NEXUS BETWEEN MERGER, ACQUISITIONS AND COMPETITION LAW

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Abstract

Mergers and acquisition are methods of corporate expansion. However there is a continuous debate on the subject matter with respect to competition in the market. There are two sets of arguments one is that mergers increase power of reducing competition or swallowing the business competitor, this type of merger is known as horizontal merger. Merger also increases bargaining power of a company. However other argues that mergers and acquisitions are integrations which help companies in diversification of business areas and exploring new vistas in new sectors etc.

Therefore an effort has been made to analyze mergers and acquisition as to whether there are adverse effects of corporate mergers and acquisitions, which leads to monopolies and to what extent mergers and acquisitions should be controlled and its interplay with the competition law in India i.e. how and to what extent Indian Competition Law helps in striking a balance between corporate consolidation and protection of economic interests of the society.

In nutshell the researcher aims to contemplate the advantages and disadvantages of mergers and acquisition with respect to competition in the market and whether competition law plays a complementary role in the process of corporate consolidation and to enlighten the readers of this paper with the same.

The researcher begins with the assumption that mergers and acquisition are advantages for the organization as a tool of corporate restructuring and for the market also, and competition law plays a complimentary role in the furtherance of merger and acquisition and does not unnecessarily act as an impediment in the way of mergers and acquisition.

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Introduction

Mergers and acquisitions are regular and necessary phenomena of the business world and is the bone of contention with respect to the competition law which is studied in this very paper. Mergers and acquisitions have their own advantages such as they help to achieve economies of scale, operating efficiencies, management efficiencies. Mergers and Acquisitions are the modes of corporate restructuring and the synergy is the foremost incentive for it. Synergy is generated by strategic integration of two entities ensuing economies of scale, cost cutting, spreading risk, tax sops, elimination of competition, gaining access to new technology and expanding product of service offerings etc.

However there are number of detrimental effects which might arise from mergers. The argument which goes against mergers is that it might result in monopoly thereby giving rise to monopoly, which decreases the competition in the market. Because of these different sets of arguments it becomes necessary to study the competition anti-competitive effects of mergers and the role of the governments in regulating them. To this effect, India has enacted the new Competition Act, 2002 which has replaced the earlier law i.e. Monopolies and Restrictive Trade practices Act. After passing of the Competition Act there was a shift from curbing monopolies to encouraging competition.

Mergers and Acquisitions- Overview

With globalization and liberalization of Indian economy, there was a sudden increase of competition in the market. To provide institutional support to healthy and fair competition there is a requirement of better regulatory and adjudicatory mechanism. To this effect, India has enacted the new competition law, which replaced the earlier law i.e., Monopolies to Restructuring Trade Practices Act 1969. This is a shift from curbing monopolies to encouraging competition. We have to understand that whether our competition act is preventive or corrective. The preventive seeks to outlaw those forms of behaviour, which if pursued for enough, reduce or eliminate competition. The corrective seeks to eliminate monopolistic power already in existence, or at least to curb certain exercises of this power.[1]

[1] George J. Stinghler, " Mergers and Preventive Anti- trust Policy", University of Pennsylvania Law Reviews, Volume104, 1995, p-178.

According to the Oxford Dictionary "merger" means "combining of two companies into one". Merger is a fusion between two or more enterprises, whereby the identity of one or more is lost and the result is a single enterprise. In merger the assets and liabilities of the companies get vested in another company, the company that is merged losing its identity and its shareholders becoming shareholders of the other company.

Mergers and acquisitions are used synonymously and interchangeably, but there is a fine differentiation between a takeover, merger, acquisition and amalgamation. A "takeover" takes place when one company acquires control of another, usually a smaller business. By contrast a "merger" is a marriage between two companies, generally of roughly equal size. However, in practice it is commonplace to use the word "merger" to include takeover as well.[2]

A takeover may be defined as a transaction or series of transaction or series of transactions whereby a person acquires control over the assets of a company, either indirectly by obtaining control of the management of the company. The distinction between a takeover and a merger is really one of intent and degree in a takeover, the direct or indirect control over the assets of the acquired company passes to the acquirer, whereas in a merger the shareholdings in the combined enterprise will be spread between the shareholders of the two companies, not only at the date of the combination, but substantially so for some time thereafter. In particular with a merger no particular company should be in a position to dominate the other parties to the combination. If one company makes a share-for-share exchange offer for another company, which is of roughly the same size, the former shareholders of the target will finish up holding approximately 50 percent of the share capital of the offeror. Such a combination can legitimately be called a merger if the shareholders in the offeree company substantially continue to hold their shares in the combined entity for some time after the combination takes place, and if the separate management teams of the two companies to a significant degree continue in office after the fusion of the entities activities.[3]

By contrast, if the offeror is many times the size of the target, the operation might properly be regarded as a prima facie "takeover"

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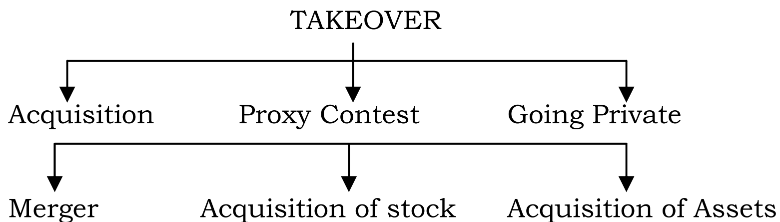
[2] Weinberg and Black, Take-overs and Mergers; p. 1005 (2005), Sweer & Maxwell, London.

