



## MERGER AND ACQUISITION AND THE COMPETITION LAW – AN ANALYSIS

By *Tanisha Mishra*  
From *NLU Assam*

### Abstract

In a growing and liberalised economy which is highly competitive, the mergers and acquisition as a corporate tool of restructuring has been going grooved in India, so also the associated rules and regulations governing these mergers and acquisitions.

Merger and acquisition (or combination) happen when two or more companies combine to form a new company for expansion and economic growth. However, these combinations may also lead to undesirable ant-competitive impact, reducing thereby the scope of competition or innovation, in addition to affecting the consumers unfavourably.

This situation needs to be regulated, monitored for greater good for which the competition commission of India (CCI) replacing old MRTP ACT came into fore through the competition Act 202 following Raghavan committee recommendation and also India becoming a signatory to WTO, in the era of economic reforms. The competition Act of 2002 is triggered by the articles 38 and 39 of the Indian constitution and comes under the directive principles of state policy. The competition Act revolves around 3 of its vital sections – section 3 and 4 for anti-competitive agreements and abuse of dominance by a single firm while sections 5 and 6 deal with regulations pertaining to merger, acquisition and amalgamations with

regard to determining appreciable adverse effect on competition, mandatory notifying to the competition commission on breach of threshold limits (set by the ministry of corporate affairs, govt of India) and scope of investigation wherever necessary. The competition commission has been over the years, taking many steps for the ease of corporate restructuring and transition of M&A in sync with economic reforms, globalisation of trade, in the country. This paper attempts to discuss some of the areas of importance under the competition act 2002 with regard to merger and acquisition.

The Liberalized era, fast emerging innovations and investments, the rapid changes in technologies and their access in the digital India, all have led to corporate restructuring for achieving desired sustainable growth, economies of scale and overall competitiveness in the Indian economy in recent times.

The Corporate restructuring through the routes of merger and Acquisition (M & A) has assumed much importance so also the associated regulatory provisions governing M & A, Legal-economic impact of M & A to the consumers, the market, the nation, have become critical in fast growing India.

Mergers and Acquisitions (or combinations) refer to a situation where the ownership of two or more enterprises is joined together, in other words, a merger happens when two or more companies combine to form a new company. This may be either merging with an existing company or the combination may mean a new company. The Assets and Liabilities of the transferor company become the assets and



liabilities of the transferee company after the merger.

As a corporate strategy, corporate finance and better management tool, M & A deal with buying, selling, combining of different companies and similar entities that can help an enterprise grow rapidly in its sector, location of origin or a new field or a new location without creating a subsidiary or other child entity or a joint venture.

The rationale behind any merger and Acquisition is usually to create a bigger entity which leads to economies of scale, better operative performance, accelerated growth and expansion of business to gain more assets.

However, a merger may also lead to unwanted, socio-economic implications that are not desirable. Other than growth, performance, expansion motives, the another motive of merger may also be to create anti-competitive efforts-like, to reduce the numbers of competitors or to create dominance in market, reducing the scope of competition which is likely to harm consumers through prices, reduced choices, or less innovations.

It is in this background, the competition Act of 2002, a successor of the old monopolies restrictive trade practices (MRTP) Act came into force. Through the M & A are regulated by the provisions of the SEBI Act, the companies Act also, with the inception of the competition Act 2002, these (M &A) issues now come under the purview of the competition laws. Here we will limit our discussions of M & A with regard to the competition law only.

MRTP Act (from 1969 to 2009) was based on regulating firms on the criteria of size and market share and complemented existing license raj system. Several factors were responsible for paving the way for the repealing of MRTP Act as recommended by the Raghavan Committee, in favour of competition Act, to provide a level playing field to both state-owned enterprises and the private sector, to help implement the economic reforms with India becoming a signatory of WTO (World Trade Organization) in 1995 and Institutionalization of several sectoral regulators.

Competition Law for India was triggered by Articles of 38 and 39 of the constitution of India. These Articles are a part of the directive principles of state policy.

