



# The Growing Trends of Merger and Acquisition in Modern India and Its Impact on Competition Law in The Light Of Anti-Competitive Effects.

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## ABSTRACT

World over, with the advent of Globalization, Deregulation and growing technological advancements have led to a super surge in Mergers & Acquisitions. Enormous literature is available in various sources for M & As in the developed and advanced economies. But for that in India, the case is different. There exists very little information on the subject in the domestic context. Where on one side M & A ensures and promotes growth and expansion of the domestic enterprises to even foreign markets, the competition in the market economy can in no way be ignored. Competition restores the consumers wider access to services at the most competitive prices. The Competition Policies were framed with the fundamental aim to preserve and promote competition as a means of ensuring efficient allocation of resources in an economy and proper effective regulation of M & As (combinations).

This study attempts to understand the impact and trends of M&As in India. Further, it explores the role played by combination law in regulating the M&As activity. The current study thus ontologically bases its findings on objective epistemology and employs a 'Positive Paradigm' Approach (including both positivism and interpretivism). In light of this, the paper has been categorized into various chapters and sub-chapters which take up the topics individually and in detail.

**Keywords:** Competition, Globalisation, Mergers & Acquisitions

## 1. Introduction

### 1.1. Mergers & Acquisition

Prior to 1990, strict controls were imposed on Indian enterprises which had led to higgledy-piggledy growth of Indian economy particularly the corporate sector. With the economic reform policy introduced by the Government in 1991 and beyond, Indian enterprises were encouraged to adopt various growth and expansion strategies. Amongst many, the mergers and acquisitions (M&As) came to the forefront as common phenomenon that was extensively adopted by the enterprises. Hence, the concept of M&As is not new in the Indian economy. Since past many years, companies have adopted M&As to grow and now the same is adopted as a means of refocusing into their core competence, market share, global competitiveness and consolidation. This process significantly got a move on with increased number of foreign competitors. In this backdrop, restructuring activities in order to create formidable presence and expansion of core areas of interest have proved profuse.

The term Mergers and Acquisitions (acronym M&As) refers to the consolidation or combination that is affected between companies in order to form a new and a bigger company. Both the terms mergers and acquisitions are used interchangeably for each other; however, they hold different meanings. Where the former refers to joining hands of two companies that leads to the formation of a new, joint entity, while the later refers to the action where a target company is acquired by another and the company so acquired no separate existence. Section 2(a) of Competition Act, 2002 defines acquisitions as directly or indirectly, acquiring or agreeing to acquire —

- (i) shares, voting rights or assets of any enterprise; or
- (ii) control over management or control over assets of any enterprise.

The phrase mergers and acquisitions deal extensively with the corporate finance and management strategy which involves selling, buying, and combination of different companies that can finance, aid or help a growing entity in a given industry grow rapidly without having to create another business entity<sup>1</sup> eventually creating competitive strategy for them to survive in the aggressive market.

Again, a combination containing within its ambit Mergers & Acquisitions is defined under the Competition Act as one meaning acquisition of control, shares, voting rights or assets, acquisition of control by a person/ enterprise of another enterprise where the acquirer has direct or indirect control over the acquired while it engages in competing businesses, and meaning also the mergers and amalgamations between or amongst enterprises when the combining parties exceed the thresholds stipulated under the said provision. The thresholds are specified in terms of assets or turnover of enterprises within or without India.

Section 5 of the Competition Act, 2002; combination –

*“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”.*

<sup>1</sup> Frederieksen, Mergers & Acquisition as part of Growth Strategy; Available at: <https://hingemarketing.com/blog/story/mergers-and-acquisitions-as-part-of-your-growth-strategy> [Accessed on 1<sup>st</sup> April, 2023]

## 1.2. Literature Review

The review of various available literatures is done with the object of understanding concept, impact and trends of the Mergers & Acquisitions activity that has been taken up as the subject matter of this research paper. The various literatures of different authors w.r.t the current study has been reviewed in order to gain a better understanding of the subject and also gain an insight into the views that the various others hold. Some of the studies both Indian and worldwide regarding the Mergers & Acquisition along with its effect on Competition have been discussed and referred here in this section of the paper.

According to, **Dr. Geeta Gouri**<sup>2</sup> “M&A are vibrant in India and their strategy is more towards facing competition by concentrating on developing core strengths..... M&As in India are strategic in nature that motives range from growth and expansion to high quality of human resources, strong brand presence and global identity and leadership”. **Verma A. (2018)**<sup>3</sup> laid emphasis on the progress of Mergers & Acquisitions on the ground that “Corporate restructuring in the form of Merger and Acquisition (M&A) has in the recent times emerged as an intriguing area of law and the regulatory provisions governing M&A has assumed a vital place in the Indian Jurisprudence.”. Also, **Paliwal M. (2016)**<sup>4</sup> is of the view that “The corporate sector all over the world is restructuring its operations through different types of consolidation strategies like mergers and acquisitions in order to face challenges posed by the new pattern of globalization, which has led to the greater integration of national and international markets.” Also, **Kumar and Rajib (2007)** stated that “India has been a late comer in the M&A process due to unfriendly regulations and restrictive laws. Based on their dataset, it was found that prior to liberalization, mergers outnumbered acquisitions, but post-liberalization; it was the other way around.” and **Carline, Linn & Yadav (2003)**<sup>5</sup> in his research inferred that “Mergers were associated with improvements in operating efficiency and the total abnormal revaluations of bidder/target pairs are both positive. Operating performance improvement depends on whether the merger was friendly or hostile.”

## 1.3. Scope & Objective

Through an extensive literature review and results of the Analytical Research undertaken the objective of the study comes out to be three-fold -

- To analyse the implication of Mergers & acquisition (Combinations) over Competition policies and regulations in India.