[3] Ibid.

(or acquisition) of the target by the offeror. This would still be the case even where the shareholdings in the offeror were far more widely dispersed than in the target and the offeror comes under the joint effective control of the former controller of the offeror and the former controllers of the target, or even under the sole effective control of the former controllers of the target.[4]

A merger refers to the complete absorption of one firm by another. The acquiring firm retains its name and identity, and it acquires all of the assets and liabilities of the acquired firm. After a merger, the acquired firm ceases to exist as a separate business entity.[5]



Reasons of Merger and Acquisition

Under this chapter we will study the various factors which build the rationale behind mergers and acquisition. Some of them rely on the theory of industrial organization and refer to enhancement of the market power, efficiency gains and preemptive motives. Some others rely on corporate governance theories and refer to motives such as the correction of internal inefficiencies, agency problems and capital market imperfections. There are number of motives given by many theorists supported by their hypothesis but in this paper the researcher will only highlight few important motives.

- **Shareholder Gain**

Since the increase in the value of the firm directly benefits its owners (shareholders) it is said that shareholders gain. A firm may increase its market value by increasing its profits. Increasing profits, in turn, is possible by decreasing costs, operating more

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[4] Ibid.

[5] Stephen A. Ross, Randolph Westerfield, Bradford D. Jordan, Fundamentals of Corporate Finance, Third Edition pp. 654, Irwin Inc, USA.

efficiently, implementing optimal incentives to managers or enhancing market power.[6]

- **Economies of Scale**

A firm is said to have economies of scale when its average cost decreases as total output increases. More strictly, economies of scale arrive when the higher the production, the lower the marginal cost. In the short run, when physical capital is held fixed economies of scale make production less expensive. In the long run, they may result from the coordination of the merging firms' investments in physical capital. So, short-run economies of scale may result from mergers because joining two firms allows getting rid of double fixed costs, i.e., costs that involve administrative tasks, customer service, billing, etc. The reason is that the larger firm will have after merger one single team in charge of these tasks instead of two. Short-run economies of scale can also be achieved by a reallocation of output across different units of operation of the merged firm. In the long-run, economies of scale result from the merger if the increase in output more than doubles the increase in all the inputs. This might arise when a larger and financially stronger firm invests in new technologies that substantially improve its production process and its research and development areas.[7]

- **Diffusion of know-how**

If the merging firms have different technological capabilities, human capital, organizational cultures, patents, or simply know-how and it turns out that they are complementary to each other; then, by putting them together, they will most probably achieve a technological progress. Such a technological progress can take the form of product or process innovation.[8]

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[6] Jrisy MOTIS, "Mergers and Acquisitions Motives", Toulouse School of Economics - EHESS (GREMAQ) and University of Crete, February 2007. Available at http://economics.soc.uoc.gr/wpa/docs/paper2mottis.pdf last visited on 25th November 2015.

[7] Juanjuan Wang, "Motives and Effects of Mergers and Acquisitions", University of Nottingham, September 7, 2007. Available at http://edissertations.nottingham.ac.uk/1597/1/07MA_lixjw16.pdf last visited on 25th November 2015.

[8] For more details See Roller, Stennek and Verboven (2006) cited in Jrisy MOTIS, "Mergers and Acquisitions Motives", Toulouse School of Economics - EHESS (GREMAQ) and University of Crete, February 2007. Available at http://economics.soc.uoc.gr/wpa/docs/paper2mottis.pdf last visited on 25th November 2015.

- **Research and Development**

As well as know-how, R&D is a very powerful non-tradable asset that combined in better ways (by merging with a complement) may allow for a technological progress and an increase in the firms' joint production possibilities. Cost savings is a very general concept that may be attained in many distinct ways. What is important for the analysis of merger motives is to identify the type of cost saving, i.e., if it consists on a reduction of average or marginal costs of production, fixed costs or financial costs. Fixed costs are those that do not vary with production but that are necessary to produce. They include for instance administrative support, public relationships, maintenance of property plant and equipment, salaries, advertising, etc. Average costs vary with production, by definition they are total costs divided by total production. Acquiring a high R&D target or a target with patents instead of directly expending on it is another way of saving costs. Transferring more efficient technology from one firm to another clearly decreases total costs.

- **Enhancement or strengthen of market power**

Market power is defined as the ability of a firm or group of firms to raise prices above the level that would prevail under competitive conditions. The ability to exclude competitors is also seen as a result of excessive market power. The scope of enhancement of market power is associated with industry concentration, product differentiation, entry barriers and cost advantages.

