THE INHERENCE-PROPORTIONALITY FRAMEWORK IN ACTION: REGULATING THE EXCHANGE OF COMMERCIALLY SENSITIVE INFORMATION DURING COMBINATIONS

ABSTRACT

The Competition Commission of India is entrusted with the responsibility of regulating combinations that may have an Appreciable Adverse Effect on Competition in the market, in order to protect the competitive landscape in India. Under the suspensory merger control regime in India, no combination can be implemented without obtaining a prior approval from the CCI. The process as provided under the Competition Act, 2002 has to be duly followed before a combination can be brought into effect. A significant challenge arises during the due diligence process, where parties often exchange commercially sensitive information to determine the feasibility and profitability of the deal. While information exchanges are essential for assessing the value and risks of a transaction, they also pose the risk of premature integration which harms the competition if the transaction does not eventually materialize. To address this concern, the CCI has introduced the inherence proportionality test. This paper analyses this test which requires that any exchange of information or related arrangements must be inherent and proportional to legitimate business objectives, while ensuring that the standstill obligations under the Act are not violated. The paper also discusses a set of safeguards suggested to reduce the risk of adverse effects on competition during the course of transactions.

I. INTRODUCTION

The Competition Act, 2002[1] ('the Act') has conferred powers on the Competition Commission of India ('CCI' or 'Commission') to regulate combinations that cause or are likely to cause an Appreciable Adverse Effect on Competition ('AAEC') in the market. A corporate transaction involving acquisition or merger of one entity with another is typically undertaken as a strategic initiative to enhance long-term profitability and achieve sustainable growth within a competitive market landscape. The combination regulation provides for a suspensory framework where no combination can be consummated until it is assessed by the CCI.

The events take an interesting turn during the due diligence process which is inherent to combination transactions. At this stage an entity may share commercially sensitive information with another entity for a legitimate objective. However, such exchanges carry the risk of premature

[1] The Competition Act, 2002 (12 of 2003).

integration. If the CCI later declares the combination harmful to competition, the damage caused may be irreversible.

In order to resolve this dilemma, the CCI has laid down a standard for information exchange through its recent decision in the case of *In Re Adani Green Energy* (*'Adani Green')*.[2] This case marks the origin of the 'inherence-proportionality test,' which requires that the extent of information exchange be proportionate to the stage of the combination. The subsequent sections of this paper will elaborate on this test in greater detail.

As Lord Goff once remarked, "*We are there to help businessmen, not to hinder them; we are there to give effect to their transactions, not to frustrate them; we are there to oil the wheels of commerce, not to put a spanner in the works, or even grit in the oil.*"[3] The role of the law therefore, is to carve out a balance by framing its policies in such a manner that they promote the economic growth, allowing the businesses to strive while ensuring businesses are not subject to unnecessary impediments. The CCI's approach in the recent *Adani Green* case reflects this spirit, where it sought to preserve the competitive health of the market while simultaneously facilitating new commercial opportunities. This paper will explore the framework introduced by the CCI and examine the complexities tied to such transactions.

This paper *firstly* elaborates upon the regulatory scheme of combinations as per the Competition Act, 2002. *Secondly,* it delves into the meaning of the 'standstill obligations' imposed over the combinations. *Thirdly,* it explains the exchange of sensitive information during the due diligence process and its outcomes. Further, the paper shall build upon the gun jumping concerns and shall explore the *inherence proportionality* test developed by the CCI. *Lastly*, the paper suggests various safeguards to avoid the anti-competitive concerns.

II. COMBINATION REGULATION UNDER COMPETITION ACT, 2002

The CCI has powers to regulate mergers, acquisitions and amalgamations and assess whether they cause an AAEC in the market, under Sections 5 and 6 of the Act.[4] The CCI can prohibit any combination which causes or is likely to cause an AAEC within the relevant market in India. There are two stages to every combination transaction under the Act:

i. The notification of the combination to CCI
ii. Passing of an order to approve, reject or modify the transaction.

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[2] *Proceedings against Adani Green Energy Limited under Section 43 A of the Competition Act, 2002* Reference No C-2021/05/837.
[3] *Commercial Contracts and the Commercial Court* (1984) LMCLQ 382, 391.
[4] The Competition Act, 2002 (12 of 2003) s 5.; The Competition Act, 2002 (12 of 2003) s 6.

