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REGULATION OF COMBINATIONS UNDER THE COMPETITION ACT, 2002: AN ANALYSIS

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Abstract:
This research paper examines the regulatory framework established by the Competition Act of 2002 and its impact on mergers and acquisitions within the specified jurisdiction. By analyzing the provisions of the Act, along with scholarly literature, the paper aims to elucidate the legal mechanisms governing combinations and their implications for competition, market dynamics, and economic growth. Additionally, the study explores the effectiveness of the regulatory regime in promoting fair competition while safeguarding consumer interests and fostering innovation. Through a comprehensive review, this paper offers insights into the strengths, weaknesses, and potential areas for improvement within the regulatory framework governing combinations.

Keywords:
Combination, mergers and acquisitions, regulatory framework, competition law, market dynamics, economic growth, consumer interests, innovation, regulatory effectiveness.

INTRODUCTION:

The Competition Act of 2002 is a significant legislation that governs competition and antitrust practices in India. It was enacted to promote fair competition and prevent anti-competitive practices in the market. The Act applies to all enterprises operating within India and regulates activities that may have an appreciable adverse effect on competition in markets within the country.

Under the Competition Act, the term "combinations" refers to mergers and acquisitions that can substantially impact competition in the market. These combinations could involve two or more enterprises coming together through mergers or acquisitions, directly or indirectly, leading to changes in control and affecting market dynamics.

The introduction of provisions related to combinations in the Competition Act aimed to strike a balance between promoting economic growth through corporate restructuring and ensuring that such activities do not stifle competition in the market. The Act established the Competition Commission of India (CCI) as the regulatory body responsible for scrutinizing and approving such combinations.

The CCI plays a crucial role in evaluating the potential anti-competitive effects of proposed combinations. It assesses whether a particular combination is likely to cause an appreciable adverse effect on competition in India and, if so, may impose necessary remedies or prohibit the combination altogether.

The introduction of provisions related to combinations under the Competition Act reflects the Indian government's commitment to fostering a competitive market environment, encouraging innovation, and safeguarding the interests of consumers and small businesses. By regulating combinations, the Act ensures that the market remains open, transparent, and fair for all participants, thereby promoting economic efficiency and consumer welfare.

1. Antitrust and competition issues in India are governed by the Competition Act, 2002. In addition, the Companies Act, 1956 (now replaced by the Companies Act, 2013) contains provisions with regard to the acquisition and transfer of shares by or to enterprises having a dominant position or which will become dominant as a result of such acquisition or transfer. See: The Asia- Pacific Antitrust Review 2021 http://globalcompetitionreview.com/reviews/51/sections/175/chapters/1971/india-overview/, Visited on:15-09-2023

BACKGROUND:

Prior to the enactment of the Competition Act in 2002, India lacked a comprehensive legal framework to address competition-related issues. The Monopolies and Restrictive Trade Practices (MRTP) Act of 1969, which was the primary legislation dealing with monopolistic and restrictive trade practices, had become outdated and was unable to effectively address the complexities of the evolving business landscape.

Recognizing the need for a modern and robust competition law, the Government of India introduced the Competition Act in 2002, which repealed the MRTP Act. The Competition Act aimed to align India's competition law with international standards and best practices. One of the fundamental aspects introduced by the Act was the regulation of "combinations" – mergers, acquisitions, and amalgamations – which could potentially impact market competition.

The introduction of the combination provisions marked a significant shift in India's approach towards mergers and acquisitions. It established the Competition Commission of India (CCI) as the regulatory authority responsible for scrutinizing and approving combinations to ensure they do not adversely affect competition. This move was essential to prevent the formation of monopolies or the abuse of dominant positions in various sectors of the economy.

Under the Competition Act, the CCI examines proposed combinations to assess their potential impact on competition within India. This scrutiny helps in maintaining market dynamics, preventing unfair trade practices, and promoting consumer choice. By establishing clear guidelines for combinations, the Competition Act fosters a competitive business environment, encouraging healthy competition, innovation, and overall economic growth while safeguarding the interests of consumers and smaller market players.

