Where it has been determined by the merger control office that any transaction that have an effect on the relevant jurisdiction, the information relied upon may be used by the national authorities.

CONCLUSION

THE ROAD AHEAD

The basic and the primary function of the competition law is the welfare of the consumer. On the other hand the competition law eliminate the trade barrier and create opportunities to market entrance. It focuses on the elimination of cartels which resulted into market dominance and monopoly[159]. Initially competition law was formulated to regulate the domestic economic activities, but with the passage of time trade trends were changed immensely and the economic activities outside the border of the countries started effected the business inside the country[160]. Further globalization has also played its role and distorted the walls between international and domestic business. All this has lead the world towards the need to create an institution having extraterritorial jurisdiction. International agreements, such as, governing intellectual property rights (TRIPS) investment (TRIMS) and services (GATS) has already been signed[161]. Furthermore, WTO, NAFTA and various E.U. has also suggested the creation of the international institution for the regulation of competition policy.

Various proposals have been emerged which suggested a fully articulated international body like WTO, with dispute resolution system or within the frame work of the WTO[162], but the important thing is that the proposals for the creation of international competition law regime

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[159] Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT'L L. 1 (1997).
[160] Ibid at 3
[161] Ibid at 4
[162] Harry First, *Symposium: Antitrust at the Millennium (Part II): The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 ANTITRUST L.J. 711 (2001).

has been discussing by the nation states since 1900, from the creation of league of nations[163]. One important reason which justify the creation of extraterritorial competition law policy is to eliminate the chances of conflict arising out of different rulings in different jurisdictions. Another reason may be the reduction of private and public cost imposed by domestic jurisdiction. For instance, cost may be increased if a single transaction of merger is subject to many merger control regimes and every regime have its own compliance cost. The creation of independent competition law governing body at international level with an independent enforcement agency is needful and of significant value.

Near future will not seem possible if a body which will regulate merger internationally would come into existence. National interest are too much attached with the competition law that it seems impossible for the states to reach at a point of consensus on the enforcement mechanism. U.S is also not in favor of international merger control regime due to number of reasons. For instance U.S though to WTO would not be able to develop a common definition of competition law which would be acceptable to all national states. Further U.S has also expressed its concern that the body of law created for the regulations of merger at international level would erode the effectiveness of the existing law[164]. These are the reasons which it seems that in near future nation states are not agreed upon the creation of any international body which will regulate the mergers and replace the institutions working within national boundaries.

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[163] Andre Fiebig, *A Role for the WTO in International Merger Control*, 20 NW. J. INT'L L. & BUS. 233 (2000).

[164] Joseph P. Griffin, *Extraterritoriality in U.S. and E.U. Antitrust Enforcement*, 67 ANTITRUST L.J. 159 (1999)

However, through cooperation and convergence competition law has been developed on international level. This cooperation and convergence is evident from the behavior of the E.U and U.S. U.S has drifted from its policy aimed at increasing the economic activity and to prevent monopoly. On the other hand E.U has developed its law in a manner that significantly discourage the monopolistic approach in business. With this, there is an environment of cooperation between E.U and U.S. This is an optimistic point for an international institution that the growing economic states are at convergence as well.

Although a global framework for the merger regulations is premature and some scholars are of the view that global standard will never become a reality. However, as business and trade is shifting towards global markets and the corporations are shifting towards multinational regime,it is suggested that competition law should be framed which overlook the affairs of the multinational firms on a single forum so that firm may escape themselves from the formalities of the domestic law and world may achieve its goal of trade liberalization.

Recommendations

- There is an obvious need for an international institution facilitating the cross border mergers for simplifying the complicated processes of different domestic competition and antitrust laws
- The question of surrendering the authority of reviewing the mergers for an international institution is the biggest hurdle for sovereign countries.
- A super national premerger control regime is suggested to be created as a premerger control office in the framework of the WTO
- WTO is considered as suitable institution with proper framework which could be used. The WTO is an established institution have professionals of all fields and experience of international working thus it is most suitable institution than any other one.
- The office would be vested an authority to review international mergers. That would not in any case be the purpose of the merger control office to gain sovereignty over national merger control authorities
- The authority of such office would not extend up to the limit of substantively review of the merger. The premerger control office would assist the national authorities to determine that a certain merger has no significant effect on the competition.
- The first and the foremost thing which is to be determined by the merger control office is to specify the jurisdictions in which mergers have no effect on competition. In other way, we may say merger control office would act as a filter
- The second essential component of the merger control office established on international level is to determine the jurisdiction of the office and the rules governing its jurisdiction.

- In certain cases participating state may overrule the decision of the WTO merger office. Such as where a merger harm the competition in one country and merger control declare it, otherwise. National office may declare that transaction void. In addition, there are other factors which national institution may take into consideration to overrule the decision of the Merger control office like environmental, employment and industrial policies

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