The Act places a requirement of notification for transactions falling under certain threshold limits, which are prescribed under Section 5 of the Act. The threshold values concern the turnover and asset value of the parties, viz. the target and the acquirer. It provides that any acquisition or merger or amalgamation which exceeds the threshold prescribed therein, is a combination for the purposes of the Act and there is a mandatory notice requirement for this transaction.

This pre-consummation obligation is prescribed under Section 6(2) of the Act which states that the parties entering into a combination shall notify the CCI disclosing details of the combination before its consummation.[5] The post-notification procedure/*standstill obligation* is provided in Section 6(2-A)[6], which stipulates that after filing the notice, no combination shall come into effect until the expiry of 150 days from the date of filing of the notice, or until the CCI passes an order under Section 31 of the Act, whichever is earlier.[7] The CCI may approve the combination by passing an order, if it is of the opinion that the combination does not or is not likely to cause an appreciable adverse effect on competition. Moreover, Section 29(1-B)[8] mandates that the Commission shall form a prima facie view within 30 days of receipt of notice, otherwise, there is a deemed acceptance of the combination.

The concept of *Deal Value Threshold* ('DVT') has been introduced in the 2023 Amendment Act, through insertion of Section 5(d) and introduction of the CCI (Combination) Regulations, 2024[9]. The parties, which would have earlier benefited from the exemption of *de minimis*, may now have to seek approval from the CCI if the value of the deal meets the DVT criteria. It includes two aspects: *first*, the deal value must cross INR 2,000 crores and *second*, the target must have substantial business operations in India. Any deal which satisfied both these conditions has to be notified to the CCI.

Therefore, it can be concluded that these provisions require combinations to be notified to the CCI, thereby, giving the Commission an opportunity to form a prima facie view on whether the transaction may cause an Appreciable Adverse Effect on Competition (AAEC). Section 6(2-A) also imposes a *standstill obligation*, which means that the parties cannot complete the transaction until the CCI issues its order or 150 days have passed since the notice was filed. Under Section 31 of the Act, the Commission may approve the combination, reject it, or require modifications to address competition concerns.

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[5] The Competition Act, 2002 (12 of 2003) s 6(2).
[6] The Competition Act, 2002 (12 of 2003) s 6(2-A).
[7] The Competition Act, 2002 (12 of 2003) s 31.
[8] The Competition Act, 2002 (12 of 2003) s 29(1-B).
[9] The Competition Commission of India (Combinations) Regulations, 2024 (7 of 2024).

III. STANDSTILL OBLIGATIONS UNDER THE 2002 ACT

The combination regulatory regime is in the nature of a mandatory and a 'suspensory regime' wherein, any combination that meets the requirements of asset or turnover thresholds under Section 5 has to be notified before the Commission. As also discussed above, this means that a transaction cannot be consummated before, either passing of an order by CCI or lapse of a given number days, whichever is earlier.[10]

Section 6(2-A) of the Act, imposes the standstill obligation upon the parties, where even *part-consummation* is not allowed.[11] In *SCM Soilfert v. CCI,* [12] it was observed that it places an *ex-ante* obligation on the parties by using the phrase *"no combination shall come into effect"*. The Commission has to be given a chance to examine the anti-competitive effects of the proposed combination before its consummation. The underlying objective of the provision is to guarantee that the parties continue to operate as independent competitors until the transaction is assessed for AAEC and receives the Commission's approval.

In *In Re Bharati Airtel Limited*, it was again noted that the purpose of the obligation is two-fold, i.e., *firstly*, to prevent any harm to the competition in the interim stage where combination is under review and *secondly,* to prevent any harm which is not capable of being reversed in the event the transaction is not approved.[13] This acts like a safety net, protecting the competitive health of the market by mandating that the firms involved in the combination still continue to carry our activities independent of each other.[14]

Therefore, the standstill obligations help preventing any harm to competition by prohibiting the parties from undertaking activities closely related to integration before receiving approval, as any resultant harm cannot be reversed.

IV. EXCHANGE OF COMMERCIALLY SENSITIVE INFORMATION DURING DUE DILIGENCE

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[10] Competition Commission of India, *Frequently Asked Questions Booklet* (CCI, 2022) <https://www.cci.gov.in/images/whatsnew/en/faq-english-compressed-31020221664785663.pdf> accessed 12 May 2025.

[11] The Competition Act, 2002, §6(2-A).; Competition Commission of India, *Compliance Manual for Enterprises* (Competition Commission of India, 2017) <https://www.cci.gov.in/images/publications_compliance_manual/en/compliance-manual1652179683.pdf> accessed 10 May 2025.

