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CONGLOMERATE MERGER **IN INDIA, THE UNITES STATES AND THE** **EUROPEAN UNION**

AUTHORED BY - ANISHA MAAN

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Introduction:

When we say the world combination we automatically think about various things mingled together but will they mean the same legally ? To an extent yes they can be described like this , the simple phrase in which some things come together for a purpose. In the competition realm of the world market combina- tions have been defined differently in every jurisdiction. The basic idea of combinations originated from the mergers aspect, combinations define various kinds of mergers not only in India but the term is globally used for the same reason.

The competition act of 2002 governs the competition in the markets of India which talks about

combinations in the sections 5 and 6 of the act respectively. The act has given the section heading as regulation of combinations. If we begin to wonder why has it been referred to as regulations to combinations when combinations at most times benefits the people so why regulate it? The combinations mentioned here might present an AAEC on the market or is likely to present if hasn't done yet. As we always have been hearing prevention is better than cure, sections 5&6 try to prevent the possible damage that may occur to the market in the form of the merging companies aftermath. Every country has different competition acts to regulate the markets in some way or other. The competition act in India believes in doing ease of business but without deference to the competency in the market leading to lack of competition resulting in a statement, dominated market. Hence we will try to understand combinations with reference to conglomerate mergers in specific as they have been viewed differently by every authority in different jurisdictions. We will mainly focus on the Indian view of conglomerate mergers with contrast to foreign jurisdictions as well, mainly EU and the US.

What is a combination?

The combinations are regulated under the Indian competition act of 2002 under sections 5&6 respectively. The act defines combinations as in section 5 :

“The acquisitions of one or more enterprises buy one or more persons or mergers or amalgamations of enterprises shall be a combination of such enterprises and persons or enterprises.”

As mentioned by the competition Commission of India combinations are:

“M&A that meet the asset and turnover prescribed under section 5 of the act are termed as combinations. Thus, only M&A that meet assets and and turnover prescribed under section 5 of the act requires notifications to any approval of the commission prior to their consummation.”

The competition act defines combinations in contrast with certain terms such as ‘asset or turnover value’ threshold. It is identified by the asset value of the acquirer and acquired, asset value of the company post merger and control triggers. The control triggers have been given under section 20{3} of the competition act.

The competition act 2002{ herein referred to as the act } defines “enterprise” in section 2(h).

The definition of enterprise includes a department of the government or a person who is involved in the supply of goods and services. The essentials to qualify as an enterprise are

- : i. any person or department has to be engaged or has been engaged
- ii. In the activity related to the production
- iii. Storage, distribution, acquisition, or control of articles
- iv. or goods and services which include investment and the business of acquiring, holding, underwriting, or dealing, with shares, debentures, or other securities of any other body corporate.

The simple inference of the word can be activity of an economic nature. The institutional aspects have been kept aside focussing more on the functional aspects.

There have been numerous cases in relation to the subject related to 'being an enterprise'. In the case of Reliance Big Entertainment Ltd the CCI was faced with the question whether associations qualify to be called enterprises.

The CCI had observed that the qualification to be an enterprise is, there must be economic activity as mentioned in section 2(h).

The terms merger or amalgamations have not been expressly described in the act. The term merger has been used broadly under the act. The CCI is not concerned with all mergers but with only those which meet the prescribed threshold of the transactions prescribed.

Types of combinations:

There are three types of combinations:

Horizontal combination :

Horizontal combinations are between groups which work on the same industry level. They are undertaken to expand in size, diversify the groups market, expand in new markets and reduce competition.

Example - coming together of Vodafone and Idea. They both were mega companies in the same sector yet came together, integrated with each other who were on the same industry level. The competition has reduced as two significant companies came together and

expanded their markets as they got to leverage each others customer data base. The companies without a doubt have ex- panded in size.

Vertical combination:

Vertical combinations just as the name suggests is between groups which are not on the same lev- el in the industry. They might be up and down the supply chain. These kinds of combination help make the company less dependent on the other sources. Vertical combinations may help boost profits. The companies become less vulnerable in some ways. Example - Huge landlords merge with the pesticide producing company. Both the companies work on different levels of the industry.

Conglomerate / complementary combinations :

Conglomerate or complementary combinations are the kind of combinations where the compa- nies work in completely different industries of the market, have nothing in common come togeth- er and combine. Both the companies are significant have common aspiration to Tapp into a new market with the advantage of each other. The companies combining have many benefits which are in most cases not a problem for the competition in the market but there are parameters to judge for the same if there are likely any to appear in the near future. Conglomerate mergers can be further divided into two types:

- i. Pure conglomerate
- ii. Mixed conglomerate

Nature of the sections:

The competition act does not anywhere define or mention the different kinds of combinations. Combinations have only been defined in the act in section 5 which provides for what are combi- nations. There have been various thresholds to identify the combinations put in place with the central governments and the competition commissions together formulating them subject to noti- fications every two years if necessary.

Conglomerate combinations:

The competition act does not distinguish combinations on name basis rather on the

complexity of the said combination. Conglomerate mergers can also be known as complementary combinations based on the circumstances of each case. There is no specific notification regarding the said combination. India believes in the ideology of ease of doing business and does not restrict business joys because they might grow too big. Conglomerate combinations tend to be big in size, there is no specific provision regarding conglomerate mergers in India. India has not yet used the word conglomerate expressly but has approved and created channels for their smooth transit. The green channel created by India introduced by the amendment in the act deals mainly with such combinations. The green channel has been a speedy tool used by the companies to merge together if they have been in line with all the guidelines and do not violate any.

