
BALANCING DUE DILIGENCE AND GUN-JUMPING: MANAGING INFORMATION SHARING IN COMBINATIONS

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ABSTRACT

The unregulated flow of information during mergers and acquisitions has been at the heart of controversy in modern times, especially in India. Exchange of competitively sensitive information has been linked with exerting premature influence on the company being acquired, thereby giving effect to a combination before the Competition Commission of India's formal approval, in violation of "standstill obligations" under section 6(2A) of the Competition Act, 2002. As combinations become more rampant in the face of a growing economy, it has become imperative to develop a proper framework for outlining boundaries between competitively sensitive information, the exchange of which would hamper fair merger practices, and information necessary to be exchanged in order to properly facilitate combinations. This paper attempts to decipher this boundary through a study and analysis of statutory regulations as well as the CCI's decisional practices. It analyses the various applicable tests used to decide the scope of such information exchange. It goes on to conduct a comparative analysis of other jurisdictions across the world in order to understand global industry practices better. It goes on to discuss the impact of technology and artificial intelligence on these practices. It reasons that a certain degree of information exchange is necessary during combinations, but that without the proper demarcation of this degree, such exchange becomes a loophole for anti-competitive practices. Thereafter, it identifies the existing policy gaps in India and further suggests solutions or recommendations for a better framework. It concludes with a hope to imbue key aspects from foreign jurisdictions into our own regime, although so molded that these practices are adaptable to our unique economy.

Keywords: *Competitively Sensitive Information, Exchange, Gun-Jumping, Anti-Competitive Practices, Due Diligence.*

Introduction

Combinations play a central role in the growth of businesses and of the economy. India has witnessed a steady increase in such transactions over the past two decades, owing to the liberalisation of the Indian economy and rising cross-border investment. Mergers and Acquisitions (hereinafter referred to as “M&A”) have since become a common pathway for companies seeking market expansion and access to better resources. A key aspect of any such combination is the proper disclosure and exchange of data. Any combination of business entities depends heavily on a healthy exchange of information, whereby acquiring entities often require access to critical information related to the target, including financial information, organizational structure, operations, and hierarchical information, to name a few categories.¹ This is vital in understanding the possible risks involved in exchange and to decide whether or not to go ahead with the combination, as well as to execute a seamless combination. On the other hand, entities would also be interested in securing their sensitive information that could hamper their market position or trade secrets. This dual need creates an interesting conundrum, in the sense that while a certain degree of information exchange is undoubtedly necessary for valuation and planning, unregulated exchange may affect fair competition if shared in ways that could exert pre-mature control or implement a combination prior to clearance, which may constitute an offense of gun-jumping under the antitrust regime.

Gun-jumping refers to the practice when combining entities prematurely implement a transaction before receiving assent from the Competition Commission of India (hereinafter referred to as “CCI”), or “the lapse of the standstill period under Section 6(2A)” of the Competition Act, 2002² (hereinafter referred to as “the Act”), whichever is earlier. In practice, this “standstill obligation” has raised difficult questions about what constitutes “implementation” of a combination. Although gun-jumping as a violation of fair competitive practices is more often associated with overt collusive or concerted action, a delicate form of pre-combination coordination is observed in the exchange of competitively sensitive information prior to the assent of the CCI, or lapse of the standstill period. While direct steps such as integration of management or transfer of assets clearly fall within the prohibition, there is less clarity on whether certain forms of pre-closing information exchange could amount to a violation. For instance, sharing of competitively sensitive data such as pricing, customer lists,

¹ Michael C Naughton, *Gun-Jumping and Premerger Information Exchange: Counseling the Harder Questions**, www.abanet.org/antitrust/committees/counsel/ (last visited Mar 13, 2025).

² Competition Act, 2002, No. 12, Acts of Parliament, 2002, § 6(2A) (India) (“The Act”).

or future strategy might be seen as coordination before the deal is approved. At the same time, restricting information too heavily could undermine due diligence and make it impossible to evaluate the transaction properly. There exists a fine line between exchanging sufficient information at the right time with only the necessary individuals and constituting an offense of gun-jumping by exerting influence prior to obtaining regulatory consent. The CCI has often penalised companies for gun-jumping in several cases, but much of the guidance is implicit rather than explicit. This leaves parties and members of the legal fraternity uncertain about the scope of such an exchange.

Globally, competition regulators such as the European Commission and the U.S. Department of Justice (hereinafter referred to as “DOJ”) have developed a more comprehensive framework on this subject, particularly around the use of clean teams and restrictions on access to prospective commercial information. These comparative insights provide useful guidance for India, where regulatory boundaries are still evolving. As information rapidly becomes akin to currency in global markets with the advent of technology, and with informational independence and privacy undergoing constant evolution and reform, it becomes increasingly imminent at this juncture to decide the boundaries of information exchange.

This paper thus seeks to examine the issue of information exchange in M&A transactions under Section 6(2A),³ with the objective of clarifying when such conduct is permissible and when it risks being considered unlawful. By placing Indian law in a broader context and offering practical solutions, the paper seeks to illuminate a pressing issue in the present merger control regime: the thin line between due diligence and gun-jumping in M&A transactions.