[12] *SCM Soilfert v CCI* (2018) 6 SCC 631.

[13] *Notice given under Section 6(2) of the Competition Act, 2002 by Bharti Airtel Limited* Combination Registration No C-2017/10/531.

[14] *Proceedings against Adani Green Energy Limited under Section 43 A of the Competition Act, 2002* (n 2).

In major business transactions, due diligence is conducted to understand the operations of the other party. This process requires examination of the commercially sensitive information of a competitor.[15] The Commission in its Compliance manual and FAQ Booklet acknowledges the necessity of pre-transaction due diligence and post-signing integration planning. However, while carrying out these procedures, the parties need to ensure that these arrangements are not causing a violation of the *Standstill Obligations* under Section 6(2-A).

The CCI has emphasized that nature and scope of exchange of information varies with the stage of the transaction. During due diligence, the only information desirable is of the kind which helps in an assessment of suitability of the target and for valuation of the transaction. Further, after execution of more definite agreements, the focus of the information exchange should be more towards ensuring the preservation of economic value of the target and to facilitate a successful integration planning.[16]

1. WHAT CONSTITUTES COMMERCIALLY SENSITIVE INFORMATION?

Commercially sensitive information includes exchange or transfer of forward-looking planning documents, details of projects or strategic plans, cost data, pricing and discount policies not publicly available etc.[17] Furthermore, a perusal of the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union, facilitates an understanding that commercially sensitive information includes "*pricing, costs, capacity, production, quantities, market shares, customers, plans to enter or exit markets, or concerning other important elements of a firm's strategy that undertakings active in a genuinely competitive market would not have an incentive to reveal.*"[18] It denotes that the other relevant considerations over the sensitivity of data include, the nature and age of data[19], frequency of exchange and, the analysis of whether the exchanged information is present in public domain.

2. EXCHANGE OF COMMERCIALLY SENSITIVE INFORMATION: AN ANTI-COMPETITIVE AGREEMENT?

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[15] ibid
[16] *Proceedings against Adani Green Energy Limited under Section 43 A of the Competition Act, 2002* (n 2).
[17] Competition Commission of India, *Compliance Manual for Enterprises* (n 11).
[18] European Union, Commission, 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements' (European Commission, 21 July 2023) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023XC0721(01)> accessed 21 May 2025.
[19] Office of Fair Trading, *Agreements and Concerted Practice: Understanding Competition Law* (2004) <https://assets.publishing.service.gov.uk/media/5a7c457e40f0b6321db38123/oft401.pdf> accessed 13 June 2025.

Section 3(1) of the Act[20] prohibits any agreement between enterprises which harms or has the potential to harm the competition in the market. The provision includes in its ambit any such agreement between two parties which may be harmful to the competition. Most importantly, the Act places a very low threshold of entering into an agreement and it may be any convergence of purpose leading to anti-competitive effects, be it any informal arrangement. The exchange of commercially sensitive information may harm the competition in various manners. It has the potential of removing or reducing degree of strategic uncertainty in the market. This means reducing uncertainty about the future decisions of the competing firm.[21]

It also may allow them to reach a focal point or convergence or a common understanding, while taking their market decisions, such as allowing them to facilitate a coordination of prices.[22] This means that the information may be used as a tool to signal other parties to an anti-competitive agreement, in turn, facilitating a concerted practice. The practice of sharing such information assists in implementation of anti-competitive agreements.[23] In such cases, an assessment can be carried out to determine whether there exists an anti-competitive agreement through an analysis of the behaviour of such parties in entirety, along with examination of all the forms of evidences present, such as communication evidences, economic evidences, etc.[24]

The Commission expounded in *Paper Manufacturing Industries case*, that even the presence in the channel of discussion of information can lead to comprising one's ability to take decisions independently and has held the same to be anti-competitive in nature. In a situation where the parties are present in the channel of communication of discussion of prices and thereby, there is also fixing of prices, it leads to a contravention of Section 3(3)(a) of the Act. There is a presumption that their presence in the channel of communication influences their ability to decide independently. [25]

In another noteworthy ruling, *In Re: Express Industry Council of India v. Jet Airways, Indigo Airways and Spice Jet airways*, it was seen that where parties enter into an anti-competitive agreement, it is not necessary that the price rise happens at the same time. Rather, the companies may incorporate the agreement after an artificial gap of time to create a façade of competitive environment.[26] Therefore, it can be concluded that any agreement, including an agreement facilitating sharing of sensitive

