

EFFECT OF COMPETITION LAW ON MERGERS AND ACQUISITIONS IN INDIA

Aditi Jain¹ & Mr. Ujjwal Singh²

¹B.B.A. LL.B. (Hons.) Email: aditi0710@gmail.com

²Assistant Professor
Law College Dehradun, Uttarakhand University.

ABSTRACT

Competition is universally acknowledged as the best means of ensuring that the consumers have access to the broadest range of services at the most competitive prices. The basic purpose of Competition Policy and law is to preserve and promote competition as a means of ensuring efficient allocation of resources in an economy. For proper regulation of combinations including M&A, Competition Act, 2002 came into existence in January 2003 and Competition Commission of India came into existence into October 2003 to regulate orders given by CCI on M&A in India.

Keywords: Merger and Acquisitions, Competition law

INTRODUCTION

There is a fast growing economy leading to competitive practices and cut throat competition in the free market mergers, acquisitions and takeovers of the companies are very common. Some reasons for such mergers and acquisitions (M&A) of the companies are to acquire a greater share in the market by increasing competitiveness in the market and thereby reducing the number of business entities in the market. Therefore, it sometimes, if not always leads to monopolisation in the market by carrying out restrictive business practices – such as predatory pricing, anti-competitive agreements, abuse of dominance, mergers and takeovers between the companies which negatively affect the market. Demand and supply of resources regulate and protect the market economies of a country that is why it is necessary for the countries to develop their own competition laws according to their requirement.

Meaning and Definition of M&A

The meaning of Mergers and Acquisitions is the consolidation of companies and they are used interchangeably for each other but they have different meanings. Mergers are

defined as the consolidation of two or more companies to form a larger and a bigger company. Whereas Section 2(a) of Competition Act, 2002 defines acquisitions as directly or indirectly, acquiring or agreeing to acquire — (i) shares, voting rights or assets of any enterprise; or (ii) control over management or control over assets of any enterprise.

The phrase mergers and acquisitions refers to the part of corporate finance, management and corporate strategy dealing with the selling, buying, and combining of different companies that can finance, aid or help a growing entity in a given industry grow rapidly without having to create another business entity. Often it is observed that mergers and acquisitions are seen as the only corporate competitive strategy to sustain in the market.

EVOLUTION OF COMPETITION LAW IN INDIA

Competition Policy's main object is to enhance competition that will facilitate better allocation of resources in the economy. Competition Policy should be divided into parts: firstly, activities that will promote competition activities in the economy and, secondly, legislation made to curb anti-competitive activities in the market with no or minimum government intervention. Competition Policy is a social welfare policy. Unnecessary Public Policy intervention and restrictive trade practices can be terminated with the help of the efficient and successful implementation of Competition Policy. Competition policy also helps to facilitate healthy competition in the free market. Competition law by itself cannot ensure or produce competition in the market unless this is aided by appropriate Government policies. On the other hand, Government policies without a law to prevent competition malpractices and to enforce such policies would also be incomplete.

Competition is as ancient as a human being on the planet Earth. In common parlance competition helps to aid better results because of more creativity and effort. It is a driving force of the market. The presence of competition in the business and market help to obtain better output of the resources utilized and promote the welfare of the people. Competition Culture plays a very important role in aiding the Competition Policy and it creates awareness about the benefits and gains that are initiated by the implementation of the competition legislation in the public and the economic entities. Lack of knowledge and acceptance about the effective competition policy and

inexperience of the courts due to no proper Competition Law in the developing countries is comparatively weaker to the developed countries.

Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) was the first Indian competition law Act that was legislated in India in 1969. Articles 38 and 39 of the Indian Constitution are unique in the creation of MRTP Act, 1969. The Directive Principles of State Policy in those Articles lays down, inter alia that the State shall strive to promote the welfare of the people by securing and protecting as effectively, as it may, a social order in which justice – social, economic and political-shall inform all the institutions of the national life, and the State shall, in particular, direct its policy towards securing:

1. That the ownership and control of material resources of the community are so distributed as best to sub serve the common good; and
2. That the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

The MRTP Act became obsolete in the light of international economic developments relating more particularly to competition laws as it focused on curbing monopolies and not on promoting competition. It lacked provisions to deal with anti-competitive practices that may accompany the operation and implementation of the WTO agreements. A committee was formed in 1999 by the Government under the chairmanship of S.V.S Raghavan based on the recommendations of which, the Competition Act, 2002 was enacted and notified in January 2003, and the Competition.(Amendment) Act, 2007 was enacted in September 2007 to promote competition and to promulgate a modern competition law. After a long struggle, Competition Act, 2002 and Competition Commission of India came into existence. The objective of the Act can be known from its Preamble which can read as:

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

REASON BEHIND MERGER CONTROL

In the concept of competition law Merger Control plays a major and important role with the increasing international trade and commerce activity. It also forms a part of Competition Act, 2002. The need to regulate a merger can be economic as well as political which can be analysed accordingly. The merger regulation can be done to protect and safeguard a 'combination' coming into an agreement which cause or is likely to cause '*appreciable adverse effect on competition*' (AAEC) within the relevant market and such agreement shall be void or hostile behaviour maybe created with unfavourable impact on competition law. The motive to regulate can also be detection or regulation of Public Interest. A single business entity is formed when two or more business entities are combined or merged and regulates the position in the market by creating a dominant position in the market. If there is an adverse effect on the welfare of the free market then it can be challenged as mergers are only concerned with the market power, market abuse and market dominance of the market. Market dominance in the market also sometimes is a bad decision for the market as the practices like hiking the prices of the articles in the market or using its dominant position to take over the market can thereby leave a negative impact in the market.

