

EFFECTS OF MERGERS AND ACQUISITIONS ON COMPETITION IN INDIA

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ABSTRACT

Competition law typically considers those merger cases where the main concern is that the merging parties would become so dominant in the market that they will increase the rates they charge the customers. This happens, mostly, because the merged entity has now gained a dominating position, as a consequence of the merger, to manipulate the market.¹ Some mergers, on the other hand, minimize competition thus dropping rates that vendors demand. Thus, mergers and acquisitions have the capacity to hurt competition at both ends- from where the merged entity buys, and where it sells and this they can do in varied ways. Merger and Acquisitions can be anti-competitive where they include trends like limiting output or imposing price, fixing prices between competitors, or sale or supply terms on down the stream intermediaries. Merger and acquisition activity has been on a rise in India, and their impact on competition has led to many changes in the competition law. In this article we would be exploring how the merger and acquisition activity hurts competition and how the law in India has had to change to combat its damaging effects.

KEYWORDS: Merger, Acquisitions, Competition Law, Abuse of Dominance.

Introduction

Mergers and acquisitions are a **\$3 trillion** activity, which changes the long-term course of companies and industries. Outside of an IPO, an M&A deal is the largest corporate action which any company can take in its lifespan. Outside of the startups, there is not a billion-dollar company in existence that has not contributed to at least one M&A transaction. Therefore, there is simply no way to get around that activity and not pay proper attention to it, and the Indian legislature is well aware of it and the law has always caught up to regulate the mergers and acquisitions better.

The enactment of the Competition Act is commendable piece of work by the Indian legislature, as it was a much-needed action. The highpoint or the most characteristic part of the legislation is its intention, which not just forbids agreements that hurt consumers & marketplace as they are anticompetitive, but likewise forbids “any agreement which is likely to cause a considerable adverse effect on competition.”

The Competition Act is credited with establishment of the Competition Commission of India or the CCI which oversees the operation of the Competition Law, implementation of a complete regulatory structure, and establishment of “the National Company Law Appellate Tribunal, i.e. NCLAT”, a tribunal functioning as the appellate power on CCI. Ever since the Act became operational, it has helped enormously in competition growth & implementation of fair practices in our country.

But since then, significant development has happened in Indian markets & an exemplary shift has occurred in the manner businesses function especially with the development of new-age marketplaces comprising technology. In order to keep up with times, “the Ministry of Corporate Affairs” established “the Competition Law Review Committee” to make sure that the Law “is in sync with the needs of sturdy economic basics.”

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¹ Hemphill CS, Rose NL. Mergers that harm sellers. The Yale Law Journal. 2018 May 1:2078-109.

After studying the commendations given by the Committee, “the Competition (Amendment) Bill, 2022”, was presented. The improvements in the Act are to decrease regulatory obstructions & stimulate business in our country. The changes aim to give better clearness to companies in our country & decrease the burden of compliance for businesses.

Different Forms in Which Mergers and Acquisitions Hurt Competition

- **Abuse of Dominance:** If the market power is exercised unilaterally, the practices involved could be objectionable for businesses without market power. If a dominant business player uses its power to weaken competition, it is abuse of dominance¹.
- **Discrimination:** Where a platform supplies for third parties as well as sells its own products, it could promote its own goods while discouraging other sales from other vendors, like say by providing biased ratings.
- **Bundling of Products:** Where a vendor has a dominant position in the market, he could take advantage of the position by selling distinct products in bundles in order to increase the sale of products that were lagging in sale. Like say, he could bundle shoe polish with shoes and discount the rate a bit to clear out stock of shoe polish.
- **Predatory Pricing:** A big behemoth company could sell its products at dirt cheap prices to drive out competitors. For instance, Jio had provided free fiber installations to smother competition. This mostly continues till the competition is quelled.
- **Anticompetitive Agreements:** Section 3(1) of the Act prohibits anticompetitive agreements. Any agreement between any number of companies, if it has the effect of reducing competition, is prohibited by law.
- **Cartelization:** When some companies, in order to curb competition or affect prices come together to manipulate the market, it is called Cartelization. For all practical purposes, they are considered as one entity.