SCOPE:

The regulation of combinations under the Competition Act, 2002 in India encompasses various corporate transactions, including mergers, acquisitions, amalgamations, and joint ventures, regardless of the sector. It applies to both domestic and international transactions, ensuring that no industry is exempt from scrutiny. The regulation’s scope also covers collaborations between entities that might lead to anti-competitive practices, safeguarding fair market competition.

WHAT ARE COMBINATIONS?

Section 5[2] of the Competition Act explains 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'.

2. The Competition Act of 2002, Section 5, defines "Combinations" with respect to assets and turnover (a) only in India and (b) both inside and outside of India.

Section 5 of the Competition Act, 2002 in India deals with combinations. In the context of this section, a combination refers to an acquisition, merger[3], amalgamation[4], or joint venture arrangement between enterprises. The primary objective of this section is to prevent anti-competitive practices that may arise due to such combinations.

Under Section 5, combinations that cause or are likely to cause an appreciable adverse effect on competition within the relevant market in India are scrutinized by the Competition Commission of India (CCI). This scrutiny is aimed at ensuring that these combinations do not adversely impact competition, consumers, or the market structure.

The Act mandates that parties to a combination must notify the CCI about the proposed combination if certain asset or turnover thresholds are met. The CCI assesses the potential impact on competition and may approve the combination, approve it with modifications, or prohibit it if it is found to be anti-competitive. In summary, Section 5 of the Competition Act, 2002 empowers the Competition Commission of India to regulate and scrutinize combinations to safeguard fair competition and prevent practices that could harm the market dynamics in the country.

TYPES OF COMBINATIONS:

Under the Competition Act, 2002 in India, combinations are broadly categorized into different types based on the nature of the transaction. These types of combinations include:

Acquisition: This occurs when one company acquires the assets, shares, or control of another company. It can be through agreements, shares, voting rights, or assets.

Merger: A merger happens when two or more companies combine to form a new company. The existing companies cease to exist as separate entities and merge their resources and operations into a single entity.

Amalgamation: Amalgamation is similar to a merger but typically involves the blending of assets and liabilities of two or more companies into one. The shareholders of the merging companies usually become shareholders of the amalgamated company.

3. See: Siddharth Bawa, Law of Competition in India, Allahabad Law Agency, First Edition 2005, Chapter III: Prohibition of Certain Agreements, Abuse of Dominant Position and Regulation of Combinations, p.28

4. See: www.investopedia.com/terms/a/amalgamation.asp, Visited on: 17-09-2023. In India, however, we have merger in two defined forms i.e. merger by absorption and merger by consolidation, hence- merger and amalgamation are considered one and the same thing..

Takeover: A takeover happens when one company acquires control over another company, often against the will of the target company's management. Takeovers can be hostile or friendly, depending on the approach of the acquiring company.

Joint Venture: A joint venture is a business arrangement where two or more companies collaborate to undertake a specific project or to achieve a common goal. In a joint venture, the participating companies remain independent entities but work together for a shared purpose.

Under the Competition Act, combinations that meet certain asset and turnover thresholds are required to be notified to the Competition Commission of India (CCI) for approval. The CCI assesses these combinations to ensure that they do not have an appreciable adverse effect on competition in India. This regulatory process helps in promoting fair competition and preventing anti-competitive practices in the market.

THRESHOLDS FOR COMBINATIONS:[5]

Under the Competition Act, 2002 in India, certain thresholds determine which combinations (mergers, acquisitions, amalgamations, etc.) are required to be notified to the Competition Commission of India (CCI) for approval. These thresholds act as a filter, helping the CCI focus on combinations that are more likely to impact competition significantly.

Assets and Turnover Thresholds: The combination must exceed certain asset and turnover thresholds. If the combined assets of the merging entities in India are worth more than INR 5000 crores (approximately USD 675 million), or the combined turnover is more than INR 15000 crores (approximately USD 2 billion), then it is mandatory to notify the CCI.

Global Assets and Turnover: If the combined global assets of the merging entities exceed $2 billion, or the global turnover is more than $6 billion, then the combination must be notified to the CCI, provided that the entities have Indian assets or turnover above the specified thresholds.

5. See: Krishan Keshav & Divya Verma, Competition and Investment Laws in India, Singhal Law Publications, Chapter 2: Prohibition of Agreements, Abuse of Dominant Position and Regulation of Combinations, p.82-83.

