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THE DELICATE ACT OF BALANCING: A COMPREHENSIVE GUIDE ON THE MERGER CONTROL EXERCISE IN THE COMPETITION JURISPRUDENCE IN INDIA

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ABSTRACT

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A merger or a combination inevitably brings about a change in the concentration and use of a market power. This change can be attributed to reduction of the number of players operating in the market which results in an increase in the market share controlled by the merged entity. It has to be noted that the Competition Commission of India (hereinafter 'CCI') prohibits any such combinations which are likely to be anti-competitive and allows those which are likely to have no adverse effect on the market. This scenario requires a delicate balancing act. The paper analyses the Competition Act, 2002 specifically Section 5 and 6 and provides an overview of the enforcement mechanism. A special emphasis has been laid down on the Merger Regulation, 2011 in order to discuss and clarify the procedure involved. A hypothetical case study of a merger of two pharmaceutical companies has been included in order to provide a comprehensive guide for filling Form 1 provided by the commission. This part of the paper provides a pragmatic charter on determination of overlapping products and provides apt modus to ascertain the figures required to be filled in the concerned Form. In addition to the specification under the Indian jurisprudence the paper encompasses a multijurisdictional analysis of the substantive tests for prohibiting mergers in other countries. This has been done in order to ascertain the approach of other competition regimes in their quest to achieve the right balance between prohibition and permission in merger control.

Keywords: Merger Control, Form 1, Multijurisdictional analysis, Threshold, Adverse effect, Grounds of Rejection

1. INTRODUCTION

1.1. Overview of Combinations & Merger Control Policy

There are primarily two ways of growth- organic and inorganic- for a business entity. Organic growth as the name suggests relates enhancement in the prevailing structure by increasing customer base, higher sales etc. An inorganic growth on the other hand enables the organisation to attain accelerated growth. This may include a corporate restructuring through a merger, amalgamation etc. Mergers and acquisitions (or combinations) refer to a situation where the ownership of two or more enterprises is joined together to form a new entity.[1] This is a strategy adopted for inorganic growth.[2] A merger is said to occur when two or more companies combine to form a new company.[3] These companies may merge with an existing company or they may merge to form a new company. The assets and liabilities of the transferor company become the assets and liabilities of the transferee company after the merger.[4]

The purpose of a merger is usually to achieve economies of scale, operating economies, diversification of products, synergy.[5] The other advantages of a merger includes- achieving management efficiency or exiting an industry, increasing market power etc. There are several mergers happening around the globe. A brief overview of the M&A deals can give us a fair idea about the boom of such transactions:

Particulars	**2011**	**2010**
Number of deals involving Indian entities	806	1135
M&A Deal value	$34.4 Billion	$60.7 Billion
No. Of 'Billion Dollar Deal'	7	12
Average size of a deal	$104.6 Million	$121.1 Million

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[1] De Rebus, 1+1=3: A brief overview of merger requirements, Available athttp://www.saflii.org/za/journals/DEREBUS/2013/123.html (Last visited on 13.4.2014)

[2] Case M 737, OJ [1997] L 201

[3] Case M 1806, decision of 26th July 2000

[4] *Ibid*

[5] Aamukthamaalyada, Competition Regulation of Mergers and Acquisitions, Available at, http://consumer.indlaw.com/search/articles/?c09b7d9c-1477-4cda-b197-be5e695ae25d (Last visited on 12 January 2014)

Table showing M&A deals across the world in terms of value

It is undeniable that the firms wish to merge in order to eliminate competition between them. However there can be adverse effect of an unchecked merger. Here comes the 'merger control' under the competition law for rescue. Competition law forbids the abuse of market power.[6] The authorities today have an ex ante control on mergers.[7] Most mergers cause no harm to competition. However there are cases wherein it can be predicted that the changed structure of market will be harmful to consumer welfare.[8] Merger control can be justified on the ground that they lead to firms of huge strength which would be antithetical to a balanced distribution of wealth. The government is concerned with certain mergers as they may result in the control of indigenous firms passing to overseas companies. Therefore the modern competition law has been developed in such a way that it permits the beneficial merger but restricts the one that can potentially harm the Indian market.