Laws to Deal with The Hurts Caused by Mergers and Acquisitions on Competition:

The MRTP act, 1969 was the first law dealing with law relating to competition in India. Chapter III of the Act, “Concentration of Economic Power” regulated mergers and acquisitions. The Act laid down a strict criterion for the approval of mergers. The Act gave very wide powers to the Central Government in approving mergers, which adversely affected industrial growth.

In the wake of international developments, India too realized the necessity of initiating reforms on the economic front. In 1991 reforms were initiated on a large scale such as liberalizing the industrial licensing, reform of the trade policy, banking and stock market witnessed major policy changes.

After these reforms it was felt that the time has come to promote healthy competition instead of putting check on monopoly, Chapter III of MRTP Act was omitted by the MRTP (Amendment) Act, 1991 to propagate the new concept of competition the new regime of liberalization, privatization and globalization. On the recommendations of the Raghavan Committee the “Competition Act” was enacted in 2003. Preamble to the Act mentions that Competition Act aims to promote healthy competition and keeps a check on any activity which impairs free and fair competition thereby being beneficial to the common strata of the society and this all is achieved through a commission formed under the act which specifically deals with these aspects.”

From a policy perspective, Competition Commission of India is now stressing on increased implementation in markets². In the *Matrimonial v. Google*³, the CCI’s decision made it clear that it would refrain from meddling with Google search design as that would amount to killing innovation. The decision highlighted the need to balance the apprehensions about competition with safeguarding the interests of consumers. In a clear disparity, in a recent decision allowing interim remedies,⁴ the CCI was of the opinion that all players should have a level playing field. It also underlined the significance of acting swiftly to

¹ Section 4 Competition Act 2002

² Naval Chopra, Yaman Verma & Aman Sethi (2020) *The Competition Commission of India’s Approach Towards Digital Markets: The Shift Towards Interventionism in The Evolution of Antitrust in the Digital Era: Essays on Competition Policy* (David Evans, Allan Fels AO & Catherine Tucker eds.) vol. 1: 273 Competition Policy International.

³ <https://www.cci.gov.in/sites/default/files/07%20%26%20%2030%20of%202012.pdf> [Accessed on 01 March, 2023]

⁴ *Federation of Hotels & Restaurant Association of India & Ors. v. Make My Trip India Pvt. Ltd. & Ors. and RubTub Solutions Pvt. Ltd. v. Make My Trip India Pvt. Ltd. & Another*, CCI Case no. 14 of 2019

eliminate anticompetitive conduct. The CCI may also increase enforcement of mergers after the recommendation in Competition Review Commission Report wherein it said that current merger thresholds for review had prohibited the Competition Commission of India from reviewing significant transactions such as WhatsApp's acquisition by Facebook.

There are numerous prevalent Competitive practices that adversely impact the customers. The main aim of Competition law is to guard competition & consumers as opposed to the safeguarding of competitors. The CCI is working efficiently in keeping checks and balances on mergers which have a bad impact on competition, which practice in the end is useful to the end consumer. In **CCI v SAIL**¹ it was pronounced that competition is the genesis of the market economy thereby enforcing economic principles. In a market when there is no monopolization and the firms or enterprises are in active competition with each other, there arises a situation which leads to ideal competitiveness.

Main Characteristics of the 2002 Competition Act

The following are the main characteristics of the 2002 Competition Act:

- Horizontal or Vertical Anti-competitive agreements: horizontal & vertical anti-competitive arrangements between businesses is prohibited by The Competition Act.
- Prevention of abuse of Dominance: the businesses that exploit their dominating position are penalized.
- Anti-cartel arrangements: Any arrangement between individuals or businesses that hurts competition is deemed to be a civil offence. The law applies even to combinations that took place outside our country, but the bad impact happens in India.
- Acquisitions & Mergers: Only those mergers & acquisitions are approved by the commission that do not weaken market competition.
- Requirement to Inform under the act: The CCI needs to be notified of any dealings that could harm competition in the market. Such information must be given prior to doing such action or getting involved in such agreement.