Research Problems

This paper addresses core issues that companies regularly face:

1. When does the flow of information in an M&A process cross the boundary from legitimate due diligence to unlawful pre-merger coordination violative of “standstill obligations”?
2. Where can the line be drawn between competitively sensitive information and

³ The Act, § 6(2A).

information necessary to be shared?

3. How can Indian merger regimes be updated to control the unlawful flow of competitively sensitive information?

Research Objectives

This paper is structured to address the following objectives:

1. Understand the scope of “standstill obligations” under Section 6(2A) of the Act by analysing the relevant statutory provisions and regulations.
2. Understand the concept of “competitively sensitive information,” assessing the extent of what constitutes such information.
3. Understand the CCI’s decisional practice with respect to the exchange of information in various scenarios to formulate a general rule of thumb followed by it.
4. Analyse existing tests to determine whether the exchange of information during the standstill period constitutes gun-jumping, and attempt to formulate a more robust and comprehensive test for the same.
5. Analyse the practice across jurisdictions in various parts of the globe to understand the lacunae in our own framework.
6. Propose recommendations for a more solid framework for determining the extent of allowed information exchange prior to the CCI giving its formal assent to combine.

Literature Review

1. “Information Exchanges Between Competitors from a Competition Law Perspective – the Problem of Premature Exchanges of Sensitive Information in the Context of Merger Control by *Nuno Calaim Lourenço*:⁴”

⁴ Nuno C. Lourenco, *Information Exchanges between Competitors from a Competition Law Perspective – the Problem of Premature Exchanges of Sensitive Information in the Context of Merger Control (Gun Jumping)*, 4 UNIO - EU LAW J. 78 (2018), https://www.researchgate.net/publication/326947617_Information_exchanges_between_competitors_from_a_co

This paper is a comprehensive literature on the effects and boundaries of information sharing within mergers and breaks down European competition law and court cases shaping these merger-control rules. The author presents empirical case analyses, such as the Commission's scrutiny of Ineos and Kerling, which illustrate how premature information exchanges can lead to sanctions and legal liabilities. The paper is, however, focused on EU law and therefore does not compare these rules with other jurisdictions (e.g., the US, Asia), which could offer a broader perspective on international standards. Given the increasing role of digital platforms and AI in mergers and information sharing, the paper also does not address how technological advances impact the risks and management of sensitive information exchanges.

2. "The Antitrust Risk of Information Sharing by Corby C. Anderson and Ted P. Pearce:"⁵

This literature examines the balance between the benefits of information sharing and its potential to facilitate anti-competitive behavior, as well as the regulatory frameworks and safeguards designed to mitigate these risks. Focused on Western frameworks, it depicts the more developed systems, the ideas and practices from which India could benefit. It chooses the middle ground on information exchange in suggesting that controlled or monitored sharing of information. However, although the author presents general guidelines on how to control such practices, there is limited discussion on practical steps, such as internal compliance programs or training initiatives that companies can implement to ensure safe information sharing.

3. "Gun-Jumping under the Indian Competition Law: An Analysis with Global Jurisdictions by Saswata Roy and Debdatta Mukhopadhyay:"⁶

The literature on gun jumping in the context of Indian competition law underscores its significance as a violation that undermines the regulatory framework governing mergers and acquisitions. The authors of this work highlight the necessity of developing a clearer legal framework, supported by strong and transparent enforcement mechanisms. They advocate for practices that allow authorities to effectively prevent instances of gun jumping. Such an

mpetition_law_perspective_-
_the_problem_of_premature_exchanges_of_sensitive_information_in_the_context_of_merger_control_Gun_Jumping (last visited Aug 30, 2025).

⁵ Corby C. Anderson & Ted P. Pearce, *The Antitrust Risks of Information Sharing*, 23 FRANCH. LAW J. (2003), <https://heinonline.org/HOL/Page?handle=hein.journals/fchl23&id=17&div=&collection=> (last visited Aug 30, 2025).

⁶ Saswata Roy & Debdatta Mukhopadhyay, *Gun Jumping under the Indian Competition Law: An Analysis with Global Jurisdictions*, 4 INT. J. LEG. SCI. INNOV. (2022), <https://www.ijlsi.com/UndertheaegisofVidhiAagaz-InkingYourBrain> (last visited Mar 11, 2025).

approach is viewed as essential for ensuring regulatory compliance and for preserving the integrity of fair competition within Indian markets. However, although the concept of sharing competitively sensitive information prior to approval is acknowledged as a violation within this work, there is limited analysis on the actual impact of such exchanges on market competition and post-merger behavior.

