COMPETITION LAW AND CROSS BORDER MERGERS

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INTRODUCTION:

Ever since liberalization, there has been an increase in cases of mergers and acquisitions. The Competition Act has the power to regulate Mergers and acquisitions. In 2008, the commission had come out with the Competition Commission (Combination) Regulations, which regulates merger transactions. The MCA came out with the notification to implement the cross-border merger provision, section 234, on 13th April, 2017. The competition commission has been dealing with cross border merger cases before the particular section was notified as well. The relevant provisions under the Companies act, 2013 and Competition Act, 2002 are discussed further in the paper.

The Competition Act has set a threshold of 210 days for deciding upon the issues of mergers, amalgamations, and acquisitions. It should not be seen as a minimum time period for party to notify the Commission. The combination comes into effect from the next day Since cross-border M&As are the order of the day, the law takes care to provide domestic nexus as a pre-requisite for notifying the Commission in terms of assets or turnover in India of the combined entity. of being accepted by the CCI. Not every Combination case is required to be notified to the commission. As compared to other countries Indian laws prescribe high limits for assets or turnover.

Cross border, mergers have recently increased in India and the law makes sure that such mergers are notified to the commission about the combined entity.

This article discusses the contemporary issues related to the powers of the Competition Commission and merger controls. Further, it discusses decisions given by the CCI in cases of cross-border mergers. The commission also has extra territorial jurisdiction to adjudge cases of cross border mergers.

CONCEPT OF CROSS BORDER MERGERS:

A cross border merger is basically when a company from one country is acquired by a company from another country. Any company can be acquired be it private or public. When a merger happened by the way of the foreign investments, it is termed as cross border merger and acquisition. Such a merger results in change of authorities and control structure.

Cross border merger happens when the assets and liabilities of the two merging companies are put together and combined which results in formation of a new entity and when we talk about cross border acquisitions, the native company's assets and liabilities are transferred to the foreign company and the local company seizes to exist. The basic reason behind such mergers is growth. It is considered to be a pretty good alternative for companies with good grasp within the market in their own country. This sort of a merger helps such companies to expand into new markets.

GENERAL PROVISIONS:

A cross-border merger under Section 234 should adhere to the prerequisites as set down in Sections 230-232[1]. This will incorporate procedural necessities, for example, filing of application before NCLT, calling meetings of stakeholders, distribution of publication in regard of the merger, and so on.

Sub-section (5) of Section 230 accommodates sending of notice and other documents to the regulators and other authorities such as the competition commission of India who will be influenced by the merger, in order for them to decide within the 30 days' period.

A prescribed procedure is required to be followed to determine whether a filing is required before the Competition Commission. The first step is to examine the transaction. In 2011, the ministry of Corporate affairs, Government of India came out with an exemption as a *de Minimis* requirement for a notice to be filed with the Competition Commission. The acquisition of the target company, whose share, assets and liabilities, voting rights etc are being transferred, must have assets of Rs. 250 crore or less and a turnover of Rs. 750 crore or less.[2] This provision is there for a period of five years and until the limit does not exceed the benefits accrue. In 2016, the Ministry of Corporate Affairs extended this benefit for another period of five years.[3]

[1] Companies Act, 2013.
[2] Published in the Gazette of India vide SO no. 483 (E) dated march 4, 2011.
[3] Published in the Gazette of India vide SO no. 674 (E) dated march 4, 2016.

They also increased the limit of assets to Rs. 350 crores or less and the turnover to Rs. 1000 crore or less.

The second exemption available is that the aggregate of the assets and turnover of the acquirer and the target company must not increase Rs. 2000 crores and Rs. 6000 crores respectively. In case of cross border mergers it is 1000 million USD along with Rs. 1000 crore assets in India and 3 billion USD turnover and Rs. 3000 crore of investment in India. For a group of companies merging the provisions are different.

In case these thresholds are met then as per the combination regulations of the Commission, it has the authority to carve out certain transactions as not having an appreciable adverse effect.