- **Empire building**

Also called the managerial discretion motive, it states that managers' objective is to increase the size of the organization they want to lead. Their goal is to grow and the fastest way to do it is by acquiring. The reason might be that their compensation is directly related to the size of the company they manage. This hypothesis has first been formulated by Mueller (1969).[9]

- **Risk spreading or diversification**

Sometimes the overall investment strategy of the manager to construct an optimal portfolio includes mergers and acquisitions. According to the portfolio theory this is indeed a mean, to diversify

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[9] Supra Note 6.

risk and to maximize expected returns. However, sometimes the manager seeks for a personal portfolio rather that an optimal portfolio for the firm. Since he has the power to select the portfolio, personal diversification might be his goal.

It is worth mentioning here that competition authorities generally consider overall economic welfare as consumer surplus rather than total surplus. For purposes of merger enforcement, the issue that matters is the effect on welfare and not whether the transaction will generate gains to the firm or to the manager of the firm. For instance, mergers (of conglomerate, vertical or horizontal type) motivated by managerial gains are not worth analyzed by antitrust authorities as they only involve a redistribution of gains among shareholders and managers. Neither are mergers driven by the empire building motive which effect is a transfer of wealth from shareholders to managers. The same reasoning applies for financial costs reducing mergers, that is, they do not necessarily affect the product market where the merger takes place and thus welfare. In fact, competition authorities do concentrate the assessment of merger effects on the scope of enhanced market power resulted from a horizontal or vertical merger. The reason is that from all these hypotheses of merger motives only the market power one offers a clear potential effect on consumer surplus.[10]

Economist Views

In the context of Industrial economics, mergers and acquisitions are seen primarily as an alternative way of expanding a firm's activities to internal organic growth. However, they can also be used to increase market power by reducing competition in an industry or to shore up a firm's competitive position by acting defensively against a particular rival. While the internal growth is always available as an alternative to external growth, the effects may be quite different. There are a number of private advantages from external growth which are not present when growth is internal.[11]

An existing enterprise may possess a valuable asset in the form of good will. A firm whose products enjoy wide consumer acceptance has an advantage which is not likely to be overlooked by a potential acquiring firm. Procter and Gamble which once and considered its own facilities for manufacturing bleach was not

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[10] Supra Note 6.
[11] John Richard Felton, Conglomerate Mergers, Concentration and Competition. American Journal of Economics and Sociology.

unmindful of the cost of diverting customers away from the Clorox Company whose name had become almost synonymous with household bleach.

Another private advantage of acquisition over a new construction is that it does not increase the number of sellers in the market. This may be of considerable importance if a new entrant either to be efficient or to operate on a national scale would add substantially to industry output and depress prices as a consequence. Finally merger has tax advantages. This include the non-taxability of gains associated with the exchange of stock, the tax savings associated with the exchange of convertible debentures for the common stock of the acquired company, and the ability of the acquiring firm to carry forward any earlier losses of the acquired company.

Combinations can also be used to take advantage of scale economies where there is horizontal integration. Other incentives giving rise to mergers and acquisitions are to increase bargaining power by taking over a supplier or a customer firm, to diversify into other industry sectors or to take advantage of a perceived undervaluation of a business or of various tax- related benefits that are available.[12]

Financial economists tend to view mergers and acquisitions on the one hand, and demergers on the other, as particular types of investment project like industrial economists, they explore the motives for combining businesses, identifying those that seem legitimate and those that are more dubious. Amongst the former objectives are to secure economies of scale or economies of vertical integration, to exploit complementarities or unused tax shields, to gain access to surplus funds, or to eliminate inefficiencies, while the latter include diversification to become a conglomerate, to lower financing costs, or to inflate earnings per share an artificial device that should be picked up immediately by well informed investment markets.

Mergers and Acquisitions can be used to reduce unit costs to reduce the threat of new entrants or to eliminate competitors. Combining with other companies also provides a ready means of diversification, either by introducing new products or by opening up new markets. Another option open to businesses wishing to

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[12] Weinberg and Blank, Takeovers and Mergers, Fifth Edition (2005), p. 1015, Sweet 7 Maxwell, London.

expand is to enter into joint venture arrangements. This has the advantage of requiring a lower level of capital outlay-important where the investors is facing capital rationing constraints- and also ensures a degree of devolved autonomy in the management of the joint venture vehicle.[13]

