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Cross Border Mergers and Competition Law

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Introduction

Mergers and Acquisitions (M&A) is a strategic business activity in which companies combine their resources, operations, and assets to achieve various objectives, including improving market share, reducing competition, and increasing profitability. In India, M&A activity has seen a significant surge in recent years due to the country's growing economy, favorable investment climate, and the government's efforts to promote foreign investment.

Cross-border mergers, as the name suggests, involve companies from different countries merging to create a single entity. These mergers often present unique challenges related to cultural differences, regulatory frameworks, and market conditions. However, they can also provide opportunities to access new markets, diversify operations, and leverage expertise and technology from both companies.

In India, cross-border mergers and acquisitions have become increasingly common, driven by the country's favorable investment climate and growing economy. The Indian government has also been taking steps to facilitate cross-border M&A activity, including introducing regulations for inbound and outbound investments.

However, in the context of M&A activity, competition concerns also arise. The Competition Act, 2002 is a key piece of legislation in India that regulates mergers and acquisitions and prohibits anti-competitive practices. The act aims to promote fair competition in the market and prevent monopolistic behavior by companies.

Overall, the topics of mergers and acquisitions, cross-border mergers, and the Competition Act are crucial areas for businesses operating in India to understand. As India continues to emerge as a key player in the global economy, it is essential for companies to navigate these issues effectively to stay competitive and compliant with regulations.

The Ministry of Corporate Affairs in August 2009 issued a notification pursuant to which the Monopolies and Restrictive Trade Practices, 1969 was repealed and replaced by the Competition Act, 2002.

Provisions relating to Cross Border Mergers in India

The term "cross-border merger" is used to describe mergers and acquisitions involving companies based in separate nations. Since the implementation of the Companies Act, 2013 on April 1, 2014, India has allowed international mergers. The rules allow for mergers between Indian and foreign enterprises. However, the Competition Act of 2002 regulates such mergers and their effects.

The Competition Act, 2002, is the primary legislation governing competition law in India. It aims to promote and sustain competition in markets, protect the interests of consumers, and ensure freedom of trade carried out by individuals and entities. The Act prohibits anti-competitive agreements, abuse of dominance, and regulates mergers and acquisitions to prevent any adverse effect on competition.

The Competition Act, 2002, defines a "combination" as the acquisition of control, shares, voting rights, assets, or mergers or amalgamations. The Competition Commission of India (CCI) is the regulatory body responsible for reviewing combinations and determining whether they would cause an Appreciable Adverse Effect on Competition (AAEC) in the relevant market.

In the case of cross-border mergers, the CCI has issued a set of regulations called the "Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011." These regulations apply to all combinations that have an impact on the Indian market, even if the parties involved are located outside India.

Under these regulations, any combination that exceeds certain financial thresholds must be notified to the CCI for approval. The thresholds are based on the assets and turnover of the companies involved in the combination. If the combination does not exceed the thresholds, it is not required to be notified to the CCI.

The CCI has 210 days to review the combination and determine whether it would cause an AAEC in the relevant market. During this period, the parties involved in the combination are not allowed to consummate the transaction. If the CCI finds that the combination would cause an AAEC, it may prohibit the combination or require the parties to modify the combination to address the competition concerns.

It is worth noting that the CCI has approved several cross-border mergers in the past, including the merger of Vodafone India with Idea Cellular in 2018. The CCI has also approved the acquisition of Flipkart by Walmart, subject to certain conditions, in 2018.

In conclusion, India has made provisions for cross-border mergers through the Companies Act, 2013, and the Competition Act, 2002. The Competition Act regulates mergers and acquisitions to prevent any adverse effect on competition, and the CCI is the regulatory body responsible for reviewing combinations. Cross-border mergers that have an impact on the Indian market must be notified to the CCI for approval, and the CCI has 210 days to review the combination and determine whether it would cause an AAEC. While the CCI has approved several cross-border mergers in the past, it remains to be seen how these regulations will be enforced in the future.

Role of Competition Commission of India

Cross-border mergers in India are heavily regulated by the Competition Commission of India (CCI). The Competition Commission of India (CCI) is in charge of monitoring the Indian market to prevent anti-competitive mergers and acquisitions. To assess whether the proposed merger or acquisition would significantly reduce competition in the target market, the CCI analyses the transaction and considers if any remedial action is necessary.

The CCI may also work with competition authorities in other jurisdictions to ensure that the merger does not have a negative impact on competition globally. The CCI has signed a number of Memorandum of Understanding (MoUs) with foreign competition agencies to improve international merger coordination and communication.

In the current global economic scenario, where mergers and acquisitions are on the rise, the CCI's position in cross-border mergers is particularly crucial. With the expansion of multinational corporations, it is common for companies from different countries to merge. In such situations, the CCI plays a crucial role in ensuring that the merger does not reduce competition in India.

In addition to its regulatory function, the CCI provides assistance to companies seeking to engage in cross-border mergers. The CCI has issued guidelines for the evaluation of cross-border mergers and conducted multiple stakeholder consultations to ensure the guidelines' continued relevance and efficacy.