The term conglomerate does not reflect on the paper but the practices in the market do which our market regulators are not very concerned about as conglomerates do not possess extreme harms or any harms at times.

Conglomerate term might not be defined or as can be said mentioned in the act, but complementary has been given space in the competition commissions' informative notes to understand.

The provisions which govern the combinations ultimately are section 5&6 of the act:

Section 5 goes as far as only to talk about what are combinations, words in respect to be used and explained them, it is informative in nature. It defines what will be a combination. Section 6 on the other hand talks about the mandatory regime of notifying the Commission of transactions which according to section 5 are combinations. Section 6 is mandatory in nature and cannot be undone with or neglected as combinations cannot proceed further without informing the competition Commission.

Conglomerate combinations in India:

As mentioned above conglomerate combinations or as a matter of fact any kind of combination has not been given a definition in the act or the following amendments. The Commission in its orders, passes or guidelines has till date not mentioned the word conglomerate. Conglomerate combinations can be identified by the circumstances and the types of companies merging.

In India conglomerate and complementary have a very vague line between them which can easily be overseen or can be confused by seeming to be same to the person.

The complementary good have been given a outline in the notes to form 1 published by the competition commission as under:

“v. Generally, products / services are considered complementary when they are related because they are combined and used together (e.g. printers and ink cartridges). Further, these products do not compete with each other, actually or potentially, and are not vertically related. However, in general a complementary product or service enhance value of combined product or service.

vi. Complementary products / services require competition assessment similar to the assessment required in case of vertically placed products / services and therefore, the category of complementary products/services is separated from vertically placed products/service.”

If we look at the above definition given out it looks as if conglomerate goods/services have been defined yet we cannot call it conglomerate because the word has been mentioned anywhere. We must understand here that we cannot simply call a combination conglomerate or complementary interchangeably but need to understand the complexes of both. They both might resemble each other and in some other jurisdictions might mean the same but in India they are different and cannot overlap or intersect each other at any point but run parallel.

Green channel:

The first question that comes to mind is what is green channel and why do we have it ?.

The simplest answer put into words can be it is to facilitate easy transaction of businesses and process the coming together of the companies in a faster and easier manner.

Now the question may be why the green channel and what type of combinations may qualify? Green channel is a passage way for conglomerate combinations which meet all the guidelines and prima facie do not create or show signs that in the near future might create trouble for the market in any form. Conglomerates have not been expressly identified in a word form in India but have been facilitated by the move of creating a green channel. This indicated the stand of the Indian market regarding the conglomerate combinations, which is

a threshold approach which promotes ease of doing business, facilitating competition and new prospects in the market. Through the green channel instant recognition is given to the companies. The regime followed in India is mandatory and suspensory. The companies who opt for the green channel have to be sure of them not being a risk of any kind or not having any inconsistency which will render them ineligible.

Green channel provisions :

Green channel was not originally a part of the act but has been introduced by a notification dated August 13, 2019, amended the Competition Commission of India Regulations, 2011 and introduced an automatic system of approval for combinations through a green channel.

Under the new regulation 5A of the combinations regulations:

“[5A. Notice for approval of combinations under Green Channel.-

(1) For the category of combination mentioned in Schedule III, the parties to such combination may, at their option, give notice in Form I pursuant to regulation 5 along with the declaration specified in Schedule IV.

(2) Upon filing of a notice under sub-regulation (1) and acknowledgement thereof, the proposed combination shall be deemed to have been approved by the Commission under sub-section (1) of section 31 of the Act:

Provided that where the Commission finds that the combination does not fall under Schedule III and/or the declaration filed pursuant to sub-regulation (1) is incorrect, the notice given and the approval granted under this regulation shall be void ab initio and the Commission shall deal with the combination in accordance with the provisions contained in the Act:

Provided further that the Commission shall give to the parties to the combination an opportunity of being heard before arriving at a finding that the combination does not fall under Schedule III and/or the declaration filed pursuant to sub-regulation (1) is incorrect.]”

How do we know that the green channel has been introduced to facilitate the conglomerate type of combinations? As mentioned by the Competition Commission of India the schedule iii of the regulations regarding the combinations has laid out categories that can be approached by green channel.

Schedule iii states the following:

“Considering all plausible alternative market definitions, the parties to the combination, their re-

spective group entities and/or any entity in which they, directly or indirectly, hold shares and/or control:

- a. do not produce/provide similar or identical or substitutable product(s) or service(s);
- b. are not engaged in any activity relating to production, supply, distribution, storage, sale and service or trade in product(s) or provision of service(s) which are at different stage or level of production chain; and
- c. are not engaged in any activity relating to production, supply, distribution, storage, sale and service or trade in product(s) or provision of service(s) which are complementary to each other.”

From the above we can infer that all these conditions match the conglomerate combination. We cannot find the word conglomerate anywhere directly. Green channel is a facilitating channel created to ease the process of conglomerate combinations.

The main things to avoid are that there should be no overlap and AAEC in the present and the future which might render the combination to unravel back to original and penalties, which might be suspensory in nature.

Advantages of green channel:

The regulations in the act impose a standstill obligation on parties, which enables them from giving effect to the combination or any other act in respect of it. Until the order passed under the section 31 or till 210 days from the date of notice provided to the Competition Commission of India which ever is earlier {6[2A]}.