4. “Gun-Jumping through Pre-Closing Information Exchanges in M&A Transactions and Alternative Safeguard Mechanisms by *Esen Ergül - Salih Buğrahan Köroğlu*.”⁷

This literature observes that current debates on this topic concentrate on defining precise limits for what parties may lawfully exchange before a transaction is finalized. The authors have particularly examined the possibility of adopting protective measures that allow necessary due diligence while reducing the likelihood of regulatory breaches. Among the suggested measures are controlled or time-restricted sharing of information and the use of strict confidentiality arrangements. This literature falters in the aspect of precedent analysis. Although some cases are referenced, a comprehensive analysis of recent enforcement actions, including the jurisprudence surrounding gun-jumping and information exchanges, remains limited.

5. “Pre-Merger Coordination: The Emerging Law on Gun-Jumping and Information Exchange by *William R. Vigdor*.”⁸

A comprehensive textbook on pre-merger collusive action with a focus on that in the form of information exchange, the author of this work emphasizes the basics of understanding what pre-merger coordination refers to, and how something as simple as information exchange can act as a loophole in antitrust law, allowing harmful anti-competitive practices and effects on markets. It also discusses how such an exchange may result in “Appreciable Adverse Effect on Competition” (hereinafter referred to as “AAEC”), if left unchecked.

⁷ Gonenc Gurkaynak, Esen Ergul & Salih Buğrahan Köroğlu, *Gun-Jumping through Pre-Closing Information Exchanges in M&A Transactions and Alternative Safeguard Mechanisms*, SECOND ACAD. GIFT B. ELIG GÜRKAYNAK ATTY. SEL. CONTEMP. COMPET. LAW MATTERS 217 (2019), <https://papers.ssrn.com/abstract=3396919> (last visited Aug 30, 2025).

⁸ WILLIAM J. VIGDOR, *PREMERGER COORDINATION: THE EMERGING LAW OF GUN-JUMPING AND INFORMATION EXCHANGE* (2006), https://books.google.com/books/about/Premerger_Coordination.html?id=x1zl9WChN5gC (last visited Aug 30, 2025).

6. “The Suspensory Effects of Merger Notifications and Gun-Jumping: A Report by OECD.”⁹

A report published by The Organisation for Economic Co-operation and Development (OECD), this literature highlights that certain communications, especially post-signing or during the interim period, require safeguards, including “anonymization or aggregation of data.” It also emphasizes the importance of clean teams in assessing the nature of information shared. This report observes that although exchanging information is often essential for assessing and structuring a merger, such sharing must be handled carefully to avoid prematurely disclosing competitively sensitive details that could raise compliance issues. The guidance also notes that certain categories of information, such as historic or aggregated data, are generally considered lower risk, and that involving third parties or legal advisors to screen and manage the flow of information can provide an added layer of protection.

Gun Jumping or Due Diligence: Critical Evaluation of Information Exchange

The following section aims to critically evaluate the boundaries between due diligence related information exchange and unlawful exchange of commercially sensitive information that constitutes gun-jumping under present merger and anti-trust regulations.

Statutory Regulations for Gun-Jumping in India

All mergers or combinations in India exceeding a transaction value or Deal Value Threshold (hereinafter referred to as “DVT”) of Rs. 2000 crore is required to notify the CCI before giving effect to such transaction.¹⁰ This threshold was implemented in September 2024 with the Competition Commission of India (Combinations) Regulations, 2024 (hereinafter referred to as “2024 Combination Regulations”), to regulate high-value transactions that previously might have escaped regulatory scrutiny.¹¹ Gun-jumping, as described above, may occur in two ways. Substantive gun-jumping occurs when parties to a combination do not observe “standstill obligations” and act as a singular entity prior to receiving CCI approval. However, procedural

⁹ SUSPENSORY EFFECTS OF MERGER NOTIFICATIONS AND GUN JUMPING, (2018), www.oecd.org/competition (last visited Aug 30, 2025).

¹⁰ Aparna Mehra et al., *Competition Commission of India Issues Revised FAQs on Merger Control*, (2025), https://trilegal.com/knowledge_repository/trilegal-update-competition-commission-of-india-issues-revised-faqs-on-merger-control/ (last visited Aug 30, 2025).

¹¹ Competition Commission of India (Combinations) Regulations, 2024, Competition Commission of India (India).

gun-jumping occurs when entities fail to notify the CCI of the combination as mandated by procedure. As per Section 6(2) of the Act, any enterprise intending to enter into a combination is required to notify the CCI in the prescribed form, along with the applicable fee, within thirty days either from the date on which the board of directors approves a proposal for merger or amalgamation, or from the date of executing any agreement relating to acquisition of control.¹² Failure to abide by this constitutes procedural gun-jumping. Section 43A of the Act penalizes such procedural gun-jumping, in stating that the Commission is empowered to impose a penalty upon entities failing to furnish the requisite notice or information to the CCI before consummating the merger. This penalty may extend up to one percent of the total turnover or the value of assets of the combination, whichever is greater.¹³

