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FAILING FIRM DEFENCE IN MERGER CONTROL: ASSESSING POSITION, PROSPECTS AND CHALLENGES IN INDIA[1]

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1. CONCEPTUAL FRAMEWORK

"For it ought to obey him by whom it is preserved; because preservation of life being the end, for which one man becomes subject to another, every man is supposed to promise obedience, to him, in whose power it is to save, or destroy him."

(Thomas Hobbes[3])

Competition Law, in whatever form it exists globally, has certain common ends it seeks to achieve, which include enhancing economic development of the concerned jurisdiction, preserving healthy and vibrant competition in the market, protecting the interests of customers and end consumers, promoting efficiencies, and ensuring freedom of trade by balancing the situations to create a fair and level playing field for all the players in the market.

Merger Regulation or Merger Control mechanism is specifically aimed at regulating those transactions which are likely to create anti-competitive effects due to increased concentration in the market which, as a result, considerably impairs the competition. If this causal connection is established, the regulators have a reasonable pretext to block such a merger. On the other hand, the absence of such a causal connection between the proposed merger and the anticipated harm, gives rise to the defences which may be available to parties in a merger proceeding. Some jurisdictions have expressly recognised the same and have raised them to the pedestal of formal defences in their legislations, while there are jurisdictions which have preferred to take such an absence of causal link as one of the many factors which may be considered by the regulators in assessing mergers. India falls in the category of jurisdictions which have not raised formal defences in their statutes but have recognised them as factors that should be considered in a merger analysis. Defences or factors related to efficiencies, innovation, and involving a failing firm etc, have found place in most of the merger control regimes including United States, European Union and India too.

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[3] THOMAS HOBBES, LEVIATHAN 140 (Cambridge Univ. Press 1996) (1651).

1.1 The Rationale.

When one speaks about the inclusion of a failing firm defence particularly in the assessment of mergers, it entails not only an anti-trust rationale, but also certain economic and social factors which play an important role. Failing firm defence can also be understood as a way of protecting the weak[4] and failing firms by allowing them to merge with the established strong players in the market. Generally, a merger that creates a dominant position or strengthens an already dominant player in the market is under the strict scrutiny of the regulators and on account of its prospective adverse effects on competition, it may not be allowed to proceed. In this backdrop, on the face of it, making an argument for strengthening an already strong firm in the market may sound a bit absurd, but it is not just the concentration in the market that matters as there are various other undercurrents that provide legality to such an approval of a merger. A merger that would otherwise be blocked due to its harmful impact on competition is allowed when the firm to be acquired is a failing firm and no other competitive solution to the problem is readily available. Even considering the situation socially and economically, the defence finds a sound basis to be good in law. If such a merger involving a failing firm is not permitted, it is expected to cause unemployment in the concerned sector. Further, the useful assets of the failing firm which could have been put to a better use in the event of the proposed merger, shall also eventually exit the market leading to a crunch in the possible economic and social benefits to the society. Therefore when Thomas Hobbes calls *'preservation of life as the end, for which one man becomes subject to another'*, we need to understand that for the greater good and greater goal of promoting effective competition leading to consumer welfare, recognising the failing firm defence is imperative for the regulatory bodies to serve the ends of justice.

The failing firm defence has been interpreted and applied by competition agencies throughout the world from the time it was first perceived in the United States vide the decision in **International Shoe Case** in 1930.[5] The burden of proof was placed on the failing firm, to prove that *"its resources were so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure."*[6]In the European Union, the first case in which this defence was raised, although unsuccessfully, was **Aerospatiale-Alenia/De Havilland** in 1991, just one year post the

4 AgnieszkaZwirska, Failing firm defence 6 (2003) (unpublished Master thesis, Lund University) (on file with Lund University).
5 International Shoe Co. v. FTC, 280 U.S. 291(1930).
6 *Id.* at 302.

enforcement of EC merger control.[7] Since then, the defence has infiltrated, to various jurisdictions, in varying degrees and forms, although it is sparingly applied till date.[8]

1.2 Factors constituting Failing Firm Defence.

The general consensus on the issue has led to policy convergence and has brought out certain common factors that constitute a failing firm defence as accepted by majority of jurisdictions. These factors include that (a) there should be high evidentiary standards for the failing firm defence to be accepted, (b) in the absence of merger the failing firm would exit the market leading to lesser and weaker competition and (c) the proposed merger is neutral towards any distortion of competition which means that merger has no causal link with the deterioration of competition and even if it is disallowed the anti-competitive effect would be the same. Precisely speaking, a failing firm defence is accepted usually when the assets of the allegedly failing firm are expected to leave the market in the near future if not acquired, and there's no other less anti-competitive prospective buyer of those assets other than the present acquirer.

1.3 Failing Division Defence.

There is another debate that revolves around the failing firm defence. It is with respect to peculiar kind of defence based on a failing division of an enterprise and hence is called as the "Failing Division Defence". Regulatory bodies have been reluctant in allowing this kind of a failing firm defence. In such cases they strictly scrutinize all the conditions, especially the evidence on record which is more likely to be molded and manipulated to favor the parties. It is *"generally difficult to establish that a firm is failing"*[9] in the strict sense of the term and there is always a likelihood of maneuvering the balance sheet of the allegedly failing division by its parent company to serve its own purposes. Hence, it is important to unveil the real motive behind the possible failure of the division- a management decision or an actual economic breakdown. Despite the risks associated with allowing the failing division defence, it is generally accepted that such a defence cannot and in fact should not be expressly wiped off. **At times there may be genuinely failing divisions which could have utilised the defence to save their assets, would lose such an opportunity altogether.** But, evidentiary standards for such a defence

7 Case IV/M.053, Aerospatiale-Alenia/de Havilland, OJ 1991, L334/42, ¶ 31.

8 In India there has been no case till date where failing firm defence was successfully raised. Handful of such cases have been decided in European Union and position is not much better in the United States.

