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Mergers And Acquisitions and Incompetency of Competition commission of India in Its Regulations

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ABSTRACT

India made its own Competition Law in the year 1969 named MRTP Act, 1969. But it was not fulfilling the need of India, so a new Act came into force in the year 2002 named as the Competition Act, 2002. Mergers and Acquisitions are provided under the name combination as given under the section 5 of the Competition Act, 2002 and the provisions for its regulation is given under the section 6 of the Act. These provisions were added to the Act in the year 2007. Powers and Duties of the Competition Commission of India (CCI) is given under the Chapter IV of the Act. But all these provisions are not making the CCI completely competent in the regulation of combinations. So, this article is also dealing with the incompetency of CCI in the regulation of combinations as well.

KEYWORDS

Merger, Acquisition, Combination, Competition Commission of India, Appreciable Adverse Effect on Competition (AAEC)

INTRODUCTION

a. Background

The main purpose of enacting the Competition Act was to 'promote' competition and 'protect' the interest of consumers. Before the enactment of this Act, there was MRTP Act, 1969 but due to numerous gaps in this Act, it resulted in the implementation of the Competition Act of 2002.

In the 42nd amendment of the constitution the word 'socialist' was added in the preamble of the Constitution of India and the main purpose of adding this word was intended to remove all types of discrimination that were leading to economic inequality. To tackle this problem of concentration of economic power to few persons, the government formed a monopolies inquiry commission on whose recommendation a 'Monopolies and Restrictive Trade Practices Bill' was introduced in front of the parliament and in the year 1969 was implemented as MRTP Act, 1969.

The MRTP Act, of 1969 derives its inspiration from Articles 38 and 39 of the Constitution of India which talks about the 'social', 'economic', and 'political' welfare of the people.[1]

The primary aims of the MRTP Act, of 1969 were 'to prevent the accumulation of economic power in the hands of a few individuals', which negatively impacts the interests of others, 'to control monopolies', 'to prohibit restrictive trade practices', 'to prohibit monopolistic trade behaviour's', and 'to forbid unfair trade practices.

b. The New Competition Act

When it became clear that the MRTP Act, 1969 of India was the weaker Competition Law in comparison to other countries basically in the cases of International Economic Development, there was also a sentiment that the emphasis should shift from suppressing monopolies to encouraging competition necessary The primary aim of the MRTP Act, 1969 was 'to curb trade practices that hinder competition', creating a necessity to shift policies from command and control to a more liberalized and globalized approach to trade, particularly since the nation embraced a new model of economic liberalization in the year 1991.

Finally, in the year 2002 the Competition Act, 2002 came into effect.

c. Regulation of Mergers and Acquisitions

Now the main purpose of the Competition Act is to prohibit any trade and practices that are causing appreciable adverse effects on the competition and the Act focuses on the prohibition of three kinds of agreements: a. 'anti-competitive agreements under section 3', b. 'abuse of dominant position under section 4' and c. 'the regulation of combinations under section 5', which majorly talks about mergers and combinations.

Section 5 of the Competition Act, 2002 defines 'combinations', and 'the provisions of the regulation of combinations' are given under section 6 of the Act, under Section 7 There is a

[1] Articles 38 and 39 of The Constitution of India

provision for the 'constitution of the commission', under Section 29 the 'commission is empowered to investigate any such combinations which have a detrimental impact on the competition' and under section 31 of the Act, 'certain orders could be passed' and section 53A of the Act provides for 'Appellate Tribunal' and 'appeals' under section 53B[2].

THE MERGERS AND ACQUISITIONS UNDER THE COMPETITION ACT, 2002

In the year 1991, India adopted liberalization in its economy and after that, the process of globalization and liberalization swiftly transformed. This led to increased competition in both the Indian market and beyond. There was a rapid rise in mergers and acquisitions among Indian companies. These factors rendered the situation extremely concerning and a pressing need was recognized by the government to prevent such activities which were causing "appreciable adverse effect on competition" in the market.

To understand the 'effects of mergers and acquisitions' under the combination section outlined in Section 5 of the Competition Act, 2002, it is essential to also consider the other two types of agreements which could have "appreciable adverse effect on the competition" in the market that is given under sections 3 & 4 of the Act which are "anti-competitive agreements" and "abuse of dominant position" respectively.

As outlined in Section 5 of the Competition Act of 2002: 'The acquisition of one or more enterprises by one or more persons or mergers or amalgamations of enterprises shall be a combination of such enterprises and persons or enterprises if[3]-

1. If the parties to the acquisition acquire control of the enterprise's voting rights or control of its shares or assets and the asset's value exceeds one thousand crore rupees, the turnover exceeds three thousand rupees, or the asset's value in or outside India exceeds 500 million US dollar.