Under the green channel section 5A of the combination regulation the companies who have filled under the channel need not wait to consummate their combining as it is getting a acknowledgement from the commission negating any possible waiting period.

The channel process is less time consuming, cost efficient and easy. It saves the resources of the Commission to focus on real potential threats.

There is an option open for all for pre filing consultation so as to not make a mistake and understand all the nuances and nitty gritty of the process which makes the process much simpler.

How many green channel cases have been received by the competition

Commision of India-

There have been 60 notices in total received as of on 20th july 2022 through the green channel route, which sums up to 25%. The first ever combination received via the route was on 3rd October 2019, under section 6(2) along with section 5 and 5A.

India till now has not rejected any combinations under the route but have made the combination go under modifications or changes if it deemed it right and in the interest of the market.

Competition law review committee report :

In the committee report the green channel has been discussed in detail, the various discussions and comments have been given in the report. The report has outlined the arguments by some participants who do not resonate with the idea of having a developing economy like India to have a merger control regime. The OECD note states the importance of having a merger notification present is to “identify” the transactions which are “suitable” for merger review.

From the year of 2011 till march 31, 2018 the combinations which required modifications were accounted for at 2.6% and there has been no rejection till date.

The reasons listed out to incorporate the green channel were:

- The annual report of the competition commission of India indicated that majority of combinations notified were passed without modifications.
- Transactional delays and potential cost increase are the outcomes of the merger control, this way tries to ensure a balance to be struck between the regulatory oversight and the ease of doing business.
- There can be self assessment by the parties based on the criteria set up by the Commission, the Commission can be consulted for the combination which is targeted by the pre-filing consultation which clarifies any doubt in the minds of both the regulatory authority and the regulated authority.
- Once the company has done with the preparations and decide to notify under the green channel the company can consummate without getting delayed by the automatic approval.
- The companies do not need to wait for the statutory 210 days which have been prescribed in the act.
- The green channel is based on the robust pre-filing consultation between the parties and the

competition Commission of India.

- The pre-filing is informal in nature and is not binding.
- The purpose to introduce green channel was to less complicate the process and easy for the sake of time and cost efficiency, any wrong information, purposely omitted information will render the form void an initio from the subsequent approval also.
- Wrongly availing green channel will be penalised and the form will be void ab initio.

The regulatory oversight of the competition Commission of India: The

competition act has provisions which attract penalty:

Section 44 of the act lays down penalties starting from rupees fifty lakhs extended upto rupees one crore on the concealment of any information or provider of misinformation. It can be any person to a combination.

Section 20(1) talks about the time period which extends upto one year in which the combination takes effect, cci can asses the AAEC these combinations might have or are likely to have. After the expiry of one year since the initiation of such combination no enquiry can be conducted.

This may be stated in the pre-filing state or in the form.

Green channel exempted from the standstill obligations:

The committee discussed- i. 95% of the cases were cleared by the cci in phrase I without modifications, hence the green channel is a route for combinations which require minimum intervention from the commissions side.

ii. Pre-filing stage will minimise the risk of wrong filings drastically.

Intention of the committee:

The intentions of the committee were i. The combinations which are notifiable must be able to pass through the green channel

ii. To save costs, time and no not invoke the suspensory regime until totally needed.

iii. The cci can focus on actual competition threat cases and not use the resources on the general cases.

iv. So as to avoid undoing a deal.

The act may provide broad principles such as ‘public interest’ while forming subordinate legislation. The eligibility for availing the green channel route is determined by the central government along with the cci. The notification for the eligibility has to be reviewed and if felt changed by the central government along with the cci once in two years or may be not if they do not feel the need. The green channel can be availed by the combinations that are not exempted.

Key advantages of green channel:

- Automatic route
- Reduce time
- Reduced costs
- Cci can focus on genuine competition threat
- Gain from economics of scale
- Compete at global Level
- Development in country and industry
- Cci will benefit from ‘signalling’ connotations associated with such notifications
- Ensure that the business in India is able to consolidate with minimal regulatory compliance

Deal value threshold for combinations:

S.5 of the act discusses the adequacy of the existing asset and turnover based threshold for notifications of combinations. The cci has no residuary power to assess non-notifiable transactions as competition act does not grant such powers. Like India the EU also has no residual power but the referral system is a game changer as combinations can be reviewed by the EU by the referral mechanism in place for the combinations which do not meet the threshold. Unlike the EU India has no backhanded mechanism to review non-notifiable combination even if so they have anti-competitive effects. Section 20(1) has also concluded that there is no residuary jurisdiction available to the cci to review non-notifiable combinations.

Countries such as Brazil, Ireland and USA have residuary powers have been used to review transactions not meeting thresholds. In the US merger notifications are based on the size of

the transaction, the competition authorities have jurisdiction to review transactions that fall below such thresholds. The countries who have not relied on residuary powers and introduced a deal value threshold for merger notification such as Germany and Austria have specially incorporated competition legislations as an additional subsidiary threshold for notifications.

Green channel recent first of its kind order dated - 18th August 2023

Combination Registration No. C-2022/12/995OECD:

In re: Proceedings against Platinum Jasmine A 2018 Trust, acting through its trustee Platinum Owl C 2018 RSC Limited, and TPG Upswing Ltd. under Sections 43A and 44 of the Competition Act, 2002

A notice was received on 20th December 2022 by the CCI jointly by Platinum trust, acting through platinum trustee, and TPG upswing in relation to the combination comprising acquisition of stake in UPL SAS by platinum trust and TPG upswing through the upswing trust.