[20] The Competition Act, 2002 (12 of 2003) s 3(1).
[21] *Ambuja Cements Ltd v Competition Commission of India* (2018) 95 taxmann.com 310 (NCLAT).
[22] *Rajasthan Cylinders and Containers Ltd v Union of India and Another* 2018 SCC OnLine SC 1718.
[23] *In Re Cartelisation in respect of Zinc Carbon Dry Cell Batteries Market in India* 2018 SCC OnLine CCI 5.
[24] *Express Industry Council of India v Jet Airways (India) Ltd* Case No. 30 of 2013.
[25] *In Re Anti-competitive conduct in the Paper Manufacturing Industry* Suo Motu Case No. 05 of 2016 (CCI).
[26] *Express Industry Council of India* (n 24).

information, having the potentiality of reducing competition in the market, is prohibited under the Act.[27]

The exchange of such information can lead to various collusive outcomes. It is the ordinary course of business that the undertakings under normal competitive conditions, have no incentive to publish their commercially sensitive information. It may arise in situations where the parties are planning an action in concert. Such exchange can lead to various collusive outcomes such as:

i. *Firstly,* it can be used to increase transparency between competitors and thus facilitate a coordination. It means that the information can be used to signal competitors to follow the conduct.
ii. *Secondly*, it allows for reaching a common understanding of the terms of coordination.
iii. *Thirdly,* it can be used to increase internal stability and keep a check on other undertakings to avoid their deviation.[28]

Therefore, it is evident that the exchange of competitively sensitive information can lead to formation of an anti-competitive agreement. This means that during the combination transaction, any exchange carries the potential to lead to coordinated behaviour or an anti-competitive understanding between the parties to a combination. If, during the process of due diligence, the parties begin to act in concert or prematurely integrate, it can harm competition in the market. This constitutes gun-jumping, which violates the standstill obligations imposed by the Act. The next section of the paper shall discuss this dilemma at length and also analyse the manner in which the CCI has attempted to resolve it.

V. EXCHANGE OF INFORMATION DURING DUE DILIGENCE AND GUN JUMPING CONCERNS: ANALYSING THE INHERENCE-PROPORTIONALITY STANDARD

Gun jumping refers to a situation where, before obtaining approval by the CCI, any party or parties to the combination consummate the transaction in part or wholly, which violates the standstill obligations. The CCI acknowledges that combination transactions carry within them a dual character, i.e., the legitimate need for information sharing, but also the peril of gun-jumping. The Commission has tried to mitigate this dilemma in the *Adani Green* case.[29] It has introduced a standard to be followed which enables the parties to share the information in a controlled manner, so that the gun-jumping concerns can be kept at bay.

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[27] *Builders Association of India v Cement Manufacturers' Association* (2016) SCC Online CCI 46.
[28] European Union, Commission, 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements' (n 18).
[29] ibid.

In addressing the delicate balance between legitimate safeguards and compliance with standstill obligations, the Commission articulated its position through the following observation:

> "*Wherever it is felt that certain restrictions are required to be imposed or certain information is required to be exchanged/discussed to ensure preservation of economic value of assets or any other such legitimate objective, the parties ought to strive to make the arrangement as objective and precise as possible to avoid any likelihood of inference on interference with ordinary course activities of the target or causing any competition distortions in contravention of standstill obligations."*

Here, the CCI emphasized that there may be a need for the acquirer to:

i. impose certain restrictions on the target company; or
ii. information may be needed to exchanged/discussed; or
iii. any other arrangement;

for purposes such as ensuring the valuation of business, profitability of business, or preservation of economic value of the assets of the target company, or broadly any legitimate purpose required to be served by this restriction or exchange. These objectives may be carried out but with a caveat that the arrangement does not interfere with ordinary course of business of the target.

Further, conceding that sharing of information may be a potential cause of competition distortions, an observation was made that these actions/agreements need to be examined as per the *inherence-proportionality* test/framework.[30] The CCI worded the aforementioned requirement as follows:

> *"It is incumbent on the acquirer to ensure that the form and scope of the aforesaid customary arrangements imposed by it on the target* ***is inherent and proportionate*** *to the objective of ensuring certainty in business valuation and preservation of the same and that such conditions do not violate standstill obligations as envisaged in the Act."*

Here, it clarifies that the acquirer may impose such arrangements on the target, however, it must ensure that the form and scope of agreements imposed on the target are *inherent and proportional* to the objective of ensuring certainty in business valuation or its preservation. Further, the conditions imposed on the target or information received purposes such as ensuring the valuation of the business, shall not violate standstill obligations.[31]

In the *Adani Green* case, the CCI observed the Clause in the agreement:

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[30] *Proceedings against Adani Green Energy Limited under Section 43 A of the Competition Act, 2002* (n 2).
[31] *Notice given under Section 6(2) of the Competition Act, 2002 by Bharti Airtel Limited* (n 13).