The Competition Act was supposed to be passed in 2002 and section 66 of the new Act provided for the repeal of the MRTP Act and disposal of the pending cases of MRTP Commission, which got desated for several reasons though.

On 1<sup>st</sup> Sep, 2007, the parliament passed an Amendment Act, leading to creation of competition Appellate Tribunal (COMPAT) and so also section 66, with an extension of the life of MRTP commission by 2 years to clear unfair Trade Practices” pending cases. Eventually, in may 2009, the enforcement of competition Act 2002, became a reality, actually.

The Objectives of the competition Act are sought to be achieved through the instrumentality of the competition commission of India(CCI) which is



established by the Central Govt. to achieve its objectives.

**The Competition Commission of India (CCI) endeavors to do the following<sup>(1)</sup>:**

1. Make the Markets Work for the benefit and welfare of consumers.
2. Ensure fair and healthy competition in economic activities in the country for faster and inclusive growth and development of economy.
3. Implement Competition policies with an 9 Am to effectuate the most efficient utilization of economic resources.
4. Develop and Nurture effective relations and interactions with sectoral regulators to ensure smooth alignment of sectoral regulating laws in tandem with the competition law.
5. Effectively carryout competition advocacy and spread the information on benefits of competition among all stakeholders to establish and nurture competition culture in Indian economy.

**BRIEF ANALYSIS OF THE COMPETITION ACT 2002:**

The Competition Act revolves around 3 of its sections primarily. Section 3 deals with anti-competitive agreements (both horizontal and vertical) section 4 deals with abuse of dominance by a single firm whereas sections 5 and 6 deal with the regulations pertaining to mergers, acquisitions and amalgamations. The competition Act has jurisdiction over foreign carters and foreign combinations, likely to cause an “Appreciable Adverse effect on competitions” (AAEC) which the MRTPACT was not able to do.

The Act also allows for monetary penalties in case firms do not comply with competition commission of India Orders.

1. [http://cci.gov.in/images/media/Research\\_reports/competition%20Law%20in%20India%20us%20uk-A%2](http://cci.gov.in/images/media/Research_reports/competition%20Law%20in%20India%20us%20uk-A%2)

The Commission had imposed significant fines on 10 cement firms that were involved in a cartel which was facilities by the cement manufacturers Association (CMA) in 2016. In 2018, the CCI imposed fines of Rs 135.86 crores (?) on Google for abusing its dominance for alleged manipulation of search results.

In Jan 2019, in the case of competition commission of India V.JCB India Ltd. And others, the supreme court held that the Director General (DG) of the commission has the power to search and seizure with magistrate’s authorization in context of section 41 (3) of the Competition Act 2002 and 240 A of companies Act, 1956.

**COMBINATION:**

Broadly, Combination under the Act means acquisition of control, shares, voting rights or assets, acquisition of control by a person over an enterprise where such person has direct or indirect control over another enterprise engaged in competing business, and mergers and amalgamations between or amongst enterprises when the combining parties exceed the thresholds set in the Act. The thresholds are specified in the Act in terms of Assets or turnover in India and abroad.

The combination which causes or likely to cause an appreciable adverse effect on combination (AAEC) within the relevant



market in India is prohibited and such combination shall be void. The provision of the Act relating to regulation of combinations have been enforced with effect from 1<sup>st</sup> June, 2011.

The Statutory Provisions as spelt out in section 5 and 6 of the Act primarily envisages that any merger or acquisition (M & A) taking place within the Indian sub-continent has to be examined on the touch stone of the competition Act, 2002 by the competition watchdog/regulator i.e. competition commission of India (CCI) <sup>(2)</sup>.

#### **MERGER AND ACQUISITION:**

Merger and Acquisition are often interchangeably used through they are two diverse modes of corporate restructuring. Merger refers to the process of amalgamation or merging of two companies to form a new company whereas acquisition takes place when one company is taken over by another company. Acquisition further can be hostile or friendly<sup>(3)</sup>.

The SVS Raghavan committee acknowledges mergers as a legitimate means by which firms can grow and are generally as much part of the natural process of industrial revolution and restructuring as new entry, growth and exit<sup>(4)</sup>.

