ROLE OF COMPETITION COMMISSION OF INDIA ON MERGERS AND ACQUISITION

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ABSTRACT

The Competition Commission of India was implemented in order to promote fair competition. CCI replaces the old MRTP Act which followed the policy of “Command-and-Control”. MRTP Act was unable to keep up with needs of the global economic market. Despite the numerous amendments that were made to the MRTP Act, it wasn’t able to match the contemporary economic reforms of the time which led to the implementation of CCI. But the question arises is whether CCI is able to match the contemporary economic needs while at the same time promoting fair competition in the market. With growing M&A transactions, interference of CCI can prove to be a little harsh and stringent but role of CCI is significant in order to balance both competition and economic reforms.

Keywords: Mergers, Acquisition, Competition Commission of India

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INTRODUCTION

When M&A takes place, ownership of two or more than two companies joins together. In merger, either a new enterprise is formed when two or more company’s merges or one of the companies is absorbed in other totally and loses its identity. After the merger, ownership of all the assets and liabilities of the company which is absorbed is transferred to the new company. Usually, the main reason behind merger is to expand and stimulate the growth of the company which ultimately hits the economies of scale. “The last 2 years have witnessed significant cross-border mergers and acquisitions activity by Indian companies in India on a scale that is unprecedented. This global expansion is likely to occur by inorganic growth, and it is, therefore, imperative that new hurdles are not erected to dampen the growth plans of these companies. There is a need to further strengthen the policy change process rather than impose curbs on industrial expansion”.2

HISTORY OF MERGERS AND ACQUISITION

History of Mergers and Acquisition can be trace back to the 19th century when there was dominance of power by anti-competitive companies. Mergers which took place during this period were mostly horizontal in nature and dealt with mainly those sectors which favor their productivity like railways, steel, electricity etc. It was mainly due to the unorganized and discouraging legislative structure of India. Later, implementation of Sherman Act gave way to the de merging of anti-competitive mergers. But, it was only after 1988 when the concept of Merger and Acquisition became popular in India.

Before 1988, country witnessed very few and unsuccessful number of M&A deals and most of them were friendly acquisition or horizontal acquisition. The main reason behind the country attracting few M&A deals was the limitation and regulations imposed by the Monopoly and Restrictive Trade Practices Act (MTRP Act), 1969, which was the very first act dealing with competition and unfair trade practices. As per the act, in order to get approval for any M&A deal, the company has to go through various strict regulatory procedures which were often

2 Available at http://www.competition-commission.india.nic.in/regulations/Comments_Regulations/cii_Regulation_of_Combinations.pdf
troublesome and onerous. It was only in the year of 1988, when India witnessed one of its first and most popular hostile takeovers attempt by Swaraj Paul. Though the attempt by Swaraj Paul to takeover Escorts ltd. And DCM was unsuccessful and ineffective but it opened the gates for other Mergers and acquisition deals and hostile takeover to take place in India. Cross border acquisitions along with unfriendly hostile takeovers became regular.

In 1992, globalization further stimulated the growth in M&A deals and liberalization led to de regulation in various laws and policies controlling the economic market. Since, then India has seen a tremendous rise in M&A transactions. $27.62 billion of M&A deals took place in previous financial year 2015-2016 and this financial year 2016-2017 set the highest record for M&A deals worth $61.26 billion. Thus, in order to achieve globalization India opened its economy by adopting the idea of liberalization and further removing various strict regulatory laws. This helped Indian companies to expand themselves on a worldwide basis as well as allow foreign companies to enter the country, which led to a sudden increase in competition within the country. But, there are various challenges and complexities which arose while facing such competition and in order to face such challenges India protected itself by framing various competition laws and at the same time adopted liberalization in its framework to create an ideal market for promoting upcoming M&A deals. The Competition Act of 2002 is one such step taken by Indian government to liberalize its restrictive laws which were previously acting as barrier for the Indian companies as well as foreign companies to enter into M&A transactions.