Types of Mergers and Acquisition

Merger can be categorized as follows –

- **Horizontal**

Horizontal mergers normally involve the joining together of two or more companies, which are producing essentially the similar products or rendering the similar services which compete directly with each other (for example, sugar and artificial sweeteners). A merger is said to be Horizontal if the parties involved undertake directly competing activities. Horizontal mergers produce two consequences that do not arise in either vertical or conglomerate mergers. They reduce the number of firms competing in the relevant market and eventually result in market concentration. This structural change raises two potential competitive issues. Firstly, they weaken the strength of overall competition constraints currently exist in the relevant market. If two potential competitors of the relevant market merge then there may raise a situation of abuse of dominance. This combined entity then may have command over price and price may rise too significantly relative to pre-merger level or they can also limit the output. A merger that has this characteristic is said to give rise to a situation of single firm dominance. This competitive effect is also known as the unilateral effect of merger. Secondly, by eliminating effectiveness of competition merger can also change the shape and nature of competition. Merger may lead to coordination friendly environment. It is more favourable for sustainable tacit collusion. Once merger takes place competition in the market is largely eliminated. The firms that have been coordinating even before merger gain some collective market power after merger takes place. This market power can involve increasing prices, limiting output or dividing up the market. A merger which has these characteristics is said to give rise to collective dominance or alternatively to give rise to coordinated effects.[14]

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[13] Ibid.

[14] Available at http://cci.gov.in last visited on 2th November 2015.

- **Vertical Merger**

Vertical integration arises where combining companies are actual or potential suppliers of goods or services to each other. Backwards integration is where a company seeks to ensure a source of supply, whereas forwards integration is where a company seeks an outlet for its products or services. The advantage of vertical integration is that it reduces uncertainty, facilitating co-ordination and administration. However, anti – monopoly concerns arise because of the risk that opportunities for competitors may be foreclosed: for example, competing suppliers might find themselves excluded from part of their actual or potential market.

- **Conglomerate**

A conglomerate takeover or merger involves the coming together of two companies in different industries: i.e. the businesses of the two companies are neither related to each other horizontally nor vertically. In a pure conglomerate, there are no important common factors between the companies in production, marketing, research and development, or technology. In practice, there is a wide range of situations falling short of pure conglomerate in which there is some degree of overlap in one or more of these common factors.

- **Cash Merger**

In a typical merger, the merged entity combines the assets of the two companies and grants the shareholders of each original company shares in the new company based on the relative valuations of the two original companies. However, in the case of a 'cash merger', also known as a 'cash-out merger', the shareholders of one entity receives cash in place of shares in the merged entity. This is a common practice in cases where the shareholders of one of the merging entities do not want to be a part of the merged entity.

- **Triangular Merger**

A triangular merger is often resorted to for regulatory and tax reasons. As the name suggests, it is a tripartite arrangement in which the target merges with a subsidiary of the acquirer. Based on which entity is the survivor after such merger, a triangular merger may be forward (when the target merges into the

subsidiary and the subsidiary survives), or reverse (when the subsidiary merges into the target and the target survives).

Acquisition

An acquisition or takeover is the purchase by one company of controlling interest in the share capital, or all or substantially all of the assets and/or liabilities, of another company. A takeover may be friendly or hostile, depending on the offeror company's approach, and may be affected through agreements between the offeror and the majority shareholders, purchase of shares from the open market, or by making an offer for acquisition of the offeree's shares to the entire body of shareholders.

- **Friendly Takeover**

Also commonly referred to as 'negotiated takeover', a friendly takeover involves an acquisition of the target company through negotiations between the existing promoters and prospective investors. This kind of takeover is resorted to further some common objectives of both the parties.

- **Hostile Takeover**

A hostile takeover can happen by way of any of the following actions: if the board rejects the offer, but the bidder continues to pursue it or the bidder makes the offer without informing the board beforehand.

- **Leveraged Buyouts**

These are a form of takeovers where the acquisition is funded by borrowed money. Often the assets of the target company are used as collateral for the loan. This is a common structure when acquirers wish to make large acquisitions without having to commit too much capital, and hope to make the acquired business service the debt so raised.

- **Bailout Takeovers**

Another form of takeover is a 'bail out takeover' in which a profit making company acquires a sick company. This kind of takeover is usually pursuant to a scheme of reconstruction/rehabilitation with the approval of lender banks/financial institutions. One of the primary motives for a profit making company to acquire a

sick/loss making company would be to set off of the losses of the sick company against the profits of the acquirer, thereby reducing the tax payable by the acquirer. This would be true in the case of a merger between such companies as well.

Disadvantageous of Mergers and Acquisition

The innovation rate declined after acquisitions. The explanations for these drops in innovative outputs have centered primarily on strategic factors, particularly the tendency for companies to use acquisitions as substitute for organic development, thereby reducing their commitment to R & D spending and internal innovation. Acquisitions are directly disruptive for technical personnel in acquired firms, causing their performance to suffer. Like many other types of knowledge workers, corporate scientists and engineers develop socially embedded routines for conducting their tasks. When the context that supports those routines is disrupted, as occurs with many acquisitions, these personnel can be expected to experience a sense of dislocation, loss, even trauma and their productivity may suffer.[15]

The track record of Mergers & Acquisitions has hardly been stellar. More often than not, such deals end up destroying, instead of creating value for the companies involved. A big part of the problem is that all the myriad complex decisions that senior executives make before or during a merger, one is mandatory and critical but often given short shrift: the branding of new corporate entity. That can be a huge blunder. With no solid brand perform to work from, company integration will often be mismanaged, and communication to key constituencies will necessarily suffer. In the worst situations, the relationship between two organizations becomes contentious: promised synergies remain elusive, employees become distrustful and disgruntled; and customers grow cynical and dissatisfied.[16]

Consider the merger of U.S. airways, Inc. and America West Airlines. During the negotiations, executives decide to retire the America West brand. Strategically, that made sense because the new air carrier would have an enhanced national and international network of routes beyond that conveyed by the

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[15] Srikant Parchuri , Atul Nerkar, Donald S. Harbrick, acquisition Integration and Productivity Losses in the Technical Core: Disruptive of Inventors in Acquired Companies, Prganisational Science, Vol 17 , No. 5 Sep-Oct 2006 ,pp. 545.