1.2.The Constitutional Aspect:

Articles 38 and 39 of the Constitution of India mandate, inter alia, that the State shall strive to promote the welfare of the people by securing and protecting as effectively, as it may, a social order in which justice social, economic and political shall inform all the institutions of the national life, and the State shall, in particular, direct its policy towards securing the same.[9] The merger control regime under the Competition Act is a modus to actualize this economic objective.[10]

2. INDIAN MERGER CONTROL REGIME:

The main object of Indian antitrust law is to make enterprises compete fairly. It is an undeniable true that the Indian competition law model is based on the Sherman Act and the EU anti trust laws however the Competition Act, 2002 has encompassed certain

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[6] GORE Daniel (et al.). *The economic assessment of mergers under European competition law*. Cambridge: Cambridge University Press, 2013.
[7] RODGER Barry (ed.). *Landmark cases in competition law: around the world in fourteen stories*. Alphen/Rijn: Kluwer Law International, 2013.
[8] LOWE Philip, MARQUIS Mel (eds). *Merger control in European and global perspective*. Oxford: Hart, 2013.
[9] Why India Adopted a new Competition Law, Available at http://www.cuts-international.org/pdf/wiancl.pdf, (Last visited 16.7.2014)
[10] Ibid

modifications in order to suit the need of the Indian market.[11]This segment would provide us a brief overview of the legislation that governs the merger control regime in India.

2.1.RaghavanCommittee Report

In 1999, the then Department of Company Affairs, Ministry of Law Justice and Company Affairs, constitutued a high level committee on competition policy and law under the chairmanship of Shri SVS Raghavan.[12] The committee opined that India needed a suitable legislative framework in the light of international economic developments for the purpose of promoting competition. It also stated that the MRTP Act was redundant to combat with issues arising out of a merger or a combination. The committee report intrinsically contained the reason as to why combinations must be regulated. A merger leads to a 'bad' outcome only if it creates a dominant enterprise that subsequently abuses its dominance. To some extent the issue ananlogous to that of agreements among enterprises and also overlaps with the issue of dominance; viewed in this way it is quite justified to justify the need to regulate the mergers.

2.2.Substantive Test:

The Act contains a general prohibition that no person shall enter into a transaction which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a transaction shall be void.[13]

The test of whether a merger is to be permitted or not should be based inter alia on the following[14]:

i. The expected impact of the merger on the market power and competition in the relevant market.
ii. Given the size and growth of the market and the presence or absence of entry barriers, an assesement of how the market is expected to evolve.
iii. Do the markets of the merging entities overlap?

2.3.Review of Section 5 of the Competition Act:

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[11] American Bar Association Sections of Antitrust Law and International Law and Practice, Report on the Internationalization of Competition Law Rules: Coordination and Convergence 4 (1999).
[12] Rakesh Basant and Sebastian Morris, Competition Policy in India: Issues for a Globalising Economy, Economic & Political Weekly, July 29, 2000, 2735.
[13] Ibid
[14] Handbook on Mergers, Amalgamation and Takeovers, ICSI, 5th Edition, 2012, pp.127

The most important legal issue in merger analysis is jurisdictional, that is, which mergers or amalgamations are important enough to be considered 'combinations' which attract regulatory scrutiny.[15] Section 5 of the competition act defines combination by providing threshold limits on assets and turnovers. At present, any acquisition, merger or amalgamation falling within the ambit of the thresholds constitutes a combination.[16]

In India

Applicable to	Assets	Turnover
Individual	1,500 Crore	4,500 Crore
Group	6,000 Crore	18,000 Crore

In and outside India

Applicable to	Assets	Turnover
Individual	750 million	2250 million
Group	3 billion	9 billion

2.4.Review of Section 6 of the Competition Act, 2002

Section 6 of the Competition Act prohibits any person or enterprise from entering into a combination which causes or is likely to cause an appreciable adverse effect on the competition within the same relevant market and if such a combination is formed it shall be void.[17] Further the section envisages that any person or enterprise who or which proposes to enter into any combination shall give a notice to the commission disclosing details of the proposed combination, in the form prescribed and submit the form together with the fee

[15]Jasinski, P. and Ross, C. (1999) "The Use of Policies for Competition in the Promotion of Structural Change in Transforming Economies", Post-Communist Economies, Volume 11, Issue 2, pp. 193-217.
[16] Section 5(1) and Section 5(2) of the Competition Act, 2002
[17] Section 6(1) of the Competition Act, 2002

prescribed by regulations. Such intimation should be Submitted within thirty days of the trigger event.[18]

3. CASE STUDY TO UNDERSTAND PRACTICAL NUANCES OF FILING

3.1.Introduction of the hypothetical companies

For the purpose of understanding how the merger regulation functions an example can be taken of two merging pharmaceutical companies. A ltd., is a pharmaceutical company with an objective of to create greater access to affordable medicines and reach as many patients as possible worldwide, they have a strong presence in key generics markets across the Asia primarily in India, Pakistan, Myanmar. B ltd., another company with mission to be a leading global healthcare company which uses technology and innovation to meet everyday needs of all patients. There channel of distribution overlaps with that of A ltd meaning thereby that they function in the same geographic market as defined under Section 2 (s) of the Competition Act, 2002.

For the purpose of this case study let us hypothesize that there are only 8 dominant player in the same relevant market as these two companies.