"(i) allows the parties to discuss ongoing business and operations of the Target and its subsidiaries; (ii) allows the Acquirer to provide inputs on the business of the Target; and (iii) provides for the Target to take such inputs into account in the best interests of the Target and its subsidiaries. Prima facie, the scope of the Clause is broader than what has been stated by the Acquirer, as it envisages the discussion on the "on-going business and operations of the target"."

This clause allowed the acquirer to discuss ongoing business operations and provide inputs to the target. The CCI examined the construction of the Clause and ruled that it was broadly worded and in such a manner that the possibility of exchange of sensitive information or any coordinated outcome could not be ruled out. The intent of preservation of value could not be substantiated, where the requirement was for discussions including those on *ongoing business and operations*. Even if the intent was to monitor/ preserve the value of the business, the Clause was held to be ***not inherent and proportionate*** to the objective.

The perils associated with these arrangements can also be understood by taking note of *Hindustan Colas* case.[32] It was discussed that agreements between parties to a combination may, at times, incorporate clauses that result in premature integration. Interestingly, ***Clause 4.2.1*** of the Sale and Purchase agreement required payment of 'consideration less deposit' at the time of completion. The same is quoted below as follows:

*"**Clause 4.2.1 of SPA:** The Consideration less Deposit, along with the other amounts listed in Clause 4.1 above, shall be paid at Completion in immediately available cash funds through electronic funds transfer to the Seller's Account."*

The Commission ruled that it clearly demonstrates that the deposit was actually the payment of part consideration and not a refundable deposit. The pre-payment of consideration in the transaction was considered capable of reducing incentive/will of target to compete or may become a basis to access confidential information of the target. The CCI noted that "*gun jumping takes many forms and has the potential to distort the competition dynamics of the markets*." Therefore, gun jumping may take place even in cases where the information is exchanged, provided that the nature of exchange is such that it leads to a premature integration or it reduces the incentive and will of the target to continue to compete in the market.

This is in furtherance of the discussion in the previous section of the paper that the exchange of information may lead to collusive outcomes and reduce the uncertainty in the market, in result,

[32] *Notice given under Section 6(2) of the Competition Act, 2002 by Hindustan Colas Private Limited* Combination Registration No. C-2015/08/299.

causing an AAEC in the market. The rule is that the arrangement must be inherent and proportionate to the legitimate business objectives.

To further illustrate the types of clauses in combination agreements that result into a premature integration, we shall discuss the ruling of CCI in the combination notice by *Bharati Airtel*, where the commission observed that a clause which has the effect of allowing one party to influence the target's business before formal approval violates standstill obligations.[33]

The commission noted the following regarding the nature of the ER clause:

The *ER clause* in the acquisition agreement provided for a mechanism to the acquirer to exercise operational control on the target company from the agreed date, which was prior to the approval. It was in nature of a direct interference to the ordinary course of activities of the target. The cash flow was sought to be managed retrospectively by the acquirer.

It was held that the cash flow is a variable that can only be managed prospectively and the clause may have the effect of causing the parties to cease to act independent of each other. The CCI held that the direct interference with the ordinary course of business and violated standstill obligations, as it could eliminate the target's incentive to compete independently.

Taken together, the cases discussed above illustrate the various ways in which standstill obligations can be breached. Building on these examples, the Commission has clarified the broader legal principles governing combinations:

i. The CCI has clarified that there is no distinction between "actual actions" and "agreed contractual obligations" as they stand in violation of the ex-ante nature of the provision, meaning that even terms agreed in a contract, although, not yet performed still constitute a violation of the standstill obligations.[34] Section 6(2-A) does not prohibit only actual actions aimed towards implementation, such as pre-payment of consideration, but also prohibits making of agreements of this nature.
ii. The combinations shall be examined ex-ante and the question whether the parties benefitted or not from the impugned conduct or whether there were any commercial exigencies behind a particular conduct are not relevant for determination.[35]

In conclusion, it can be safely stated that while the Commission recognizes the risks of premature integration, it also acknowledges that information exchange during mergers and acquisitions is

[33] *Notice given under Section 6(2) of the Competition Act, 2002 by Bharti Airtel Limited* (n 13).
[34] ibid.
[35] *Notice given under Section 6(2) of the Competition Act, 2002 by Hindustan Colas Private Limited* (n 32).

necessary. To resolve this dilemma, the Commission has tried to balance the possibility of premature integration/gun jumping and the inherent requirement of information exchange through the *inherence-proportionality test* in the *Adani Green* case.

