

MERGERS AND COMPETITION LAW

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With the evolution human kind, market had played a very important role. Due to the transformation and change in the society, structure of market had also changed. Nowadays with the increase in the market size, the competition in the market had also shown immense growth. Competition is healthy and beneficial for any market if practiced with bona fide intentions. Many competitors try to defeat the purpose of competition by indulging into mal practices like hoarding, black marketing, mergers etc. Mergers are generally made to remove the competition in the market and to promote the monopoly of sellers/traders. Through mergers, seller can control the price and supply of goods and services. To overcome such practices, Competition Act of 2002 came into force with various rules and regulation governing the Mergers and Combinations. This paper emphasizes on determining the true nature of combinations and mergers. The main object is to draw a relation between the Market and effect of mergers in it. It also highlights the credibility and efficiency of laws enacted under the Competition Act to curb the detrimental mergers.

Keywords- Competition, Merger, Combinations, Economic Policy, Anti-Competitive Agreements, Abuse of Dominance.

RELATION BETWEEN MERGER AND COMPETITION LAW

Economy of any nation depends upon its market. The status of any nation as developed, developing or third world is determined upon the market condition of that particular nation. India received its independence in the year 1947 and after that there has been a tremendous change in its Market. Due to the strong Market base, within a period of seventy years, India has achieved the status of developing nation from being under developed.

Visible changes in the market structure of India came during the L.P.G (Liberalization, Privatization and Globalization) policy of 1991. To achieve the ultimate goal of increasing GDP of the country, the government opened the floodgates for the entrance of Multi National Corporate in the Indian Economy. This initiative was very much hailed and it proved to be a huge success. But the pre-liberalization statute which was known as Monopolies and Restrictive Trade Practices Act¹, 1969 was not competent enough to deal

¹ Ministry of law and Justice, *THE MONOPOLIES AND RESTRICTIVE TRADE PRACTICES ACT 1969*, GOVERNMENT OF INDIA (August. 09, 2017, 06:21PM), http://www.mca.gov.in/Ministry/annual_reports/annualreport2006/CHAPTER4.pdf

with the new scheme of the government. The aim of this MRTTP act was to regulate the Market conditions and to curb the unfair trade practices in the economy. It worked comparatively well before the L.P.G policy as most of the market percentage was dominated only by the Government. However, the scenario completely changed after the year 1991. The governance of huge multinational corporate was not possible with this Act.

Numerous numbers of challenges and practical problems came upfront the MRTTP Act, which finally led to the birth of Competition Act. This new act changed the approach of the government of India from being authoritative to being liberal and global towards trade system. The only aim of the previous enactment was to restrain any trade practices which would have an adverse effect on the competition. By comparing the MRTTP Act with legislation of other countries, it was observed that MRTTP Act is very limited and weaker legislation. Therefore the Competition Act², 2002 came into force keeping in view of the economic development of the country, for the establishment of a commission to prevent the practices having adverse effect on the competition, to promote and sustain competition in the market, to protect the interest of the consumers and to ensure freedom of trade carried on by other participant in the markets in India and for matters connected therewith or incidental thereto.

The objective of competition policy in India is the creation of active competitive environment. Various restraints like licensing control over acquisition of economic power, trade restriction and high tariffs and restriction on foreign direct investment were dominating the economy. The Competition Act takes care of these phenomena. In common parlance, competition in the market means seller striving independently for buyers' patronage to maximize profits. A buyer prefers to buy a product at a price that maximizes his benefits whereas the seller prefers to sell the product to maximize his profit. Competition can also be defined as a economic rivalry between market players to attract customers. These market players can be multinational or domestic company, whole seller, retailer or even the neighborhood shopkeeper.

The Amended act of 2002 had an objective to promote competition and protect Indian market by restricting and prohibiting the mal practices causing adverse effect on competition. Prohibition can be categorized into three categories by the name of anti-competitive agreements, regulation of combinations (merger and acquisition) and abuse of dominant position. Combination in itself is not void. Parties are free to combine with each other, however if Competition Commission of India feels that the nature of Combination was to defeat the purpose of this act which is preventing anti-competitive agreements, in such case CCI can issue show cause notice to the combining parties under section 29 of the Act. Purpose of the show-cause notice is to draw information from the parties that why no investigation should be carried against them.

² Ministry of law and Justice, *COMPETITION ACT 2002*, GOVERNMENT OF INDIA (August. 11, 2017, 09:59PM), http://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf

If we look into the statutory provisions of the Act relating to the Combinations, then Section 5 provides for the definition of Combinations and the rules and regulations pertaining to such combinations are mentioned in Section 6 of the act. Constitution of the competition commission is defined under Section 7 of the act. The commission derives its power to investigate and to issue show cause notice to combinations from section 29. According to this section if any combinations have a detrimental effect on the competition then commission is authorized to take action against such combinations. Section 39 also empowers the commission to issue certain orders

If any person is aggrieved by the decision of the Competition Commission, then this act provides for an appeal before the Appellate Tribunals. Section 53A provides for the establishment of Competition Appellate Tribunals