<sup>2</sup>Dr. Geeta Gouri, Member, CCI., Competition Act; Available at: <https://www.cci.gov.in/sites/default/files/speeches/CAM.pdf?download=1>

<sup>3</sup> Verma A; Most Critical M&A Deals in India 2020; Available at: <https://blog.ipleaders.in/critical-ma-deals-india-2020/>

<sup>4</sup> Paliwal m., Mergers and Acquisitions in India: A Trend Analysis and Future Forecasting; Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2759676](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2759676)

<sup>5</sup> Carline & Ors., Can the Stock Market Systematically Make Use of Firm- and Deal-Specific Factors When Initially Capitalizing the Real Gains from Mergers and Acquisitions; Available at:

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=567110](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=567110) [Accessed on 1<sup>st</sup> April, 2023]

- To ascertain the need for competition assessment of the emerging Mergers & Acquisitions in the Indian Market.
- To develop an understanding of trending spurt in the Mergers & Acquisitions activities in India post 1990s till date

The scope of the research paper has been limited in order to facilitate the completion of the project within reasonable time and with the resource constraints. The study has been delimited to the Trends, Impact and regulatory frameworks of Mergers & Acquisitions in India. The paper also discusses the various anti-competitive effects of mergers discussed with case laws along with some of the recent M&A deals in India for the year 2020.

#### 1.4. Hypothesis

In the light of the above; the hypothesis in the current study is formulated as,

*“With the growing changes at the economic front, M&As are at a growing rate being aligned to the needs of corporate business houses to survive as well as compete in the global arena. This increase in M&A activities leads to a shoot up in the adverse impact that the same showers on the competition policies in the Indian Markets”.*

#### 2. Mergers & Acquisitions and Competition Law

*“Competition law is all about economics and economic behaviour”.*

- Fali S. Nariman

If we look at the worldwide view, the competition all over as a form of jurisprudence has majorly three attributes, namely:

- i) Prohibiting Anti-Competitive Agreements & AAEC;
- ii) Prohibition of abuse of dominance; and
- iii) Regulation of Combinations (mergers & acquisitions)

The competition Act, 2002 of India is a modern piece of economic legislation and has all these essential ingredients stated above. Under Competition law, the anti-competitive practices and abuse of dominance are generally prohibited by orders of the Commission; whereas, combinations are regulated by the orders passed. Mergers & Acquisitions warrants economic growth, increased opportunities for corporate entities opening up competitions overseas and in doing so ultimately ensuring welfare of the public. But when such M&As take the

form of anti-competitive combinations, they tend to harm markets and also causes the interests of the consumers to topple.<sup>6</sup>

Mergers, acquisitions and takeovers of the companies have become common now in the fast-growing economy leading to competitive practices and cut throat competition that exists in the free market. Companies favour mergers and acquisitions (M&A) in order to gain an increase in the market share and as a result reduce the number of rival players existent in the market. These in certain cases results in monopolisation and in extreme cases indulges in restrictive business practices which includes; predatory pricing, anticompetitive agreements, abuse of dominance, etc. whipping up a negative effect to the market. In such a situation competition laws become utmost important for regulating demand and supply of resources in the market economies.

The legislation pertaining to competition and that of Mergers & Acquisitions inextricably associated amongst each other since any Mergers & Acquisitions has to pass through the scrutiny of Competition commission not just under the Competition Act and other allied Regulations in order to establish the new combined entity.

## 2.1. Need for Regulation

Merger between two or more firms or even a business sector acquisition is nothing but defined as ‘combinations’ under the Competition Act. The primary intention of the Government behind controlling mergers and acquisitions (combinations) within the country is to promote competition and thus ensuring that small scale establishments are not concealed and cloaked by those which are considered the more reputed industries operating in the market. For the merger of big shot companies is not just likely to reduce competition but also making smaller businesses incapable of growing or earning profit ultimately leading to stacking of wealth and economic power certain sectors in the economy. This would potentially lead to major economic and social discrepancies within the nation.<sup>7</sup>

The basic need of regulating and controlling any merger or acquisition deal is to study and scrutinize as to what impact will such a deal have on the market competition that is prevalent since such a combination would enable the new company so formed to alter or fix prices in a particular sector. There always remains a fear that post M&A activity, the new entity would eliminate competition in its favour and simultaneously tend to control the prices in the relevant market.

The need to regulate combinations is both; economic as well as political. The merger regulation and control are thus done in order to save and protect them from causing ‘*Appreciable Adverse Effect on Competition*’ and if not done such would cause hostile market behaviour leading to unfavourable impact on competition law.<sup>8</sup>

<sup>6</sup> Chaudhuri M., Mergers & Acquisitions under the Indian Competition Law – a critical legal view; Available at: [https://www.jftc.go.jp/eacpf/01/india\\_mergers0706.pdf](https://www.jftc.go.jp/eacpf/01/india_mergers0706.pdf) [Accessed on 2<sup>nd</sup> April, 2023]

<sup>7</sup> Kumbhaj N., Regulation of Combinations; Available at: [http://www.legalserviceindia.com/legal/article-3255-regulations-of-competitions.html#:~:text=of%20the%20Act,-Regulation%20of%20Combinations,long%20form%20application\)%20as%20applicable](http://www.legalserviceindia.com/legal/article-3255-regulations-of-competitions.html#:~:text=of%20the%20Act,-Regulation%20of%20Combinations,long%20form%20application)%20as%20applicable). [Accessed on 2<sup>nd</sup> April, 2023]

<sup>8</sup> Jain A. & Singh U., Effect of Competition Law on Mergers and Acquisitions in India; Available at: <http://aegaeum.com/gallery/agm.j-2714.127-f.pdf> [Accessed on 1st April, 2023]

In the light of such regulatory needs, any transaction relating to Combinations would not be valid or legally consummated until the Competition Commission India grants its approval or the until the review period of 210 days under the competition statute whichever is earlier, has expired. The CCI has been conferred sufficient power to approve, disapprove or impose modification to a transaction under Section 31 of the Act, the same has been discussed under chapter 3 of this paper.

## 2.2. Competition Related Issues

*“The purpose of Competition Law merger analysis is to identify and prevent or remedy only those mergers that are likely to harm competition significantly.”*

- International Competition Network (ICN),  
Recommended Practices for Merger Analysis

This part of the paper deals with the competition issues that are often showcased by Mergers & Acquisitions which is ultimately the primary concern of the Competition Commission which while examining a combination is that the proposed combination does or does not cause the following anti-competitive effects in the relevant market.