2. Combination also occurs when any group acquires an enterprise and controls its shares, voting rights, and assets in India where the asset's value exceeds four thousand crore rupees or the turnover exceeds twelve thousand crore rupees or when the aggregate value of the asset exceeds two billion USD in or outside India.

3. Combinations also occur when a person acquires control of one enterprise and exercises direct or indirect control over another enterprise engaged in the production, distribution, or trading of similar, identical, or substitute services.

4. Combination is also considered to occur when the value of the enterprise's asset after amalgamation or merger exceeds one thousand crore rupees or when the aggregate value of the asset within or outside India exceeds five hundred million USD.

[2] The Competition Act, 2002
[3] Section 5 of the Competition Act, 2002

5. Where the group after merger or amalgamation would belong to the enterprise and it would have assets of the value of more than rupees four thousand crores or the aggregate value of the assets is more than two billion US dollars within or outside India.

Merger is an activity where one enterprise is entitled to exercise control over a significant part of the assets and decision-making power of the other enterprise. It is done to expand their business; it is also considered to be an activity for the enterprise as it provides the enterprises to run their business on a large scale.'

However, all mergers are not considered good for business and competition in the market, certain mergers are considered detrimental and have 'appreciable adverse effects on the competition' in the market. The most feared negative impact is the decrease in competition in the market and the rise in prices of goods and services negatively impacts customers as well as other competitors as the merged enterprise's exercise 'full control over the market and restrain the entry of new players. Here it could also be said to be the violation of 'sections 3 and 4 of the Competition Act, 2002'.

There are three kinds of mergers: "Horizontal Mergers, Vertical Mergers, and Conglomerate Mergers". A 'horizontal merger' is a merger between enterprises engaged in dealings of similar kinds of goods and services, 'vertical merger' is a merger between companies that operate at different levels of the production chain within the market. This may be in respect of the production, storage, supply, distribution, etc., and then comes the 'conglomerate merger' where two companies come together for the benefit of their activities and strengthening of financial position.

According to the Competition Act, of 2002, enterprises involved in any merger must provide prior notice to the competition commission established under the Act.

POWERS OF CCI UNDER THE COMPETITION ACT, 2002 IN REGULATING "MERGERS AND ACQUISITIONS"

The provisions about "anti-competitive agreements" and "abuse of dominant position" came into effect in 2009 and 2011., CCI made proposals regarding the amendments to the provisions for the merger control. 'Merger' has been defined in section 5 of the Competition Act, 2002 and its 'regulation' is given under section 6 of the Act. The merger is good for the business with several advantages like an increase in efficiency and economy until and unless it causes detrimental effects or "appreciable adverse effects on competition" in the market. The term "appreciable adverse effect on competition" in the market has not been defined in the Competition Act but there is a substantive test given under section 20(4) of the Competition Act to test 'whether the combination has or is likely to have an appreciable adverse effect on the competition'.

'The duties, powers, and functions of the commission' are provided under Chapter IV of the Competition Act, of 2002. Where Section 18 provides 'the duties of the commission', section 19 provides 'the power of the commission for inquiry into certain agreements and dominant positions of enterprise', and Section 20 provides 'the power of the commission for inquiry into

combination by the commission'. These duties, powers, and functions are provided up to section 40 of chapter IV of the Act[4].

As stated in Section 18 of the Act[5], 'the basic duties of the commission are to eliminate practices having "appreciable adverse effects on the competition", to promote and sustain competition, to protect the interest of consumers, and to ensure freedom of trade carried on by other participants in India'.

The competition commission holds specific powers regarding combinations under the Act. These powers are regarding 'the regulation of combination' by the commission which is given under section 6 of the Act[6]. This restricts 'any person or enterprise' from forming any combination that has an "appreciable adverse effect on competition" in the 'relevant market' in India and if such a combination is made then such combination is void.

There are additional powers, such as the Mandatory Notice, which obligates the enterprise to inform the competition commission about a merger when the value of its assets or turnover exceeds the threshold limit outlined in section 5 of the Act. Any such notice must be submitted to the commission within 30 days. Then there is a 210-day waiting period during which no combination will take effect until either 210 days have passed or an order is received, whichever comes first after the commission receives notice about the combination. The commission also determines the "relevant market" concerning the "relevant product market" or "relevant geographic market" or both.

Under section 32 of the Act,[7] the commission has an imperative power 'to enquire into any act about any "agreement", "abuse of dominant position", or "combination" taking place outside India but has an "appreciable adverse effect on competition" in the relevant market in India'. This is also known as the 'extra-territorial jurisdiction' of the commission.

For the determination of "AAEC (appreciable adverse effect on competition)" in the "relevant market" in India, the Competition Act 2002 has empowered the commission to do so and the factors determining AAEC are given under section 20(4) of the Act.

The commission is authorized under the Competition Act to impose penalties after conducting an inquiry into matters of combination if parties fail to notify them.