9 Organisation for Economic Co-operation and Development (OECD), *Roundtable on Failing Firm Defence* 6 ¶ 15, DAF/COMP (2009) 38 (Aug. 10, 2010).

have to be stringent. This has been established across the leading competition law jurisdictions of world.[10]

1.4 Failing Firm Defence and Economic Crisis.

Another issue that usually crops up in the discussion about failing firms is whether relaxation in standards of accepting the defence should be made in the times of financial distress in a country. But this statement, again, is very contentious. The document produced in OECD Competition Committee's Roundtable Discussion on the Failing Firm Defence, 2009[11] highlights that during the times of financial distress and economic crisis, it is quite likely that there are increased numbers of claims for the application of failing firm defence as has been seen in major developed nations when they faced economic crisis. Total bankruptcy filings in the United States alone, increased from 603,633 in 2006 to 847,141 in 2007 and increased to 1,117,771 in 2008.[12] This pattern was also traced in Europe. Standard & Poor's (S&P) estimated that the overall default rate increased to as high as 11% in 2009, while the average rate was around 3% for the past 15 years.[13] Even in Japan, in December 2008, company bankruptcies were approximately 25% higher than the previous year.[14] But, even during the economic crisis, none of the major developed jurisdictions agreed to relax their criteria to allow the failing firm defence to proceed unless all the required conditions were fulfilled. If there were any mergers that were allowed during the financial distress period on account of failing firm defence, despite many speculations, the authorities refused to declare economic crisis as a relevant factor to allow the defence to succeed. Recently, in the times of economic crisis, two cases were decided by the European Commission in 2013 one after another, allowing the failing firm defence. However, the European Commission refused to accept the fact that they were allowed by relaxing the standards due to economic crisis. Probably, there is no need to relax the standards in the times of economic crisis because the doctrine of *"res ipsa loquitur"* (Latin for "the thing speaks for itself")

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10 Case COMP/M.2876 NewsCorp/Telepiu

11 OECD*, supra* note 9

12 See bankruptcy statistics of American Bankruptcy Institute: http://www.abiworld.org/AM/Template.cfm?Section=Annual_U_S_Filings1&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=62&ContentID=36294.

13 *European bankruptcy laws - Out of pocket*, THE ECONOMIST (Dec. 30, 2008), www.economist.com/displaystory.cfm?story_id=12855376.

14 *More firms go bankrupt in Japan*, BBC NEWS, http://news.bbc.co.uk/2/hi/business/7826009.stm (last updated Jan. 13, 2009).

may be applied to assess such situations. If the condition of the failing firm is so bad such that it qualifies for the defence, it would speak for its own cause, be it in times of crisis or otherwise.[15]

The assessment shall vary from case to case as there may be few failed companies whose assets would be of a greater value if continued as a going concern than if sold vide liquidation. Firms that are desperately failing anyways would prefer to be acquired by the prospective purchaser instead of liquidating if their claims are not being negotiated well by the creditors, as happens in a credit crunch situation. But, it is quite expected that during a credit crunch situation, due to economic crisis, there may be many merger filings involving failing firms. At times, it makes perfect sense for merging parties to get along in this manner in times of financial crisis. But yes, the question remains, whether the harm which is likely to be caused to consumers has been taken into account without fail or not. Another important question that can be raised here is that can a defence that has emerged and developed in the times of perfect financial order stand the rough tides of economic crisis at present? Can the factors laid down during financially sound state apply well during financial distress? Or is it the appropriate time to revisit and refine the concept of failing firm defence in the wake of recessionary economic conditions being witnessed now?

2. FAILING FIRM DEFENCE IN INDIA

India has, over the years, seen a gradual evolution of its competition law regime. From considering *"big is bad"* to *"big is bad only if it is abusive"*, from restricting monopolies to promoting competition, it has taken a great leap towards the modernisation of the Indian competition law regime. India adopted the Nehruvian[16] Socialism Model of a mixed economy post-independence which impacted its competition enforcement indirectly. Industries (Development and Regulation) Act, 1951 (IDRA)[17] was the first Act which was enacted by the Indian Government to regulate the private sector and the issues related to pricing, production, distribution, labour etc. But this Act could not produce the desired uniform growth rate as expected and there began to emerge great disparities in economic standards of Indian masses at large. Therefore, the Government appointed a Committee to inquire into the inequality in the distribution of income

15 KalpanaTyagi, *Merger Control in times of Financial Crisis: An Expedient Instrument to Heal the Fledgling Economy or an Object of Abuse*, RILE- BACT Working Paper Series No. 2015/5, Rotterdam Institute of Law and Economics &Behavioural Approaches to Contract and Tort, Erasmus University Rotterdam, http://ssrn.com/abstract=2614861.

16 Named after the First Prime Minister of India PanditJawaharLal Nehru.

17 Act No. 65 of 1951.

and standards of living **(Mahalanobis[18] Committee, October, 1960.)**[19]The committee found that due to the planned economy that India was, several giant business houses were emerging and hence there was an emergent need to chain/restrict these monopolies to prevent the destruction of industrial structure and restore the lost economic balance. On account of recommendations made by the Mahalanobis Committee, the Government instituted the Monopolies Inquiry Commission (MIC) in 1964 to look into the power matrix in the private sector and strengthened monopolies. In furtherance of the recommendations of the MIC, Monopolies and Restrictive Trade Practices (MRTP) Act[20]was passed in 1969 to control this concentration in the Indian market.[21] With the increasing policy convergence in the wake of globalisation and with the passage of time, MRTP Act became obsolete and it could no more live up to the international standards. WhenIndia liberalised its policies in 90s to fall in conformity with the commitments made at the WTO and opened up its economy, the discourse around the concept of competition law began to take a new turn which after the report of a High Level Committee (**S.V.S Raghavan Committee, 1999**[22]) on Competition Policy and Competition Law. This culminated into passage of the present Competition Act, 2002.The Act was brought into force in two phases. Provisions relating to anti-competitive agreements and abuse of dominance were notified in May, 2009.[23] Thereafter provisions relating to combinations were notified in June, 2011[24].