### 2.2.1. Anti-Competitive Agreements & AAEC

Mergers/Combinations between companies are not per se illegal. Cost-efficient development and distribution of products and services, market extension and competitive strength can be vital factors why merger activities are undertaken. It is, however, important to carefully examine whether a merger will have anti-competitive effects, such as the new entity formed post the merger, tending to become dominant in the market would significantly hamper competition in the market. The Anti-competitive effect of competition would lead to a substantial lessening of competition, or significantly impede effective competition in the relevant market and would have deterrent effect towards the consumers.

There are two major anti-competitive effects of merger-

#### a) Unilateral Effects

Where a merged entity, keeping in mind that enough sales is maintained, profitably and unilaterally increase its prices gives rise to Unilateral effects. López & Vives (2018) states that *“mergers can have unilateral effects for investment in research and development (R&D) those are conceptually similar to the unilateral effects from mergers for price competition.”*<sup>9</sup>

#### b) Coordinated Effects

Businesses and their rivals coordinating their activities towards anti-competitive behaviour by coming together and changing the nature of competition including price raises or otherwise harming effective competition is said

<sup>9</sup> Anti-Competitive Mergers & Acquisitions ; Available at :<https://asean-competition.org/about-cpl-anti-competitive-mergers-and-acquisitions> [Accessed on 1st April, 2023]

to bring out coordinated effects. A merger also tends to make coordination easier and more stable or more effective for those firms which were as it is coordinating prior to the merger.<sup>10</sup>

Combinations, besides having anti-competitive effects, are also regulated to prevent them from causing Appreciable adverse effect on competition in the market. The regulating powers are duly conferred on the commission by the Competition Act, 2002. The factors which form the base for the regulation of the combination are laid down u/s. 20(4) of the act.

The provision for AAEC is laid down u/s. 3 of the Act, which states that any agreement including cartel entered in respect of production, supply, distribution, storage, control etc. which-

- i) directly or indirectly determines purchases and sale prices;
- ii) limits or control production, supply, markets, technical development, investment or provision of services;
- iii) directly or indirectly results in bid rigging or collusive bidding

are presumed to have appreciable adverse effect on competition in India. It was held by CCI in the case of *Builders Association of India v. Cement Manufacturers Association*<sup>11</sup>, that the presumption of anti-competitive agreements can be inferred from the intention or conduct of the parties along with the supporting circumstantial evidence.

In regard to the Mergers & Acquisitions, the agreement for combination is scrutinised at the touchstone of their intention towards anti-competitive behaviour in the market leading to Appreciable Adverse Effect on Competition.

The regulation 25 of the Combination Regulations states that, CCI after forming prima facie opinion of combination causing AAEC, may propose appropriate modification to the combination to the parties to such combination, which once accepted by the parties, CCI passes Order approving the combination.<sup>12</sup>

### 2.2.2. Abuse of Dominance

S. 4 of the Competition Act, 2002 defines dominant position as a one of strength, enjoyed by any particular enterprise in the relevant market which enables the enterprise to operate independent of the competitive forces in relevant market or can affect competitors, consumers or relevant market in its own favour. abuse of dominant position would include imposing unfair or discriminatory condition or price in sale and purchase of goods and services; limiting or restricting production of goods and services; indulging in practice resulting to denial of market access; making conclusion of contracts subject to acceptance by other parties; or using its dominant position in one market in order to invade another relevant market. It was decided by the Commission in the case of *Shri Shamsher Kataria v. Honda Siel Cars India Ltd & Ors*<sup>13</sup>, that customers to purchase spare parts and diagnostic tools solely from the respective car manufacturer or its authorized dealers constituted abused dominant position by the car manufacturing companies.

<sup>10</sup> Coordinated Effects; Available at: <https://www.concurrences.com/en/dictionary/coordinated-effects> [Accessed on 1st April, 2023]

<sup>11</sup> COMPETITION COMMISSION OF INDIA, Case No. 29 of 2010

<sup>12</sup> Vyas V., Factors Considered by CCI to Accept/Reject Acquisition; Available at: <https://mnacritique.mergersindia.com/ci-factors-adverse-effects-competition-merger-acquisition/> [Accessed on 1st April, 2023]

<sup>13</sup> Case No. 03/2011

One of the most recent case of *Harshita Chawla v. WhatsApp & Facebook Inc.*<sup>14</sup> is one example where the CCI assessed combination and the resultant abuse of dominance. It was alleged in the case that Facebook backed WhatsApp, by using its dominance in the internet based instant messaging App, is bundling its messaging App with the payment option (WhatsApp Pay) thereby using such dominance to penetrate into the UPI enabled Digital Payments App Market. Moreover, by enabling automatic installation of WhatsApp Payments App in the WhatsApp Messaging App, WhatsApp is alleged to be taking advantage of its vast userbase to popularise its newly launched WhatsApp Pay App. The Informant submitted that WhatsApp is dominant in the market for internet based instant messaging app through smartphones in India. Relying primarily upon the following factors, as enshrined under Section 19(4) of the Act, of Market share, Size and resources of enterprise, Size and importance of competitors, dependence of consumers on the enterprise and countervailing buyer power, Vertical Integration of the enterprises or sales and service network, market entry barriers, etc. have alleged dominance. The conduct of WhatsApp is said to amount to bundling since the two products are offered as a package and are not available independent of each other, which contravenes Section 4(2)(d) of the Act causing coercion as WhatsApp enjoys a dominant position in the internet based instant messaging app market, having a pre-existing user base of more than 400 million monthly active users in India. The Commission prima facie finds WhatsApp to be dominant in the relevant market i.e. ‘market for OTT messaging apps through smartphones in India’. The Commission observes the nature of such allegation to be more akin to ‘tying’. Tying products involves certain conditions that are to be met, namely:

- (i) the tying and tied products are two separate products;
- (ii) the entity concerned is dominant in the market for the tying product;
- (iii) the customers or consumer does not have a choice to only obtain the tying product without the tied product; and
- (iv) the tying is capable of restricting/foreclosing competition in the market.

All the conditions are seen to be met by WhatsApp but not the third and the fourth since consumers retain full discretion on whether or not to use WhatsApp and the WhatsApp Pay feature’. The Commission held the opinion that there exists no prima facie case of contravening S. 4 and the information filed is thus directed to be closed under Section 26(2) of the Act.

