MERGER CONTROL UNDER THE COMPETITION POLICY OF INDIA

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Abstract: *The today's world is a competitive world due the impact of globalization. In India, Rao-Manmohan policy of economic reforms in 1991 introduced a competitive trend in the country by initiating policy of Liberalization, Privatization, and Globalization (LPG) in the economic sphere. The policy reforms of 1991 have increased the competition to a high level and the entry of MNCs (Multi National Companies) has further strengthened the competitive environment. To cope with this cut throat competition companies started using many strategies, merger and acquisition is also one of them. Mergers and acquisitions leads to reduction in competition due to the monopoly of the acquiring firm on the products. So, to curb this negative intention behind merger and acquisition other than the rightful objectives like growth, market penetration, economies of scale etc.; the Competition Act 2002, was introduced by the Government of India. The act provides rightful check on the merger process and this paper tries to explain the steps followed under the act to maintain the desired level of competition in the market.*

Keywords: *Globalization, merger and acquisition, MNCs, Liberalization, Geographic market, Product market.*

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INTRODUCTION

The globalization and liberalization of trade has transformed national markets into one single global market; where geographical boundaries become less and less relevant to relationships between "cause" and "effect". One of the distinguished features of international commerce is the swift growth in trans-national mergers to create global corporations and to cope with the requirements of global market.[1] India Inc strikes 480 merger and acquisition deals for $27.4 billion in 2013. Hit by sluggish economic trends, merger and acquisition activities of Indian companies slowed down in 2013 to a total of nearly 500 deals worth close to $30 billion, but the momentum is set to pick up in the New Year especially after the general elections. In comparison, Indian companies were involved in 598 M&A deals worth $35.4 billion in 2012 and 644 transactions worth $44.6 billion a year ago in 2011, shows an analysis of data compiled by various deal-tracking firms. If recent reports appearing in the print media are to be believed, M&A activity in India seems to be heading for a revival. The economic downturn presented itself in the form of unprecedented challenges and corporate entities were forced to take steps to cut spending, reduce liabilities and closely examine business restructuring as a way to survive. Although a full recovery is still a while away, there are indications that the downturn may have thrown up some opportunities for inorganic growth and consolidation for those who are willing to take advantage of the low M&A valuations.

The effect of such big transactions, combination is so apparent that it can be aptly summarized as: "we live in an age of international commerce, where decisions reached in one corner of the world can reverberate around the globe in less time than it takes to tell the tale."[2] As transnational corporations are uniting to meet the challenges of globalization, Competition authorities had a tough task ahead to protect the consumer's interest. The proponents of free trade market always viewed Globalization as a normative concept that aimed at promoting global welfare, common good of humankind.[3]

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[1] India in 2005 had attracted deal worth $18.35 billion, in 2006 had attracted deal worth $28.16 billion, and in year 2007 attracted deal worth $68.32 billion.

[2] US v. Nippon Paper Industries Co. 109, F. 3d. 1, page 8

[3] J. Delbruck, Globalization of law, Politics, and Markets – Implications for Domestic law – A European Perspective, 1 Ind. J. Global Legal Stud. 9 (1993)

Today the slogan "bigger is better" had become the success mantra in this globalised economy. Amidst all these development; maximum welfare of Consumer remains the focus of every policy, legislations and trade negotiations etc. An ideal definition of 'Global Consumer Welfare' would mean the availability to consumers, irrespective of their nationality, of access to low-priced, high quality products, and an option to choose among differing products, and the availability to producers of an internationally stable transactional environment.[4]

COMPETITION ACT, 2002 & SCHEME OF MERGER CONTROL

India had opened up its economy in 1991; since then it had adopted numerous policy measures to attract the investment, to transform it as an economic power. In 2002, Indian parliament had enacted Competition Act, 2002 to prevent anti-competitive practices, to foster healthy competition through freedom of trade and to ensure that consumer's interest are best served in a market economy.[5] One of the distinguished features of the ACT is "Regulation of Combination".[6] Under the Competition Act, 2002 the expression 'Combination' has been defined in terms of mergers, amalgamation, acquisitions and take-over.[7] The combination in a market economy can take place in one or more forms such as Horizontal Mergers, Vertical Mergers or conglomerate Mergers. The Competition authorities are cautious about the effect of the mergers on the market economy because any form of merger leads to reduction in the number of business entities operating in a market and increase in market share.[8] The new merged identity is capable to exercise increased market power which may lead to practices which are considered as Anti-competitive such as to force a potential competition to quit the market, restricted output, increased barriers to entry etc. Mergers are not prima facie anti-competitive as sometime it enhances efficiencies, results into economies of scale, helps in combining R& D to introduce new or improved products. Hence, the competition policy prohibits only those mergers

[4] Joseph Wilson, Globalization and the Limits of National Merger Control Laws , Kluwer Law International, International Competition law Series, Volume 10, page 18.