Combinations are explicitly dealt under the Indian Competition Act, 2002 and the relevant text enumerates the thresholds, factors and defences to be considered by the Commission in regulating combinations. As far as Combinations are concerned, India is a **"Suspensive Jurisdiction"** **[25]***(if threshold met)* because there is mandatory notice filing requirement, i.e. no

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18Prof. Mahalanobis was the real architect of the second plan. And was responsible for introducing a clear strategy of development based on Russian experience

19 See PRADEEP S. MEHTA, COMPETITION AND REGULATION IN INDIA – LEVERAGING ECONOMIC GROWTH THROUGH BETTER REGULATION(2009).

20 Act No. 54 of 1969.

21 It may be relevant to note that the Government had also formed the Hazari Committee which looked into aspects relating to industrial licensing procedure under the IRDA which indicated that the licensing system had resulted in disproportionate growth in respect of industrial houses. Subsequently, the Dutt Committee (Monopolies Inquiry Commission) was also constituted in 1964 to study monopolistic practices and the Dutt Committee also observed the economic concentration of power and suggested the introduction of the MRTP Bill.

22http://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf.

23 Central Government notification S.O 1241 (E) and S.O 1242 (E) (May 15, 2009).

24 Central Government notification S.O. 479(E) (Mar. 4, 2011).

25 G.R. Bhatia, *Mergers under new Competition Law Regime* (Nov. 7, 2009), https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=9&cad=rja&uact=8&ved=0ahUKEwjk37zE7ODMAhXHHZQKHQs2ANYQFghKMAg&url=http%3A%2F%2Fwww.icsi.edu%2Fdocs%2F37n

notifiable transaction can be proceeded with, without being approved by the Competition Commission of India[26]. The regulation of Combinations under the Competition Act has made the existing legislative framework on combinations in India even more comprehensive.[27] All the provisions of the Act including those on combinations have to be read in the light of and to give effect to the objective enshrined in its preamble which states-

"An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto."[28]

A combination analysis is always an *ex ante* analysis of the factors which may reduce the competition in the market if such a combination is allowed by the regulatory authorities.[29] Concentration which may be caused or a dominant position which may be created post a combination is worth considering. The greatest procedural difference between merger control and the control of dominance post-merger is that any analysis of merger will usually be undertaken *ex ante*, and any assessment of abuse of dominant position will always be made *ex post*. This is what makes the entire combination analysis quite contentious, as the results are based on anticipation and not exact calculations or past experiences.[30]

The after effects which a merger may cause are at the heart of analysing such mergers at the touchstone of various merger provisions in the Act. It is pertinent to note that the after effects may be negative or positive depending upon the facts and circumstances of each case. If negative, they cause appreciable adverse effect on competition and if positive they form a part of the efficiencies argument/defence in mergers.

2.1 Possibility of a Failing Business

From 2011 till date, Indian Merger Control Regime is not even 7 years old. Being a nascent competition jurisdiction, the jurisprudence in India is still not as developed as is in the United

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26 The Competition Act, § 6 (2A) (2002).

27 For e.g.§§ 108A-108H (§ 56 Provisions of Companies Act, 2013 as notified) and§§ 391-394 of the Companies Act 1956 (Under Companies Act, 2013- §§ 230-240, yet to be notified) ; the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulation, 1997.

28 The Competition Act, Preamble (2002).

29 RICHARD WHISH, COMPETITION LAW 806 (Oxford Univ. Press, 6th ed. 2008).

30 MARK FURSE, COMPETITION LAW OF THE EC AND UK 374 (Oxford Univ. Press, 6th ed. 2008).

States, European Union or for that matter any other mature jurisdiction. We have something to learn from each jurisdiction, its experiences and challenges and apply the same in the Indian context in the Indian way. Exact legal transplants have never been fruitful, and modifications to suit the Indian needs and requirements of the time are always required.

Learning from various jurisdictions, India has also moved towards recognising the "failing firm defence" in its own manner and form. Discussions on the issue initially cropped up during the passage of the Competition Act and also find mention in the S.V.S. Raghavan Committee Report. While commenting on Horizontal mergers, the report speaks of several issues that need to be considered, while assessing the permissibility of a horizontal merger. Two of them it says may be the efficiencies argument and the failing firm defence-

"The case can be made that even mergers that lead to an uncompetitive outcome could result in certain "efficiencies" that more than make up for the welfare loss resulting from this. The Russian law has such a provision. The US law has generally been balanced in favour of competition. However, the "failing firm" defence has, at times, been accepted by courts. If a firm is, indeed failing and likely to go out of business, it is not clear what social welfare loss would occur, if this firm's assets were taken over by another firm."[31]

The concept was later incorporated in the Competition Act 2002 as well. In order to determine whether a combination would have the effect of or is likely to have an *appreciable adverse effect on competition* (AAEC) in the relevant market, the Competition Commission of India (CCI) shall consider various factors which are enumerated in Section 20(4) of the Act. The factors interestingly also include the defences which the parties may raise in combination proceedings which the CCI shall also pay due regard to. And one such defence that it states unequivocally is the failing firm defence, worded under **Section 20(4) (k)** as – *"possibility of a failing business"*

2.1.1 When shall a business be considered as *'failing'*?

While discussing the applicability of a failing firm defence in Indian Context, it becomes quintessential to understand what meaning can the term *'failing'* used under Section 20(4) (k) basically import. Since the Act does not define or explain what shall be meant by the term 'failing', interpretation in the light of other provisions and the preamble of the Act are the available resorts.