The relevant geographic market and the relevant product market are two of the major concerns of the competition regime towards determining the abuse of dominant position. Section 6 is considered to be a vital provision pertaining to combination. This section provides for regulating the combinations. Under this section the competitions act restrains companies from entering into any Mergers & Acquisitions or Combination agreement that causes or is likely to cause them to become dominant and there upon abuse the same to hamper the relevant market in India.<sup>15</sup>

<sup>14</sup> Case No. 15 of 2020

<sup>15</sup> Anti-Competitive Mergers & Acquisitions ; Available at :<https://asean-competition.org/about-cpl-anti-competitive-mergers-and-acquisitions> [Accessed on 1st April, 2023]



## 2.3. Impact of Mergers & Acquisitions on Competition

The current chapter on Impact of Mergers & Acquisitions on Competition deals with the various types of mergers, i.e. Horizontal, Vertical and Conglomerate and how they individually affect competition.

### 2.3.1. Horizontal Mergers & Competition

A Horizontal Merger is a combination between two or more companies which is affected at the same level of production or distribution in the relevant market. These kinds of mergers are primarily undertaken by the companies who aims at increasing their value by attaining economies of scale, increasing their market power and exploiting the cost as well as revenue-based synergies. The negative side of these mergers is to eliminate competitors and bring about adverse changes to the competitive environment that would make it easy for the merging companies to coordinate prices, output and other aspects constituting competition.<sup>16</sup> One such example was the Vodafone acquiring Hutch in the year 2007.

Horizontal mergers of companies in the market while dealing with the competition tends to give rise to unilateral anticompetitive effects while they aim at charging higher price, producing lower output, or act less competitive, while non-merging rivals do not alter their strategies.<sup>17</sup>

### 2.3.2. Vertical Mergers & Competition

On the other hand, a Vertical merger of businesses in the market refers to combinations at different levels of production chain, particularly, between those operating at different, but complementary levels of the market for the same end product. These potentially cause collusion between merger companies and third parties or foreclosure of upstream/downstream market to third parties in the form of limiting or controlling the competitor's access to key inputs or outlets.<sup>18</sup> Such type of merger was seen in the 2004 merger of the Reliance group with the FLAG Telecom wherein the former acquired FLAG Telecom for a valued deal of USD 207 Million.<sup>19</sup>

### 2.3.3. Conglomerate Mergers & Competition

The last type of merger that is a conglomerate merger is one which allows businesses that operates in completely different product markets to come together and agree to combination (diversification goals). These very rarely lead to anticompetitive behaviour; however, such mergers have the potential to eliminate future competitors and delay price competition. In this view we also find that this type of merger has been kept out of the Merger Review Guidelines of the United States. Merger of Walt Disney and the American Broadcasting Company in 1995,

<sup>16</sup> Competition Commission of India: Merger Control; Available at: <https://algoallegal.in/1818-2/> [Accessed on 2<sup>nd</sup> April, 2023]

<sup>17</sup> Werden & Froeb, Unilateral Competitive Effects of Horizontal Mergers; Available at: [https://www.researchgate.net/publication/228293682\\_Unilateral\\_Competitive\\_Effects\\_of\\_Horizontal\\_Mergers](https://www.researchgate.net/publication/228293682_Unilateral_Competitive_Effects_of_Horizontal_Mergers) [Accessed on 1st April, 2023]

<sup>18</sup> Competition Commission of India: Merger Control; Available at: <https://algoallegal.in/1818-2/> [Accessed on 2<sup>nd</sup> April, 2023]

<sup>19</sup> Economic Times, Reliance to Acquire FLAG Telecom for \$ 207mn; Available at: <https://m.economictimes.com/wealthmakers-the-ambanis/anil-dhirubhai-ambani-enterprises/reliance-infocomm/reliance-to-acquire-flag-telecom-for-207-mn/articleshow/934046.cms> [Accessed at 3<sup>rd</sup> April, 2023]

Amazon acquisition of Whole Foods in 2017, etc. are a few examples of conglomerate mergers. These although contains potential for bundling and tying, reducing innovation incentives, and coordinated effects towards competition.<sup>20</sup>

Conglomerate mergers are alleged to be anticompetitive only in few cases where it brings forth the possibility of reciprocal dealings and predatory pricing, eventually bringing down the number of potential competitors, and engaging in reciprocity and predatory pricing according to Backman, 1970 is considered a bad business policy.

### 3. Regulatory Framework for Merger Control

The Competition laws in India has soaked in itself the philosophy of social and economic justice that is enshrined in the Constitution of India under its Part IV that lays down the Directive Principles of State Policy. The MRTP Act which was the first competition legislation in India did not expressly recognized the importance/concept of combination and the control of the same. Even after repeated amendments it was seen that the same was a damaged legislation incapable of meeting the then changing needs of the economy. The various lacunas that was exhibited by the Act catalysed its repeal and the germination of a completely new law in the shape of the Competition Act, 2002. The Act of 2002 not only incorporated combination control within its ambit but also propped it with supplementary guidelines. The Act alongside the primary anticompetitive behaviours of the players in the open market also vetoed those combinations which tend to result in an Appreciable Adverse Effect on Competition.

