ANTITRUST – A MAJOR ISSUE IN THE MODERN M&A REGIME

Akshit Gupta*

ABSTRACT

Since mergers and acquisitions are a collusive activity, it is rife with numerous behind-the-scenes factors which induce anti-competitive trade culture and threaten to damage small - investors and shareholders. Despite the fact that the antitrust and anti-unfair competition phenomena have received sufficient concern from the Government, and subsequently, reasonable steps have been taken in that regard as well, the issue of merger control under anti-trust laws remains a rather complex entity. The smaller target enterprises remain in a constant state of perplexity due to lower negotiation capacity as compared to foreign giants. In this article, we try to critically analyze, the various what are the various antitrust challenges faced by corporate entities while undergoing the process of mergers/demergers, how the laws evolved to shield the market from monopolistic and damaging anti-competitive motives of a few key players, what is the position of the International conglomerate market on this issue and what can be a viable roadmap ahead to address this issue more prudently.

Keywords: Antitrust, Competition Law, Combinations.

MERGERS AND AMALGAMATIONS - AN OVERVIEW

Mergers and Acquisitions is a type of conglomerate-combining method wherein two inherently different industries, involved in the manufacturing/distribution or sales of non-competing products and services, integrate for better production performance, tapping of supply chain, more ready availability of raw material required in the companies, etc. The two companies are situated at different stages along the same supply chain and usually produce non-competing goods and services, though their final products might be complementary. In the usual course of business, mergers and amalgamations are manifested with the objective of reducing operational and manufacturing costs production by controlling the earlier stages of the supply chain. On the basis of types of colluding industries, Mergers are divided into Four (4) broad categories –

*BBA LLB, FIFTH YEAR, BHARTI VIDYAPEETH, NEW LAW COLLEGE, PUNE.

HORIZONTAL MERGERS: A type of merger between two firms that are producing and selling the same products, i.e., are in direct competition with each other. combination wherein two enterprises, are involved in the production of similar product lines and are in direct competition with each other are called horizontal mergers. A well-known example of a horizontal merger is the Integration of Facebook, WhatsApp, Instagram, and Messenger where all of these were individual social media platforms established by different companies, but are now integrated into one single entity. Eg. - Merger of Exxon and Mobil in 1988, two enterprises engaged in the production of petroleum products.

VERTICAL MERGERS: Contrary to horizontal mergers, vertical mergers take place between two industries that do not directly compete with each other but operate on different levels of the product line. In other words, it can be said that it is a merger between a company and its supplier. The companies might even be producing products that are complementary in nature. Such a combination such combinations take place with the objective of lowering operational cost, production efficiency, and controlling key nodes of (operations, management, logistics, management, etc.) of the target company. A perfect example of this is Eg. - IKEA (A Swedish Furniture giant) bought forests in the state of Baltic amounting to a massive 38,000 hectares and along with it also bought an 83,000-acre forest in Romania. This merger assisted the company to manage its forest operations by controlling the cost of its main raw material wood, furniture, and home-decor Corporation acquired a 100,000 sq ft. patch of a European hardwood forest in 2015 in order to build a sustainable supply chain of raw materials.[1]

CONGENERIC/CENTRIC MERGERS: When two companies, operating in two inherently different production lines, merge into one single enterprise, the same is referred to as a concentric merger. This type of merger is done usually to offer an extended range of products or services to customers. This type of merger at times involves companies that produce complementary products. The acquisition of Vitamin Water by Coke is one example of this type of merger, which gave the latter a stronger footing in the beverage industry. For Eg. - an automobile manufacturing company might enter into a merger with a tire manufacturing company, since both products fall on different levels of the same product line and at one point intersect to form one single final product.

[1] "*IKEA Group Acquires 25,000 Acre Forest in Alabama Latest investment furthers the IKEA Group*" (Ikea, September 29, 2021) <https://www.ikea.com/us/en/newsroom/corporate-news/ikea-group-acquires-25-000-acre-forest-in-alabama-latest-investment-furthers-the-ikea-group-pub986453f7 >

CONGLOMERATE MERGERS: Contrary to the Congeneric merger, where both the companies are in similar industries, a conglomerate. This is done between companies that are in no way related. Usually, both companies are engaged in completely different companies. The focus of these types of mergers is to diversify the company by incorporating multiple unrelated products. An Example can be the merger of Berkshire Hathaway and Precision Castparts Inc. in 2015, two mega firms for a whopping 37 billion USD.