**MRTP AND COMPETITION ACT 2002**

In order to achieve the Indian economic liberalization of 1991, the Indian government felt the need to introduce new competitive laws so as to prevent the unfair competition taking place in the market. Hence, the idea of all new Competition Commission was implemented through the enactment of the Competition Act 2002. The main objective of the act is to “provide the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants.
The present Act replaces the old MRTP Act which followed the policy of “Command-and-Control”. The period when MRTP act governed the country was also known as License Raj. “The outcome of the ‘License-Raj’ system was restriction of freedom to entry into industry which ultimately resulted in concentration of power into few individuals or groups”.

The role played by Competition Commission is very crucial because it acts as a market regulator by balancing both the implementation of competitive laws by controlling unfair trade practice and also creating an ideal market which is liberal enough for the companies to trade freely among each other.

The roots of this act can be traced back to the principle enshrined within Article 38 and 39 of the Directive Principles of State Policy and the Preamble of our Constitution. An obligation to maintain a social order containing political, economic and social justice in every sphere of any institution in the nation rests upon the state, as is mandated by Article 38 of the Constitution. Moreover, these provisions also address the need to remove and reduce the irregularity in income with respect to not only individuals but also to various groups that are present in different areas. This sentiment has been furthered by Article 39 which states that the state should ensure that the economic systems does not operate in such a way that it leads to consolidation of wealth as well as means of production leading to harm of the general population.

The changing scenarios globally and its resulting effects on the economic landscape meant that the MRTP Act was unable to keep up with needs of the global economic market. Despite the numerous amendments that were made to the MRTP Act, it wasn’t able to match the contemporary economic reforms of the time. “It lacked provisions to deal with anti-competitive practices that may accompany the operation and implementation of the WTO agreements”.

“However, to promote competition and to promulgate a modern competition law, Government constituted a committee in 1999, based on the recommendations of which, the Competition Act,
2002 was enacted and notified in January 2003, and the Competition (Amendment) Act, 2007 was enacted in September 2007".6

The act basically talks about 3 types of arrangements; (i) exploitation of dominant position, (ii) prohibition of those agreements which are in contravention to the competition and (iii) a proper regulation of combinations. Competition Act plays a crucial role in M&A transactions. All kinds of M&A transactions need to be in compliance with CCI regulations. Without the approval of CCI, no M&A deal can take place.

The main idea behind the Act is to promote fair competition within the market and to ensure that anti-competitive activities are not taking place. By taking approval from CCI companies ensures in advance that there is adverse effect on the market. "Where a competition authority considers that a merger transaction will result in anti-competitive effects, it can require the merging parties to enter into commitments to remedy those anti-competitive effects, or prohibit the transaction entirely"7

MERGERS AND CCI

The main debate going around nowadays is the delay in many deals of consummation which would ultimately ensue arising out of the Merger Control Regime. In between of this debate, there are other exemptions which actually give breather for all kinds of industries specially dealing with acquisitions which are non-strategic in nature. If these exemptions wouldn’t have been there then these non-strategic acquisitions would have gone through strict unwarranted anti-trust scrutiny.

But, 4 years after the implementation of Merger Control Regime a new situation has arisen. Though, it has ensured speedy decisions but CCI has shown various concerns because of the delays taking place due to Regulations cumbersome process of approval and not only this, there different kind of exemptions has also proven to raise many unsolved questions.

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6 Available at http://www.thehindubusinessline.com/todays-paper/a-review-of-competition-law-from-an-ma-perspective/article1115561.ece

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MANGALORE FERTILIZERS AND CHEMICALS LIMITED CASE

Before the advent of Merger Control Regime, people used to take many things for granted and lack of regime led to the references taken out from different other market controlling regulations like SEBI (how SEBI handled under those situations). However, CCI’s new orders are adding new elements to be taken into considerations for various kinds of deal makers. One such example is of Mangalore Fertilizers and Chemicals Limited (“MFCL”) where heavy fines were imposed on the 2 architects involved in a hostile bid of MFCL. This shows us the impact of Merger Control Regime on deal breakers and how they have to battle with it at one or the other point of time. The origin of MFCL case takes us back to the controversy arises out of UB Group (MFCL promoters) and Vijay Mallya which led to the decline of Kingfisher airlines. The decline of Kingfisher Airlines paved way to Deepak Fertilizers who always had an eye on MFCL in order to acquire it. Deepak Fertilizers wanted to create an important position in MFCL by buying its share through block deals and purchasing in bulk. And, the problem was the MFCL shares were easily accessible at high discount in market due to the liquidity created by UB Group invocation of pledge. Vijaya Malya looking at the upcoming danger purchased white knight. While on the other hand Adventz group brought 16% stake and Deepak fertilizer brought 24.46% in MFCL. Further, after an year Deepak Fertilizers made another acquisition of 0.8% whereby, triggering takeovers code mandatory open offer of 26%. Mindful of the upcoming danger of hostile bid, both UB Group and Vijay Malya (MFCL promoters) made an agreement with Adventz Group. The agreement was to make an open offer jointly whereby, acquiring 26% of MFCL’s public shareholders.