The very need of a comprehensive framework towards regulating competition can be seen as enabling competition authorities to regulate changes that occur in the market structure that would depend on its decision of granting permission to two or more commercial companies towards merging, combining or consolidating their business in the light of the consideration whether the same leads to a “bad” outcome creating a dominant enterprise that would eventually abuse such power.<sup>21</sup>

Regulating Mergers & Acquisitions in the form of Combinations, the Competition Act, 2002 lays down a threshold limit for businesses undergoing the combination activity beyond which the Commission has to be duly notified. The threshold limit was made subject to modification by the Central Government in consultation with the CCI with the proposed insertion of S. 5A within the Amendment bill of 2012.<sup>22</sup> The obligation of an enterprise meeting the threshold limit u/s. 5 to send a notice to the CCI proposing to enter into combinations is provided vide Section 6 of the Competition Act. The notice must be accompanied by the required binding documents [under Regulation 5(8) of the Combination Regulation] and the prescribed fees. The term binding document was contemplated by the CCI in the **Acquisition case of Pantaloons Retail India Ltd by Aditya Birla Nuvo**

<sup>20</sup> Conglomerate effects of Mergers; Available at: <http://www.oecd.org/daf/competition/conglomerate-effects-of-mergers.htm#:~:text=However%20there%20can%20also%20be.%20and%20co%2Dordinated%20effects.> [Accessed at 3<sup>rd</sup> April, 2023]

<sup>21</sup> High Level Committee of Competition Law, SVS Raghavan Committee Report; Available at: [https://www.cci.gov.in/sites/default/files/presentation\\_document/OECDKoreaCentreIndianCompetitionLaw14Nov2008.pdf?download=1](https://www.cci.gov.in/sites/default/files/presentation_document/OECDKoreaCentreIndianCompetitionLaw14Nov2008.pdf?download=1) [Accessed at 3<sup>rd</sup> April, 2023]

<sup>22</sup> Kumar J. & Roy A., Competition Law in India, Eastern Law House 2<sup>nd</sup> Edn.

**Limited**<sup>23</sup>, wherein the CCI holding that an MOU is a mere premature arrangement and cannot be considered a binding document rejected the notice for non-compliance with S. 5 of the Competition Act. The commission further reiterated Regulation 5(8) of the Combination Regulations which when read with S. 5 of the Competition Act for “documents” to include “such documents conveying an agreement or decision to acquire control, shares, voting rights or assets” such as a term sheet executed by parties, etc.<sup>24</sup>

Talking of the Combination Regulations, it came into force in the year 2011 with the primary objective of determining whether any combination is likely to cause an AAEC in the relevant market in India and such had to be done within thirty days of the receipt of the notice. The regulations 2011 and the subsequent amendment in the year 2012 similar to the Competition Legislation of 2002 provided extra-territorial jurisdiction on the CCI to accomplish its task of terminating practices having an AAEC and modes of exercising these powers.<sup>25</sup>

In case post scrutiny of the notice and the binding documents, the Commission is *prima facie* satisfied that the combination that is proposed between parties is likely to cause Appreciable Adverse Effect of Competition, the former shall issue a show cause notice to parties to show as to why investigation with respect to such combination shall not be conducted. Post response of parties to the show cause notice, the Director General is called upon to prepare a report on the proposed combination.<sup>26</sup> Thereafter, the parties are required to publish the information regarding the combination so that the public is made aware of the same or people so affected. S. 20 of the Act, 2002 confers on the Commission power to either *suo motu* or on receipt of information relating to acquisition, inquire into a combination on the question whether such combination has caused or is likely to cause an AAEC in the relevant market. Also, provision laid down u/s. 6 (2A) that any combination would not be brought to effect until 210 days have passed from the date on which notice of combination was given to the Commission or the orders passed by the commission.

Any additional information from the parties can be called upon by the Commission under the provision laid down in S. 29 (4) of the Competition Act, 2002 and then shall the Commission approve deal with the combination in the manner enumerated under Section 31 of the Act where the commission can either approve, reject or modification to the merger & acquisition deal.

Again, the Companies Act of 2013 provides for Regulatory/ Third Party Approval which requires notice of Merger to be sent along with other documents including the Scheme and valuation report, not only to shareholders and creditors, but also to various regulators like the Ministry of Corporate Affairs, the Reserve Bank of India

<sup>23</sup> C 2012/07/69

<sup>24</sup> Triggering the Combination Regulations, Available at: <http://www.nishithdesai.com/information/news-storage/news-details/article/fit-conference-1.html> [Accessed at 3<sup>rd</sup> April, 2023]

<sup>25</sup> Sanyal T. & Chatterjee S., COMBINATION CONTROL: STRENGTHENING THE REGULATORY FRAMEWORK OF COMPETITION LAW IN INDIA?; Available at: <http://docs.manupatra.in/newsline/articles/Upload/931502F5-8DDB-4C22-AAE9-01890981BBF4.pdf> [Accessed at 3<sup>rd</sup> April, 2023]

<sup>26</sup> Suman S., Merger and the Role of Competition Commission in India; Available at: <http://www.legalservicesindia.com/article/2244/Merger-And-The-Role-of-Competition-Commission-of-India.html> [Accessed at 3<sup>rd</sup> April, 2023]

(in cases, where non-resident investors are involved), SEBI and Stock Exchanges (for listed companies), etc. A period of 30-days for the regulators to make representations is also laid therein.<sup>27</sup>

Recently, the new Competition Amendment Bill of 2020 allows sector specific and new thresholds for merger notification by the CCI and the Central Government to be determined by insertion in S. 5 in the interest of the public.

#### 4. Trends of Mergers & Acquisition in India

Based on the available data it is evident that the Indian economy witnessed a thriving success towards Mergers & Acquisitions during the last three decades. Breaking high level of growth in the M&A sector in India, such activities has never been as high as about 409 deals in total before 2016 (IMPA Insights, 2016). With amendments in the Monopolies and Restrictive Trade Practices Act, the M&A activities took a rise for it was seen as vital for raising financial synergy as well as being a prominent and authentic expansion strategy.<sup>28</sup> The Energy, Mining and Utilities sector besides telecommunications, consumer durables and pharmaceuticals sectors have witnessed a lead in the Mergers & Acquisition activities in the last five-six years. Prominence of Merger and acquisition activities can be understood based on a periodic analysis from 1990s till date. The entire time frame can be divided into three phases:

- i) Before 1990- 1995 (referred to as the consolidation era)
- ii) 1995 – 2002 (known as the period of foreign acquisition)
- iii) 2002-2009 (known as the era of venturing abroad)

##### 4.1. For period up till 2002

The transformation was brought to the Indian Industrial Sector post World War II with the introduction of the Mergers & Acquisitions. Wave of M&A activities were seen during this period which continued to several years even after India attained Independence due to the post war - economic and political conditions, majorly the inflationary situation which enabled majority of Indian businessmen to rack up income by way of high profits, dividends and black money (Kothari 1967).