Furthermore, Section 6(2A) of the Act, which describes substantive gun-jumping, provides that a combination cannot take effect until the Commission issues its order under Section 31¹⁴, or 150 (one hundred and fifty) days have lapsed from the date of filing such notice, whichever occurs earlier, as per the 2023 amendment.¹⁵ The exchange of commercially sensitive information prior to CCI approval of a merger constitutes substantive gun-jumping as per its definition. Once the notice is received, the CCI is mandated to examine it in accordance with the procedure laid down under Sections 29¹⁶, 30¹⁷, and 31¹⁸ of the Act.¹⁹

Commercially Sensitive Information: A Brief Overview

The CCI has time and again clarified the scope and limits of what qualifies as Commercially Sensitive Information (hereinafter referred to as “CSI”). In its *Compliance Manual for Enterprises*, the CCI emphasized that CSI generally covers data that bears a direct nexus with business performance and competitive conduct.²⁰ Such information, for example, may involve details about bidding strategies or other elements that might materially affect how a company operates in the market if it were to be disclosed.

¹² The Act, § 6(2).

¹³ The Act, § 43A.

¹⁴ The Act, § 31.

¹⁵ Supra note 3.

¹⁶ The Act, § 29.

¹⁷ The Act, § 30.

¹⁸ Supra note 14.

¹⁹ The Act, § 6.

²⁰ Compliance Manual for Enterprises - Competition Act, 2002, COMPETITION COMMISSION OF INDIA, https://www.cci.gov.in/images/publications_compliance_manual/en/compliance-manual1652179683.pdf (last visited Mar 12, 2025).

The CCI has not restricted itself to broad principles but has continued to refine the contours of CSI through guidance and practice. Notably, in May 2025, the Commission revised its section on *Frequently Asked Questions (FAQs)* in several aspects, including Merger Control, adopting a more expansive and comprehensive approach. Under this updated section, any information that is fundamental to “safeguarding, maintaining, or improving” the position of an undertaking in the market now falls within the ambit of CSI. This definition extends beyond pricing alone to include a wide range of competitively significant matters such as customer strategies, production capacities, sales performance, and even forward-looking decisions regarding entry into or withdrawal from particular markets.

Judicial pronouncements and case law have also added precision to this understanding. The issue of access to CSI came into sharper focus in Indian merger control following the CCI’s 2020 decision in *ChrysCapital/Intas*.²¹ In this case, ChrysCapital was allowed to acquire a minority interest in Intas on the condition that it surrendered its board position and related rights in a competing portfolio company. Additionally, it was required to implement strict firewalls to restrict the flow of CSI. Further, in *Goldman Sachs/Biocon*,²² the CCI first provided examples of CSI. In the *Ruby/Sintgel* case, the CCI elaborated on the types of information that can be considered commercially sensitive.²³ It expressly recognized that CSI includes, but is not limited to, confidential details such as: “(i) pricing of specific assets, (ii) build costs associated with particular projects, (iii) strategies concerning utilities like power supply or land parcels, (iv) information about a company’s customer pipeline or significant business opportunities, and (v) broader commercial plans including pricing strategies, sales initiatives, promotional campaigns, and forward-looking infrastructure strategies such as those relating to “infrastructure as service” technologies.”²⁴ By laying out these categories, the CCI has provided companies with concrete guidance on where the boundaries of permissible information exchange lie.

Furthermore, the Commission has clarified that not all information qualifies as CSI in its FAQ section. Certain categories fall expressly outside its scope, thereby reducing uncertainty for enterprises. For example, publicly available information, whether through regulatory filings,

²¹ Combination Registration No. C-2020/04/741

²² In re: Proceedings against Goldman Sachs (India) Alternative Investment Management Private Limited under Section 43A of the Competition Act, 2002, Ref. No.: M&A/10/2020/01/CD

²³ Combination Registration No. C-2024/07/1168

²⁴ *Id.*

press releases, or general disclosures, does not constitute CSI since it is already accessible to competitors and to the market as a whole.²⁵ Similarly, data that is not tied to any one market entity or business, such as industry-wide practices or general business strategies, does not fall under the ambit of commercially sensitive information. Organisational hierarchy-related information or reporting structures also do not constitute CSI. In addition to this, historical data or information already available to shareholders is generally considered to be outside the purview of CSI. Even audited or unaudited financial statements, provided they are prepared as per GAAP and do not contain details beyond what is contained in audited financial statements, are not classified as commercially sensitive information.²⁶

The Impacts of CSI Exchange Prior to Merger Approval

Having understood the concept of CSI, it is now essential to understand the impact that exchange of CSI may have on market dynamics. The exchange of information between entities before they receive approval to combine poses several risks to fair competition. Firstly, it may lead to premature exertion of control or influence by the acquiring entity on the entity being acquired. The definition of ‘control’ includes the ability to exercise “material influence over the management affairs, or strategic commercial decisions of an enterprise,” in line with CCI’s decisional practice.²⁷ For example, before receiving clearance, an acquiring company begins to receive detailed sales reports, pricing strategies, and upcoming product launch plans from the company it is acquiring. Based on this information, it advises the company to delay a new product launch until after the merger to avoid “internal competition.” Even though the merger is not yet approved, the acquiring company has already influenced the market conduct of the other company by reducing its independence and altering competitive dynamics.