REGULATION OF COMBINATIONS

Once any merger, amalgamation or any merger that has been classified as a combination, it has to adhere to the regulations laid down in Section 6 of the Competition Act, 2002. Section 6(1) proscribes the formation of combinations that are likely to have an appreciable adverse effect on competition in the relevant market in India and further declares that such combinations should be deemed void. Now subject to the proscription laid down in Section 6(1) of the Competition Act, if any person or enterprise thinks fit to form a combination, formation of a combination is possible with the sanction of the Competition Commission India. The following system is required to be followed before the Competition Commission of India passes an order of approval or rejection with respect to the desired combination.

Submission of Notice to CCI

As per Section 6(2) of the Competition Act, any person or corporation who intends to set foot into a combination has to compulsory give a notice to the Commission. The notice has to be in the format précised and it should be followed by the prescribed fee and such notice has to communicate all the particulars of the proposed combination. The notice must be given to the Commission in thirty days of receipt of approval from the board of directors of any enterprise in pursuit to enter into a merger or amalgamation, or within thirty days of performance of any agreement or other document for the acquisition of any enterprise or to acquire to have the power over any enterprise. Though, no combination can come into reality unless 210 days have passed from the date on which the Commission had received notice from the corporation under Section 6(2), or the date on which the Commission has passed any order on the combination under Section 31 of the Competition Act (which offers with orders of the Competition Commission of India on combinations), whichever comes earlier.

Disposal of Notice by CCI

Amidst the receiving of the notice under Section 6(2), the Commission will scrutinize the notice and form a prima facie opinion if the bring forward combination is likely to, or has provoke an appreciable adverse effect on competition in the relevant market. If the Commission is of the prima facie opinion that the combination is to be expected, or has provoked an appreciable adverse effect on competition in the relevant market, it will examine the combination under the investigation procedures provided in Section 29 of the Competition Act.

Passing of order by CCI

The powers to issue orders on combinations are laid down under Section 31 of the Competition Act and are given to the Competition Commission of India. After investigation occurs, assuming the Commission is of the assessment that any combination does not, or isn't probably going to significantly affect rivalry, it shall by order confirm the combination with reference to which notice was brought into the Commission under Section 6(2).

On the other phase, after disquisition, if the Commission is of the opinion that the combination has, or is likely to have an perceptible adverse sequel on competition in the applicable request, the Commission will channelize that the combination shall not come into sequel and similar combination will be supposed void. Still, if the Commission is of the opinion that the combination has, or is likely to have, an perceptible adverse sequel on competition but similar adverse sequel could be removed by making certain variations to the proffered combination, it might propose applicable variations to the combination and to the parties to similar combination. The parties to the combination, who accept similar variations as proffered by the Commission, have to make similar revision within the time prescribed by the Commission. However, who have accepted the revision fail to bear out the revision within the prescribed time, similar combination shall be supposed to have an perceptible adverse sequel on competition in the applicable request, If the parties to the combination.

In case the parties to the combination reprobate to accept the variations proffered by the Commission similar parties can, within thirty working out days of the revision proffered by the Commission, blink amendments to the variations proffered by the Commission. If the Commission is gratified with the amendments submitted by the parties it'll authorize the combination by making an order. still, if the Commission doesn't accept the emendations proffered by the parties to combination, also the parties are allowed a further period of thirty working out days within which similar parties will have to accept the variations originally proffered by the Commission If the parties still fail to accept the revision proffered by the Commission, the combination shall be supposed to have an perceptible adverse sequel on competition.

Still, the accession or acquiring of control or junction or admixture, will be dealt with by the authorities under any other law for the time being in manpower as if similar accession or acquiring of control or junction or admixture hadn't taken position and the parties to the combination shall be dealt with consequently, If the Commission has ranged a combination to be void.