The Market Failures are said to be the main rationale behind merger control. Regulation is done to justify the control the market which will hike the prices of the articles or will fail to deliver public interest at large. There can be numerous reasons to recognise and to regulate the market thereby knowing that every regulation activity has its own strengths and weaknesses regarding its implementation.

COMPETITION LAW AND MERGERS AND ACQUISITIONS

Many statutes have been made to cover mergers and acquisitions. The previously legislated Act i.e. MRTP Act also covered various provisions but it became obsolete in comparison to the legislations legislated in other countries in terms of anticompetitive practices in the domestic and international trade or for increasing trade or competition in the market. After it, a new legislation was passed to regulate competition law in India to govern mergers and acquisitions in the country; it was named as The Competition Act, 2002. Mergers and acquisitions and Competition law

are very much dependent on each other as every merger and acquisition has to be scrutinised under the CCI i.e. Competition Commission of India under the regulatory provisions of the Competition Act, 2002 and other regulations. The Competition Act, 2002 is the only statute in the country which helps to examine the impact of competition on mergers and acquisitions and to introduce a regulatory mechanism which governs mergers and acquisitions. Section 4, 5 and 6 of the Competition Act is the regulation of mergers and acquisitions enforced since June 2011. The Competition Act basically explains about 3 types of arrangements;

- (i) prohibition of exploitation of dominant position,
 - (ii) prohibition of those agreements which are in contravention to the competition or anti-competitive agreements, and
 - (iii) a proper regulation of combinations.
- (i) Prohibition of exploitation/abuse of dominant position:

Exploitation of dominant position hampers the healthy competition between the firms, factories, companies and also exploits the consumers and makes it very difficult for other markets players and competitors to play in the market due to dominant position in the market. It refers to a place of strength which a firm operates independently of the competitive forces in the market and thereby it severely affects the consumers and the market in the long run. Exploitation of the market includes various activities like increasing the prices of the products, enabling barriers to entry in the market, prejudiced and destructive pricing and conditions, using its dominant position in the market to gain advantages, making dissimilar conditions for similar and same transactions, limiting production and technical support, not giving access to the market.

- (ii) Anti-competitive agreements:

An anti- competitive agreement is a pact having appreciable adverse effect on competition (AAEC). Under section 20 of the Act, before forming an opinion about the combination the commission has to consider the factors like competition through imports about the AAEC of the proposed combination.

Anti- competitive agreements also includes various agreements like conditional purchase/ sale (tie-in arrangement), to allocate markets, to fix price; resale price maintenance; big rigging or collusive bidding; and refusal to deal. There are more explanations to prove that less mature markets are more susceptible to the anti- competitive practices than the developed countries' markets. Reasons to the above explanation include:

- A. larger local markets;
- B. information passed is irregular in both credit and product market;
- C. natural barriers to enter in the market due to insufficient distribution channels, irregular conditions and inadequate business infrastructure including regulation regimes.

(iii) Combination Regulation:

Competition Commission of India regulates combinations such as mergers, acquisitions and amalgamations under the Combinations Regulations. Combinations are regulated by the orders of the Competition Commission of India. CCI has been conferred with extra- territorial jurisdiction under section 32 of the Act which means that if any acquisition takes place above the specified limits in India shall be subject to scrutiny of CCI, even if the acquirer is situated or located outside India. An enquiry can be made by the commission suo-moto or on the receipt of the notice. The time bound enquiry by the commission has been exempted under Section 20(1). Competitive harm can reduce by applying the remedies aroused by a combination. The focus of to prevent competitive harm is to enable effective competition in the market and gain the advantages of it. The remedies granted by the Act are both Structural and Remedial. The Act enables CCI with discretion to propose the modification with a flexible approach before forming an opinion.

Competition Act plays a very important role in M&A deals. All M&A must be complied with the Competition Commission of India (CCI) regulations. No M&A can take place without the approval of the CCI. The reason to legislate Competition Act was to promote fair competition within the market and to make sure that no anti-competitive activities takes place. After CCI's approval companies ensures that there

is no adverse effect on the market. When CCI has a reason to believe that a merger transaction will result in anti-competitive effects, it can completely prohibit the transaction completely or it can make the contracting parties to enter into commitments to correct those anti- competitive effects.

Companies Act, 1956 also control mergers to safeguard the interest of the secured shareholders and creditors. Takeover Code, 2011 also regulates merger and protects the investors. Companies Act, 1956 and Takeover Code, 2011 also shields the private individuals and they are the sub-sets of Competition Act, 2002. But Competition Act, 2002 targets to protect the whole market, customers from appreciable adverse effect on competition (AECC) in the country and it is purely based on competition law in the country. Competition Act also helps to curb anti- consumer activities in mergers and acquisitions.

CONCLUSION

Competition Law is a complex creation of law and also serves to diffuse socio-economic power broadening participation in economic, social, and political advances while ensuring opportunities for new entrepreneurs. However, in the interest of consumers, and the economy as a whole, it is necessary to promote an environment that facilitates fair competitive outcomes in the market curb anti-competitive behaviour in the market and discourage market companies from adopting unfair measures. With the evolving business entities and the competition in the market, only with the higher rate of innovation and adoption of new technologies will sustain in the market. Therefore, Competition Commission of India should understand the law and use it according to the needs of the Indian economy. Moreover, it can give insight of the benefits for the domestic economy of integrating into investment patterns and international trade.