31 *Supra* note 22, ¶ 4.6.4.

Reference may be made here to the latest version of Companies Act, 2013 wherein Chapter 19, deals with the Revival And Rehabilitation of Sick Companies. This chapter on Sick Companies shall, once notified, replace the provisions of Sick Industrial Companies (Special Provisions) [SICA] Act, 1985[32], and would result in a wider application of this concept. The application of SICA is confined only to industrial companies, while the 2013 Act encompasses within its sphere the revival and rehabilitation of all companies, irrespective of their sector. Section 253 (1)[33] of Companies Act, 2013 (Determination of Sickness) states that a company which is unable to pay or secure a debt amounting to fifty percent or more of its total outstanding debt, within thirty days of demand notice, it may be declared as a sick company by the National Company Law Tribunal.[34] The entire definition of a "Sick Company" has been changed altogether. Instead of previous "net worth erosion"[35] , now the inability to pay dues to creditors within 30 days of the demand would be sufficient enough prove that the company has become a sick company under the Act. Hence, the CCI, when faced with a failing firm claim while assessing a merger, may refer to this provision on sickness to determine corresponding failure under Section 20 (4) (k).

While understanding the concept of failure, it is also important to examine the true financial picture of the allegedly failing business to find out whether the business is actually financially distressed so as to avail the advantage of the failing firm defence or not. Usually, firms assert that they are failing but those which actually meet the criteria under the section are rare in number. Many firms may at times face certain financial difficulties but not every financial difficulty can be termed as a failure to qualify for the said defence. There may be several reasons due to which firms may encounter certain periods of distress, like – fierce competition in the market, expansion at a fast pace, and also certain unanticipated events such as natural calamities, currency rate fluctuations, economic crisis, war situations etc. Hence, the failing business must be genuinely 'failing' and not merely 'ailing', meaning thereby that a business should be facing an

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32 SICA was to be repealed through Sick Industrial Companies (Special Provisions) Repeal Act 2003- Not made effective.

33 Section 253 (1) Where on a demand by the secured creditors of a company representing fifty per cent or more of its outstanding amount of debt, the company has failed to pay the debt within a period of thirty days of the service of the notice of demand or to secure or compound it to the reasonable satisfaction of the creditors, any secured creditor may file an application to the Tribunal in the prescribed manner along with the relevant evidence for such default, non-repayment or failure to offer security or compound it, for a determination that the company be declared as a sick company.

34 Constituted under § 408 of the Companies Act, 2013.

35 It's a scenario in which liabilities are higher than the assets. Deficit net worth can occur for a variety of reasons, but typically it arises when current or future asset values erode unexpectedly. For example, when home values fall, often one is left owing more on their mortgage than the home is presently worth. Likewise, in frontier days, land and property often gained or lost value suddenly depending on where the nearest railroad was located. It is also known as negative net worth, https://www.investopedia.com/terms/d/deficit-net-worth.asp.

emergent situation of bankruptcy or approaching insolvency so as to be deemed to be failing. This interpretation is the position of the USA and European countries.[36]

American Regulators take into account several factors to deduce a firm's failure. These factors are whether a company's costs are greater than its revenue[37], whether total liabilities exceed total assets over a period of time[38], if a company's short term losses are likely to be repeated[39], if company's "productivity is declining"[40], company's poor current management[41], company's financial problems are part of "an irreversible downward trend"[42], firm is attributable to the "general, and temporary, depressed state of the economy"[43], "company's pre-merger, ordinary course of business documents reveal an imminent financial failure, or if the claims of failure appear to be invented to help defend the merger"[44] etc. United States anti-trust authorities also take into account the possible failure to reorganise under the Bankruptcy Act to determine the validity of the defence.

In India, the RajyaSabha on May 12, 2016 gave its assent to the new bankruptcy code, almost a week after it was passed by the LokSabha, clearing path for the law that provides for speedy resolution of bankrupt businesses.[45]Prior to this law, there was not a single umbrella law dealing with insolvency and bankruptcy in India. Liquidation of companies was being handled by the high courts, while individual cases were being dealt with under the **Presidency Towns Insolvency Act, 1909** and **Provincial Insolvency Act, 1920**.[46] The recently passed **Insolvency and Bankruptcy Code, 2016** is being seen as a consolidated mechanism to swiftly resolve issues of bankrupt companies, and side by side the interests of all stakeholders. Hence, if a company is unable to reorganise itself or is declared as insolvent or bankrupt or an order to effect liquidation

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36 Ravisekhar Nair, *The Failing Firm Defence*, 1 Comp LR 105 (2009), http://www.luthra.com/admin/article_images/manupatra-clr-failing-firms-rn.pdf.
37 *Id* at 111.
38 California v. Sutter Health System, 84 F. Supp. 2d 1057 (2000).
39 Ken Heyer& Sheldon Kimmel, *Merger Review Of Firms In Financial Distress*, EAG 09 – 1 (2009), *https://www.justice.gov/sites/default/files/atr/legacy/2009/03/31/244098.pd*f.
40 *Id.*
41 *Id.*
42 OECD, s*upra* note 9, ¶ 177.
43 OECD, *supra* note 9.
44 OECD, *supra* note 9 at 177-178.
45 Joel Rebello, *Bankruptcy Code gets RajyaSabha nod, to ease business conditions*, THE ECONOMIC TIMES (May 12,2016, 02:43 AM), http://articles.economictimes.indiatimes.com/2016-05-12/news/73039464_1_bankruptcy-bill-bankruptcy-law-new-code.
46 Other laws which deal with the issue include SICA (Sick Industrial Companies Act), 1985; Recovery of Debt Due to Banks and Financial Institutions Act, 1993, SARFAESI (Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest) Act, 2002 and Companies Act, 2013, http://indianexpress.com/article/india/india-news-india/insolvency-and-bankruptcy-code-a-legislation-to-promote-investments-develop-credit-markets/#sthash.uZ6I9U3e.dpuf.

is passed under the new Insolvency and Bankruptcy Code of India, it may be a relevant factor to be considered by the Competition Commission of India in deciding whether a business is failing.