Notifying parties :

Platinum trust- established under the laws of abu-dhabi global market, does not directly carry out any business activities in India.

TPG upswing - part of TPG group

The upswing trust- jointly co-owned by subsidiaries of ADIA& TPG INC.incorporated under the laws of jersey.

The notice was given in relation to the combinations envisaging acquisition of 5% shareholding of UPL SAS, subsequent to the interval reorganisation, by platinum. The notice was provided under the provisions of the green channel given under section 6(2) of the act read with regulations 5A of the combination regulations.

The inconsistencies found:

- Exhibited overlaps within activities,
- The acquisition did not fall under schedule III
- Green channel declarations appeared incorrect and false in material particulars
- Notifying parties made statements in the notice, including notice declarations that are false in material particulars

The first proviso to regulations 5A(2) combinations regulations provides for that if the Commission finds that the combinations does not fall under schedule III and or/ declarations filed pursuant to sub-regulations (1) is incorrect the notice given and approval granted under this regulations shall be void ab initio. Section 43A of the Act provides that if any person or enterprise fails to give notice to the Commission under Section 6(2) of the Act, the Commission shall impose on such person or enterprise a penalty which may extend to 1% of the total turnover or the assets, whichever is higher, of such a combination.

Therefore the UPL SAS acquisition is not eligible for the benefit of green channel approval for facility, the green channel declarations were incorrect and false in material particulars. Statements were found to be false in material particulars, hence liable under penalty under section 44 of the act.

Considering the facts and circumstances of the case, a penalty was imposed by the Commission of RS. 5,00,000 under section 43A of the act and of INR 50,00,000 under section 44 of the act, on the acquirers. The acquirers shall be jointly and severally liable to pay the amount of penalty

OECD - ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT
- EFFECTS OF CONGLOMERATE MERGERS - ROUND TABLE CONFERENCE

Held a round table on the effects of the conglomerate mergers in the recent years which will give a better view of the topic. OECD is a global organisation with member and non member countries from all over the world, it helps to gain benefits and face the challenges of a global economy by ways of using efficient resources for the promotion of economic growth leading to a free market.

The view of OECD about conglomerate mergers:

“Conglomerate mergers involve firms that are not product market competitors, and which are not in a supply relationship.”

As further described by the OECD the products of such firms can be :

- **Complementary**- the products which when used together are of greater value than when used individually. { shoe and a shoe polish }
- **Weak substitutes**: weak substitutes can also be recognised as “neighbouring goods”. These are those goods just like the name suggests have a lot of similarities but cannot be considered in the same product market with the original goods. [example herbal face paints and normal face paints]
- **Unrelated products**: the goods which are not related which are neither substitutes nor complementary in nature but are offered in the same brand family. They might have the same purposes. { baby powder with adult powder combo }.

As according to the OECD further in its roundtable talks it was seen that the term conglomerate mergers is used very often but many vied under this banner do not prima facie fall completely under the banner of conglomerate mergers hence conglomerate effects don't fit into a single neat category. The OECD established that they will be using the banner conglomerate mergers either for which are totally pure conglomerate transactions which negates horizontal or vertical connections and conglomerate components of more complex mergers.

Conglomerate mergers are not an effect of economic efficiency but has various other factors responsible for it. It helps firms in reduction of taxes, public subsidiaries can be procured, diversifying the business portfolio. It can always be a medium for linking diverse geographical market with firm activities

The term conglomerate merger expands to include the transactions which are inclusive of a wide range of product relationship, which is pursued for a diverse range of businesses. The competition problems related to conglomerate mergers analysed in the OECD paper:

- **Unilateral effects** - Risks related to the firms ability to foreclose competition post merger by methods such as bundling and tying strategies.

- Co-ordinated effects - facilitation of conclusive outcomes; and
- Efficiencies - the effects that are only going to materialise through the merger.

Empirical evidence of conglomerate effects :

How do the competitive authorities know which conglomerate merger to review and assess and what will be their effects . All this depends on the tests conducted by the competition authorities. The theories of harm are the determining factors.

The first set of study regarding conglomerate mergers was set out in the 1960's - 1970's in the US which focused on the then so called 'third merger wave'. It was contended that there wasn't any impact on industry concentration any how. Generally industry-level concentration is not a factor while considering the effects of a conglomerate mergers or its competitive pressure on the market level.

OECD - conglomerate mergers affecting multiple markets of the same industry have not shown signs of having affected the industry structure.

The study in the form of survey was conducted regarding the merger wave by MULLER , no evidence could be found that suggested towards the increase in profits, diversification of risks or stock returns of the conglomerate. Simply stating there was no better performance exhibited by the conglomerate than the rest of the others in the industry. There were no significant impacts on the competition, no significant sign that pointed towards the extreme benefits the conglomerate achieved after merging.

There have been studies conducted in the recent years which have focused on the impact of certain specific mergers which might be able to provide certain information for competition policy framers. One study assesses whether i. Foreclosure and ii. Leveraging occurs in reference for weak substitute products.

In the study conducted by Chung and Jeons - It was established that there was indeed leveraging effects from the said merger of related goods producing firms. The leveraging only extended letting the conglomerate have entry into the markets which were previously dominated by a single player. The result which can be inferred is that the markets can be

leveraged across other markets.