HOW DOES COMPETITION LAW GOVERN THE FAIRNESS OF MERGERS AND ACQUISITIONS?

The Indian Antitrust regime derives its significance primarily from the Competition Act, of 2002. Indian laws have evolved over time to encompass various aspects of Fair and Competitive Trade Practices through legislative enactments and amendments. Historically the Monopolies and Restrictive Trade Practices (MRTP) Act, of 1969, was the governing legislation that controlled and regulated the trade practices of competing businesses, in order to ensure a level playing ground for all businesses. Apart from that, to protect the interests of small stakeholders, legislations such as the Indian Contract Act, of 1872, and the Consumer Protection Act, of 1987 were intact. However, after the metamorphosis caused by the liberalization began gaining ground in the country, a was needed to prepare the economy from the sudden gush of FDI and Industrial and Corporate mergers which were likely to take place after the economy was fully liberalized. Hence, To create a buffer for indigenous small industries from hostile takeovers from foreign giants and, in order to consolidate the antitrust regime in the country Itself, the Competition Act was enacted in 2002, which led to the creation of the Governing body, known as the Competition Commission of India (CCI) in 2009. The main functions of the Competition Act were to oversee three types of activities within the market players anti-competitive activities and agreements, abuse of dominant position, and the conduct of mergers and combinations. Section 3 of the Act puts a focus on anti-competitive contracts and agreements that form detriments to the fair-competition atmosphere in the market, and hence are known to have an Adverse Appreciable Effect on Competition (AAEC). There are three sections in the act that regulate mergers or acquisitions, which are, Section 5, Section 6, and Section 20.

Section 5 of the Competition Act is the principle section that defines what a combination is. It explains the combination *as:"…….Acquisition of one or more enterprises by one or more*

persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises……."

Section 6 of the act is the most important section as it provides for the regulation of combinations. As per Section 6, any person or enterprise entering into a combination shall mandatorily give notice to the Commission of any such acquisition, merger, or amalgamation. The main objective behind regulating such combinations is to assess the Appreciable Adverse Effect on competition in the Country (AAEC).[2] Under the act, only those mergers and acquisitions which cross the specified assets and turnover criteria as set out in the Competition Act are regulated. The act also provides for a standstill clause under Section 6(2), as it says that no combination will take effect for 210 days from the date of giving notice to the Commission and until the Commission passes an order on the Combination. Through the act, the Competition Commission was also established in the country. Section 20 of the act lays down the framework on which the commission assesses whether a combination is anti-competitive or not. Subsequently, Section 20(1) read with section 20(2) gives the Commission the power to examine it into a combination either on its own motion or on the basis of a notice given under Section 6 (2).

EVOLUTION FROM MRTP TO COMPETITION ACT

Where the MRTP act laid more emphasis to prevent the concentration of economic power and monopolistic behavior, the Competition Act, in contrast, focuses on positive acts of endangering competitive spirit and free enterprise. The fundamental distinctions between the enactments are the objectives of the respective statutes and the intent of the legislature.[3] The Raghvan Committee, (1999) was the whole and sole reason which recommended a suitable legislative framework to be set up relating to the competition law in the country. It was realized that MRTP in comparison to other countries' Competition laws was inadequate for promoting competition in competition in the market. This led to the enactment of the Competition Act in the year 2002.