Bankruptcy is a state of inability to repay debts to the creditors. Under the new code, a bankrupt entity is a debtor who has been adjudged as bankrupt by an adjudicating authority that has passed a bankruptcy order. The adjudicating authority for companies and limited liability partnerships is the National Company Law Tribunal (NCLT), and for individuals and partnership firms the competent forum is the Debt Recovery Tribunal (DRT).[47] Hence a possibility may also arise wherein the Competition Commission of India may require an allegedly failing firm to first present its case of failing business to the above mentioned competent authorities and only after order to that effect has been passed by any of these Tribunals, shall the Commission take into consideration the failure. Since the new Code has made the insolvency and bankruptcy procedure clearer and easier, it shall herald a new era of development of jurisprudence on failing firm defence as well.

Another important factor worth considering post the passage of the new Insolvency and Bankruptcy Code, 2016 is the increased role of creditors. The code has made remarkable changes to the prioritisation of creditors in the liquidation process which is a radical shift from previous position, under which some of the dues owed to the government and statutory dues took precedence over the dues owed to secured creditors. The re-prioritisation of creditors in relation to the distribution of the insolvent body's assets is likely to act as a major incentive for investors and creditors alike, since it substantially increases the likelihood of successful debt recovery.[48]Hence when creditors have now become even greater and important stakeholders in the event a firm is failing, their interests shall also be considered by the Commission when a claim of possible failing business is raised in mergers.

In Europe, in order to determine the failure of a firm, reference is made to the balance sheet of a company, to examine its profitability, ability to reorganise, liquidity, and solvency, which will in turn depend upon the industry and market characteristics. There are different parameters and evidence that are used in this assessment in different sectors by the European Commission. In the banking sector, if there are solvability problems being faced by a bank which are also

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[47] Khushboo Narayan, *Simply put: Why the proposed Bankruptcy Code is needed, how it'll tackle bad debts*, THE INDIAN EXPRESS, http://indianexpress.com/article/explained/bankruptcy-code-passed-why-the-proposed-bankruptcy-code-is-needed-how-itll-tackle-bad-debts-2792444/ (last updated May 10, 2016, 7:02 AM).

[48] Jyoti Singh & Vishnu Shriram, *India: Insolvency and Bankruptcy Code 2016: Well worth the Wait*, http://www.mondaq.com/india/x/462788/Insolvency+Bankruptcy/Insolvency+And+Bankruptcy+Code+2015+Well+Worth+The+Wait (last updated Feb. 2, 2016).

confirmed by the central bank, then it can be deemed to be sufficient enough to constitute a financial difficulty under the first limb of this test in EU.

Similarly India can opt for a cumulative approach to determine the required standard of failure to be eligible enough for extending the advantage of failing firm defence to the parties. Banking sector can always be treated as an exception to the general rule. In exercise of the powers conferred by **clause (a) of Section 54** of the Act, the Central Government, in public interest, has already made two kinds of exemptions to regulation of combinations under the Act, which were revised recently in March 2016 itself:

1. **Small Target Exemption**- "an enterprise, whose control, shares, voting rights or assets are being acquired, has either assets of the value of not more than INR 350 crore in India or turnover of not more than INR 1000 crore in India from the provisions of Section 5 of the said Act for a period of five years."[49]

2. **Banking Sector**- "Banking Company in respect of which the Central Government has issued a notification under Section 45 of the Banking Regulation Act, 1949, from the application of the provisions of Sections 5 and 6 of the Act for a period of five years."[50]

2.1.2 Interpreting the *'Possibility'*.

The term *"possibility"* as used in Section 20 (4) (k), hints towards a future probable failure of a business which may take place and in anticipation of such a probable failure, Commission shall consider the defence of merging parties under this section. This means that the business need not be a failure at the time of notifying the CCI, but a mere possibility that it is likely to fail in future is enough to entitle the parties to claim the failing firm defence in India. This is similar to the position in United States and the European Union.

The first and also the third limb of the test of failing firm defence in EU laid down under the horizontal merger guidelines states- *"(i) the allegedly failing firm would, in the near future, be forced out of the market because of financial difficulties if not taken over by another undertaking"*[51]

"(iii) In the absence of a merger, the assets of the failing firm would inevitably exit the market."[52]

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49 Ministry of Corporate Affairs Notification S.O. 674 (E) (Mar. 4, 2016).
50 Ministry of Corporate Affairs notification S.0.93 (E) (Jan. 8, 2013).
51 *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, OFFICIAL JOURNAL OF THE EUROPEAN UNION ¶ 90 (Feb. 2, 2004).
52 *Id.*

Both the limbs indicate towards a possibility of failure in near future which may drive the failing firm out of the relevant market hence leading to its assets exiting the market too and consequently leading to a greater market concentration too. Hence making such an *ex ante* analysis of probable negative after effects of the firm failing, it is better allowed to merge to save the assets and maintain effective competition in the market.

The 2010 Horizontal Merger Guidelines in the United States provide-

"The Agencies do not normally credit claims that the assets of the failing firm would exit the relevant market unless all of the following circumstances are met: (1) the allegedly failing firm would be unable to meet its financial obligations in the near future; (2) it would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act; and (3) it has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger."[53]

The first two requirements of the test clearly and unequivocally represent the "possibility" character which Indian law also incorporates. The U.S. antitrust law also rests its failing firm defence on an *ex ante* analysis of the approaching failure of a firm and not necessarily a failed firm already.