Conglomerate theories of harm:

The harm caused by the conglomerate or by the companies if they merger can be seen in terms of unilateral and coordinated effects. Ever theory differs but has points where they intersect and connect, the elements of consistency in all the theories of harm involving conglomerate mergers are

1. The prominence of bundling and tying
2. Importance of market power

Tying - Tying occurs when any firm requires its consumers to purchase one or more "tied" products if they wish to purchase a "tying product". The tying can be either 'technical tying' or through 'contractual tying'. Full line forcing occurs when a consumer buying one item is compelled to purchase a full set of products.

Bundling - bundling occurs when a firm offers multiple products together as a single product by the way of pure or mixed bundling.

Bundling and tying are often considered together for practical reasons. Bundling can be considered a type of tying itself.

Unilateral effects:

The most common concern is the foreclosure of competition through bundling and tying, fore-closed is the focal point of traditional conglomerate theories of hate.

The likelihood of foreclosure rising through conglomerates can be asses by the following ways:

1. The abilities of the merging firms to implement tying and bundling strategies,
2. The incentive of firms to engage in tying and bundling,
3. The effects of such conduct

The two ingredients in particular shape this assessment are:

The relationship between the products -

Simplest form of bundling and tying happens when products in question are complementary, when consumed together benefit the consumers. A complement can be either consumable (repeatedly purchased) or durable (an infrequent purchase). When a consumable product is tied to the purchase of a durable complement the restrictions can be referred to as a dynamic tie.

The structure of the market:

The common factor amongst all the conglomerate theories of harm require the existence of a Dominant position, or at least have significant market power in at least one market prior to the merger. To simply state a dominant position may be required for a firm to have the ability to engage in potential anticompetitive conduct. The likelihood of a non dominant or strong firm to structure the market in such a way which influences the outcomes of tying and bundling can also be possible. The economic literature mostly focuses on situations in which these markets exhibit either barriers to entry or strong economies of scale. Tying and bundling in such situations as an exclusionary strategy could be profitable and feasible. The economic theory suggests that where perfect competition in the market exists there may be little to gain from bundling or tying.

Efficiencies associated with conglomerate effects:

The economic literature recognises the efficiencies attached along with conglomerate mergers, they can be substantial and the harms are very dependent on the specific circumstances of the market. Commonly cited efficiencies of mergers between firms producing complements is what is referred to as the **cornot effect**. When firms decide to produce complementary products they tend to overlook the impact on the producers of their products complements. The rise of efficiencies on the demand side can also be a result of conglomerate mergers. Search costs can be lowered by way of bundling, also convenient as a one stop shopping. Economies of scale and scope can be seen by the way of management skills, internal experiences from “learning by doing” and more effective utilisation of assets already in use.

Guidelines on the assessment of non- horizontal mergers- EU

The European Union does not have specific guidelines for conglomerate mergers but distinguishes it from horizontal. The guidelines for conglomerate merger are common with those of vertical mergers.

The EU recognises two types of non horizontal mergers:

- Vertical and
- Conglomerate mergers.

The EU describes conglomerate mergers as -

“Conglomerate mergers are between firms that are in a relationship which is neither horizontal or vertical.”

In practise the focus of the guidelines of the Commision are on the mergers between those com- panies which are active in closely related markets. Distinction between the horizontal and con- glomerate mergers can be subtle. Example when a conglomerate merger is involved with prod- ucts that are weak substitutes for each other the same distinction is upheld while distinguishing between vertical mergers and conglomerate mergers for instance products may be supplied by some companies with the inputs already integrated (vertical relationship) on the other hand the customers are left to select and assemble the inputs themselves (conglomerate relationship).

The EU believes that unlike the horizontal mergers, vertical or conglomerate mergers do not en- tail the loss of direct competition between the merging firms in the same relevant market. In ver- tical or conglomerate mergers the main source of anti- competitive effect absent which are found in horizontal mergers. Substantial scope of efficiencies are provided through vertical and con- glomerate mergers, a characteristic of some of these mergers are that the activities &/or the products of the companies involved are complementary to each other.

The two main ways through which non horizontal mergers may significantly impede effective competition :

- i. Non-coordinated effect &
- ii. Coordinated effects.

Conglomerate mergers :

The EU has acknowledged the fact that conglomerate mergers in majority won't lead to any competition problems but it depends from merger to merger. In its assessment the Commision considers both i. Pre- competitive effects, ii. Anti-competitive and possibly pro-

competitive effects.

A. Non-coordinated effects: foreclosure

The main concern in the context of conglomerate mergers is that of foreclosure. Combinations of products in related Market may confer on the conglomerate ability to leverage, building a strong market position by means of tying and bundling or other exclusionary practices in the other desired market. These practices are common, most cost-efficient ways, better offers, products. Many times these practices may lead to reduction in action or potential rivals ability to compete. The competition pressure may be reduced on the merged entity hence they increase the price.

There is no received definition of 'leveraging' but in neutral sense, able to increase sales of a product in one market by virtue of the strong market position of the product to which it is tied or bundled.

The Commission examines the following:

1. The ability of the merged firms to foreclose its rivals
2. Whether economic incentives are present in doing so
3. Whether there will be any significant determination effect on competition through the foreclosure strategy, thus causing harm to consumers

These factors get examined together as they are closely intertwined.

Ability to foreclose:

The way in which merged entities may use their Market power in another market to foreclose competitors in another market is by conditioning sales in a way that links the products in the separate market, this may be done directly either by tying or bundling.