[16] Richard Ettenson and Jonathan Knowles, Merging the Brands and Branding the Merger, MIT Sloan Management Review, Summer 2006, Vol 47 No-4,pp. 39.

moniker America West. In its place, though the merged airline was introduced as US Airways. That was not the best choice because not only did it create a winner/loser mentality inside the new organization, it also signaled that little had changed with US Airways- a missed opportunity because the airline had not exactly garnered a glowing reputation of being "best of breed" among domestic airlines.[17]

Legislative framework

There are numbers of bodies dealing with mergers and acquisitions which are as follows:

- Sick Industrial Companies (Special Provisions) Act, 1985
- SEBI (Substantial Acquisition of Shares and Takeovers) Regulation, 1997
- Regulatory Authorities also regulate mergers
- Competition Act 2002
- Recent amendments

The researcher will not be dealing with the entire legislative framework but only with Companies Act, SEBI in brief and Competition Act and amendments in a bit detailed.

- **SEBI**

Under SEBI's Amendment to Clause 24 of the Disclosure & Investor Protection Guidelines, each of the companies involved in a merger has to obtain the opinion of an independent merchant banker on the valuation of the deal. Modifying the clause 41 of the listing agreement to bring more efficiency in the disclosure of financial results, SEBI has allowed a listed entity two months' time from the end of a quarter if it is submitting consolidated financial result in addition to submitting quarterly and year to date stand alone financial results.

- **Income Tax Act**

The ITA defines the analogous term 'amalgamation' as the merger of one or more companies with another company, or the merger of two or more companies to form one company. The ITA goes on to specify certain other conditions that must be satisfied for the merger to be an 'amalgamation'.

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[17] Ibid.

- **The Competition Act, 2002**

In India, the Monopolies and Restrictive Trade Practices Act, 1969 ("MRTP") was the first enactment that came into effect on June 1, 1970 with the object of controlling monopolies, prohibiting monopolistic and restrictive trade practices and unfair trade practices. The commission set up under the MRTP was empowered to inquire into any practice in relation to goods or services which are monopolistic, restrictive or unfair in nature. The complaint may be preferred by a consumer, trade or consumer association or even the Central Government. The commission was armed with powers to pass orders for the discontinuation of the practice. Where the inquiry by the commission reveals that the trade practice inquired into operates or is likely to operate against public interest, the Central Government may pass such orders as it thinks fit to remedy or present any mischief resulting from such trade practice. Prior to 1991, the MRTP also contained provisions regulating mergers and acquisitions. In 1991, the MRTP was amended, and the provisions regulating mergers and acquisitions were deleted. With the changing nature of competition laws, a need was felt for a change in focus, with emphasis on promoting competition rather than curbing monopolies.

The Competition Act takes a new look at competition altogether and contains specific provisions on anti-competition agreements, abuse of dominance, mergers, amalgamations and takeovers and competition advocacy. The Competition Commission of India ("CCI") has been established to control anti-competitive agreements, abuse of dominant position by an enterprise and for regulating certain combinations. The substantive provisions of the Competition Act relating to anti competitive agreements (Section 3), abuse of dominance (Section 4), and provisions relating to combinations (Section 5, 6, 20, 29, 30 and 31) have been notified and brought into effect.

Further, CCI on May 11, 2011 issued the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ("Combination Regulations"). These Combination Regulations will now govern the manner in which the CCI will regulate combinations which have caused or are likely to cause appreciable adverse effect on competition in India ("AAEC").

The Combination Regulations have come into effect from June 1, 2011 to supplement Sections 5 and 6 of the Competition Act. With the publication of these Combination Regulations, the CCI has been finally saddled with all the powers required to act as an economic regulator and exercise 'merger-control' over the Indian soils. The effects of the enactment of the Combination Regulations are vast since under Section 32 of the Competition Act, the CCI has been conferred with extra-territorial jurisdiction to fulfill its mandate of eliminating practices having AAEC. What this means is that every acquisition that involves the acquirer or the target, wherever incorporated having assets or a turnover in India in excess of the prescribed limits may be subject to scrutiny by the CCI.

The Competition Act, 2002 in its preamble highlights the following major objectives:

- Prevent practices having adverse effect on competition.
- Promote and sustain competition in the market.
- Promote the interests of consumers
- Ensure freedom of trade carried on by other participants in markets in India.