Since Indian Competition Act 2002, does not have express guidelines on the failing firm defence, the term 'possibility' has to be cautiously interpreted. Learning from the E.U. and U.S. experience, one thing which we need to understand while interpreting this possibility of failure is that it should denote the possibility of failure in the 'near future'. The possibility should not go on to mean a probable failure in few years or a longer period of time, because it is impossible to reasonably stretch the *ex-ante* evaluation of a merger that far. Hence the time frame must be reasonable to consider validly this possibility.

What is important to understand in Indian parlance is that this 'possibility' should not be *a remote possibility* of failure. The chances of the allegedly failing firm *failing* should be as high as to legally entitle the parties to claim the failing firm defence under this section. American law on the point speaks of bankruptcy proceedings and European practice takes into account the approaching insolvency proceedings. Hence India can set its own parameters to decide the gravity of this

53 U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *Horizontal Merger Guidelines*,http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf(Aug. 19, 2010) [hereinafter 2010 HORIZONTAL MERGER GUIDELINES].

probable failure so as to constitute a valid possibility worth giving consideration to under the Act.

2.1.3 What Shall Constitute a *'Business'*?

Section 20(4) (k) seeks to address the possible failure of a "business". However it is quite uncertain as to what shall constitute a business precisely. The Legislature has left the question open ended without restricting it to a particular- enterprise, firm, company etc. It could have expressly used the term *'enterprise'* which has been used throughout the Act and refer the same as a 'failing enterprise', but that has not been the case. This makes it quite clear that the intent of the legislature was not to restrict this defence only to enterprises as defined under Section 2(h) of the Competition Act[54] but something beyond that.

One possibility of wording the sub clause in this manner could be to give room to the ***"Failing Division Defence".*** This defence is recognised by many other jurisdictions including EU too, although the evidentiary requirements and nature of the test to qualify for this defence is much more stringent. Despite many apprehensions accompanying such kind of failing firm defence, it is never out-rightly rejected and rather should not be rejected in my opinion. The possibility of failure of a particular kind of business which a parent company or enterprise undertakes cannot be ruled out. The test to claim the defence can be validly designed to be stricter owing to the influence which the parent company has to manipulate the balance sheets and economic records of the subsidiary/unit/division or business.[55]Recently Failing Division Defence was accepted by the European Commission, in two back to back decisions of NYNAS/Shell/Harburg Refinery Case[56] and Aegean/Olympic II Case[57].

India has something to incorporate from various jurisdictions which are open to such kind of defence. Our legislature has left it open ended for the Commission to decide and ponder upon the same when faced with such a situation. In my opinion, the Commission may take advantage

[54] "enterprise" means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

[55] *Supra* note 9 ¶15.

[56] Case No COMP/M.6360, NYNAS/Shell/Harburg Refinery.

[57] Case COMP/M.5830 Olympic/Aegean Airlines, Decision of Jan. 26, 2011 ¶ 1988.

of such wordings of the section to interpret it as the situation demands. There may be cases where a failing unit of an enterprise is a merging party and may raise the argument under Section 20(4) (k). Therefore Commission may impose higher standards of evidence upon the merging parties but it should not completely foreclose its stand to exclude such possibilities and rather keep the situation as status quo in the manner legislature has intended it to be. Interpreting it case by case would add beauty to the defence and help in evolving a comprehensive jurisprudence on the point.

Till date there has been no case in Indian Competition law regime wherein failing division defence was raised. When faced with such a situation, it would be interesting to see how the Commission responds and sets a precedent.

2.2 Failing Firm Defence as Merely one of the Factors in Merger Assessment and not an Absolute Defence

The failing firm doctrine as established by the US Supreme Court in 1930 and modified in 1969 has also infiltrated in different forms in various jurisdictions including India (Section 20(4) (k))[58] and major other Asian and African nations (For e.g. South African merger regulatory framework)[59]. Essentially an American doctrine, it now finds acceptance even in the developing jurisdictions and major developed nations as well. One such jurisdiction is South Africa. It is worthwhile to mention as we can learn something from the South African Merger Control as well, since we share a common colonial past and face certain common challenges of a developing economy that we both are. Section 12 A (2) of the South African Competition Act[60] enjoins the authorities to, assess *"whether the business or part of the business of a party to the merger or proposed merger has failed or is about to fail"*[61] in determining a merger's likely competitive effects. Similar to the Indian position, the South African provision relating to the failing firm defence renders the doctrine as one of the many factors enlisted in section 12A(2) of the South African Competition Act that must be considered in assessing the compatibility of a merger. In the Indian Competition Act the relevant section is Section 20 (4) (k). This indicates that, both in Indian and South African parlance, even if the criterion for establishing a failing firm is met, the merger

58 The Competition Act (2002).

59 S 12A(2)(g) of the Competition Act and See Iscor Limited/Saldanha Steel (Pty) Ltd 67/LM/Dec 01 para 101; Schuman Sasol (SA) (Pty) Ltd/Price's Daelite (Pty) Ltd 23/LM/May 01 para 57; Santam Ltd/Emerald Insurance Co Ltd and Emerald Risk Transfer (Pty) Ltd 57/LM/Aug 09 para 52 and generally Phodoclinics/Protector Group Medical Services 122/LM/Dec 05.

60 Act No. 89 of 1998.

61 The Competition Act, § 12(A)(2)(g) (2002).

must still pass the other factors of the substantive assessment test.[62] This therefore enjoins that India has not established the failing firm doctrine as an absolute defence to an otherwise anti-competitive merger like is the position in U.S. and E.U. India rather considers it merely as one of the factors that is considered in assessing mergers which probably also explains why it is not coming up with any guidelines or regulations on the failing firm defence. Since in India, Legislature has not created failing firm defence as an absolute defence but rather has kept it as one of the many factors which CCI shall look into while assessing mergers, therefore probably the Commission is reluctant in carving out a defence out of one single factor of Section 20 (4).