"Bundling" is the process in which the products are offered and priced by the merged entity. A distinction can be made between the pure and mixed bundling. In the process of bundling products are sold jointly in fixed proportion, mixed bundling products can also be available separately but the sum of the stand-alone prices may be higher than the bundled price.

"Tying" refers to the process where the consumers purchasing one good are required to also purchase another good from the same producers, such tying can take place on a technical or contractual basis.

For the foreclosure the new entity must have a significant degree of market power, which might

not result into dominance in the concerned markets. The threat of foreclosure to be potential there must be a case where there is a large common pool of customers for the individual products concerned. The foreclosure effects of the process of tying and bundling are more likely to be more severe in industries where there are economies of scale and the demand pattern at any given point in time has dynamic implications for the conditions of supply in the market in the future. The scope of foreclosure is lesser where the merging firms cannot commit to making their tying or bundling strategy a lasting one, example - through the technical tying process or bundling which is costly to reverse.

Co-ordinated effects:

Conglomerate mergers may in some circumstances facilitate anti-competition coordination in the market, even in the absence of any agreement or a concerted practice within the meaning of Article 81 of the treaty. The framework set in the section iv of the notice regarding the horizontal mergers also applies in this context. In particular, co-ordinated and where such coordination is sustainable. One of the ways in which a coordinated outcome is given in a market is by reducing the number of effective competitors to such an extent that tacit coordination becomes a real possibility. A conglomerate merger might increase the extent and importance of a multi-market competition. Competitive interaction on several markets may increase the scope and effectiveness of disciplinary mechanisms in ensuring that the terms of co-ordinated are being adhered to.

Broadcom/ Brocade-

The main concerns of the commission were that of potential degradation of interoperability between the merged entities switch chips and interface cards, which could possibly lead to leakages and misuse by the merged entity of confidential information related to competition interface card suppliers.

The concern of the Commission were remedied by Broadcom committing to cooperate closely and in a timely manner with competing interface card suppliers to achieve for them the same level of interoperability enjoyed by its own interface cards.

Essilor/Luxottica-

The concern of the Commission with the merging entities was the use of Luxottica's powerful brands by the merged entities would force opticians to buy Essilor's lenses by means of

bundling or tying, and thus exclude other suppliers.

The Commission undertook extensive market testing reaching out to 10,000 opticians and received 4,000 third parties and the transaction was cleared with no remedies.

Microsoft/ LinkedIn -

The concern of the Commission was that of Microsoft pre-installing LinkedIn on all windows PC's integrators, LinkedIn into offices by combining the users database and shut out LinkedIn's competitors by not providing them with the technical information that they need to interoperate with Microsoft products .

The Microsoft was advised to undertake remedies inter alia, not to force PC manufacturers and distributors to pre- instal LINKEDIN on windows PC's and to allow users to remove it, should the manufacturer or distributor decide to pre-install.

Conglomerate effects of mergers - Note by the united states

OECD- organisation for economic cooperation and development

Legal frame work:

In the US mergers are reviewed under section 7 of the Clayton Act. In applying section 7 all mergers are " tested by the same standard, whether they are classified as horizontal, vertical, con- glomerate or others". The congress in the year 1950 even redrafted section 7 in part , to put it simply section 7 would apply to not only mergers between actual competitors, but also to verti- cal and conglomerate mergers whose effects may tend to lessen competition in any line of com- merce in any section of the country. The courts in the united states apply a three fold or rather a three phrase burden shifting framework while analysing mergers under section 7 of the act. The burden lies in the plaintiff to prima facie establish a case regarding the anti-competitive effects of. Merger in the relevant market. The section 7 requires the court to "arrest anti-competitive tenden- cies in their incipency." The same framework will apply regardless of the type of merger is being reviewed, a presumption of harm from horizontal mergers has been establishes by the courts which is not applied for vertical or conglomerate mergers. In vertical and conglomerate mergers there is no presumption of an increase in market concentration while in horizontal mergers the harm to competition is presumed from "undue concentration in the market for a particular prod- uct in a particular geographic area."

The evolved approach of the United States:

The approach of the United States has changed over the years now reaching a state where they committed to the core values of the antitrust laws protect competition, efficiencies, and consumer welfare. There was a decade long period from 1965-1975 where the agencies would challenge several mergers of unrelated products. The doctrine known as “entrenchment” in particular was wary of mergers which strengthened an already dominant firm through greater efficiencies, or might give the acquired firm access to a broader line of products or greater efficiencies this would make the life of the rival firms harder which were significantly smaller. However as time has changed this approach is no longer valid under the U.S. law or the economic theory. This approach of the entrenchment can be seen in the case of *FTC v. Procter & Gamble Co.*

Phillip Areeda and Donald Turner in their antitrust law treatises showed that to condone the conglomerate merger just because they might allow the merged firm to capture cost savings and other efficiencies, thus getting a competitive advantage over the other players is contrary to sound antitrust policy because cost savings are socially desirable.

The shift in the approach of the U.S. can be seen in the case of *GE/Honeywell*, in the year 2001 the DOJ’s decision to clear the merger with minimal conditions. The EU’s DG competition on the other hand blocked the merger despite the DOJ determining there was no direct overlap as GE worked in business focused on jet engines for large commercial aircrafts whereas Honeywell focused on engines for the small regional jets, turboprops and non-aviation aircrafts. The merger was blocked on the basis of GE strengthening market power and Honeywell to gain a dominant position. The same concern were not shared by both the authorities.