Mergers can be Horizontal or Vertical conglomerate.

#### **HORIZONTAL MERGER:**

Horizontal Merger or Combination refers to merger of two companies at the same level of production or distribution in the relevant market. From the point of view of competition law, horizontal mergers normally come under the purview of regulation of competition commission, as

they can have high AAEC (appreciable adverse effect on competition), simply put these mergers have the potential to curtail competition in market.

2. *Satish Sharma, Impact of merger Acquisition on competition – An Analysis, 25/10/18, Available at <https://www.waki.no1.com/legal-news/impact-of-merger-acquisition-on-competition-an-analysis.html/amp>.*

3. *Satish Sharma, Impact of merger and Acquisition on competition-An analysis, 25/10/18.*

*Available at <https://www.vakilno1.com/legal-news/impact-of-merger-acquisition-on-competition-an-analysis.html/amp>*

4. *Satish Sharma, Impact of merger and Acquisition on competition-An analysis, 25/10/18.*

*Available at <https://www.vakilno1.com/legal-news/impact-of-merger-acquisition-on-competition-an-analysis.html/amp>*

#### **VERTICAL MERGERS:**

A vertical merger joins together a firm/company that produces an input with a firm that uses that input to produce the output. Vertical merger thus is an arrangement between the enterprises at different stages or levels of production chain and therefore, in different markets.

From the competition law point of view, such mergers are generally taken leniently by the commission as their impact to affect competition or market is perceived not as much that of Horizontal mergers.

#### **CONGLOMERATE MERGS:**

If the merger is neither horizontal nor vertical, it may be a conglomerate merger.



Conglomerate merger operates in different product markets and are said to be a feature of any acquisition between the companies that are sufficiently diversified. From the point of view of competition Act, the conglomerate merger may not pose any threat to competition.

### MAJOR AREAS OF INTEREST FOR COMBINATION UNDER COMPETITION ACT, 2002:

As the most important concern of competition commission of India while assessing a combination is to ensure that the proposed combination does not cause anti-competitive effects in the relevant market, we may understand few important areas of interest under the Act, as under:

#### AAEC (APPRECIABLE ADVERSE EFFECT ON COMPETITION)

The Competition Act envisages appreciable adverse effect on combination in the relevant market in India as the criterion for regulation of combinations. In order to evaluate appreciable adverse effect on competition, the Act empowers the commission to evaluate the effect on combination as per factors highlighted in sub-section (4) of section 20 of the act.

The factors to be considered, in this regard, by the commission while evaluating the AAEC in the relevant market, are<sup>(5)</sup>;

- a. Actual and Potential Level of competition through imports in the market;
- b. Extent of barrier to entry into the market;
- c. Level of concentration in the market;
- d. Degree of countervailing power in the market;

- e. Likelihood that the combination would result in parties to the combination being able to significantly and sustainably increase prices or profit margins;
- f. Extent of effective competition likely to sustain in a market or extent to which substitutes are available or likely to be available in market;
- g. Market share in the relevant market, of the persons or enterprise in a combination, individually and as a combination;
- h. Likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;
- i. Nature and extent of vertical integration in the Market;
- j. Possibility of a failing business;
- k. Nature and Extent of innovation;

*Subsection (4) of section 20 of the competition act 2002*

- l. Relative advantage by way of the combination to the economic development by any combination having or likely to have appreciable adverse effect on competition;
- m. Whether the benefits of the combination outweigh the adverse impact of the combination, if any.

#### ABUSE OF DOMINANT POSITION AND PREDATORY PRICING:

The dominant position under the competition Act refers to a position of



strength, enjoyed by an enterprise in the relevant market in India enabling it to<sup>(6)</sup> .:

- a. Operate Independently of Competitive forces in relevant market;
- b. Affect competitors, Consumers or relevant market in its favour.