It is clear that the Indian approach to the failing firm doctrine is different from the European and American approach, as the latter treat it as an absolute defence to an anti-competitive merger while the former has the same in its Competition Act as one of the many factors to be considered while assessing mergers. The distinction may on the face of it appear to be very minute but this drift towards a serious interpretation can produce strikingly varied results on application of the doctrine in these jurisdictions. These drifting and contrasting approaches actually compel us to analyse whether it is necessary to adopt the traditionally narrow and stringent criteria, the US and EU have been adopting, or is the Indian approach of the doctrine which considers it as only a factor in merger assessment is better to proceed with.

Although United States and European Union exhibit a high degree of flexibility, the doctrine is narrowly interpreted there. This makes it more like a paper tiger than a defence of an actual use. On the other hand India has prospects of turning out to be a far more flexible jurisdiction by treating the defence as one of the factors in assessment, and providing wider options to restructure transactions which may be done by learning something from South African jurisdiction which "subjects mergers involving failing firm claims to further scrutiny thereby giving the failed claims a second chance at navigating the traditionally strict and narrow criteria synonymous with treating the doctrine as an absolute defence."[63] Similarly our substantive assessment test under Section 20 (4) can be effective in preserving a competitive market structure by treating the doctrine as a factor and questioning the rationale of adopting a narrow and strict approach thereto in terms whereof it is considered in isolation in order to decide whether an anti-competitive merger should be approved.[64]South African Competition Law is

62 The Competition Act, § 12(A)(a)(ii) (2002).

63 IgnatiousNzero, *Interpretation and Application of the Failing Firm Doctrine in MergerRregulation in South Africa and the US: A Comparative Analysis*, 77 JOURNAL OF CONTEMPORARY ROMAN-DUTCH LAW 443 (2014).

64 *Id.*

much influenced by the *Public Interest Doctrine* which gives enormous powers to the Competition Authorities there to either block or allow a merger solely on the grounds of public interest and this is why they have also not raised this factor to the pedestal of a formal failing firm defence. India has also not yet come out of the socialist flavour of economy probably, and hence it has also adopted the South African way.

In this manner CCI has a wider power of interpreting the factor of failing firms to restrict an anti-competitive merger, even if it qualifies for the failing firm defence in the strict sense of the term as in U.S. and E.U. Had it been the case that it enjoyed a position of an absolute defence under the Act, it would act as a blanket exemption if the criterion of fulfilment was satisfied. It would have categorically operated as the General Defences operate under the Indian Penal Code, which once proved, absolves one of any liability under the Code. Similar is the case of the Failing Firm Defence as is understood in the European and American parlance, which if proved, even entitles an anti-competitive merger to be allowed. But Indian legislators, either intelligently or as a matter of mere chance, left the avenue open by giving space to failing firm defence as a factor but not closing the possibility of blocking an anti-competitive merger even if it involves failing firms.

3. CONCLUSION

India has a fine merger regulation mechanism in place, but there are a few gaps which need to be filled. Some modifications and clarifications were made through the (Procedure in Regard to the Transaction of Business Relating to Combinations) Regulations, 2011 (the Combination Regulations) which came into effect from 1 June 2011. Thereafter amendments were made to these regulations frequently in February 2012 and April 2013 and recently in 2016 as well. Even the Insolvency and Bankruptcy Code, 2016 is a consolidated mechanism to swiftly resolve issues of bankrupt companies, protecting interest of all stakeholders. Hence, if a company is unable to reorganise itself or is declared as insolvent or bankrupt or an order to effect liquidation is passed under the new Insolvency and Bankruptcy Code of India, it may be a relevant factor to be considered by the Competition Commission of India in deciding whether a business is failing. Reference may be made to the latest version of Companies Act 2013 wherein Chapter 19, deals with the Revival And Rehabilitation of Sick Companies. This chapter on Sick Companies shall, once notified, replace the provisions of Sick Industrial Companies (Special Provisions) [SICA]

Act, 1985[65]and would be a wider application of this concept. Hence the CCI may, while assessing mergers, when faced with a claim of failing business may refer to this relevant provision on sickness to determine corresponding failure under Section 20 (4) (k).

Having mentioned the existing provisions from other legislations that may be sought help of, it is pertinent to highlight that till date no provision has been incorporated into the Combination Regulations regarding Failing Firm Defence or as to what factors, shall the Commission consider when parties raise this defence under Section 20(4) (k) and what shall a "*possibility of a failing business"* actually mean in Indian competition law parlance. The probable reason for this lack of attention towards such an important internationally recogniseddefence may be that the Competition Commission of India has not yet encountered any case involving such a defence being claimed by the merging parties. But in my opinion the Commission may not wait for long for such a defence to be raised by the parties and it may, in near future, be ready beforehand with a clear set of guidelines as to what factors it shall consider as qualifying a merging party for the failing firm defence.

An alternative way out may be that CCI instead of amending the present Combination Regulations, may also come up with standalone regulations on failing firm defence setting out the rules and procedure of how it will perceive the defence and the criteria it will adopt in assessing combinations involving failing firms quite like competition authorities in the U.K.[66], E.C.[67], Canada[68] and the U.S[69] and many others jurisdictions around the world. I have tried to frame a proposal which the Competition Commission of India may consider if it thinks fit. The Proposed Draft Regulations on Failing Firm Defence in India form Annexure A of this Article.

It would be quite interesting to note how the Competition Commission of India interprets the "possibility of a failing business' to allow or disallow such a claim in future.