The U.S agencies have as recently as in March 2020 challenged mergers of complements on vertical theories. The DOJ had the companies divest assets to address vertical concerns arising from the proposed merger of United Technologies Corporation (UTC) and Raytheon.

Halliburton/ Baker Hughes:

The DOJ sued to block Halliburton in April 2016, being one of the largest oilfield service provider company in the U.S., was to acquire its closest rival Baker Hughes. Along with one more company named Schlumberger these were known as the “big three”. The DOJ observed “the elimination of competition between Halliburton and Baker Hughes would

have more pro- found anticompetitive effects than market shares and HHI measures alone would indicate.”

The Halliburton proposed billions of dollars worth of divestitures to address the overlap in the market. As determined by the DOJ the remedy was considered inadequate and the merger was sued to block. Ultimately the plans of merging by both the companies were abandoned.

Bayer/ monsanto:

In may 2018, the proposed acquisition of Monsanto valued at \$66 billion was cleared by the divi- sion subjected to a comprehensive divestiture of assets to a third party, BASF. Both the compa- nies Bayer and Monsanto were two of the largest agricultural companies in the world. It was al- leged in the complaint that the acquisition would result in the loss of current and future competi- tion in a number of important seeds and traits in a number of important crops(cotton, soybean, canola) etc. The DOJ’s complaint was regarding the concerns of the mergers would harm innova- tion particularly innovation in the “bundle” of traits and herbicides, price harm was one of the main concerns of the DOJ. Competition concert were resolved by the way of divestiture suggest- ed by the DOJ to Bayer which consisted assets worth \$9billion to be divested to BASF. The busi- ness of bayer which was directly related in competition with Monsanto was included in the di- vestiture as well as structural divestitures to remedy vertical concerns. The divestiture of intel- lectual property and research capabilities including “pipeline” R&D projects. Additional com- plementary assets were to be divested to ensure that BASF had the same innovation incentives, capabilities and scale that Bayer would have as an independent competition including most no- tably, Bayers nascent “digital agricultural” business.

In the 1960’s and 1970’s a wave of conglomerate mergers in the US raised concerns regarding the effects of them on the competition in the market. They were divested at the very moment and conglomerate mergers are rare in these times.

In such cases companies valued together are much more than if value separately.

The equation $2+2=5$ is an adequate representation of conglomerate mergers.

Types of conglomerate mergers:

Conglomerate mergers are branched into 2 types- pure and mixed conglomerate mergers.

Pure:

A pure conglomerate merger is When the coming together companies are not in the same product market, they work in completely different industries or geographic location . There is no overlap- ping over operations and strategies.pure conglomerate mergers have been considered on the riski-er type of deal, it presents many challenges. The merging firms have many differences, in the face of the shareholders not agreeing to the merging of the companies, the management and de- velopment can pose as a challenge.

These kinds of mergers bring along with it benefits which come in the shape of entering new markets, the finances of the merged companies are boosted prompting more investors to take an interest in them. A diversified consumer base is create. The loyal consumer base of each of the companies will invest in the companies products thus expanding the market of the companies.

Mixed:

A mixed conglomerate merger occurs when different companies from different industries that have something in common come together.they may have something common in the downstream chain, common data base. The ultimate goal of these merging companies is to expand their prod- ucts or enter new markets with the help of such conglomerate mergers which gives then an ad- vantageous position in the markets of one another.

The most relevant example of mixed conglomerate merger is Walt Disney acquiring an American based broadcasting company. This kind of merger is quite rare but presents the strengths of a conglomerate merger which display the rapid growth and fast success. The various challenges posed by such mergers are in the form of different corporate cultures, product lines, business op- erations financial planning etc. the process is quite compelling and complexed for the companies in question. The main draw back is the much more needed financial resources.

Advantages of conglomerate mergers:

Diversification:

There are numerous advantages in a conglomerate merger one being diversification. When

a con- glomerate merger takes places the industries in which the companies work diversify, opening horizons to new market industries. The performance of the company does not only depend on one single industry rather the risk of the companies can be distributed across multiple industries. The companies diversify their business portfolio combining with various industries across the mar- kets. The performance of the conglomerate does not only depend on one single industry. There is elimination of industrie specific challenges and impact of economic downturns.

Market access:

The conglomerates are exposed to a wider market gaining access through the diversification and coming in touch with a larger and new customers base. The conglomerates through merging gain access to the markets they have not yet tapped into by combining they reach the desired markets and introduce themselves in the new industries they desired access to. This specific move in- creases the sale and revenue of the conglomerates by having a diverse Market range. The most specific of the gains of a conglomerate merger is the conglomerates can now engage in different industries, leveraging the existing customer base of the merger company.

Creating Synergies:

The most common or obvious result of conglomerate merger is the combining of the diverse companies. The conglomerate now have shared resources, cross selling and use the complemen- tary capabilities to Create a synergy. By putting these synergies to use company can gain a leverage. The most frequent outcomes can be the improving operational efficiencies, leading to increase in its market competitiveness hence resulting in increased revenues. The conglomerates can even be additional save money.

Reduction in vulnerability:

The risks of the companies failing in one specific market is always high because the markets are risky by the way of conglomerate mergers the company diversify there working market industries and no longer rely on one single market outcome hence they are less vulnerable. Companies working in one specific market are in a way secured from the market specific risks as they have backup Market to supply the revenue support in the times of downtime in a specific market. Companies expand working in industries to ensure lower risk exposer by

operating in different industries. The conglomerate can leverage the data of the merged company to gain an advantage.