At one hand CCI did gave the approval for both the offers made by Adventz/UB Group an Deepak Fertilizers, a hefty fine was imposed on the two groups for making the open offer without taking the CCI’s approval. CCI clearly said that acquisition made by Adventz Group in four trenches to make an acquisition of 16% was in contravention to the act. CCI called it a strategic acquisition as it was done in with intent to gain major control in MFCL. Not only this CCI further held that the acquisition made by Deepak Fertilizers acquiring 0.8% & 24.46% shares of MFCL was also in contravention to the act and was made with intent of gun jumping.

CCI totally discarded the fact that both the parties Deepak Fertilizers and Adventz Group comes under the exemption of the Regulation. According to the Regulation, a combination of both
turnover threshold and financial assets including the approval from CCI while acquiring shares is necessary for exemption.

As per regulation 4 of CCI which solely talks about asking for exemption from CCI, “an acquisition of shares or voting rights, solely as an investment or in the ordinary course of business in so far as the total shares or voting rights held by the acquirer directly or indirectly, does not entitle the acquirer to hold 25% or more of the total shares or voting rights of the company”8. Thus, relying on the act and above evidences CCI held that acquisition made by Deepak Fertilizers and Adventz group by purchasing of 24%,16% and subsequently 0.8% was not done to make any investment instead was done to acquire and hence was a strategic acquisition. Private equities usually use this acquisition in order to acquire minority position.

The main precedence set by this case was that, the decision given by CCI actually analyzed the word control in the Exemption regulation. Other than that, CCI also laid emphasis on the scope of the sentence “solely made as an investment”. CCI pointed out that “solely made as investment” does not suggest “strategic investment” instead it indicates “passive investment”. Therefore, any investment made with intent of strategic investment in a target company will not be covered by the phrase “solely made as an investment”. But whether this exemption is actually feasible in today’s world? Looking at the exemption, we can clearly see that it only allows acquisition of shares till 25% which is a large amount of threshold to be achieved by any company without including the intention of strategic investment.

If we look at the decisions taken by CCI, we may find them really harsh in par with India but if we look at globally, the situation is quite different. The decision given by CCI is parallel with most of the other global regimes and laws. For instance antitrust laws enacted in US. US also has identical kind of exemption which talks about exemptions for all such kind of acquisition made for ‘solely for investment purposes’. In US, intentions of the parties are taken into consideration while determining whether the investment made by the party is strategic investment or ‘solely for investment purposes’. This is basically due to the fact that the laws US, in relation with exemption are interpreted in a very narrow manner.

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8 Prasad G. Godbole, Mergers, Acquisitions and Corporate Restructuring, 2nd Edition, Pg.286
CONCLUSION

It is quite clear that CCI interference in M&A transactions can prove to be harsh in nature but at the end strict scrutiny of these acquisitions is the need of an hour. For eg, various companies acquire very small percentage of shares over time (less than 5%) in order to avoid public disclosure. Such type of transaction can lead to hostile bids and ultimately unfair competition which CCI wants to eliminate at every cost. Looking at the case of Vjay Malya and MFCL, it is clear that no matter how much resources and power you have in your hand, you will always have to face CCI regulations at one stage or the other. But, even though there were many legal clarifications given in the decisions of CCI, most of the questions are still unanswered like if at the initial stage the intent of the party while acquiring the shares were for solely for investment and not strategic but in later years the intention changes, will the initial intention for solely investment purpose be considered or the one at the later stage? Looking at the amendments made in the CCI guidelines and the growing power of it, perhaps there will be more guidelines and proper framework regulating mergers in India in order to answer these questions.