**Section 4(2) of the Act prevents following acts that result in promoting “Abuse of dominant position”<sup>(7)</sup>:**

- (i) Impose unfair or discriminatory condition or price in sale and purchase of goods or services;
  - (ii) Limit or restrict production of goods or services;
  - (iii) Technical or scientific development relating to goods or services to the prejudice of consumers.
6. *Satish sharma, what is Abuse of dominant position under competition act? 30/11/2017, available at <https://www.vakilno1.com/bareacts/laws/abuse-dominant-position-competition-act.html/amp>*
7. *Satish sharma, what is Abuse of dominant position under competition act? 30/11/2017, available at <https://www.vakilno1.com/bareacts/laws/abuse-dominant-position-competition-act.html/amp>*

**INDULGING IN PRACTICE LEADING TO DENIAL OF MARKET ACCESS, LIKE:-**

- a. Make conclusion of contracts subject to acceptance by other parties.
- b. Use its dominant position in one market to enter into other relevant market.

**PREDATORY PRICING:**

Means Sale of goods or services at a price which is below the cost as may be with the view to reduce competition or eliminate competitors.

**ABUSE OF DOMINANT POSITION – (CASE REFERENCES) :**

In the case of Shri Neeraj Malhotra, Advocates V. North Delhi Power Ltd.<sup>(8)</sup> the competition commission of India (CCI) observed that-Section 4 of the Act does not prohibit an enterprise from holding a dominant position in a market, it does place a special responsibility on such enterprises, in requiring them not to abuse their dominant

The actions, practices conduct of an enterprise in a dominant position have to be examined in view of the facts and circumstances of each case to determine whether or not the same constitutes an abuse of dominance in terms of section 4 of the Act.

**ON MOTIVE OF DOMINANT ENTITY: IN THE CASE OF VELANKANI ELECTRONICS PVT. LTD. V. INTEL CORPORATION<sup>(9)</sup>,**

The Commission held that at this stage, the commission is not required to go into the intent or motive of OP (Opposite Parties) in indulging into the alleged conduct, that has been, prime facie, found to be abusive and the motive of dominant entity does not play any role nor section 4 imposes any such obligation on commission.

8. *Satish sharma, what is Abuse of dominant position under competition act? 30/11/2017, available at <https://www.vakilno1.com/bareacts/laws/abuse-dominant-position-competition-act.html/amp>*



9. *Satish sharma, Recent Development in the competition law 14/3/19 available at <https://www.vakilno1.com/legal-news/recent-development-in-the-competition-law.html/amp>*

**IN A RECENT CASE OF – MR. MEET SHAH AND ANOTHER V. UNION OF INDIA, MINISTRY OF RAILWAYS AND ANOTHER<sup>(10)</sup>,**

It was alleged that the Ministry of Railways and IRCTC Ltd. Were rounding off the actual base fare to the nearest higher multiple of Rs. 5/- to arrive at the total base fare in contravention of the provisions of section 4 of Act i.e. by abusing dominant position.

The commission, in the absence of any valid justifications by the OP (Railways) held that this practice of rounding off to the next higher multiple of Rs. 5/- by the opposite parties, prima facie, amounted to an imposition of unfair condition in the market for sale of rail tickets in India, particularly for online booking of rail tickets, in contravention of provision of section 4(2) (i) of the Act.

**RELEVANT MARKET:**

According to section 2(11) of the Act, “relevant Market” <sup>(11)</sup> Means the market which may be determined by the commission with reference to the relevant product market or the relevant geographical market or with reference to both markets.

**RELEVANT PRODUCT MARKET:**

Relevant product market is understood as a market with all those products and services that are considered interchangeable or substitutable by the

consumer, by reason of features of products or prices, their prices and intended use.

The factors to be considered by the CCI while determining “relevant product market” are covered in section 19 (7) of the competition Act 2002.

10. *Satish Sharma, Recent development in the competition law, 14/3/19, Available at <https://www.vakilno1.com/legal-news/recent-developments-in-the-competition-law.html/amp>*
11. *Satish Sharma, Impact of merger and acquisition on competition – An analysis, 25/10/18 Available at <http://www.vakilno1.com/legal-news/impact-of-merger-acquisition-on-competition-an-analysis.html/amp>*

**RELEVANT GEOGRAPHIC MARKET:**

Refers to a market in a geographical area in which the conditions of competitions for supply of goods or provisions of services or demand of goods or services are distinctly homogenous and can be differentiated from the conditions prevailing in neighboring areas<sup>(12)</sup>.