This has a dual effect. On one hand, consumers who might have benefited from the timely launch of the new product will be at a loss. This is perhaps the greatest harm caused by premature CSI exchange. Consumers would possess fewer choices or delayed access to innovative products or services due to premature coordination. On the other hand, competitors are faced with an artificial reduction in rivalry. Non-merging entities are faced with an uneven playing field, and this in turn causes market distortion and harm to fair competition.

²⁵ Frequently Asked Questions, COMPETITION COMMISSION OF INDIA, GOVERNMENT OF INDIA, <https://www.cci.gov.in/faqs> (last visited Aug 30, 2025).

²⁶ *Id.*

²⁷ Combination Registration. No. C-2015/02/246

In a similar vein, and the case in point of this paper, such an exchange results in the premature implementation of the transaction. A transaction may be “given effect to” through the exercise of premature control by the acquiring entity over the target, since this has the effect of the two entities acting as one prior to approval. In the *Baxalta Incorporated* case, it was held that if the parties to the combination are allowed to “give effect” to the proposed combination before the expiry of the standstill period post notification, it will amount to a violation of Section 6(2A) of the Act.²⁸

A similar effect may occur via bid rigging. Bid rigging occurs when enterprises dealing in similar goods or services reduce competition or manipulate the bidding process, causing AAEC, and is considered one of the most harmful outcomes of premature information exchange. When competitors who are parties to a proposed merger share competitively sensitive information such as bidding strategies or cost details before receiving approval, they may align their bids in public procurement processes or private tenders. For instance, if two firms that are otherwise rivals exchange their upcoming bid prices under the pretext of merger negotiations, one may deliberately submit a higher bid while the other submits a lower one to ensure allocation of the contract. In return, the favour may be reciprocated in a future tender, effectively eliminating the uncertainty of competition between them. The CCI has consistently treated bid rigging as a per se violation under Section 3(3)(d) of the Competition Act, recognising its inherently collusive nature.²⁹ Where such conduct occurs in the shadow of a pending merger, it effectively constitutes a dual violation as both a breach of the “standstill obligation” under Section 6(2A) and a horizontal agreement prohibited under Section 3.

Indirectly or directly, such an exchange of CSI thus leads to AAEC within the market, which is the end or cumulative impact of such actions.

Decisional Practice of the CCI

The decisional practice of the CCI has played a central role in shaping the contours of permissible conduct during the pre-merger period, owing to the lack of explicit statutory guidance in this regard.

It was observed in the *Hindustan Colas* decision that gun-jumping included an assessment of

²⁸ Combination Registration No. C-2015/07/297

²⁹ The Act, § 3(3)(d).

the “potential competition distortions” due to the parties’ conduct in the interim period, such as whether the target’s will and incentive to compete was reduced, whether there was a reason to access confidential information or whether a situation was created similar to tacit collusion.³⁰ This forms a basis for assessing whether or not a pre-merger action constitutes gun-jumping.

The *Adani Green Energy*³¹ decision stands as a landmark in decisions around this particular issue. The CCI penalized Adani Green Energy Ltd. (AGEL) an amount of Rs. 5 lakhs in 2022 for gun-jumping during its acquisition of S.B. Energy. The CCI found that AGEL violated its “standstill obligations” by engaging with S.B. Energy’s ongoing business operations and allowing inputs to the target before obtaining CCI approval for the combination, constituting a breach of Section 6(2A). Herein, the CCI clarified the distinction between legitimate due diligence and impermissible information exchange. The Commission observed that due diligence is confined to the period preceding the execution of a definitive agreement, and its purpose is limited to enabling an informed decision on whether or not to proceed with the transaction. Once such an agreement is executed, however, the nature of permissible information sharing shifts. At that stage, exchanges should focus narrowly on preserving the economic value of the target and planning for post-merger integration. Any communication that falls outside these limited objectives, and which cannot be justified as proportionate to these ends, may cross the threshold of due diligence and risk being characterized as substantive gun-jumping. The *Adani Green Energy* ruling further clarified that the legality of such exchanges depends not merely on their occurrence but also on whether they amount to premature implementation of the merger by eroding competitive independence.³²

In particular, the CCI has clarified that any steps by combining entities at this stage that have the potential to undermine the independence of these merging entities are therefore contrary to the very spirit of the standstill obligations. For instance, in *UltraTech Cement Limited*, the Commission held that any action prior to the consummation of a transaction that has the effect of reducing the incentive of the parties to compete in the market, thereby rendering the underlying essence of the standstill period null and void, constitutes gun-jumping.³³ When parties exchange competitively sensitive information such as business strategies or pricing strategies before merging, the exchange of sensitive information, particularly such as business

³⁰ Combination Registration No. C-2015/08/299.

³¹ Combination Registration No. C-2021/05/837

³² *Id.*

³³ *Supra* note 27.

or pricing strategies, their incentive to compete is drastically reduced, thereby indirectly constituting an offence of gun-jumping.