[2] Samir Gandhi, Hemangini Dadwal and Indrajeet Sircar, '*AntiTrust and Competition in India*', Global Compliance News (2020) <https://www.globalcompliancenews.com/antitrust-and-competition/antitrust-and-competition-in-india/>

[3] Nishant Pande , Urja Dhapre , "*The Curious Case of Composite Combinations Under the Indian Competition Law Regime*" , Kluwer Competition Blog (2019) <http://competitionlawblog.kluwercompetitionlaw.com/2019/12/05/the-curious-case-of-composite-combinations-under-the-indian-competition-law-regime/

MERGERS AND ACQUISITIONS UNDER THE ACT

Liberalization in 1991 has been a watershed moment for the Indian trans-border cooperative economy. Several Foreign Companies investing in India, as well as Indian enterprises merging or acquiring foreign entities. With the number of cross-border mergers rising from 156 to 236 from 1974 to 1994, the number of acquisitions rose exponentially from just 11 to 646 during the same time period. This prompted the Government to take some serious steps in order to prevent the incessant inflow of foreign ventures as well as the rampant takeover of Indian entities by MNCs. The introduction of statutes such as the Foreign Exchange Management Act, 1999 (FEMA) along with Cross –border merger Regulations of 2018. The constitution of the Securities Exchange Board of India (SEBI) for the regulation of listed entities introduced concepts that were prevented in the western M&A domains, such as hostile takeovers, price rigging, Listing Obligations of the participating entities, etc. Furthermore, with the enactment of the Competition Act in 2002, the fair competition regime was given a boost when the erstwhile MRTP Act of 1969 was scrapped to introduce a modern, reinforced antitrust law to ensure that M&A Transactions did not produce any adverse impact on the level of healthy competition in the market. Public M&A in India saw a halt after the 2009 -10 Global Financial Crisis, it bounced back just a few years, statistically, inbound mergers i.e. mergers in which a foreign company mergers with an Indian company, with the resultant entity being based in India majority of the times, accounted for 40% of the total Mergers in the year 2013.[4]

In the case of the Jet-Etihad deal, where Etihad Airways PJSC (a company incorporated in the United Arab Emirates) was acquiring 24% equity shares in Jet Airways (India) Limited, the Competition Commission was examining a merger or arrangement in the context of airlines for the very first time. The two air companies jointly gave notice under section 6(2) of the Act to the Commission[5]. Subsequently, after analyzing the entire framework of this acquisition which was initiated for enhancing their airline business through a joint venture, the Competition Commission gave a clearance to this deal expressing that there was no competition concern in the transaction. This is the landmark ruling as the Competition Commission has examined in far greater detail the significance of the proposed transaction on air passenger

[4] G. R. Bhatia , "*India : Mergers Acquisitions Under the Indian Competition Regime*" , Mondaq (2017) <https://www.mondaq.com/india/antitrust-eu-competition-/627802/mergers-acquisitions-under-the-indian-competition-regime>

[5] Rajat Sethi , Simran Dhir and Dhruv Aggarwal , "*Defining Control – A study of the Jet – Ethiad case" (National Law School of India Review,Vol.27,issue2,2015)* <"https://repository.nls.ac.in/cgi/viewcontent.cgi?article=1205&context=nlsir>

services for Etihad and Jet Airways and its subsequent impact on competition in India than it has in other cases. The antitrust provisions to the act were added in 2009, and the regulations of combinations took effect on 1st June 2011, in between the concerns of various parties primarily revolving around the time for acceptance of transactions. Nevertheless, a quick and transparent assessment has eliminated the time and cost overruns, thereby making India's merger control regime one of the most extolled in the domain of competition law. In 2019, Competition Commission introduced the green channel route, symbolizing a new approach to filing cases in a mandatory and suspensory regime.[6] Moving further on a fiduciary approach the commission introduced an automatic route for approval of combination in case of no overlaps, be it vertical, horizontal, or complementary, between the parties and the businesses. This move has significantly enhanced the ease of doing business as such transactions can now be consummated immediately upon filling only.