[5] Statement of Objective, Competition Act, 2002 [India]

[6] Sec. 5&6, Competition Act, 2000[India]. Unlike "Anti-competitive Agreements" and "Abuse of Dominance" which are prohibited under the ACT, the "Combinations" are regulated.

[7] Sec. 5, Competition Act, 2002 [India]

which are likely to have a particular impact on market power and adverse impact on competition.[9]

The expected revival in Indian M&A activity is set to bring with it a significant new layer to the myriad of merger review laws already in force in India, each catering to different policy and legislative requirements. This new layer is contained in the Combination provisions under the Competition Act, 2002 (the Act). The purpose of these provisions has to be understood against the backdrop of the Preamble of the Act which provides for "the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interest of consumers and to ensure freedom of trade carried on by other participants in the markets, in India." These provisions will be the principal instrument by which India's brand new competition agency; the Competition Commission of India (CCI) will control the structure of an industry. A change in the structure of the market can have horizontal, vertical as well as conglomerate anti-competitive effects and has the potential to enhance the market power and market share of the combined entity. The combination provisions are concerned with maintaining the process of competition in the market and this is done by exercising an ex ante control over the creation or strengthening of market power which can otherwise prove detrimental to the competitive market structure. With effect from May 20, 2009, the Government of India has brought into force the provisions of the Act which prohibit Anticompetitive Agreements and Abuse of Dominant Position and the CCI has already commenced its activities in these two spheres. The combination provisions under the Act have not been notified pending the finalization by the CCI of the relevant regulations which will set out the procedural aspects of the new merger control regime.

Thus, the Indian Competition Act, 2002 makes it clear that all such combination which is likely to cause an appreciable adverse effect on competition within the relevant market[10] in India shall be void[11]. Similarly, the European Union Merger Regulation aims to prevent the

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[8] Case 85/76, Hoffmann-la Roche v. Commission, ECR 461, Para 39-41

[9] Such approach has been adopted in various developed economies or developing economies such as USA, UK, Canada, EU, South Africa, India, New Zealand, Australia and South Africa.

[10] Relevant market has been defined in sec. 2 (r); Competition Act, 2002 [India]. The section gives a reference to the two forms of market for the purpose of Competition law i.e. 'Relevant Product Market' and 'Relevant Geographic Market'.

[11] Sec. 6(1) Competition Act, 2002 [India]

emergence or strengthening of market structures likely significantly to impede effective competition in the common market.[12]

The European Community Merger Control regulation provides that: - "A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market."[13] Hence, under European Community law even if a merger do not create or strengthen the dominant position; the merger will be prohibited if it impedes competition in the common market. As Prof. Pitofsky notes that 'Unlike the horizontal merger guidelines which may be the most influential piece of government regulation in the past fifty years, and the conglomerate merger guidelines which see to have caught the direction the law was going, the vertical merger guidelines have been widely ignored.[14] Hence, it is the Horizontal merger and conglomerate merger which essentially poses a threat to the competition in a relevant market.

MARKET AND ITS STRUCTURE

As the impact of a combination must be assessed in context of a relevant market, it becomes imperative to discuss briefly about Market. In most of the jurisdiction the Concept of Market has been defined with the help of 'Relevant Product Market'[15] and 'Relevant Geographic Market'.[16] It becomes easier for the competition regulatory authorities to assess the degree of market power which the merged firm will possess. The Indian Competition Act enlists all the important factors which a regulatory authority must take into account while determining the 'relevant geographic market' namely[17]:-

a. Regulatory trade barriers;
b. Local specification requirements;

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[12] Case T-158/00, ARD v. Commission, ECR II-3825, Para 192

[13] Article 2(3) of the European Merger Control Regulation [ECMR]

[14] R. Pitofsky, 'Past, Present and Future of Antitrust Enforcement at the Federal Trade Commission' (2005)72 U. Chic. L. Rev. 209,220

[15] Sec. 2 (t), Competition Act, 2002 [India]. "Relevant product market" means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use.

[16] Sec. 2 (s), Competition Act, 2002 [India]. "Relevant geographic market" means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas.

[17] Sec. 19(6), Competition Act, 2002 [India]

c. National procurement policies;
d. Adequate distribution facilities;
e. Transport costs;
f. Language;
g. Consumer preferences;
h. Need for secure or regular supplies or rapid after-sales services.

Similarly the Act provides a comprehensive list of factors which regulatory authority must consider while determining the 'relevant product market'[18] as:--

a. Physical characteristics or end-use of goods;
b. Price of goods or service;
c. Consumer preferences;
d. Exclusion of in-house production;
e. Existence of specialized producers;
f. Classification of industrial products.