The CCI has also made it clear that not all information sharing amounts to gun-jumping or collusion. While not in the context of merger control itself, the CCI has analysed sharing of information as an indicator of collusive activity in various decisions, providing insight that may be tied into pre-merger exchange as well. For instance, in the *Cement Cartel* case, the Commission held that information exchange as a standalone violation of Section 3 becomes problematic only when it results in coordinated collective action, thereby creating conditions conducive to collusion and distorting the market process.³⁴ Likewise, in the *Flashlights* case, it was underlined that the exchange of data, without the entities subsequently acting upon them, does not by itself constitute collusive conduct.³⁵ These two cases have shed light on the status of the nature of the action, in this case, of information sharing itself as a standalone violation. They collectively lead to an inference that while the act of sharing information can raise alarms of collusive activity indicative of gun-jumping, it is the use of such information for coordinated behavior that gives rise to anti-competitive concerns. This conclusion is proposed to be extended to may be pre-merger information exchanges as well. A criticism to this application is that since these entities would be combining regardless, any exchange would not amount to an offence considering the same. However, it also argued that irrespective of the fact these entities may already be combining, the very essence of fair competition would be frustrated.

As a developing field of jurisprudence in India, these decisions ought to be taken as a whole to reflect attempts by the CCI to strike a balance between recognizing that a degree of information flow is necessary for due diligence and integration planning and ensuring that such exchanges do not translate into premature coordination of activities. The courts thus underscore that pre-merger information exchange is not inherently unlawful. However, it does raise alarms when it distorts competition by giving effect to a transaction or reduces incentives to compete in a market fairly.

Analytical Tests

In order to test the boundaries of what constitutes a violation of Section 6(2A), several tests may be employed. The first of these is the Inherence-Proportionality Test. The inherence-

³⁴ *Ambuja Cement Limited & Others, v. CCI & Others*, TA(AT) (Compt) No. 22 of 2017, NCLAT.

³⁵ *In Re: Alleged Cartelisation in Flashlights Market in India, Suo Motu* Case No. 1 of 2017.

proportionality test states that certain actions are valid as long as they are necessary for the legitimate objectives of a combination and within the limits of necessity.³⁶ In case of gun jumping, it is a test to determine whether the information shared or the discussions held were valid in the face of necessity, and proportional to the goal to be achieved. The decision in *Adani Green Energy* further established that any exchange of information must be proportionate and should not lead to the premature implementation of a transaction.³⁷ It is thus necessary to establish that such sharing of information was proportionate to a legitimate goal.

Another test that may be used to understand the scope of information exchange is the three-limbed “P-S-E” Test. This test uses three parameters to assess the exchange: its purpose, safeguards, and its effect or influence. The first is the purpose behind the exchange of the information: whether the data is genuinely required for valuation or fulfilling legal and regulatory obligations. The data exchanged may also be validated if it serves the purpose of facilitating the planning of a merger, and no more. The second concerns the safeguards in place, such as limiting access through clean teams or using anonymised or aggregated data. Further safeguards, including maintaining records as to who had access to what data and the purpose for the same, and enforcing rules against wider sharing, may allow tighter control on the flow of information prior to mergers. The third limb of this test relates to the effect or influence of the information exchange. It analyses whether such information might, even indirectly, facilitate coordination of market behaviour or give one party undue influence over the other before CCI approval is granted. The absence of even any one of these limbs marks a scope or possibility for the existence of the offense of gun-jumping.

Through scrutinising exchanges via the lens of these two tests, a stricter control mechanism may be developed to understand the boundaries between legitimate exchange of information and unlawful exchange of CSI in violation of Section 6(2A).

Comparative Perspectives and Practices Abroad

Indian jurisprudence on this subject matter is admittedly scarce, and the same is still a developing niche within antitrust law. Recorded instances and penalties related to such offences

³⁶ AZB & Partners, *Revisiting Gun Jumping – The Adani Decision and Its Impact on Merger Control in India*, (2022), <https://www.azbpartners.com/bank/revisiting-gun-jumping-the-adani-decision-and-its-impact-on-merger-control-in-india/> (last visited Aug 30, 2025).

³⁷ Supra note 31.

in particular are few and far between, and with limited statutory support, we must turn to other global jurisdictions for guidance.