Competition Amendment Bill, 2023

The most significant modification to the Competition Act in the last around 20 years is Competition Amendment Bill, 2023. The main aim of the bill is to bring the competition administration on top of things with the changes in operations regarding businesses, particularly in the digital world. Some main amendments proposed in the Bill are as follows:

- Competition Commission of India's operations to be supervised by a board of directors (BOD), comprised of part-time experts.
- Punishment criteria is to be established by the Competition Commission of India & any discrepancies need to be explained.
- The assessment time for merger has been shortened from 210 days in the previous law to 150 days.
- A green channel has been founded for assessing merger proposals.
- Appeals to the NCLAT, National Company Law Appellate Tribunal can be made after CCI, provisional on deposit of less than 25 % of the punishment amount levied by the CCI.
- There should be an alternative mechanism without any need to pass through established processes, where CCI would be able get into negotiations with the parties to reach an amicable solution. This could bring it up to speed with the SEBI, i.e., Securities and Exchange Board of India.
- Notification of mergers or acquisitions above the value of ₹2000 crores to be made to the CCI
- Time prescribed for assessing of combinations by CCI reduced to a period of 150 days from 210 days.²
- CCI has been given the power to make objections to any merger or acquisition & suggest modifications. If the CCI finds the proposed modifications satisfactory, it may approve the combination. If not, the combination will not be permitted.³

¹ CIVIL APPEAL NO.7779 OF 2010 [D.No.12247 OF 2010]

² Per CCI's decisional practice, approximately 90% of merger notifications were cleared within 30 (thirty) working days (as the combinations raised no competition law concerns).

³ The Indian merger control regime is suspensory in nature and hence, the parties cannot consummate a notifiable transaction, in full or in part, prior to the CCI approval i.e., parties need to comply with standstill obligations.

The Range of Anti-Competitive Agreements Broadened under Section 3 Competition Act

The section now covers hub-and-spoke cartels even those parties who are not part of the anti-competitive agreement but still enable those. Now the section says “exclusive dealing agreement” in place of “exclusive supply agreement” previously to cover not just buying side but also the selling side, when looking for exclusive arrangements. Anticompetitive behavior has been defined again and now covers goods & services, unlike previously when it covered just goods. The “resale price maintenance” definition has been changed and it now covers “any direct or indirect restriction”, & not just when it is a contract.

Alterations to Punish

- **Punishment now based on Global Turnover Or Income:** The penalty can now be up to 10 per cent of the turnover or average revenue in the last 3 preceding years.
- **Combination Misrepresentation now faces increased Penalty:** False statements or omission to supply material information, when seeking approval for merger or combination attracts a penalty of up to ₹5 crores,¹ “which is more than the earlier limit of ₹1 crore.”²
- **Company & People In- Charge, both are Responsible:** It is now the responsibility for both the people in charge & the company.

Modifications To Appeals Procedures

- **Framework Of Settlements & Commitments:** At any time after the report of the Director General, but before the antitrust order of the CCI, parties found guilty of anticompetitive arrangements or abuse of dominance can now offer a settlement for the suspected infringements.

Filing of appeal Requires Pre - Depositing Of amounts

The company is to credit twenty- five % of the penalty levied by the Competition Commission of India for the appellate tribunal to entertain an appeal by it. This requirement is likely to make the businesses reexamine their choice to appeal.

Modifications to the Composition & Workings Of CCI

It is at present obligatory for the CCI now to have on board members from the technology field. The selection committee of the CCI are also required to have understanding of & experience in technology.

Role & Work of The Director General Modified:

- **Powers now to CCI to Appoint Director General:** The power of appointing the Director General, which till this Bill was with the Central Government, is now with the Competition Commission of India, although CCI has to first seek the sanction of Central Government.
- **The Director General Vested with More Investigative Powers:** More powers have now been given to the Director General to discharge an investigation – like the power to ask for the accounts & records of company under investigation, get police assistance, demand information seizure, examine corporate officers under oath, etc.

Definition of “Relevant Market” Changed

- **Supply-side substitutable also covered:** “Relevant product market” definition has been modified under the new Bill, and now also covers those products which are substitutable on the side of the supply as well. In the earlier provision, two products or services were considered part of the same market, if they were considered substitutable by the consumer. Now, two products are considered chunks of the same market not just when they seem replaceable to the consumer, but also when supply or the production of the two products or services is considered substitutable or interchangeable by the supplier.