TYPES OF MERGER/ COMBINATION

Horizontal Mergers: - From competition point of view the horizontal mergers are more dangerous in a market economy as they intend to create monopoly, may drive out other competitive players from market, and may abuse the market by their dominant position. Such mergers should be permitted only after a careful consideration of effect on relevant market, market share of the firm etc.

Vertical Mergers: -- Vertical Mergers are regarded as beneficial since such mergers improve production and distribution efficiency. But, the concern associated with it is that the vertical merger might foreclose a sufficient share of suppliers or buyers to rivals that it impairs the ability of rivals to compete.[19] The affirmative pro-competitive of vertical mergers are reduction of uncertainty; eliminate free riding incentives between manufacturers & dealers in promoting a brand, lower administrative cost, enhanced synergies etc.

Conglomerate Mergers: - A conglomerate merger is a merger of undertakings that, essentially, do not have a pre-existing competitive relationship, either as direct competitors

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[18] Sec. 19(7), Competition Act, 2002 [India]
[19] Einer Elhauge & Damien Geradin,Global Competition Law and Economics; Hart Publishing, Oxford and Portland, Oregon 2007, page 945

or as suppliers and customers. Mergers of this type do not give rise to true horizontal overlaps between the activities of the parties to the merger or to a vertical relationship between the parties in the strict sense of the term. Thus it cannot be presumed as a general rule that such mergers produce anti-competitive effects. However, they ay have anti-competitive effect in certain cases.[20]

Pre- Merger Notification

Different Competition Policy regime had different view with regards to Notification of Mergers/ Combination in a relevant market to the concerned competition regulatory authority. Some country makes it binding to notify all mergers/ combination regardless of its nature or size.[21]

The pattern of competition policy which had been widely adopted across the globe is quite uniform. In case of merger, USA competition policy requires a merger notification valued above certain monetary threshold.[22] European Union through its guidelines had made it mandatory for such mergers with a community dimension defined by reference to geographical turnover.[23] Indian competition policy also warrants such a pre- merger notification of mergers which is subject to a threshold requirement based on assets or market share.[24] Whereas jurisdictions like United Kingdom, New Zealand and Australia makes it optional to notify any combination in the relevant market. But, these jurisdictions have very stringent provision and criteria for clearance of mergers. Every jurisdiction assesses the likely benefits of a merger and efficiency factor against the anti- competitive effects of any form of combination.

Factors for Prohibiting Combinations (Which Competition Authority/ Regulatory bodies consider)

The substantial test applied in a market economy is whether a merger/ combination are likely to result in 'substantial lessening of competition' or not. The Indian Competition Act, 2002, any combination which causes, or likely to cause an 'appreciable adverse effect on

[20] Tetra Laval v. European Commission ECR II -4381, Para 142
[21] Sec. 27, Restrictive Trade Practices, Monopolies and Price Control Act, 1989 [Kenya]
[22] Sec. 7, Clayton Act [USA]
[23] Art. 1(2), 1(3) and 4 of the EC Regulation No. 139/04 of 2004. Here, Geographical Turnover indicates Geographical Market.
[24] Sec. 6 (2) Competition Act, 2002 [India]. By Competition (Amendment) Act, 2007, the threshold had been increased.

competition' within the relevant market shall be void.[25] South African Competition Act prescribe a similar test i.e. 'substantially prevent or lessen competition' in a national market.[26] The Developed country like Canada prohibits all such merger which prevents or lessens, or is likely to prevent or lessen, competition substantially in or among a (broadly defined) trade, industry or profession.[27] As sometimes because of combinations market share increases manifold which almost tends to create Monopoly or leads to strengthening the dominant position of merged identity in some jurisdiction like USA[28] and EU[29] respectively it becomes a relevant factor.

The Regulatory authorities while assessing the compatibility of a concentration with a common market must take account of a number of factors such as the structure of relevant market, actual or potential competition from undertakings, the position of the undertakings concerned and their economic and financial power, possible options available to suppliers and consumers, any barriers to entry etc.[30] The other factors which becomes relevant for the competition regulatory authorities while assessing adverse impact of 'combination' on a relevant market are :-

a. Level of combination in the market.
b. Degree of countervailing power in the market,
c. Views of the future development of the market and appropriate strategies for meeting future development of the market.
d. The stability of demand and cost.
e. The changing market demand or supply of inputs
f. Pricing behavior in the market and the extent to which transparent prices are available.
g. Nature and extent of innovation
h. Whether the benefits of the combinations outweigh the adverse impact of the combination.
i. The degree of availability of substitutable products.