65 *Supra* note 32.
66 Restatement of OFT's Position Regarding Acquisition of Failing Firms (Dec. 2008), http://www.jonesday.com/files/upload/OFT%20Guidance.pdf .
67 *Supra* note 51.
68 Canadian Competition Bureau, Merger Enforcement Guidelines, Part 9. http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html
69 *Supra* note 53.

ANNEXURE A

DRAFT PROPOSAL

The Competition Commission of India (Guidance with regard to possibility of a failing business) Regulations, 2018

(No. X of 2018)

Regulations to establish the position of Competition Commission of India regarding its approach to cases where parties to the merger seek to convince the Commission that an otherwise anti-competitive merger should be allowed on 'possibility of failing business' grounds, by virtue of Section 20 (4) (k).

No. 1-1/Failing Business-Regulations/2017-18/CD/CCI.--- In exercise of the powers conferred by sub-section (1) and clauses (b), (c) and (f) of sub-section (2) of section 64 read with sub-sections (2) and (5) of section 6 of the Competition Act, 2002 (12 of 2003), the Competition Commission of India hereby makes the following regulations, namely:-

1. Short title and commencement

(1) These regulations may be called the Competition Commission of India (Guidance with regard to possibility of a failing business) Regulations, 2018.

(2) They shall come into force on X day of XYZ, 2018.

2. Definitions

(1) In these regulations, unless the context otherwise requires:-

(a) "Act" means the Competition Act, 2002 (12 of 2003) as amended from time to time;

(b) "Combination" means and includes combination as described in section 5 of the Act and any reference to combination in these regulations shall mean a proposed combination or the combined entity, if the combination has come into effect, as the case may be;

(c) "Commission" means the Competition Commission of India established under subsection (1) of section 7 of the Act;

(d) "Enterprise" shall mean "enterprise" as defined in clause (h) of section 2 of the Act;

(e) "Parties to the combination" means persons or enterprises entering into the combination and shall include the combined entity if the combination has come into effect;

(2) Words and expressions used but not defined in these regulations shall have the same meanings respectively as assigned to them in the Act or the rules or regulations framed there under or in the Companies Act, 1956 (1 of 1956).

3. Power to determine procedure in certain circumstances

In a situation not provided for in these regulations or the Competition Commission of India (General) Regulations, 2009, the Commission may determine the procedure, in specific matters, if so required.

4. Approach of the Commission regarding 'Possibility of a failing business' under section 20 (4) (k)

A. Failing Business claims are, in essence, ones that the target business will exit the market in the absence of proposed merger; any harm to competition should therefore not be causally linked to the merger. As Appreciable Adverse Effect on Competition, or 'AAEC', test requires that the merger be the cause of competitive harm, the Commission shall allow meritorious 'failing business' cases.

B. The Commission may decide that an otherwise problematic merger should nevertheless be allowed if one of the merging parties is a possibly failing business.

C. The proposed merger if not positive, is at least neutral towards the deterioration of competition in the relevant market.

D. The allegedly failing firm is in such a condition of financial distress that its assets would be inevitably forced to exit the relevant market in the absence of the proposed combination.

E. No other prospective buyer is available as a less anti-competitive option other than the present acquirer.

F. The Commission's assessment of financial information includes a review of historic, current and projected income statements and balance sheets. The reasonableness of the assumptions underlying financial projections is also reviewed in light of historic results, current business conditions and the performance of other businesses in the industry.

5. A firm is considered to be failing if it satisfies the following criteria

A. It is insolvent or is likely that insolvency proceedings may be initiated against it in the near futureunder the Insolvency and Bankruptcy Code 2016;

B. It has initiated or is likely to initiate on its own motion the bankruptcy proceedings under the Insolvency and Bankruptcy Code 2016;

C. It is a Sick Company under Chapter 19 of the Companies Act 2013;

D. It otherwise seems to be financially distressed to such an extent that the Commission considers it to be a fit case of a failing business under Section 20 (4) (k) of the Act.

6. Burden of proof

The notifying parties are required to provide all the relevant information, including documentary evidence, necessary to show that that appreciable adverse effect on competition, if any, shall not be the result of the proposed merger.

7. Information required in the assessment of a failing business

In assessing the extent to which a business is likely to fail, the Commission may typically require the parties to furnish the following information:

A. The most recent, audited, financial statements, including notes and qualifications in the auditor's report;

B. Projected cash flows;

C. Whether any of the firm's loans have been called, or further loans/line of credit advances at viable rates have been denied and are unobtainable elsewhere;

D. Whether suppliers have curtailed or eliminated trade credit;

E. Whether there have been persistent operating losses or a serious decline in net worth or in the firm's asset;

F. Whether such losses have been accompanied by a deterioration of the firm's relative position in the market;

G. Whether the value of publicly-traded debt of the firm has significantly dropped;

8. Failing Division

All the factors taken into consideration by the commission to determine a possibility of a failing business apply equally to failure-related claims concerning a division or a wholly-owned subsidiary of a larger enterprise. However, in assessing such submissions relating to a failing division, particular attention is to be paid to transfer pricing within the larger enterprise, intra-corporate cost allocations, management fees, royalty fees, and other matters that may be relevant in this context.

9. Order for restructuring or reorganising

Where the Commission is of the view that the retrenchment or restructuring of a failing business may prevent its projected failure and enable it to survive as viable business and an effective competitor, by narrowing the scope of its operations, for instance, by downsizing or withdrawing from the sale of certain products or from certain geographic areas, it may pass an order to that effect.

10. Application of the 'failing firm' criteria in existing economic and market conditions.

A. The Commission shall take account of existing economic and market conditions while assessing mergers involving failing businesses. A contextual evaluation of evidence shall be carried out.

B. However, as a legal and policy matter, the Commission shall not, regardless of existing economic and market conditions, relax the standard required to establish a successful possibility of a failing business under Section 20 (4) (k).