The preamble also provides that the economic development of the country needs to be kept in view, in implementing the objectives of the Act. The competition act provides for a framework with respect to the following areas:

- Anti-competitive agreements
- Abuse of dominance
- Combinations Regulations (includes Mergers, Amalgamation and Acquisitions)

Section 6[18] of the Act deals with the regulation of mergers, amalgamation and acquisitions which go beyond a specified threshold limit.

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[18] Regulation of combinations.-

(1) No person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.

(2) Subject to the provisions contained in sub- section (1), any person or enterprise, who or which proposes to enter into a combination, may, at his or its option, give notice to the Commission, in the form as may be specified, and the fee which may be determined, by regulations, disclosing the details of the proposed combination, within seven days of-

Financial thresholds

'Financial thresholds' prescribed under the Competition Act for determining 'combinations' are as follows:

- An acquisition/ merger where the transferor and transferee jointly have, or a merger or amalgamation where the resulting entity has, (i) assets valued at more than INR 15 billion or turnover of more than INR 45 billion, in India; or (ii) assets valued at more than USD 750 million in India and abroad, of which assets worth at least Rs 7.5 billion are in India, or, turnover more than USD 2250 million of which turnover in India should be at least Rs 22.5 billion.
- An acquisition/ merger where the group to which the acquired entity would belong, jointly has, or a merger or amalgamation where the group to which the resulting entity belongs, has (i) assets valued at more than INR 60 billion or turnover of more than Rs 180 billion, in India; or (ii) assets valued at more than USD 3 billion in the aggregate in India and abroad, of which assets worth at least Rs 7.5 billion should be in India, or turnover of more

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(a) approval of the proposal relating to merger or amalgamation, referred to in clause (c) of section 5, by the board of directors of the enterprises concerned with such merger or amalgamation, as the case may be;

(b) execution of any agreement or other document for acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of that section.

(3) The Commission shall, after receipt of notice under sub- section (2), deal with such notice in accordance with the provisions contained in sections 29, 30 and 31.

(4) The provisions of this section shall not apply to share subscription or financing facility or any acquisition, by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant of a loan agreement or investment agreement.

(5) The public financial institution, foreign institutional investor, bank or venture capital fund, referred to in sub- section (4), shall, within seven days from the date of the acquisition, file, in the form as may be specified by regulations, with the omission the details of the acquisition including the details of control, the circumstances for exercise of such control and the consequences of default arising out of such loan agreement or investment agreement, as the case may be. Explanation.- For the purposes of this section, the expression-

(a) " foreign institutional investor" has the same meaning as assigned to it in clause (a) of the Explanation to section 115AD of the Income- tax Act, 1961 (43 of 1961);

(b) " venture capital fund" has the same meaning as assigned to it in clause (b) of the Explanation to clause (23FB) of section 10 of the Income- tax Act, 1961 (43 of 1961). CHAP COMPETITION COMMISSION OF INDIA CHAPTER III COMPETITION COMMISSION OF INDIA.

than USD 9 billion, including at least Rs 22.5 billion in India.[19]

Pre-Filing Consultation

Any enterprise which proposes to enter into a combination may request in writing to the CCI, for an informal and verbal consultation with the officials of the CCI about filing such proposed 'combination' with CCI. Advice provided by the CCI during such pre-filing consultation is not to be binding on the CCI.

Mandatory Reporting

Section 6 makes void any combination which causes or is likely to cause an AAEC on competition within India. Accordingly, Section 6 of the Act requires every acquirer to notify the CCI of a combination within 30 days of the decision of the combination or the execution of any agreement or other document for acquisition and seek its approval prior to effectuating the same.

The Combinations Regulations mandate CCI to form a prima facie opinion on whether a combination has caused or is likely to cause an AAEC within the relevant market in India, within 30 days of filing. The combination will become effective only after the expiry of 210 days from the date on which notice is given to the CCI, or after the CCI has passed an order approving the combination or rejecting the same.

Single Notification Involving Multiple Tranches

The Combination Regulations clearly stipulate that where the ultimate intended effect of a business transaction is achieved by way of a series of steps or smaller individual transactions which are inter-connected or inter-dependent on each other, one or more of which may amount to a combination, a single notice, covering all these transactions, may be filed by the parties to the combination.

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[19] Mergers & Acquisitions in India, With Specific Reference to Competition Law, July 2013 available at http://www.nishithdesai.com last visited on 27th November 2015.

Exempt Enterprises

An enterprise whose shares, control, voting rights or assets are being acquired has assets of the value of not more than INR 250 crores (approx. USD 56 million) in India or turnover of the value of not more than INR 750 crores (approx. USD 160 million) in India is exempt from the provisions of Section 5 of the Competition Act till March 4, 2016.