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[25] Sec. 6 Competition Act, 2002 [India]
[26] Sec. 12- A The Competition Act, 1998 [South Africa]
[27] Sec. 92 0f the Competition Act 1985 [Canada]
[28] Sec. 7 of the Clayton Act [USA]
[29] Article 2(3) of the Council Regulation No. 139/04 on the Control of concentrations between undertakings.
[30] Case C-12/03 P, Commission v. Tetra Laval, ECR II-987, Para 125-27

FACTORS FOR APPROVAL OF COMBINATION (WHICH COMPETITION AUTHORITY/ REGULATORY BODIES CONSIDER)

Any for of combination or mergers are not per se illegal in a given relevant market until and unless it has substantial adverse impact on competition. Recognizing the benefits of such combination, competition policies have a provision for proper assessment of benefits arising out of such combination against anti-competitive effects. The concept of enhanced efficiency of the firm in post- merger scenario and subsequent benefits arising thereof are used as most common form of defense. The International Competition Network (ICN) in its report noted following common features in mergers guidelines of different countries[31]:-

1. Productive efficiencies are regularly taken into account by competition authorities.
2. Dynamic or innovative efficiencies are also relatively well –accepted by competition authorities, although they pose greater evidentiary difficulties than productive efficiencies;
3. Distribution and promotional efficiencies, transactional efficiencies, and demand – side network effects have had limited acceptance by some competition authorities; and
4. Procurement, management, and capital cost savings are generally disregarded by competition authorities.

Although, it becomes very subjective to prove efficiency argument in an alleged combination and raises further controversy as the competition policy across the globe is not uniform. Nevertheless, the efficiency factor has been recognized by most of the jurisdiction where –

1. If a combination generates 'gains in efficiency' that will be greater than, and will offset, any negative impact on competition.[32]
2. Whether or not the merger is likely to result in any technological, efficiency, or other pro-competitive gain which will be greater than, and offset, the effects of any

[31] International Competition Network Merger Working Group: Analytical Framework Subgroup, Project on Merger Guidelines, April 2004, p. 14-24 of chapter 6. Available at: http://www.internationalcompetitionnetwork.org/seoul/analysisofmerger.html
[32] Sec. 96 of the Competition Act RS, 1985 [Canada]

prevention or lessening of competition, that may result or likely to result fro the merger, and would not likely be obtained if the merger is prevented.[33]

3. Enable the merged firm to compete better and enhance competition in a market[34]
4. Result in lower or unchanged prices, increased output, or higher quality goods or services[35]
5. Undermine coordinated conduct in a market[36]
6. But, efficiencies cannot justify a merger to monopoly or near- monopoly.[37]

The Indian Competition Authority had not given any formal guideline on regulation of combination in a relevant market. But, in absence of same the experience and efficient guidelines from different jurisdiction can be used to protect the interest of consumers and sustain equitable economic growth.

CONCLUSION

The Challenge is quite open before the regulatory authorities. The inability of national instruments or policy to deal with cross- border mergers of transnational combination had given birth to a new debate i.e. Creation and evolution of new global institutions to regulate & promote the idea of welfare and humanity. Presently, Merger control guidelines are formulated in pursuance of national concern, but differential impact of multinational mergers in different national jurisdictions must be addressed. Is it sufficient to assess the anti-competitive impact and potential benefits within a national jurisdiction only? Or shall we evolve out some dynamic criteria so as the goal of "Global Consumer Welfare" is well pursued. The regulatory authorities apply competition standards very objectively in merger enforcement which promotes consistency, predictability, and legal certainty. It must foster confidence in the entrepreneurs to go for a fair activities and practices in day to day activity. At the same time such enforcement agencies must have sufficient degree of independence to discharge their responsibilities based solely on an objective application of relevant legislation and judicial precedents. Nevertheless, the law regulating Combination is in its infancy stage in India but it becomes important to have a sound policy framework to sustain

[33] Sec. 12A(1) of the Competition Act, 1998 [South Africa]
[34] Australian Competition and Consumer Commission, Merger Guidelines, June1999, at 5.172
[35] ibid
[36] ibid
[37] Sec. 4 of the USA Department of Justice and Federal Trade Commission, 1992Horizontal Merger Guidelines.

recent economic growth. In present scenario, to maintain the current national standards of economic and national growth, the policy of economic liberalization in form of LPG must be sustained but with proper rules and regulations, so that desired level of competition could be maintained.

In a developing economy like ours though the legislators have tried twice to frame laws which would provide suitable conditions for a fair and perfect competition but still the present act requires some alterations. It is still incomplete and is silent on various aspects. Some changes in the present act and some new things are very much important and need to be inculcated as it would help in eliminating some serious economic problems like price fixing.