The act is subject to particular restrictions. The legislation stipulates a time limit for the Competition Commission to take notice and initiate an investigation. After the expiration of one year from the merger's effective date, it is unable to do so. The Competition Commission lacks the authority to regulate the actions of the amalgamated entity, even if they have a negative impact on competition. It would be beyond their authority if they entered into anti-competitive agreements or abused their dominant position before the one-year period expired.

The Competition Commission of India performs an essential role in regulating cross-border mergers in India. It is the responsibility of the CCI to ensure that any proposed merger does not have a negative effect on competition in the relevant market, and it may take measures to mitigate any potential anticompetitive effects. With the expansion of multinational corporations, the CCI's function in regulating cross-border mergers has taken on a greater significance. The CCI also offers guidance to companies seeking to engage in cross-border mergers, thereby facilitating more efficient and effective mergers.

Competition Policy in Controlling Mergers

Competition policy is an essential tool for regulating mergers and acquisitions in India. The primary purpose of competition policy is to encourage healthy competition and prevent market monopolies. The Competition Commission of India (CCI) is the regulatory entity charged with enforcing India's competition policy. The CCI evaluates mergers and acquisitions to ensure that they do not lead to anticompetitive conduct.

The Competition Act of 2002 governs the competition policy framework in India. The Act prohibits anticompetitive agreements and the abuse of dominant market positions. The CCI has the authority to impose sanctions on companies that violate the Act's provisions. In addition, the Act authorizes the CCI to evaluate mergers and acquisitions that may have a negative effect on market competition.

For evaluating mergers and acquisitions, the CCI employs a stringent procedure. Companies are required to notify the CCI of their proposed merger or acquisition as part of the pre-merger notification procedure. The CCI then conducts a comprehensive analysis of the merger or acquisition to determine its potential effect on market competition. To assess the competitive impact of the merger or acquisition, the CCI considers a number of factors, including market share, market concentration, and entry barriers.

Based on its judgment, the CCI can either approve or reject a merger or acquisition. If the CCI determines that the merger or acquisition will have a negative impact on competition, it may force the firms to make changes to the transaction to address the concerns. In some situations, the CCI may even mandate companies to relinquish some of their assets or activities in order to maintain market competition.

The implementation of competition policy has proven successful in preventing mergers in India. In recent years, the CCI has conducted investigations into a number of high-profile mergers and acquisitions in a variety of industries, such as healthcare, e-commerce, and telecommunications, among others. The Competition Commission of India (CCI) has been especially attentive in the e-commerce industry, where it has scrutinized multiple mergers and acquisitions to prevent the rise of dominant businesses that could be detrimental to competition.

On the other hand, the CCI's method of limiting mergers has been questioned by a number of industry professionals, who argue that the CCI has been excessively cautious in its assessments. They propose that the CCI ought to take a more permissive stance toward mergers and acquisitions, particularly in industries that are highly fragmented and in which there are major hurdles to entry.

In India, mergers and deals are hard to control without the help of competition policy. The CCI has done a good job of stopping behavior that hurts competition and promoting healthy competition in the market. Even though the CCI's approach has been criticized, it is clear that India's competition policy framework has been successful at regulating mergers and acquisitions and keeping the market competitive. As a law student, it's important to know how competition policy affects the Indian economy and how it affects mergers and acquisitions.

Procedures Relating to Combinations

M&A (mergers and acquisitions) are commonplace in India's business world. The Competition Act of 2002 and the Competition Commission of India (Procedure regarding the transaction of business relevant to combinations) Regulations of 2011 control the procedures for combinations in India.

Any business combination that has or is likely to have a appreciable adverse effect on competition in the relevant market in India is illegal under the Competition Act. Acquisition of control, shares, voting rights, assets, or mergers and amalgamations are all examples of combinations according to the legislation.

To ensure compliance with the Competition Act, a combination must be reported within 30 days of its occurrence to the Competition Commission of India (CCI). The notification must include details regarding the nature and purpose of the combination, the parties involved, and the effect of the combination on competition on the pertinent market.

Upon receipt of the notification, the CCI will evaluate the effect of the proposed merger on market competition. If the CCI determines that the combination is likely to have a significant adverse effect on competition, it may order modifications or prohibit the combination entirely. The CCI may also grant approval with or without conditions.

The CCI evaluates a proposed merger based on a comprehensive examination of the relevant market, including its structure, degree of concentration, barriers to entry and expansion, and countervailing purchasing power. The CCI also takes into account any efficiency gains that may result from the merger, which can be used to justify any adverse effects on competition.

In addition to the Competition Act, other regulatory authorities such as the Securities and Exchange Board of India (SEBI) and the Reserve Bank of India (RBI) may also review combinations. The Securities and Exchange Board of India (SEBI) regulates mergers and acquisitions in the securities market, while the Reserve Bank of India (RBI) supervises combinations involving banking and financial institutions.