Competition Commission of India, which is seemingly the authority, is explicitly to be given the said notice and records. The threshold which is mentioned in section 5 of the Competition Act provides for conditions that need to be fulfilled which does not find mention under the companies act.

Section 32 of the Competition act lists down the situations on which the act is applicable. It will apply to Anti-competitive agreements, abuse of dominant position and mergers and acquisitions.

The Commission, thus, has the power to regulate or investigate in matters of cross border mergers. Provisions of section 32 are to be read with the provisions of section 18 of the Competition act. Section 18 indicates in nonexclusive specific terms the obligations of the Commission and the means it can apply in its capacities under the act. It clearly expresses that the it is the duty of the Competition Commission to make its best efforts in eliminating the practices, which might have an adverse effect on the competition and consumers in order to protect such competition and ensure freedom of trade in the market. For the purpose of discharging their duties the commission has the authority to enter into any arrangements with the approval of Central Government with an agency in a foreign Country or the country itself.

EXAMINING THE ROLE OF CCI:

It is important for all companies dealing with india to consider the anti-trust issues while making decisions for their businesses in india since the commission has focus on enforcing its ambitions for which hevy financial penalties might be imposed on the on the firms. The act looks at the corporations' everyday business as well as long-term goals. Further, while performing due diligence or entering into contracts for the purpose of mergers and acquisitions anti-trust issues must be considered to ensure that any non-compliance does not occur. The stringency of the review process by the commission, therefore, impacts the possibility of certain deals. Merger regulation is one of the broad objectives of the enactment of the Competition Act. Numerous ideas of the new law are similar to those found in European Union or United States.

Be that as it may, since the economic conditions are altogether different in India, these ideas may not be interpreted or considered in a similar way. The main concern that should be made and acknowledged with no reservations is that in an interconnected world economy everything influences everything else.

The globalization and radical changes in economy have expanded worldwide competition and has created a requirement for an undeniably coordinated and developing legal framework. Various patterns have added to the quickened globalization of industry and the joining of worldwide economies. For example, the developing understanding in accessible infrastructural amenities, dissemination channels, and advertising approaches has empowered organizations to accustom items and brands with an all-inclusive commercial centre. Nevertheless, it is not to propose that the Competition Act, 2002 gets the authority to govern all international transactions. It is necessary to recognize methods for recognizing those international issues influencing Indian trade adequately to warrant adequate consideration from our law.

There are certain limitations imposed on the act. The act has limited the period in which the Competition Commission may take cognizance and investigate. It cannot do so after the completion of one year from the date on which such merger has come into force. After the entity is merged, the Competition Commission does not have the power to regulate its actions even though it might have an adverse effect on the competition. It would be ultra vires if the one year period is over until they are entering into any anti-competitive agreements or abusig their dominant position.

COMPETTION POLICY IN CONTROLLING MERGERS:

Competition policy, as defined by various theorists, is considered a set of laws and schemes, which must ensure that in the market, the competition is not restricted to certain players, which in turn might reduce economic welfare.[4] Economic welfare should be an essential unit of measure if one has to study the effect of competition in the markets in cases relating to mergers.[5] A whole of ‘consumer surplus’ and ‘producer surplus’ is taken into consideration when we account for the economic welfare.

While analyzing mergers with respect to competition law we consider two things. Firstly, whether such merger will lead to dominance which is evident from rise in prices and market power and secondly, whether the merger may lead to an increase in collusion amongst the other firms in the market. Dominance in the market plays an essential role when it comes to merger review by the CCI.[6] To check for such dominance, identifying the relevant market is an absolute essential in order to assess the combined market power by the merging entities.[7] SSNIP (small but significant-transitory increase in price) Test plays a crucial role when it comes to identifying the relevant market.[8] The next step when it comes to identifying the relevant product market with respect to mergers is analyzing the ‘unilateral market power’ of the merged entity. Market power is traditionally associated with the market shares and it is often considered that if the market share crosses the threshold, the dominance is considered established. The capacity of the merging firms to practice improved market control post-merger in regard of their valuing choices generally relies upon the quantity of adversary rivals in the applicable market; and hence the concentration of the market moves toward becoming essential.