This post-war period was referred to as the era of Mergers & Acquisitions. Large number of M&A deals were conducted amidst industries such as jute, cotton textiles, banking, electricity etc.<sup>29</sup> The period post-Independence witnessed a considerable number of M&As. Soon, the growth was disheartened by the government policies and

<sup>27</sup> Pandey A., Combination (Merger Control) Regulations; Available at: <https://blog.ipleaders.in/combination-merger-control-2/> [Accessed at 3<sup>rd</sup> April, 2023]

<sup>28</sup> Pandya U., Mergers & Acquisition Trends- the Indian Experience; Available at: <http://www.sciedu.ca/journal/index.php/ijba/article/download/12803/7927> also at: [https://www.researchgate.net/profile/Viral-Pandya-6/publication/322204485\\_Mergers\\_and\\_Acquisitions\\_Trends\\_-\\_The\\_Indian\\_Experience/links/5b75fe89a6fdcc87df8174a6/Mergers-and-Acquisitions-Trends-The-Indian-Experience.pdf](https://www.researchgate.net/profile/Viral-Pandya-6/publication/322204485_Mergers_and_Acquisitions_Trends_-_The_Indian_Experience/links/5b75fe89a6fdcc87df8174a6/Mergers-and-Acquisitions-Trends-The-Indian-Experience.pdf) [Accessed on 3<sup>rd</sup> April, 2023]

<sup>29</sup> Pandya U., Mergers & Acquisition Trends- the Indian Experience; Available at: <http://www.sciedu.ca/journal/index.php/ijba/article/download/12803/7927> [Accessed on 3<sup>rd</sup> April, 2023]

regulations that were brought into effect during the 1960s and 1970s. In some cases, however, even the Government amidst the stringent regulations stimulated M&As activities, particularly in the cases of sick units. It was during this period, the formation of the Life Insurance Corporation and nationalization of the life insurance business in 1956 resulted in the acquisition of about 243 insurance companies. The national textiles corporation also took over a large number of sick textiles units.<sup>30</sup> All of these led to concentration of economic power to the common detriment.

Profound and noticeable change in M&As and its importance in the economy was brought while India underwent Liberalisation and Globalisation policies i.e. the period that laid to the emergence of a global environment post the new economic policy regime of 1991 for such globalisation, deregulation and technology in most economies have contributed to increased competition and not just in India but have caused an outburst in M&A activities globally. The privatisation, trade liberalisation, finance and investment, as well as technological change canvassed an environment open to Cross Border Mergers in India.<sup>31</sup> Thereafter, with the coming into force of the Companies Act, 1956 [S. 390-395]; the Income Tax Act, 1961 [S.2 (1B)]; the MRTP Act in the year 1969 along with other legislations and regulations viz. the SEBI (Substantial Acquisition of Shares and Take Over) Regulations, 1994 and 1997 [Reg. 11(1)] and subsequent amendments have paved the way for large business houses and foreign companies to fall back on the M&A route towards growth and expansion.

It was the period between 1990-99 which spotted a three-fold increase in the total number of M&As across the world. Mergers of firms belonging to the same business groups operating in similar product-lines appeared to dominate the Merger-wave in India. The period post 1990 is marked as the fifth takeover wave globally particularly in Europe and the United States.<sup>32</sup> However, in India, the first phase i.e. before 1990 to 1995 is termed as the era of consolidation where major players of the domestic company started to compete with multinational players who were attracted by the liberalization policy and economic reforms in India. Post 1995-2000 is the period when International companies started to look out for the Indian companies with an aim enter the Indian market. While the Indian corporate houses seemed to have been gearing up to face foreign competition which India was still in its first phase, the second phase watched a large presence of multinational firms participating in the M&A process actively for strengthening their position and also broadening market access.<sup>33</sup>

This phase was a phase of slow growth where India lagged behind the advanced countries (such as U.S. and Europe) as well as emerging nations (such as Malaysia and Singapore), both in terms of number and value. It is only during 1997-99 that substantial increase in M&A activities could be noticed.<sup>34</sup>

## 4.2. Post year 2000

<sup>30</sup> Kar, R.N.: "*Mergers and Acquisitions in India: Background, Implications and Emerging Issues*", Chartered Secretary, Dec, 2004.

<sup>31</sup> World Investment Report 2000: Cross-border Mergers and Acquisitions and Development, UN Conference on Trade & Development; Available at: [https://unctad.org/system/files/official-document/wir2000\\_en.pdf](https://unctad.org/system/files/official-document/wir2000_en.pdf) [Accessed on 2<sup>nd</sup> April, 2023]

<sup>32</sup> Gregoriou & Renneboog, Understanding mergers and acquisitions: activity since 1990; Available at: [https://booksite.elsevier.com/samplechapters/9780750682893/02~Chapter\\_1.pdf](https://booksite.elsevier.com/samplechapters/9780750682893/02~Chapter_1.pdf) [Accessed on 2<sup>nd</sup> April, 2023]

<sup>33</sup> Pandya U., Mergers & Acquisition Trends- the Indian Experience; Available at: <http://www.sciedu.ca/journal/index.php/ijba/article/download/12803/7927> [Accessed on 3<sup>rd</sup> April, 2023]

<sup>34</sup> Bhalla P., Mergers & Acquisitions in India: A sectoral analysis; Available at: [https://ijbed.org/cdn/article\\_file/i-5\\_c-58.pdf](https://ijbed.org/cdn/article_file/i-5_c-58.pdf) [Accessed on 4<sup>th</sup> April, 2023]

From the year 2000-2009 is the third phase and is there by referred to as the era of venturing abroad. Indian companies during this phase targeted and indulged in major foreign acquisitions in the industrialist countries eventually positioning itself successfully on the global map of industrial development.

The data for the period between 2000-2009 revealed that finance, real estate, pharma, capital goods, IT, textiles, hotels & restaurants, consumer durables, etc. were the sectors which recorded highest number of Mergers & Acquisitions in India. On the basis of the statistics available, in 2006 the number of M&As were recorded the highest at 927 completed M&As and 517 and 427 respectively for the years 2007 and 2005.<sup>35</sup>

While during 1980 and 1990, the total number of M&A cases were 268, which subsequently increased to 1,034 for the period of 1990 –2000, and 2,656 in the decade between 2000 –2009. This upward trend further continued also for the decade 2000 -2010 where India witnessed more than about 77% of merger and acquisitions activity which was affected in the manufacturing sector and that of more than 80% in the financial services sector. Evidently, mergers and acquisitions activity peaked in the year 2006.<sup>36</sup>

There was a particular trend in Mergers that the businesses indulged in till 2000, this was generally by operating in a similar product-lines, however, subsequently the trend shifted to the purpose of diversification, newer market entry and expansion and not just a means of restructuring.