ANTI TRUST IN MERGERS AND ACQUISITIONS - A GLOBAL PERSPECTIVE

POSITION IN THE UNITED STATES –

The latter half of the 19th century saw that more than 1800 companies were eliminated through mergers and acquisitions, which led to the number of firms falling to 40% of their respective markets, and 42 firms with more than 70% of their markets. These were the very reasons which led to the establishment of the Sherman Antitrust Act as a response by the Federal Government, which was the first major part of antitrust legislation. Subsequently, it was followed by Claytons Antitrust Act, which strengthened the previous Sherman Act's provisions and also introduced merger control. The act also led to the creation of the Federal Trade Commission (FTC). Between 1940-47 more than 2200 manufacturing and mining firms lost their significance in mergers and acquisitions. The 70 largest firms were having that much cash to purchase 90% of the manufacturing firms in the country. This second wave of concentration led to the formulation of the Celler-Kefauver Act in 1950 and the Hart-Scott-Rodino Act in 1976, which subsequently increased government powers to review and block combinations.

[6] Lina Khan, "*Amazon's Antitrust Paradox*," Yale Law Journal 126, no. 3 (January 2017): 712-805. https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5785&context=ylj

REFORMS PROPOSALS

Since national circumstances are changing, antitrust enforcement must also evolve subsequently. The difficulties of today's concentrated and globalized economy are very different from those of the mid-'50s and later 70's when only the broad outline of today's antitrust regime took its shape. The basic four proposals that were given for strengthening Antitrust Laws that gained large support were:-

- Reshape the structural presumption and tighten enforcement standards for horizontal mergers;
- Update the Non-Horizontal merger Guidelines;
- Institute an enforcement regime to deal with predatory pricing;
- Reduce the costs of antitrust enforcement.[7]

CONCLUSION AND WAY FORWARD

Elsewhere, the antitrust and fair competition debate has been going on for several decades, leading to various enactments and precedents. The same, however, cannot be said in the case of India. With the Competition law in the infancy stage in the country, a lot many small- stake mergers and combinations may stay below the radar of antitrust regulations. It is clearly evident from the fact that from June 2011 to March 2016, a total of 360 cases of combinations were considered by the CCI[8], without a single one being blocked. However, the post-COVID scenario looks quite promising in developing nations such as India. With the economy shut and production halted for well over 1.5 years, the derailed economy seems to gain footing again once the situation normalizes. The M&A landscape after the pandemic however changed drastically due to the innovations in lifestyle introduced during the funnel of the Lockdown era. With more and more e-commerce startups focusing on tech-driven consumer needs, such as fintech, e-commerce, B2C delivery services, etc, the need for larger enterprises to acquire smaller, more niche companies for their expansion was seen more prominently. Traditional Edu-giant Akaash acquiring Byjus – an Edu-tech startup is a clear indication of the sign that industries are moving towards more technology–driven ecosystems. Daily-services delivery

[7] Robert E. Litan, "*Entrepreneurship, Innovation, and Antitrust," The Antitrust Bulletin 61, no. 4 (2016): 580-594.* <https://journals.sagepub.com/doi/abs/10.1177/0003603X16673946>

[8] Nikhil Gupta , "*Opportunities and Challenges of M&A in India,* MIT Sloan School of Management Dissertation Archive (June 2014) < https://dspace.mit.edu/bitstream/handle/1721.1/90246/890379077-MIT.pdf?sequence=2&isAllowed=y>

providing startup Big Basket acquired milk delivery platform DailyNinja, and in turn, TATA Groups' acquisition of Big Basket in 2021 presents a scenario of layered combinations which aim to integrate diverse sectors of consumer–driven enterprises into one single unit. With India set to become the third largest economy in the world by 2050 in terms of nominal GDP and with rising M&A deals that have a more tech-driven end product, Indian Public M&A Scene is considering a serious revamping in the upcoming years.

With the Public M&A Market in India reaching a record $104 Billion in 2022, we might witness a plethora of complex and clandestine transactions heavily impacting the local economy In my opinion, the element of obscurity runs high in these mergers, considering the fact that the likelihood of such a large number of scot-free combinations being approved by the Regulating authority is surprisingly less. The Draft Competition (Amendment) Bill, 2022 has tried to plug the loopholes existing under the former legislation to establish a vigorous framework, including focused stress on the protection of Intellectual Property from abuse of dominance, which includes strength if an enterprise to manipulate the market by affecting the competitors or working independently of them. While the amendments have tried to balance out the interests of the stakeholders and the CCI, the impact of the stern enactment of the same remains to be seen.