3.2.Product description & Overlapping products

Both the companies manufacture and market around 200 molecules and their derivative combinations in varied dosage forms, catering to patient needs in various therapies. These include Anti-infectives, Cardiovascular, Pain management, Central Nervous System (CNS), Gastrointestinal, Respiratory, Dermatology, Orthopaedics, Nutritionals and Urology. However both of them have their 99.99% profit being generated from the product enumerated in the table mentioned below.

Please note that the following enumerations are hypothetical.

a. *Products of Company A (Table 1)*

[18] Section 6 (2) of the Competition Act, 2002

S.No.	Name of the Medicine	Usage
1.	Benzonatate	A non-narcotic cough suppressant, prescribed for cough. It works by depressing the "cough center" in the brain.
2.	Codeine	Codeine is a narcotic analgesic, prescribed for pain and cough. It is also used for diarrhea.
3.	Aspirin	Aspirin is an analgesic and antipyretic, prescribed for pain, heart attack and fever. The drug decreases the substances that cause pain and inflammation.
4.	Moxifloxacin	It is used to treat eye infection.
5.	Amoxicillin	Amoxicillin and clavulanate is an antibiotic in a group of drugs called penicillins. Amoxicillin and clavulanate fights bacteria in the body

b. Products of Company B (Table 2)

S.No.	Name of the Medicine	Usage
1.	Aspirin	Aspirin is an analgesic and antipyretic, prescribed for pain, heart attack and fever. The drug decreases the substances that cause pain and inflammation.

2.	Moxifloxacin	It is used to treat eye infection.
3.	Amoxicillin	Amoxicillin and clavulanate is an antibiotic in a group of drugs called penicillins. Amoxicillin and clavulanate fights bacteria in the body
4.	Bactrim	Bactrim contains a combination of sulfamethoxazole and trimethoprim. Sulfamethoxazole and trimethoprim are areboth antibiotics that treat different types of infection caused by bacteria

c. *Overlapping products (Table 3)*

S.No.	Name of the Medicine
1.	Aspirin
2.	Moxifloxacin
3.	Amoxicillin

On the basis above mentioned Table 1 & Table 2 it can be seen that both the aforementioned companies are involved in selling of identical or substitutable goods meaning thereby that they are competing in the same relevant market. However before moving ahead it is imperative to understand the financial status of both the companies and the identity that is created after the merger.

3.3.Financial Status of the companies and the merged identity

a) *Asset* (Table 4)

S.No.	Name of the Company	Value (crores)
1.	A Ltd.	500
2.	B Ltd.	800
3.	C Ltd. (Merged Entity)	1300

b) *Turnover* (Table 5)

S.No.	Name of the Company	Value (crores)
1.	A Ltd.	650
2.	B Ltd.	500
3.	C Ltd. (Merged Entity)	1150

4. Analysis of the situation & Filing relevant forms (Form 1/Form 2)

One of the most important aspect that needs to be addressed here is regarding the requirements for prior notification. There are two possibilities. The first is that approval/disapproval of the merger may be obtained before going ahead with the merger. This will be subject to the threshold requirement prescribed under the act. The Second option is that no notification of permission is required and that the threat of action in case of a violation should generally enforce legal behaviour.

In the instant matter it can be seen that both the companies are pharmaceutical giants within the relevant market and therefore there merger prima facie can cause adverse effect on the competition

Section 5 of the Act specifies the threshold limits for turnover and value of assets in India and / or outside India.

a) the target and acquirer jointly or target and enterprise of acquirer engaged in similar business jointly or merged / amalgamated entity have

i. assets > INR 1,500 (1,000) crores or turnover > INR 4,500(3,000) crores in India or

ii. aggregate assets > USD 750 (500) million or turnover > USD 2250 (1500) million in India or outside India.

b) Target and the group to which target or the merged / amalgamated entity will belong after acquisition or merger / amalgamation. would jointly have

i. assets >Rs. 6,000 (4,000) crores or turnover > INR 18,000 (12,000) crores in India or

ii. aggregate assets > USD 3,000 (2,000) million or turnover > USD 9,000 (6,000) million in India or outside India

If a reference is made to the combined value of assets and turnover (as mentioned in Table c) It can be seen that the proposed transaction falls under the ambit of Section 5 of the Act and thus needs to be notified under Section 6 (2).

There are certain information that needs to be filed as required under Section 6 (2) of the Competition Act and CCI (procedure for transaction of business relating to combination regulation) 2011. To understand what are those information we can assume that we are filing the form I/II for the transaction mentioned in the case study. The first of the Form relates to basic corporate information of the parties Foreg. Legal name, Registration no. , Full name & Designation of the person authorized to sign the notice on behalf of the parties. This authorized person needs to be a M.D., Director or CS duly authorized by the Board of Director to represent each party at the CCI. The next part of these forms relates to the financial information of the two parties. In this regard the parties can ascertain the values of turnover through the financial statement for the relevant year. One must be clear on the point as to what Accounting standards as notified or IFRS or the generally accepted accounting principle has been used.The rate of conversion of foreign exchange shall be average spot rate for RBI from the date calculated. In order to calculate the assets one can rely on the mathematical formulae provided under the Competition Act, 2002. In the next segment the company has to define the transaction structure, rationale etc.