The European Commission (hereinafter referred to as “the Commission”) has a developed system in place when it comes to pre-merger information exchange. The European Union Merger Regulations as well as Articles 101³⁸ and 102³⁹ of the Treaty on Functioning of the European Union (hereinafter referred to as “TFEU”), govern gun-jumping in the European Union (hereinafter referred to as “EU”). In particular, the exchange of information during the negotiation of a merger may fall under the scope of Article 101 of the TFEU.⁴⁰ The Commission does not however restrict itself to these regulations when adjudging information exchange prior to merger approval. In the *Altice SFR/OTL* case, it was established that discussions involving strategic business plans can hinder normal competition and undermine the independence of combining entities, thereby making the stance of the European merger control regime on this matter clear.⁴¹ The Commission in *Altice/PT Portugal* has reiterated this stance in holding that such an exchange of information must not extend to key commercial decisions, and that only once a transaction receives approval are parties legally permitted to exchange such information as a single economic entity.⁴² However, the Commission has also held that a transaction cannot be said to have “come into effect,” unless there exists an actual step taken towards a change in the control of the organization being acquired, thereby implying that mere exchange of information is useless unless accompanied by some action taken based on such information.⁴³ This highlights the “balance” approach taken by the Commission. The Commission does, however, refrain from imposing fines for violations involving the exchange of commercially sensitive information. It has also released a report on “*Best Practices on the disclosure of information in data rooms in proceedings under Articles 101 and 102 TFEU and under the EU Merger Regulation*,” in order to establish data rooms for smoother and more regulated information exchange prior to merger approval.⁴⁴ This report provides key takeaways to several stakeholders, from which India could greatly benefit.

³⁸ Consolidated Version of the Treaty on the Functioning of the European Union art. 101, 2012 O.J. (C 326) 47 (“TFEU”)

³⁹ TFEU art. 102

⁴⁰ Supra note 38

⁴¹ French Competition Authority, *Altice & SFR / OTL*, Decision n° 16-D-24, 8 November 2016 (French)

⁴² CASE M.7993, *Altice/PT Portugal* (EC) 139/2004.

⁴³ *Case C-633/16, Ernst & Young P/S v Konkurrenserådet* ECLI:EU:C:2018:371.

⁴⁴ Eur. Comm’n, DG Competition, *Best Practices on the disclosure of information in data rooms in proceedings under Articles 101 and 102 TFEU and under the EU Merger Regulation* (2015)

The United States of America also possesses a comprehensive framework for the prevention of gun-jumping with a special focus on premature exchange of commercially sensitive information. The Hart–Scott–Rodino Antitrust Improvements Act of 1976⁴⁵ (hereinafter referred to as the “HSR Act”) is the primary legislation for all anti-trust concerns, along with the Sherman Act.⁴⁶ The HSR Act in particular places great importance on gun-jumping via premature exchange of CSI. These legislations guide the Department of Justice (hereinafter referred to as “DoJ”) with respect to anti-trust violations. The DoJ considers these violations as grave, and places heavy penalties upon offending entities. In *Computer Associates*,⁴⁷ employees of the company Computer Associates allegedly used the substantial competitively sensitive information that Computer Associates had received to place competitive bids, providing an example of bid-rigging pre-merger via exchange of CSI. In order to resolve the HSR claims, the parties agreed to a \$638,000 civil penalty and mandated that Computer Associates adhere to specific behavior guidelines for a decade. In the 2014 *Flakeboard/SierraPine*⁴⁸ deal, a significant grievance surfaced when the parties violated the HSR waiting period by exchanging sensitive consumer data and coordinating customer transfers. Following the DOJ's accusations, the corporations agreed to pay US\$1.15 million in disgorgement under the Sherman Act and US\$3.8 million in civil penalties under the HSR Act, which reflected diverted sales. The disgorgement remedy was an uncommon step in gun-jumping instances, although civil fines were common.

Other jurisdictions also provide vital takeaways for Indian authorities in terms of lacunae within our framework. The Administrative Council for Economic Defense (CADE) Guidelines for the Analysis of Previous Consummation of Merger Transactions, of Brazil also provide much insight into the realm of CSI exchange in merger control.⁴⁹ It postulates that while some degree of information sharing is necessary during due diligence and integration planning, exchanges of unnecessary CSI can constitute substantive gun-jumping. Furthermore, the Organisation for Economic Co-operation and Development (hereinafter referred to as, “OECD”), continually releases guidelines and best practices on mergers and acquisitions, with

⁴⁵ Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383.

⁴⁶ Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890).

⁴⁷ *United States of America v. Computer Associates International, Inc. and Platinum technology International, inc.*, Civil Action No. 1:01CV02062 (GK, 2001)

⁴⁸ *United States v. Flakeboard America, Ltd., et al.*, Case No. 3:14-cv-4949 (N.D. Ca. Nov. 7, 2014)

⁴⁹ Ministry of Justice Administrative Council for Economic Defense, *GUIDELINES FOR THE ANALYSIS OF PREVIOUS CONSUMMATION OF MERGER TRANSACTIONS* (2011), www.cade.gov.br (last visited Aug 30, 2025).

focus often falling on CSI exchange pre-merger. It provides soft law guidance to several stakeholders, including compliance related guidance to entities and regulatory suggestions to authorities and States. The note on “*Suspensory Effects of Merger Notifications and Gun Jumping*,” provides significant insight into the harmful effects of CSI exchange, and provides key suggestions such as establishment of clean teams in order to mitigate the same.⁵⁰

Suggestions and Recommendations

With an understanding of the framework now established, the author proposes the following recommendations for a better developed system of regulation with respect to the exchange of CSI prior to merger approval:

1. The foremost step would be to achieve better regulatory clarity. This would involve more explicit and binding guidelines being put in place. The present Competition Act does not specify CSI exchange as a separate violation of Section 6(2A). The same has evolved implicitly through precedents. This creates uncertainty and chaos with respect to the interpretation of these pronouncements. Hence, a proper framework and dedicated clauses within legislation become necessary.
2. Further, India ought also to be open to adopting global insights and practices as statutes molded to fit our country. At the very least, our country ought to recognize these practices and reconcile them with practices within the country. They must enact these as binding regulations, and not merely persuasive soft law that entities may avoid abiding by. Given the sheer number of cross-border transactions and mergers that occur involving Indian companies, Indian practices and regulations on CSI exchange pre-merger approval ought to be harmonised and reflective of global standards in order to avoid unnecessary complications for multinational corporations or entities.
3. With the advent of technology and the increased usage of AI, legislators and authorities alike ought to take notice and consideration of the same when discussing CSI exchange prior to approval. Rather than working around these developments, AI and technology may be utilised to provide better control and regulation. One may take reference from the Data Rooms concept propounded by the European Commission. Instead of relying

⁵⁰ OECD (2018), *Suspensory Effects of Merger Notifications and Gun Jumping*
www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm

on unregulated methods of sharing data, companies should be required to use secure digital platforms with built-in safeguards such as access controls and encryption. Systems of monitoring can keep track of who views or downloads particular documents. This will also allow the flagging of any unusual activity so that clear reports may be generated for compliance officers or regulators. This way, there is a transparent record of how CSI was managed, which helps prevent issues in tracing sources later on.

4. Further, the establishment of mandatory and statutory clean teams is highly recommended. These teams would look into the exchange of any form of information during pre-merger discussions. Clean teams under European jurisdictions are procedural bodies where only a small group of designated individuals is allowed to handle sensitive information. This team may be comprised of external advisors or employees bound by strict confidentiality agreements. The same could be applied in India. These teams work separately from the decision-makers of the combining entities and this ensures that CSI does not flow into pre-merger discussions. This system allows a balance between due diligence being able to proceed effectively and not compromising fair competition.
5. Another suggestion is the introduction of stricter enforcement and penalising mechanisms. While the CCI has penalised a handful of cases in this respect, such as in Adani Green Energy, penalties remain lenient, as well as few and far between. A more practical approach would be to adopt a tiered penalty system: minor or unintentional breaches could attract lighter fines, while deliberate attempts to shape competitive behaviour before clearance should invite stricter sanctions. Moreover, whistleblowing mechanisms may encourage stakeholders of combining entities to come forward with information on any unlawful CSI exchange. Alternatively, voluntary disclosure mechanisms could lead to lighter penalties, encouraging transparency.
6. Another recommendation would be for the CCI to adopt certain tests, such as the inherence-proportionality test and the PSE test to assess cases. This could be put in place rather than giving a case-by-case analysis that often leaves much to the interpretation of individuals. A formal recognition of these tests will give clear, practical criteria for judging whether an information exchange is truly necessary and justifiable. Further, they may be incorporated into official regulations so that merging parties could

themselves use them to check their exchanges. This would require them to show that the information being shared is not only necessary for the deal but also proportionate to its objectives, and that proper safeguards are in place. Over time these tests could transform into formal compliance checks by offering both companies and regulators standards or checkers to follow which would reduce uncertainty in enforcement.

Conclusion

An analysis of the current legislative framework of India, accompanied by the ever-evolving jurisprudence and decisional practice of the CCI, provides an insight that there is a constant effort to expand the scope of traditional gun-jumping to include niches, including those caused by a premature exchange of CSI. There have been consistent attempts to balance regulatory oversight with commercial practicality in merger control. The emphasis on defining and restricting access to Commercially Sensitive Information, as seen in both Indian and international cases, demonstrates that enforcement agencies are increasingly attentive to the intricacies of pre-merger conduct. Scholars and jurists continuously emphasize the importance of finding a balance between due diligence-related information exchange and unlawful CSI exchange prior to merger approval.

The result of the analyses conducted within this paper find that the key to treading the line between these two aspects lies in finding the purpose of the exchange of information. Should the exchange be necessary and vital to merger planning, and not for any other purpose, then such an exchange may be allowed without repercussions. However, in the event that it is found that such an exchange was ultra vires the purpose of merger planning or legitimate use, then a sufficient penalty mechanism ought to be put in place. Furthermore, by placing adequate safeguards in place, such breaches or possible violations may be checked at the source. That being said, regulation should not reach a point of stifling effective merger implementation via over-scrutiny.

Ultimately, the aim of present discussions or action should not be to block all communication between merging companies, but to make sure that whatever information is exchanged remains proportionate, properly safeguarded, and does not distort or negatively affect competition. What is needed is a framework that balances regulation with the practical needs of businesses. A system built on clarity and transparency would not only substantially reduce instances of

gun-jumping but also build investor confidence, strengthen India's merger control regime, and bring it closer in line with international best practices.

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