Exceptions to Filing

Deviating from the strict interpretation of Section 6 of the Competition Act, which requires all combinations to be notified to the CCI, Schedule I to the Combination Regulations specifies certain categories of transactions which are ordinarily not likely to have an AAEC and therefore would not normally require to be notified to the CCI which inter alia include:

- Acquisitions of shares or voting rights as an investment or as an investment in so far as the total shares or voting rights held by the acquirer directly or indirectly does not exceed 25% of the total shares or voting rights of the company.
- Consolidation of holdings in an entity where the acquirer already had 50% or more shares or voting rights except in cases where the transaction results in a transfer from joint control to sole control.
- An acquisition of assets unrelated to the business of the acquirer other than an acquisition of a substantial business operation.
- Acquisitions of stock-in-trade, raw materials, stores, current assets (in the ordinary course of business).
- Acquisitions of bonus or rights shares, not leading to acquisition of control.
- Combinations taking place entirely outside India with insignificant local nexus and effect on markets in India.

Impact on Transactions Involving Listed Companies

In combination involving listed companies, a primary transaction may trigger notification with CCI and subsequent open offer obligation under the Takeover Code. This means that the primary transaction or the open offer cannot be effected unless clearance from the CCI is obtained. In cases where clearance from the CCI is not received within the statutory time period required to complete

the open offer as prescribed under the Takeover Regulations, then as per the extant provisions of the said Takeover Code, the acquirer has to pay interest to shareholders for delay beyond the statutory period required to complete payment to the tendering shareholders on account of non-receipt of statutory approvals.

A share subscription, financing facility or any acquisition by a public financial institution, FII, bank or venture capital fund pursuant to any loan or investment agreement, would not qualify as a combination that will be regulated by the CCI, and such transactions are therefore exempt under the Competition Act. However, the public financial institution, FII, bank or venture capital fund is required to notify the CCI of the details of the acquisition within 7 day of completion of the acquisition.[20]

- **Recent Amendments**

Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (Combination Regulations) came into force in India on 1st day of June, 2011.[21] The Combinations Regulations were framed by Competition Commission of India (CCI), a statutory body established by the Government of India to keep a check on practices which have an adverse effect on the competitive market in India and to protect the interest of consumers and other market players in India. Combinations Regulations were framed pursuant to Section 6 Regulation of combinations of the Competition Act, 2002 in order lay down the procedural aspect with regards to reporting of Combination to the CCI and the manner in which Combinations will be governed by the CCI.

Section 5 of the Competition Act, 2002 defines 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. However all Amalgamations and Mergers are not covered in the definition of Section 5 under the Competition Act, 2002, only those Acquisitions and Mergers which cross the Specified Assets and Turnover Criteria are covered under Competition Act, 2002.

[20] Supra Note 19.
[21] Available at http://www.cci.gov.in/index.php?option=com_content&task=view&id=21last visited on 28th November 2015.

As per Section 6 of the Competition Act, 2002 any person or enterprise, who or which proposes to enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India have to report the same to CCI and have to take its prior approval before entering into merger or amalgamation or for execution of any agreement or other document for acquisition or acquiring of control as defined in clause a, b and c of Section 5 of the Competition Act, 2002. However, keeping in mind that all acts of acquisitions cannot be said to have an adverse effect on competition within the relevant market in India certain acts of Combinations are normally exempted from the reporting requirement by regulation 4 of the Combination Regulations.

Categories of Combinations which are exempted from Reporting

The categories of combinations which are not likely to cause an appreciable adverse effect on competition in India are detailed in Schedule I of the Combination Regulations. The Categories are as follows:

- An acquisition of shares or voting rights, referred to in sub-clause (i) or sub-clause (ii) of clause (a) of section 5 of the Competition Act, 2002, in another enterprise solely as an investment or in the ordinary course of business in such a manner that the investment doesn't gives the acquirer more then (25%) twenty five per cent of total shares or voting rights of the another enterprise and such an acquisition should not lead to control of the enterprise whose shares or voting rights are being acquired.
- An acquisition of shares or voting rights, referred to in sub-clause (i) or sub-clause (ii) of clause (a) of section 5 of the Competition Act, 2002, where the acquirer, prior to acquisition, has fifty percent (50%) or more shares or voting rights in the enterprise whose shares or voting rights are being acquired, except in the cases where the transaction results in transfer from joint control to sole control.
- An acquisition of assets, referred to in sub- clause (i) or sub-clause (ii) of clause (a) of section 5 of the Competition Act, 2002, not directly related to the business activity of the party acquiring the asset or made solely as an investment or in the ordinary course of business, not leading to control of the enterprise whose assets are being acquired except where the assets being acquired represent

substantial business operations in a particular location or for a particular product or service of the enterprise, of which assets are being acquired, irrespective of whether such assets are organized as a separate legal entity or not.