Another important policy when it comes to merger are, the “merger remedies”. Competition authorities have a tendency to allow certain mergers to happen even if there is a chance that they may establish dominance if the concerned authorities are of the view that the remedy offered by the merging entities are sufficient.[9] It is seen that when it comes to mergers,

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[4] MASSIMO MOTTA, COMPETITION POLICY: THEORY AND PRACTICE 30 (2004).

[5] Ajay Kr. Sharma, Cross Border Merger Control by the Competition Commission of India: Law and Practice, 2015 Freilaw: Freiburg L. Students J. 12 (2015).

[6] SIMON BISHOP & MIKE WALKER, THE ECONOMICS OF EC COMPETITION LAW 260 (2 ed. 2002).

[7] *Id.*

[8] *Id* at 102.

[9] Supra note 1 at 116.

competition law and the policies go together and are considered to be complimentary to each other.[10]

CCI ON PROCEDURES RELATING TO COMBINATIONS:

Competition commission of India, the authority which deals with policies related to anti-trust laws is relatively very new when compared to other economies. Section 6(1) of the Competition Act 2002 deals with probations on combinations, which may cause adverse effect in India when we look at them through the lens of *relevant market*. At the same time, Section 6(2) of the same act makes it a mandatory for the parties entering into combination, to give a formal notice to the competition commission, which contains the relevant details of the intended combination with in a limited time of 30 days of the specified events in relation to the pending combination.

Acquisition as defined under competition act under Section 2(a) means "agreeing to acquire the shares, voting rights or assets of the other company".

The investigation on whether a combination with respect to section 5 might cause an adverse effect has to be seen by the competition commission by taking n initiative in accordance with the section 20 of the act. It is pertinent to note that such an initiative is to be taken within an year from the date of such a combination.[11] Under Section 20 of the Act which deals with the normal mode of inquiry by competition commission as and when they receive the notice, the list is provided which contains various factors which the competition commission has to take into consideration while considering the acquisition with the lens of competition/ anti-trust provisions. The abovementioned notice has to be drafted by the acquirer with the fees as prescribed by the act.[12] After the receipt of the notice, competition commission has to form an opinion with respect to the acquisition and whether this acquisition will affect the relevant market adversely. Before forming the opinion, competition commission has the right to ask the

[10] REPORT OF THE WORKING GROUP ON COMPETITION POLICY (PLANNING COMMISSION, GOVERNMENT OF INDIA), (2007), http://theindiancompetitionlaw.files.wordpress.com/2013/02/report-of-theworking-group-on-competition-policy.pdf (last visited 6 sept 2018).

[11] Notification S.O. 1198(E), Ministry of Finance (Department of Company Affairs) (Government of India), (14 Oct. 2003), http://www.mca.gov.in/Ministry/notification/Notifications_2003/noti_1410200 3_1 198(E).html

[12] Regulations 9 to 13 of the 2011 Regulations, COMPETITION COMMISSSION (PROCEDURE IN REGARD TO TRANSACTION OF BUSINESS RELATING TO COMBINATIONS) REGULATIONS, 2011 (INDIA).

interested parties for any additional information which they may require to reach a conclusion.[13]

If competition commission is of the opinion that is against the combination, they have to giva a 'show cause' notice to the interested parties asking for a justification as to why any investigation should not be conducted with respect to the combination in question. Once the opinion is made gainst the combination, the interested parties are required to publish the details of the combination in question. Such publication is made so that the parties which are affected by the combination can file objections before the competition commission.[14]

After the review of the proposed combination, CCI passes the order under different sub-sections 31 of the Competition Act 2002. If the decision against the combination is because of the likely hood of the adverse effect on the competition, the order is passed under Section 31(2) of the Act declaring the combination void. If competition commission feels that such an effect can be avoided by certain modifications, competition commission can propose the same to the parties with a stipulated time period under section 31(3) of the Act. If the competition commission approves the combination, they pass an order under section 31(1) of the Act. A total of 210 days is given to competition commission to pass an order under section 31.