In conclusion, the procedures governing mergers and acquisitions in India are designed to ensure that they do not have an appreciable adverse effect on competition on the relevant market. Any combination must be reported to the CCI, which will evaluate its effect on competition and decide whether to approve, modify, or prohibit it. Depending on the sector of operation, regulatory authorities such as SEBI and RBI may also have a responsibility in reviewing combinations.

Case Laws

1. Jet - Etihad Deal

Jet Airways made a proposal to the Etihad airways that it wishes to sell its 24% stake to it. When notice was sent to competition commission, it conducted investigation. The majority ruled under section 31 of the competition act and approved the deal whereas the minority judgement held that there would be appreciable adverse effect. The majority and minority opinions differed over what the relevant market is. While the majority used the Origin and Destination pair approach and covered the network effect stating that the nine cities that are overlapping for both the companies are on what the approach will be applied. The minority on the other hand, determined it to be the international air passengers to and from India. Among other agreements, the commercial cooperation agreement that the parties entered into had a no code-sharing clause. The majority was of the opinion that it might not prove to be anti- competitive due to the other major airlines competition with them. The minority ruled it to have an appreciable adverse effect on the competition. As it can be deduced from the current scenario that the deal was a win-win for both the parties and it did not prove to anti-competitive in nature.

2. Mylan Agila

Mylan Incorporation is a US based corporation which was to acquire Agila, an Indian company, which was a wholly owned subsidiary of SAL (Strides Acrolab Ltd.). Both were in the business of Pharmaceuticals. Competition commission approved the deal by order under section 31 of the Competition Act. Both the acquirer and merging company had a very less market in India and there was no question of anti-competitive practices. The commission did focus on the non- compete clause in their deal but found nothing objectionable.

3. Walmart – Flipkart Deal

The competition commission approved the sixteen billion dollar deal of acquisition of Flipkart by Walmart. The approval was required since the combined assets and turnover through the deal exceeded the threshold limit. The impact on the competition of the proposed combination was assessed since a lot many small online retailers were opposing the merger. Its impact on the retail sector was also assessed in general and how it affected the economy overall. The focus was on determination of relevant market and as Walmart did not have a huge market size in India the deal was not considered to have any adverse effect on the competition.

In cases where the notice has been filed after the expiration of the 30 days period the CCI has imposed heavy penalties. In case of Johnson, Ethicon and Google the delay was of 43 days in filing of the notice and the Commission imposed on the ma fine of Rs. 5 lakhs. In cases where the notice itself is not being filed when there is a need to the CCI has gone to the extent of imposing a fine of Rs. 5 crores. Such a scenario was witnessed in the case of Piramal and Shriram.

4. Bharti – MTN Deal

The Bharti-MTN deal refers to the proposed merger between Bharti Airtel, a leading Indian telecommunications company, and MTN Group, a South African telecommunications giant. The negotiations began in May 2008, and the proposed deal aimed to create the world's third-largest telecommunications company in terms of subscriber numbers. However, the deal faced several legal and regulatory hurdles due to its complex structure, involving cross-border transactions and multiple jurisdictions. The main point of contention was the proposed structure of the deal, which involved Bharti acquiring a 49% stake in MTN, and MTN acquiring a 36% stake in Bharti.

One of the significant challenges that the parties faced was the regulatory framework in India and South Africa. The Indian government had strict foreign investment regulations in the telecommunications sector, while the South African government had rules requiring the majority ownership of local companies in strategic industries. Additionally, there were concerns about the implications of the deal for competition in the telecommunications sector, especially in African countries, where both companies had a significant presence.

The proposed merger raised antitrust concerns, and there were fears that it could lead to a monopolistic market. The negotiations between Bharti Airtel and MTN lasted for several months, with the parties making several attempts to reach a deal. However, the negotiations eventually broke down in September 2009 due to disagreements over the structure of the deal and the regulatory hurdles.

In conclusion, the Bharti-MTN deal was a significant proposed merger in the telecommunications industry that faced several legal and regulatory challenges. Despite the parties' efforts to reach an agreement, the deal ultimately fell through, highlighting the importance of regulatory compliance and the complexities of cross-border transactions.

Conclusion

The law relating to combination review emphasizing on Cross border mergers are evolving. The CCI’s merger control policy and Combination reviewing scheme has to be read with the threshold limits prescribed by the MCA and the Combination Regulation, 2011. The merger control provisions aim to prevent mergers that will hamper the competition in the market and have an appreciable adverse effect on it. The Commission has managed to approve the mergers in short periods and has been able to do so without much experience. The Commission has yet not faced any cross border merger which is likely to hamper the economy and involved a substantial question of law.

A necessary change in the Competition act which is required is increase in the ambit of the power of the CCI by making the provisions application to those companies which have an adverse effect on the competition despite section 5. The Commission has quasi-judicial powers but such dilution shall be done away with for speedy disposal of matters.

Therefore, the Commission’s eagerness to examine with the best knowledge such matters does not hamper the Merger and acquisition activities undertaken by the entities and in no way acts a roadblock. If anything, it is encouraging such activities. The real challenge is faced by the Commission when a complex and substantial question of law comes before it. Despite its nascence, the commission has done fairly well.