- An amended or renewed tender offer where a notice to the Commission has been filed by the party making the offer, prior to such amendment or renewal of the offer provided that the compliance with regulation 16 relating to intimation of any change is duly made.
- An acquisition of stock –in-trade, raw materials, stores and spares in the ordinary course of business.
- An acquisition of shares or voting rights pursuant to a bonus issue or stock splits or consolidation of face value of shares or buy back of shares or subscription to rights issue of shares, not leading to acquisition of control.
- Any acquisition of shares or voting rights by a person acting as a securities underwriter or a registered stock broker of a stock exchange on behalf of its clients, in the ordinary course of its business and in the process of underwriting or stock broking, as the case may be.
- An acquisition of control or shares or voting rights or assets by one person or enterprise of another person or enterprise within the same group.
- A merger or amalgamation involving a holding company and its subsidiary wholly owned by enterprises belonging to the same group and/or mergers or amalgamations involving subsidiaries wholly owned by enterprises belonging to the same group.
- An acquisition of current assets in the ordinary course of business
- A combination referred to in section 5 of the Act taking place entirely outside India with insignificant local nexus and effect on markets in India. In order exempt further categories of Combinations from reporting requirement and approval from the Competition Commission of India, the Competition Commission of India vide Notification dated 4th April, 2013 released The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2013 (No. 1 of 2013) to amend the Combinations Regulations, 2011.

In order exempt further categories of Combinations from reporting requirement and approval from the Competition Commission of India, the Competition Commission of India vide Notification dated

4th April, 2013 released The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2013 (No. 1 of 2013) to amend the Combinations Regulations, 2011.

The Amendments made in the Combination Regulations are as follows:

- A new Category have been added whereby any Company which is owning more then (25%) but less then (50%) of shares or voting rights in another enterprise of the enterprise can acquire, by itself or through its group, five per cent (5%) of the shares or voting rights of such enterprise in a financial year without giving any notice to CCI. However such acquisition shall not result in gross acquisition of more than five per cent in a financial year and the percentage of ownership should not cross more than 50%.
- At present, any acquisition which will increase the percentage or voting right above the limit of (25%) requires notice to be given to the CCI.
- Two earlier Categories with regards to acquisition of stock –in-trade, raw materials, stores and spares in the ordinary course of business and acquisition of Current Assets in the ordinary course of business have been merged.
- An exception of "enterprise jointly controlled by enterprises that are not part of the same group" has been added in the earlier category of "acquisition of control or shares or voting rights or assets by one person or enterprise of another person or enterprise within the same group".
- Existing Category of "merger or amalgamation involving a holding company and its subsidiary wholly owned by enterprises belonging to the same group and/or mergers or amalgamations involving subsidiaries wholly owned by enterprises belonging to the same group." has been omitted and a new category has been added which can be read as follows:

  > A merger or amalgamation of two enterprises where one of the enterprises has more than fifty per cent (50%) shares or voting rights of the other enterprise, and/or merger or amalgamation of enterprises in which more than fifty per cent (50%) shares or voting rights in each of such enterprises are held by enterprise(s) within the same group.

After going through this can say that he Amendments provide relief to the Corporate Sector especially in those cases of Mergers and Acquisitions where one of the enterprises holds more than 50 % stake in another enterprise. Also the exemption from reporting requirement, for acquiring a stake of less than 5% in a financial year in another enterprise will reduce the compliance burden on the Companies. Such a move by the Competition Commission of India is a welcome step keeping in view the present business scenario.

Conclusion

Business environment should be such which must be conducive, free from red-tapism, unnecessary created shackles like license, quota, permit, control and to some extent regulation. The ideal role of the state in the present era is to act as a facilitator and not as strangulator in the cloak of regulator. In other words "Good Governance" should serve the "Corporate Governance".

However prevention of concentration of economic powers to the detriment of the public, control of monopolistic and prohibition of monopolistic trade practices are the constitutional requirements of the state policy.

To tackle such problem The Competition Act was enacted. The Indian Competition Act is a statute of globalization and liberalization era, it paves way for free competition and less regulation. The provisions of new act aim to foster the needs of the customers and simultaneously act as a sentinel of the business and industry's interests. In the contemporary period the Indian Competition Act is facilitating mergers and obviates unnecessary bottlenecks. The underlying philosophy of the competition Act is the economic approach to the competition. The act focuses on real performance of the entity and not the structure and size of the enterprise i.e. if the big is efficient then it shall continue.

However there are certain loopholes in the law Such as per section 5 of the Competition Act only those mergers and acquisitions are liable to be regulated that qualify under the definition of combination. There may arise a situation where any merger may not come under the purview of section 5 but gives rise to serious competition concern in a market. There should be some window whereby the commission could regulate such mergers and acquisitions as well. Therefore the definition of combination should be amended.

Another loophole is that under section 29 combinations can only be regulated on Competition Commission's own motion. There is no window for any complaint from a competitor or consumer, in case they feel that a competition concern has arisen or is going to arise with respect to a combination. The act provides that a commission would proceed vis-à-vis any combination if it forms requisite opinion. Although a complaint can induce the commission to form requisite opinion, it does not give rise to any obligation on the part of the commission to act on such complaint.

However the recent amendments as mentioned above in the last chapter have made certain amendments which have liberalized the mergers and acquisition by exempting certain requirements which reduces red tapism and makes environment conducive for the business, and also tries to strike a balance between consumers interests or market interests and business liberty.