For example- rationale of the combination in the present case study can be: A Ltd. has better marketing strategies and reach whereas B Ltd. has a better R&D department. So the rationale for this transaction can be making use of the resource available with the other party. The parties in order to ascertain the this may refer to the target event i.e. any agreement , or resolution by the board of directors etc.

The next section concerns information on relevant market and product/services overlap. The parties can provide a brief write up of business activities or include product description under this.

For e.g. Aspirin: **Aspirin** is known as **acetylsalicylic acid** is a salicylatedrug, often used as an analgesic to relieve minor aches and pains, as an antipyretic to reduce fever, and as an anti-inflammatory medication.

Additionally the parties would also have to disclose about filing and consequence of this transaction in other jurisdictions. The parties in their form would also have to explain the market structure and have to make certain disclosures like 5 largest customer, 5 largest competitors, 5 largest suppliers.

For e.g. 5 largest competitors for the above mentioned parties can be:

a) Dr. Reddy laboratories
b) Cipla
c) Ranbaxy
d) Pfizer
e) Roche

Lastly, there is a section on filing of fees. The fee may be paid by tendering a demand draft or pay order cheque payable in favour of the Competition Commission of India (Competition fund) New Delhi or through ECS by direct remittance to CCI fund Account No. 1988002100187687.

4. CONCLUSION

The Indian merger control regime certainly evokes praise for being a very comprehensive piece of law.When a country decides as a matter of policy to adopt a system of merger control a number of issues have to be addressed. The Indian laws are satisfactorily defines what transactions has to be treated as ‘combination’ within the domain of the act. It also answers the most contentious issues in a very comprehensive manner. Some of the answers that we can directly infer from the act are as follows: How should the acquisition of minority shareholdings and of assets be dealt with? To what extent should a system of merger control apply to the transactions consummated outside India? What should be the specific time period within which this exercise should conclude? What must be the substantive test to review the mergers? However there are certain grey areas in this law too. It is pertinent to note that the provision pertaining to merger regulation makes no direct reference to the Joint Ventures. The formation of a joint venture is not specifically covered by section 5 of the Competition Act, as it only covers the acquisition of an 'enterprise', mergers and amalgamations. As the definition of 'enterprise' under the Competition Act covers a going concern which is undertaking or has undertaken business, a purely 'greenfield' joint venture is unlikely to be considered as an 'enterprise', and would not fall within section 5. Moreover, in most cases, purely 'greenfield' joint ventures are unlikely to meet the thresholds under the target exemption.By contrast, to the extent that the jurisdictional thresholds are met, the establishment of a 'brownfield' joint venture (ie, where parents are contributing their existing assets or businesses to the joint venture) would be notifiable, as it would relate to the acquisition of an 'enterprise' under section 5 of the Competition Act. Further, as discussed above, while calculating thresholds in relation to such a joint venture, the assets and turnover of the parents are also likely to be considered.Also, there is a graveperil that the regulator will "buy" time and M&A transactions will be delayed. For example, under Regulation 30, the Director General is given 60 days to submit his report. But under Regulation 32, this time may be extended to 105 days. In this time period, a transaction with no adverse competitive impact would be unnecessarily jeopardized and be jettisoned by the parties.[19]

Lastly, it is safe to conclude that the current law has successfully maintained the balance as required. It scrutinizes every deal that can hamper the competition level in the country and also ensures that the foreign investors are not demoralized from investing in India. The CCI has combated the teething problems post formation and is now set to make India a country that has zero tolerance zone for anti competitivebehaviour. Has it truly actualized the objective of what is laid down in Competition Act, 2002 ? It remains to be an unanswered question considering it's too early to comment on the policies created two years back. For now, the bureaucrats deserve applause for their endeavour with regard to the merger regulation laws.

[19] Comments on Regulation of Combinations (Sections 5 and 6 of the Act) and the Implementing Regulations, Available at http://www.competition-commission-india.nic.in/regulations/Comments_Regulations/cii_Regulation_of_Combinations.pdf , (Last visited 18.7.2014)

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5.2.E-Resources

- APEC Competition Policy and Law Database http://www.apeccp.org.tw/
- Asia Development Bank Competition Law Toolkit http://www.adb.org/Documents/Others/OGCToolkits/Competition-Law/default.asp
- OECD: Competition http://www.oecd.org/competition