With the coming into picture of the new Government, emphasis was laid on revitalizing the Indian economy by positively affecting the prevalent business environment. Indian companies became more open and aggressive towards acquisitions post the year 2014. As a part of their action of venturing abroad, majority of Indian companies made top acquisitions world wide including Tata Steels, Hindalco Industries, Adani, Bharti Airtel, Vodafone Idea, Walmart Acquisition of Flipkart, etc (between 2007-2017). With the increasing number of Indian companies opting for mergers and acquisitions, India became one of the leading nations in the world in terms of mergers and acquisitions. 2014 being an encouraging year for India's business climate and domain, as well as the M&A topography.<sup>37</sup>

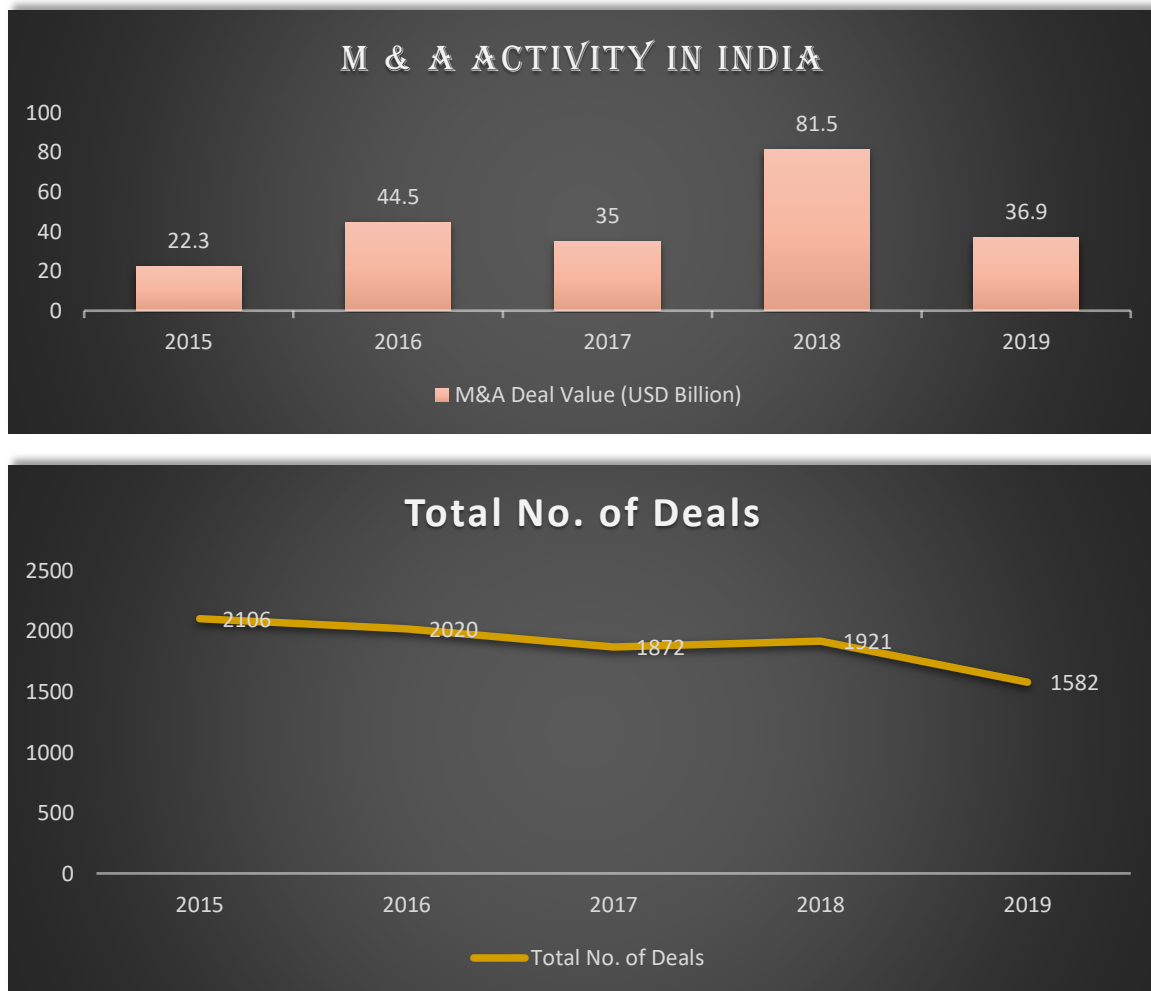
The year 2018 was considered the second-best year when it comes to rise in the M & A deals in India however, a certain percentage of slowdown was witnessed in the 2019. There was substantial acceleration in the Public M & A unlike those in the preceding years where the major focus was on Private Mergers. Deals in the infrastructure sector and the Private Equity influence on M&As are expected to rise within the next few years.<sup>38</sup>

<sup>35</sup> Pandya U., Mergers & Acquisition Trends- the Indian Experience; Available at: <http://www.sciedu.ca/journal/index.php/ijba/article/download/12803/7927> [Accessed on 3rd April, 2023]

<sup>36</sup> Paliwal M., Mergers and Acquisitions in India: A Trend Analysis and Future Forecasting; Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2759676](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2759676) [Accessed on 3<sup>rd</sup> April, 2023]

<sup>37</sup> Ibid

<sup>38</sup> Agarwal V., Anthony C. & Anr., M&A Report 2020: India; Available at: <https://www.iflr.com/article/b11mx6b3qynryg/mampa-report-2020-india> [Accessed on 3<sup>rd</sup> April, 2023]

Fig: M&A Deal Value and Amount in India<sup>39</sup>

#### 4.3. In Modern India (2020)

Despite significant slowdown of the economy due to COVID-19 Pandemic, the year 2020 yet witnessed a few, has brought forth some remarkable and critical M&A deals which not only impacts the business domain but also have a major impact on the competition in the market.