Two more factors have been added in the new Bill to the present list of 6 factors used by the CCI to ascertain “relevant product market”:

- Demand or supply switching Prices related to other services or goods
- Customers’ Categories

¹ Approx. USD 640,000 (US Dollar six hundred forty thousand).

² Approx. USD 120,000 (US Dollar one hundred twenty thousand).

Rule Making Powers of The CCI Modified

Some additional powers have been granted to the CCI under the new Bill to draft guidelines, including the guidelines on how to determine whether business operations should be considered substantial in India, the time & manner of filing the acquisition notice, form & fee of notice for combination, amount of penalty for contravening provisions of the Act, the manner for determining turnover or income, etc.

New Regulations & Guidelines to Be Issued in a Transparent Manner

A new process has been added under the new bill for issuing regulations & guidelines in a transparent manner. The draft regulations will now need to be published by the CCI, public comments will be sought before publishing a regulation & also CCI's response to public comments needs to be published in the form of a general report.

Conclusion

The process of Merger or Acquisition gives the newly created entity a domination in the market, which has the potential to manipulate the markets and hurt competition. The type of harm depends on the types of mergers. The harm caused to the competition by potential competition mergers, horizontal mergers & vertical mergers differ in characteristics. To protect from those harms and to see that the market flourishes with ground made equal for all who wish to do business, jurisdictions across the globe have Merger Control laws. In India, the 2002 Competition Law is viewed as a breakthrough legislation. It is doing pretty good work than its predecessor, The MRTP Act. Dominance abuse is prohibited under this law. Main aim of this law is to encourage competition on the marketplace & also to help in allocation of profits to businesses of all extents to cultivate the commercial potential in the public. The law has been modified and all recommendations are yet to be incorporated, which would certainly improve international & national competition in the market. The competition [Amendment] Act, 2023 has been partially notified.

With this amendment in the Act, dominance can also be the joint capacity of two or more businesses, which the Competition Commission can assess on their capability to act independently of the competitive pressures in the related market, even where one business doesn't meet the necessities of being dominant of its own accord. The Bill enables the government the elasticity to stipulate specific sector assets / turn-over thresholds. This is required to see if requirement for pre-merger notification has been triggered in the related sector. Related to the procedure, CCI's power of dawn raids or "search and seizure" is the trickiest modifications necessary. The new competition Bill swaps the current condition of the DG seeking previous sanction of the Chief Judicial or the Metropolitan Magistrate for holding a seizure operation or search, with previous authorization from the Chairperson of the Competition Commission of India. This eases the procedure for directing "dawn raids" and this authority will now be used more commonly in investigations. The new Bill strives to announce many other minor, nonetheless important modifications to the Act. These comprise giving a chance to be heard to the parties prior to levying a punishment, decreasing "waiting period" for clearance of the merger from current 215 days to 185 days & clearing the term "turnover" for eliminating the taxes on the services providing or goods sale. The projected modifications comprise of:

- DG Appointment: the appointment of DG will no longer be done by the Central Government. In the proposed amendment, the Competition Commission of India will be authorized to appoint the Director General.
- Time Limitation on filing complaints: a three year limitation period is sought to be imposed by the proposed Amendment for filing of complaints.
- Option to Leniency plus - The proposed Bill announces a "leniency plus" choice, "allowing the CCI to grant additional leniency in penalty if a party being investigated for collusive conduct makes disclosure of another undisclosed cartel."
- Commitments & Settlements: The Proposed Bill lays a structure for commitments & settlements for abuse of dominance & vertical restraint cases. These sections are inapplicable to cartels.
- Compulsory penalty deposit: The proposed Bill needs the appellant to pledge 25% of the penalty amount for an appeal to be made to NCLAT.

Though, there still is room for improvement in the Law, but the latest amendments, when properly implemented will help in Merger Control in a big way, and will prevent harms caused by all those vertical, horizontal or potential competition mergers. Our Country has amply responded to the merger growth and brought about the changes to deal with it, but still there is a lot to be done to catch up.

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