In the case of M/s Saint Gobain Glass India Pvt. Ltd. V.M/s Gujrat Gas Company Ltd;<sup>(13)</sup> the CCI, to determine geographical market, took note of factors like – Physical characters, end uses of goods, price of goods or services, consumer preferences, exclusion of in house production, classification of industrial products etc. in terms of the provisions of section 19(6) contained in the Act.



12. *Satish Sharma, Impact of merger and acquisition on competition – An analysis, 25/10/18 Available at <https://www.vakilno1.com/legal-news/impact-of-merger-acquisition-on-competition-an-analysis.html/amp>*
13. *Satish sharma, what is Abuse of dominant position under competition act? 30/11/2017, available at <https://www.vakilno1.com/bareacts/laws/abuse-dominant-position-competition-act.html/amp>*

Under the competition Act 2002, Under Section 6, any enterprise desirous of entering a combination, if not otherwise exempted in terms of threshold limits prescribed, shall have to send a notice disclosing details of combination to the Commission (CCI) in specific form with fee applicable, within 30 days of approval of the proposal relating to merger or amalgamation by the board of directors or of the execution of any agreement or other document in relation to acquisition.

**MERGER CONTROL AND REGULATORY FRAMEWORK UNDER COMPETITION ACT, 2002**

**(A) THRESHOLD LIMITS FOR COMBINATION:**

**(B)**

Threshold Limits play a major role under competition law especially related to combination. Under the section 5 of Act, It certain threshold limits (as revised by ministry of corporate affairs, MCA, Govt. Of India) are crossed the parties to combination are required statutorily to give notice about the combination to the commission.

In case a notifiable combination is not notified, the commission has the power to impose a fine under section 43(A) that may be to the extent of 1% of total turnover or assets of combination, whichever is higher, for failure to give notice to commission.

Any combination for which notice has been filed with commission would not take effect for a period of 210 days from the date of notification or till the commission passes an order. If the order is not passed during 210 days (Section 6(2A) by CCI, the combination shall be deemed to have been approved, under section 31(11) of the Act<sup>(15)</sup>.

Section (54) of the Act empowers the central Govt. to notify exemptions of giving notice for certain enterprises for certain period.

According to the Ministry's of corporate affairs (MCA) notification dated 4<sup>th</sup> March, 2016, the threshold limits (enhanced by 100% in value of assets and turnover) for combinations are appended here under:-<sup>(14)</sup>

15. *Competition act 2002, competition advocacy and awareness programme of CCI-Advocacy series (5)*

**REVISED THRESHOLDS**

14. <https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.cci.gov.in/site/default/files/quick-link-document/revise>

In a step forward and to streamline the merger control process, the commission on 9<sup>th</sup> Oct, 2018, issued amendments to the combination regulations, such as<sup>(16)</sup>

**(C) NOTICE FOR COMBINATION:**

Clause	Assets	THRESHOLDS FOR FILING NOTICE	
		OR	Turnover
Enterprise Level	India	> 2000 INR crore	>6000 INR crore
	Worldwide with India leg	>USD 1 bn with at least >1000 INR crore in India	>USD 3 bn with at least >3000 INR crore in India
		OR	
Group Level	India	>8000 INR crore	>24000 INR crore
	Worldwide with India leg	> USD 4 bn with at least >1000 INR crore in India	> USD 12 bn with at least >3000 INR crore in India
		OR	

**First :** The Notifying Parties are now given an option to withdraw and refile a merger notification, before the CCI

2. *Increase in thresholds of De Minimis Exemption:* Pursuant to Notification No. [S.O. 674\(E\) dated March 4, 2016](#), acquisitions where enterprises whose control, shares, voting rights or assets are being acquired have assets of not more than Rs. 350 crore in India or turnover of not more than Rs.



issues a show cause notice (SCN), with filing fee already paid, being adjustable against fee of new notification profiled that the new notification is given within 3 months from the date of withdrawal.