- **Zomato and Uber Eats' Acquisition Deal**

The first case under study for this paper is that of the Acquisition of Uber Eats by the leading online food delivery business Zomato. The deal valued around 350 Million USD. To effectuate the same Uber acquired 9.99% of ownership in Zomato to transfer the entire Uber Eats' business to the latter. However, this deal was premised on the condition that Zomato would not take in the Uber Eats' team in that case the only option left with the employees this deal's crucial hardship is to the future of the employees of Uber Eats. The reason being that,

<sup>39</sup> Deals in India: Annual Review and Outlook for 2020; Available at: <https://www.pwc.in/assets/pdfs/services/deals/deals-in-india-annual-review-and-outlook-for-2020.pdf> [Accessed on 3rd April, 2023]

Zomato made it reasonably clear that it won't be absorbing Uber Eats' team, which implies that they would either be absorbed in Uber's Indian business or laid off.<sup>40</sup>

The success of Uber Eats was since its inception was never easy. Facing tremendous competition, found it difficult to differentiate its services from the rival. It was since 2019 that Uber was trying to backout from the food delivery market in India. One such effort was the deal with Swiggy but the same couldn't be brought to effect. It was with the Zomato Uber Eats' acquisition deal there remained only two major competitors for online food-delivery business viz. Swiggy and Zomato as rivals giving out differential services and maintaining their individual user base,<sup>41</sup> with unique strategies to meet the blooming needs during pandemic as well.

### ● Reliance and Urban Ladder Acquisition Deal

Reliance Industries and Urban Ladder Acquisition Deal was the second in the row for Reliance in the e-commerce industry. The value for which RIL acquired Urban Ladder Home Decor Solutions Private. Ltd which is an online furniture selling business for eight years, valued up to Rs. 182.12 crore, marking its presence in the online furniture business. Post this, the retail unit of RIL, owned about 96% stake in Urban Ladder. It has further aimed at buying the remaining 4% stake by the year 2023.

Urban Ladder was facing some significant challenges for the past two years and was going in loss for stiff competition from Pepperfry. With this deal it is Reliance that would compete mainly against Pepperfry, Amazon, and Flipkart to set its roots deeper in the online furniture domain.

### ● Reliance Jio and Facebook Synergy

Facebook signed a deal with the JIO platforms Ltd. valuing about Rs 43,574 crore. With this, Facebook is determined to capture a total of 9.99% stake in Jio Platforms becoming its largest minority shareholder.<sup>42</sup> Both, the Facebook's WhatsApp and the Reliance Jio have on and about 400 million user bases in India, this fusion between these two leading market players would build up a significant market control. It will also help Reliance in giving a boost to its Jio Mart. And for Facebook, it would lead to an increase in market access in India. As stated by Mukesh Ambani, "this partnership will immensely contribute to the 'Digital India' Mission".

<sup>40</sup> Verma A., Most Critical M & A Deals in India 2020; Available at: [https://blog.ipleaders.in/critical-ma-deals-india-2020/#\\_ftn2](https://blog.ipleaders.in/critical-ma-deals-india-2020/#_ftn2) [Accessed on 3rd April, 2023]

<sup>41</sup> India: Acquisition Of Uber Eats By Zomato – The Flaw In The Plan With Deep Discounting; Available at: <https://www.mondaq.com/india/consumer-law/891314/acquisition-of-uber-eats-by-zomato-the-flaw-in-the-plan-with-deep-discounting> [Accessed on 3<sup>rd</sup> April, 2023]

<sup>42</sup> Reliance Jio – Facebook merger – Big Task before CCI; Available at: <http://gile.in/2020/05/29/reliance-jio-facebook-merger-the-big-task-before-the-cci/> [Accessed on 4<sup>th</sup> April, 2023]



- **Reliance and Future Group Acquisition Deal**

Another most revelled acquisition of Reliance in 2020 was the taking over of the Future Group's retail business which has only now been finally approved by the Competition Commission of India (CCI). The acquisition deal was valued at around Rs 24,713 crore and aimed at strengthening Reliance's position as India's largest organised retail. With this deal, all the separately listed subsidiaries of the Group containing apparel, supply chain and grocery business will firstly merge into Future Enterprises Ltd. (FEL) and thereafter be acquired by Reliance Industries Ltd. This deal will give an even more powerful position to Reliance in the retail market making it stronger than any of the competitors.

## 5. CONCLUSION

Mergers and Acquisitions, with the advent of technology and newer market conditions and formulation of favourable regulations, have assumed a substantial position in the Indian Economy. However, like the two sides of the same, mergers and acquisitions also gives rise to certain number of competition/antitrust issues which if not addressed appropriately impedes competition and ultimately deters the very objective of welfare of the economy and consumers at large.

The paper attempts to analyse, based on the secondary data available, the trends and patterns of Mergers & Acquisitions over different periods from post-independence period to the modern times in India. The pattern of M & As was never stagnant but kept changing over time. This subsequently led to a significant effect in the modus operandi of free enterprises in the market. With the increase in M & A activities, there has been a significant surge in enterprises reaping dominant positions in the market indulging in restrictive which ultimately causes Appreciable Adverse Effect on the Competition. Hence, the hypothesis to this research paper i.e. *“With the growing changes at the economic front, M&As are at a growing rate being aligned to the needs of corporate business houses to survive as well as compete in the global arena. This increase in M&A activities leads to a shoot up in the adverse impact that the same showers on the competition policies in the Indian Markets”* has been duly accepted. However, with regards the second part of the statement there is sufficient check that is provided through the Competition Legislation. Coming to more guidelines to determine what constitutes possession of an effective control over another group, the same is presumably left by the statute to be determined by the CCI as and when any case arises and the needs of that particular case. The statute w.r.t combinations finds criticism only on the point that is absence of pre-combination consultation mechanism which was also proposed under the draft Combination Regulations in 2011. This if implemented would give teeth to the entire process of regulating combinations, having an AAEC. This would make the entire process of seeking approval to combinations less time consuming.