INCOMPETENCY OF CCI IN REGULATING MERGERS AND ACQUISITIONS

According to section 20(1) of the Competition Act, 2002, The commission may initiate an inquiry based on its knowledge or information regarding acquisitions, mergers, or amalgamations as referred to in Section 5 of the Act. This inquiry aims to determine 'whether such a combination has caused or is likely to cause any "appreciable adverse effects on competition" in India'. However, this inquiry must be conducted within one year of the

[4] Chapter IV of the Competition Act, 2002
[5] Section 18 of the Competition Act, 2002
[6] Section 6 of the Competition Act, 2002
[7] Section 32 of the Competition Act, 2002

combination; otherwise, it cannot be pursued. This means that if a company operates discreetly after its combination for at least one year, the Competition Commission of India (CCI) will no longer have the authority to take action regarding that combination after that period.[8]

The meaning of 'AAEC (appreciable adverse effect on competition)' is nowhere defined. However, certain factors are given under section 20(4) of the Act from which the commission can take reference to inquire into any combinations. It must be noted that all these factors do not suggest any solid criteria or threshold, which means there are loopholes in such conditions that are subject to the understanding of the commission.[9]

Further, the government of India has provided certain green routes to certain kinds of combinations to ease business activities, so that Parties who meet the criteria involved do not need to wait for approval of their notice of combination to the competition commission.[10]

To qualify for the green route, the entities in the combination must not be involved in the production of any 'identical goods or services. They should also not participate in any stage of the business activity or engage in any level of business that is complementary.

Under section 6(4) of the Competition Act, 2002 there is a provision for certain exemptions, such exemptions are given to 'banks', 'venture capital funds', 'public financial institutions', or 'foreign institutional investors.

Most of the cases regarding AAEC are filed by foreign companies about 60% more than the domestic companies and about 84% of the cases filed under these apprehensions lead to no result[11].

The use of the terminology 'ordinarily not likely to cause an appreciable adverse effect on competition' leaves it to the wisdom of the parties as to whether they should file or not, thereby creating ambiguity. Further, the use of the term "local nexus", which was later changed to "insignificant local nexus", in Schedule I of the Competition Act is problematic.[12]

In the Sun-Pharma-Ranbaxy case, where the combined market share of the companies would become 85-90% and therefore, the companies were ordered to divest 7 drugs. Here the order said they 'think' the combination is bound to abuse their dominant position, without entering into an objective analysis of the same.[13]

The objective of the Competition Act of 2002 is 'to regulate trade and corporate restructuring practices that could harm competition'. To achieve this, the Act specifies the types of 'transactions' that are likely to have an "appreciable adverse effect on competition", requiring the involved parties to submit these transactions for review to the Competition Commission of India (CCI). 'Combinations' are one type of transaction that must be notified to the

[8] Section 20(1) of the Competition Act, 2002
[9] Section 20(4) of the Competition Act, 2002
[10] The Competition (Amendment) Bill, 2019
[11] Transcript of the VIII NLSIR Symposium on Competition Law, 27 NLSI Rev 215 (2015)
[12] Transcript of the VIII NLSIR Symposium on Competition Law, 27 NLSI Rev 214 (2015)
[13] Transcript of the VIII NLSIR Symposium on Competition Law, 27 NLSI Rev 215 (2015)

Commission. These combinations can occur through various methods, such as the acquisition of 'shares', 'voting rights', 'assets', or 'control'. While acquisitions of shares and voting rights can be objectively assessed, determining the acquisition of control is considerably more complex.[14]

CONCLUSION AND SUGGESTIONS

The concept of merger and acquisition is very new in the Competition Act, of 2002. Section 5 of the Act talks about combinations which consists of these terms of merger and acquisition which were added to the Act in the year 2007, and the provisions for their regulation by the CCI have been provided under section 6 of the Act, which is also changing according to the demand of the time. The nation moved towards liberalization and globalization which forced the old competition law that was MRTP Ac, 1969 to change into the Competition Act, 2002. Similarly, the time demanded some more changes in its regulation in the year 2019 for regulation of combinations, such changes are subject to experiences that the nation is getting from inside and outside India.

Now the Competition Commission of India has various kinds of powers to regulate the combination or any agreement or to check the abuse of dominant position by evaluating whether it has any appreciable adverse effect on competition in the relevant market in India or not. However, there are no such sharp criteria for checking AAEC. Similarly, for understanding control under the combinations, the commission gives its order on a case-to-case basis as there are no such sharp criteria to understand the control and AAEC (Appreciable Adverse Effect on Competition).

It must also be noted that the Competition Act, of 2002 is still a developing legislation and there needs to be at least some more stable definition to understand and qualify things more easily whether it has an 'appreciable adverse effect on competition' in the relevant market in India or not and in the cases of combinations the term 'control' also be made clearer to understand.

[14] Isha Jain and Vanshaj Jain, Defining "Control" under the Indian Competition Act, (2017) 12 NSLR 23