CASE STUDIES:

1. Jet-Etihad deal[15]

Jet Airways made a proposal to the Etihad airways that it wishes to sell its 24% stake to it. When notice was sent to competition commission, it conducted investigation. The majority ruled under section 31 of the competition act and approved the deal whereas the minority judgement held that there would be appreciable adverse effect. The majority and minority opinions differed over what the relevant market is. While the majority used the Origin and Destination pair approach and covered the network effect stating that the nine cities that are overlapping for both the companies are on what the approach will be applied. The minority on

[13] *Id* Regulation 19(1) of the Competition Commission of India (Procedure in Regard to Transaction of Business Relating to Combinations) Regulations, 2011, and Section 29 of the Competition Act, 2002.

[14] Sub-sections (2) and (3) of Section 29 of the Competition Act 2002.

[15] Combination Registration No. C-2013/05/122, 23 (2013).

the other hand, determined it to be the international air passengers to and from India. Among other agreements, the commercial cooperation agreement that the parties entered into had a no code-sharing clause. The majority was of the opinion that it might not prove to be anti-competitive due to the other major airlines competition with them. The minority ruled it to have an appreciable adverse effect on the competition. As it can be deduced from the current scenario that the deal was a win win for both the parties and it did not prove to anti-competitive in nature.

2. Mylan Agila[16]

Mylan Incorporation is a US based corporation which was to acquire Agila, an indian company, which was a wholly owned subsidiary of SAL (Strides Acrolab Ltd.). Both were in the business of Pharmaceuticals. Competition commission approved the deal by order under section 31 of the Competition Act. Both the acquirer and merging company had a very less market in India and there was no question of anti-competitive practices. The commission did focus on the non-compete clause in their deal but found nothing objectionable.

3. Walmart-Flipkart deal[17]

The competition commission approved the sixteen billion dollar deal of acquisition of Flipkart by Walmart. The approval was required since the combined assets and turnover through the deal exceeded the threshold limit. The impact on the competition of the proposed combination was assessed since a lot many small online retailers were opposing the merger. Its impact on the retail sector was also assessed in general and how it affected the economy overall. The focus was on determination of relevant market and as Walmart did not have a huge market size in india the deal was not considered to have any adverse effect on the competition.

In cases where the notice has been filed after the expiration of the 30 days period the CCI has imposed heavy penalties. In case of Johnson, Ethicon and Google[18] the delay was of 43 days in filing of the notice and the Commission imposed on the ma fine of Rs. 5 lakhs. In cases where the notive itself is not being filed when there is a need to the CCI has gone to the extent

[16] Combination Registration No. C-2013/04/116, (2013).
[17] Combination Registration No. C-2018/05/571, (2018).
[18] Combination Registration No. C-2015/06/286, (2015).

of imposing a fine of Rs. 5 crores. Such a scenario was witnessed in the case of Piramal and Shriram[19].

CONCLUSION:

The law relating to Combination review emphasizing on Cross border mergers are evolving. The CCI's merger control policy and Combination reviewing scheme has to be read with the threshold limits prescribed by the MCA and the Combination Regulation, 2011. The merger control provisions aim to prevent mergers that will hamper the competition in the market and have an appreciable adverse effect on it. The Commission has managed to approve the mergers in short periods and has been able to do so without much experience. The Commission has yet not faced any cross border merger which is likely to hamper the economy and involved a substantial question of law.

A necessary change in the Competition act which is required is increase in the ambit of the power of the CCI by making the provisions application to those companies which have an adverse effect on the competition despite section 5. The Commission has quasi-judicial powers but such dilution shall be done away with for speedy disposal of matters.

Therefore, the Commission's eagerness to examine with the best knowledge such matters does not hamper the Merger and acquisition activities undertaken by the entities and in no way acts a roadblock. If anything, it is encouraging such activities. The real challenge is faced by the Commission when a complex and substantial question of law comes before it. Despite its nascence, the commission has done fairly well.

[19] Combination Registration No. C-2015/02/249, (2016).