EXEMPTIONS TO COMBINATION REGULATION

The set of laws on combinations as provided in Section 6 of the Competition Act, 2002 are not pertinent to contribute to subscription, or financing facility or any acquisition by a public financial institution, foreign institutional investors, bank, or venture capital fund pursuant to any contract of a loan agreement or investment agreement. On the other hand, these institutions still have to put forward definite essential information to the Commission. Section 6(5) states that the public financial institution, foreign institutional investor, bank or venture capital fund, needs to document data with the Commission in somewhere around 7 days of the date of securing and the recording needs to be done in the recommended way. All subtleties of the securing must be given to the Commission including the subtleties of the control, conditions for exercise of such control and the outcomes of default under the credit or speculation arrangement.

CRITICAL ANALYSIS:

Combination regulations under the Competition Act, 2002 play a crucial role in ensuring a balance between fostering economic growth and preventing anti-competitive behavior.

Strengths:

Promotion of Fair Competition: Combination regulations prevent the abuse of market power by larger corporations. By scrutinizing mergers and acquisitions, the law ensures that no single entity becomes too dominant, which can stifle competition.

Consumer Protection: Fair competition typically leads to lower prices, better quality products, and improved services. By preventing anti-competitive combinations, consumers are protected from monopolistic practices that can harm their interests.

Market Innovation and Efficiency: Healthy competition encourages companies to innovate and improve efficiency to gain a competitive edge. It leads to a dynamic market where businesses constantly strive to enhance their products and services.

Global Integration: The regulations ensure that Indian companies entering into global mergers do not engage in practices that could harm international competition, fostering positive relationships with global partners.

Transparency and Accountability: The scrutiny process ensures transparency in business transactions. Companies are held accountable for their market behavior, promoting ethical business practices.

Shortcomings and Challenges:

Complexity and Delay: The approval process can be lengthy and complex, causing delays in business decisions. This can be a significant challenge, especially in fast-paced industries where quick decisions are crucial.

Inconsistency in Enforcement: There might be inconsistencies in the enforcement of these regulations, leading to uncertainty among businesses. A lack of uniformity in decision-making can create confusion and hinder predictability.

Burden on Small Businesses: Small and medium-sized enterprises (SMEs) might find it burdensome to comply with the regulations, potentially impeding their growth. Compliance costs can be disproportionately higher for smaller players.

Changing Market Dynamics: The digital economy and rapid technological advancements pose new challenges. Adapting the regulations to address emerging issues in the digital market, such as platform dominance and data-driven mergers, requires continuous updates and amendments.

Resource Intensive: The Competition Commission of India (CCI) needs substantial resources to effectively evaluate complex combinations. Insufficient resources can affect the CCI's ability to thoroughly assess every case.

Impact on Investments: Stringent regulations might deter foreign investments. Investors might be cautious about investing in India if the approval process is perceived as overly cumbersome.

While the combination regulations of the Competition Act, 2002 are crucial for maintaining a competitive market, there is a need for continuous evaluation and adaptation. Striking a balance between rigorous scrutiny and fostering a conducive business environment is essential. Regular reviews and amendments that address emerging challenges are necessary to ensure that the regulations remain effective and supportive of economic growth and fair competition.

CONCLUSION:

In conclusion, the regulations governing combinations under the Competition Act, 2002 in India represent a critical framework for promoting fair competition, protecting consumers, and fostering a dynamic and innovative marketplace. By scrutinizing mergers, acquisitions, and other forms of corporate restructuring, these regulations prevent the concentration of market power in the hands of a few, ensuring that consumers have choices, prices remain competitive, and businesses continue to innovate.

However, as with any regulatory framework, there are challenges. The complexity of the approval process, potential delays, and the burden on small businesses highlight areas that need continuous attention. Moreover, in the face of rapidly evolving industries, especially in the digital realm, it's crucial for these regulations to adapt swiftly to address emerging challenges such as data-driven mergers and digital monopolies.

A balance must be struck between stringent scrutiny and encouraging investments. It's imperative for the Competition Commission of India (CCI) to have the necessary resources and flexibility to adapt the regulations to the changing market dynamics. Furthermore, fostering international cooperation and aligning Indian regulations with global best practices can enhance India's position in the global market.

In essence, while there are challenges, the combination regulations are a cornerstone of a healthy market economy. With regular reviews, a proactive approach to emerging challenges, and a commitment to fair competition, the Competition Act, 2002, can continue to play a pivotal role in ensuring a competitive, innovative, and consumer-friendly business environment in India.

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