It has been established therein that the acquirer is permitted to impose customary standstill obligations and interim arrangements on the target.[36] The only requirement is that it should comply with the inherence-proportionality test, which will determine whether the customary obligations are consistent with the standstill obligations provided under Section 6(2-A). Concludingly, the imposed arrangements have to be inherent and proportional to the legitimate business objective.

VI. VARIOUS MEASURES TO SAFELY CARRY OUT DUE DILIGENCE

The Commission recommends that parties ought to implement some safeguards during the exchange of competitively sensitive information, and that such safeguards must be expressly incorporated into the agreement and adhered to in practice.[37]

One effective measure is in the form of a clean team protocol. Clean team refers to a team of individuals who are not involved in the operational activities of the company. These have the potential to deter the unwarranted causes of information exchange.

The Compliance Manual recommends formation of a clean team while conducting the due diligence of integration planning.[38] It provides the constitution of such a team including:

i. Members of senior management
ii. Internal legal team
iii. External legal counsel

However, this team excludes personnel involved in dealings with matters related to pricing, sales, marketing, etc. It ensures that there is no influence on the day-to-day operations like determining prices, strategies, sales quantities etc.

Moreover, we can also adopt several measures suggested by the Guidelines for applicability of Article 101 of TFEU, including formation of a clean team or trustees to receive information and process it. These trustees are independent third parties providing their services to the firm.[39] The participants can further, ensure that they have only access to their own information and only the

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[36] *Proceedings against Adani Green Energy Limited under Section 43 A of the Competition Act, 2002* (n 2).
[37] ibid.
[38] Competition Commission of India, *Compliance Manual for Enterprises* (n 11).
[39] European Union, Commission, 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements' (n 18).

aggregated information of the other. The aggregated and not detailed data is generally considered less competitive in nature.

The parties may set-up an agenda and purpose prior to the meeting/call to ensure that the purpose of disclosure is clarified. The undertakings can also opt to verify prior to exchange that whether it is strictly a genuine and legitimate requirement of the transaction. Also, the minutes of meetings can be recorded as a Standard Operating Procedure, whereby it can be ensured that the parties strictly adhered to the agenda. This is in consonance with the decision in Adani Green Case, where it was observed that the exchange has to be limited to the purpose according to the stage of the transaction.

In toto, the parties can opt for various safeguards to ensure that they minimize the gun-jumping concerns. The Commission however has opined that in order to make the clean team protocol successful, the agreement should include various aspects such as constitution, rules, etc and should be complied with "*in letter and spirit*".[40]

VII. CONCLUSION

In conclusion, there are various concerns arising from the exchange of commercially sensitive information which are capable of potentially distorting competition in the market. The exchange may give rise to some danger to the competitive landscape if the transaction does not come into existence. The result could be that the parties enter into a premature integration and ultimately harm to the competition. This can happen in various ways viz. one firm gaining some advantage over the other, or the target firm losing the incentive to compete. This harm cannot be reversed, even if the CCI later on declares the combination to be void.

The pertinent issue lies in determining the manner in which parties to a proposed combination may legitimately exchange information or impose customary standstill obligations, while simultaneously ensuring that the exchanges or arrangements instituted by the acquirer vis-à-vis the target do not amount to a contravention of the statutory provisions under the Act. In order to deal with the dilemma, the Commission came up with the inherence-proportionality standard, whereby, the information exchange has to be inherent and proportionate to the legitimate objective of the transaction. The objective differs at different stages of the transaction. Moreover, the concerns can also be avoided by putting to use other measures, including the setting up of a clean team,

[40] *Proceedings against Adani Green Energy Limited under Section 43 A of the Competition Act, 2002* (n 2).

consisting of third parties and excluding the personnel involved in carrying out the daily business operations of the firms.

In toto, the framework laid down by the CCI requires that the exchange of sensitive information has to be carried out in the view of inherence-proportionality standard, and the agreement of combination must also duly prescribe safeguards to be put in place.