**Second :** To expedite the approval process, the amendment also clear files that the notifying parties can offer voluntary modifications, post the issuance of SCN under section 29 of the Act, while providing their responses to the SCN.

**Third :** It is clarified further that the time taken by the parties in giving response, additional information, voluntary modifications etc shall be excluded from the 210 days timeline mentioned under section 6 (2A) of the competition Act.

**IN THE CASE OF –SCM SOIL FERT LIMITED AND ANOTHER V.COMPETITION COMMISSION OF INDIA<sup>(17)</sup>:**

Where the appellants on whom, due to failure to notify a proposed combination, penalty of Rs 2.00 crore was imposed under section 43 (A)

16. *Bharat Budholia, Aishwarya Gopalkrishnan and Aishwaraya Gupta, competition. Cyrilamarchad blogs.com/2018/10/sixth-amendments-combination-regulations-competition-law/#more-2138.*

17. *Satish Sharma, recent development in the competition law, 14/3/19, available at <https://www.vakilno1.com/legal-news/recent-developments-in-the-competition-law.html/amp>*

of the Act and the case pertained to issue of 30days notice period as required, the supreme court observed that-“The notice of section 6(2) is to be given prior to consummation of the acquisition. Ex-Post facto notice is not contemplated under the provisions of section 6(2) and same would be in violation of the provision of the Act.

**IN ANOTHER RECENT CASE OF COMPETITION COMMISSION OF INDIA V. THOMAS COOK (INDIA) LTD AND ANOTHER<sup>(18)</sup>-;**

The appeal was initiated by the CCI against the order passed by the competition Appellate Tribunal where the tribunal had set aside the order it passed by CCI imposing penalty of Rs 1.00 crore under section 43(A) for non-compliance of provisions of notification under section 6(2) of the Act. The issue in this case was about “Malafides” on the part of the respondents, in not complying with section 6(2) of the Act.

The Supreme Court while upholding the imposition of fine by the CCI, held that there was no requirement of mens are under section 43 (A) or intentional breach as an essential element for levy of penalty.

**INVESTIGATION AND ORDERS OF COMBINATION BY THE CCI:**

Wherever the commission, prima facie, observes that the proposed combination may lead to appreciable adverse effect on competition (AAEC) in the relevant market then the commission issues the show cause notice (SCN) to the parties concerned citing as to why investigation of such



combination shall not be carried out. Also under section 20 of the Act, the commission can do SUO Motu inquiry, if it feels so<sup>(19)</sup>.

18. *Satish Sharma, recent development in the competition law, 14/3/19, available at <https://www.vakilno1.com/legal-news/recent-developments-in-the-competition-law.html/amp>*

19. *Competition Act 2002, competition Awareness and advocacy by CCI, Advocacy series (5)*

The DG (Director General) of the commission then prepares a report based on the responses of the parties. The commission also directs the parties after the receipt of DG's report or responses from parties concerned (Whichever is later) to publish the details of said combination within 7 days from the dates of D.G Report or responses received (whichever is later).

Under section 31 of the Act, the competition commission passes orders on combinations which can be either approving or prohibiting the combinations based on the yardstick of AAEC impact or may be of the opinion that the adverse effect of AAEC can be eliminated by certain modifications.

#### CONCLUSION:

The Competition Commission of India has cleared 666 mergers and acquisitions cases since inception with some approvals got through with some modifications. But no deals have been blocked by the regulator so far.

The average disposal time taken by CCI for M&A approvals has come down from 29 days in 2016-17 to 23 days in 2018-

19, in the CCI's constant bid to streamline the competition affairs & processes.

With the recent initiative called "Green Channel" of CCI, an automatic system of approval for deals (Through more clarity is needed as to complementary overlaps areas), the things are poised to become more conducive and flexible ensuring reduction in time and costs for M&A under the competition law region.

The mergers and acquisitions as a corporate restructuring in the favorable regulation scenario are of critical importance for the economy through there may be anti trust issues.

The need of the hour is a robust, result-oriented and empowered competition commission of India so as to keep the spirit of competition high and effective for the overall welfare.

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