In comparison with mid-90s, there is a rapid change in the process of liberalisation and globalization in last few decades. The reforms towards the liberalization, privatization and globalization came into force by the implementation of LPG policy of the year 1991. Liberal approach towards the licensing and regulations lead to the immense growth of business sector in our economy. Globalization leads to the freeway entry of foreign companies in Indian Market which lead to heavy competition for domestic players of Indian market. Companies with heavy capitals were able to purchase or acquire the small businesses. Acquisitions and Cross Border mergers of domestic players were highly common those days. This situation had a positive and negative effect on Indian Economy. There was a rapid jump in the total GDP of the country; however, such mergers and acquisitions were effecting the local competition in Indian Market. It was very necessary to deal with this alarming situation. Then Competition Act 2002 came to the rescue with an objective to protect the market from anti-competitive agreements and abuse of dominance. Combination can be understood only by relating it to abuse of dominance and anti-competitive agreements. Section 3 of the Act provides for the definition of Anti-competitive agreements according to which parties are prohibited to enter into any agreement related to production, supply, storage etc. of goods or any service which will cause or likely to cause an adverse effect on competition. Abuse of dominant position is dealt with section 4 of the act. It is absolutely fine to be a dominant party in the market. But abusing such dominant position to kill the competition in market is not acceptable in the eyes of law. MRTP act provides for threshold of 25% to become a dominant party in the market. But no such threshold limit is defined under the Competition Act of 2002. This will provide discretion in the hands of the commission to declare any party as dominant or not. Main proviso which regulates the combination is section 6 of the Act. It is the most vital section pertaining to combinations. This section restrains the party to enter into any agreement which will cause or likely to cause adverse effect on competition with the domestic market in India.

Merger in itself is a very broad term. According to the act, it includes control over assets, shares and liabilities of other company. Merger brings a tremendous change in the inside and outside management of the company. One enterprise exercises its control over another.

It affects its decisions, policies, regulations and other important resolution of the enterprise. Merger is an entitlement given to the acquiring party to handle the business of acquired party. Merger is neither seldom nor any special business activity. It is an ordinary practice by the enterprises in order to expand their business. For the Acquiring company merger is a significant activity as they run their business on larger scale. Mergers can also be classified under two categories. Firstly, those mergers which have a positive effect on the market and that helps in the growth of economy. Secondly, mergers which are considered to be detrimental to competition in market. Negative impact of merger includes reduction in competition which ultimately leads to the fall in number of competitors in market. Second type of merger also affects the interest of the consumers. Through mergers, enterprises are able to control the price, demand and supply of a commodity. They can act as a monopolist with full control over the market. Mergers also affect the entry and exit of new firms in the market. New and smaller firms only have a limited access to the market.

Recent years marked a rapid growth in the merger and acquisition of firms or enterprises. The main reason behind increased mergers are taking place³ are mentioned below.

Market share- Increase in market shares helps the companies to reduce the overall competition. Mergers can lead a company to gain a dominant position in the market. Dominant position will help the company to exercise its control over price, demand and supply.

Large economy- Every firm enters into the market to expand its business. Through mergers, firms are able to expand their business and carry on their business at a larger scale. They are covering a good portion of economy through merger.

Diversification- Mergers also help the company to diversify their business. Merger can help the company to capture more consumer market. Diversification always reduces the risk and multiplies the profitability.

Tax consequences- Sometimes mergers are made to defeat the purpose of law. To evade taxes and other liabilities companies merge with each other. This not only reduces the revenue of the government, but also hinders the growth of an economy.

Although this Competition Act came in force in the year 2003, but due to heavy complexities in the Indian judiciary system the provisions related to abuse of dominance and anti-competitive agreement came into force in year 2009. CCI also recommended amending the regulations relating to merger and combination in year 2011 after consultation with various law firms, business entities and stake holders. Merger is read with combination under section 5 and section 6 of the act. According to act if merger cause “Appreciable Adverse Effect” on competition then it is prejudicial in nature. As regard to

³ Sneha Suman, *MERGER AND THE ROLE OF COMPETITION COMMISSION OF INDIA, LEGAL SERVICES INDIA* (August. 17, 2017, 08:13PM), <http://www.legalservicesindia.com/article/article/merger-and-the-role-of-competition-commission-of-india-2244-1.html>

the test whether given combination have an adverse affect or not, section 20(4) provides for a substantive test to determine the nature of combination. This test is the mixture of certain factors as mentioned in above sections.

To phrase the detrimental combination, it can be said that today's competition will be tomorrow's dominance. Socio economic effects of combinations and mergers had already been discussed earlier. Amendment in year 2007 and year 2012 had a positive effect in regards to the provisions related to mergers and combinations. Strict compliances had now been placd to grant merger approval to any enterprise. Even after the grant of merger approval, the CCI can order the enterprise to send it daily reports to the commission. Now before every combination and merger, a notice or notification must be sent to the commission for their approval. 2012 amendment also increase the limitation on combinations to reduce the number of combinations in market

At the end it can be concluded that to fulfill the requirement of a dynamic economy, various provisions are being made every day. To control the detrimental mergers and combinations, various provisions had been enacted in the Competition Act 2002. Several amendments have also been made in the last few years to overcome the newly developing problems. We must understand that it an ongoing process which will continue till the eternity.