Disadvantages of conglomerate mergers:

Complexity and integration challenges:

Conglomerates mergers possess a significant disadvantage because of them being complex and challenging to integrate. The success of any conglomerate depends on how well the planning has been done, the coordination and allotment of resources owing to their dynamics, regulatory requirements and operational considerations that are specific to every industry.

The work culture in every company is different and balancing that post the merger of the companies is a crucial element which might result into culture clashes, inefficiency resulting into fallout in many aspects of the companies which have just united posing a threat at the management level.

Lack of industry-specific knowledge:

Conglomerate mergers are mostly among different market sector industries hence unrelated companies which have different operations undertake, after the merger the conglomerate faces problems related to expert knowledge in the unrelated field, knowledge to efficiently manage the conglomerate is not enough. This is why mainly experts from a certain industry are hired to set the problem aside. The companies must have a broad understanding of the industry they plan on setting foot in with the merged company but to have proper management experts are hired. This lack of knowledge may result in various sectorial difficulties. The conglomerates are seen relying highly on external consultants.

Limited synergy potential:

When two completely unrelated companies merge there is a high possibility of the synergy expected might not always pan out the way the companies had initially collaborated upon, due to absence of complementary or overlapping elements.

This is a huge disadvantage for the conglomerates as they do not attain the desired result of the merger.

Regulatory scrutiny:

Conglomerate mergers come under the radar of the authorities when they possibly can have an antitrust element and raise competition concerns per se. Competition authorities scrutinise the merger from every angle to determine if the merger has any anti competitive element and if they might be a deterrent to the competition. The main concern which is looked into is the welfare of the consumer and the competition in the market which is closely examined by the authorities. Not all mergers are scrutinised with the same intensity but the ones which have meet the certain guidelines prescribed.

The potential concerns:

- Reduction in competition
- Monopolistic market practises
- Increased market power

These reasons result in scrutinisation by the regulatory authorities.

Resources allocation challenges:

The main stone to turn is the allocation of resources to each diverse sector of the company. Every sector has different needs, sources and requirements. The different capital requirements the type of investment which will benefit the sector cannot be common but ranges through the needs of the sector individually which results in the growth prospect. Every decision has to be sector specific and the person making them should be well versed with the working of the sector.

Conglomerate mergers have advantages and disadvantages depending upon the kind of company it is merging with. The advantages and disadvantages might change based on the kind of sectors the companies are tapping into.

Conglomerate merger guidelines for companies:

For any conglomerate merger to be a potential success there are some parameters to be looked at while deciding to merge which plays a very crucial role in determining the outcome of the merger.

Strategic alliance:

The very first parameter being strategic alliance the companies must have some common goals which they decide to approach together through the merger, the future aspirations must be similar, the values must in some manner be similar other wise it might not align in the future. Companies deciding to merge must examine the contrasting nature of the business which lead to maximising the value enhancing market position which is a determining factor in generation of revenue in new stream.

Due diligence:

A due diligence must be conducted on the target company which presents a clear picture, it eases the companies to understand the financial and legal aspects of the target. Due diligence helps identify the liabilities, potential risks the target has acquired, the regulatory compliances, its contacts, assets and intellectual property rights in detail. This helps in analysing potential risks and challenges the conglomerate might face after the merger.

Cultural alignment:

It is very important to analyse the cultural compatibility of the companies merging. Every company has a different structure, the management style varies from company to company leading to a difference in different culture. The way the management approaches its workers, the leadership the employee expectations are all very different. To create a working environment which is harmonious for the employees it is very important to understand the workings of a company in entirety and address cultural differences.

Integration planning:

Before merging companies a rough plan must be in place which helps things move swiftly, a formal outline must be prepared. Timelines should be created for integration of tasks specific steps must be taken for finances, marketing, human resource and supply chain management post the merger for the success of the conglomerate

Communication and stake holder meeting:

For a smooth merger it is important to have a transparent flow of communication with the management and the shareholders which creates a clear picture for them to analyse and understand the process which leads to a positive outlook.

Post merger evaluation:

The process of easing into the new environment should be made easy for the employees. There must be a post merger evaluation to undertake the difficulties arising in the work environment and culture. To evaluate the function of the departments which are newly integrated.

Conclusion:

The approach India has towards conglomerate combinations is not very rigid and believe in easy of doing business. The regime followed in India is mandatory and suspensory in nature . Section 5 talks about the threshold which classifies which combination is notifiable and how, while section 6 talks about the mandatory regime followed. The word conglomerate has not been defined in the act, not ben mentioned in any of the orders or guidelines. Conglomerate mergers exist only practically and there is no theoretical mention of them in india. In India to facilitate the conglomerate mergers green channel has been intro- duces as a facilitation mode. The green channel is introduced by the amendment guidelines in section 5A OF THE ACT. There have been various other guidelines integrated in the act. India has as of now not re-jected or blocked any green change merger which shows Indias stance which is not very cautious of the conglomerate mergers. There have been speed and cost efficient mergers through the green channel route. India does not have any residuary or referral power unlike other jurisdictions. The cci can only review the transactions which meet the threshold even if the transactions which have a anti-competitive effect but do not meet the threshold cannot be reviewed anyhow. The power cci has not been given enough power to review such transactions as also mentioned in section 20

(1) of the act.

The EU on the other hand is rigid towards the conglomerate combinations reviewing and blocking it heav- ily. The EU also review mergers which do not fall under the threshold or jurisdiction by way of the referral system prevalent within the Commision. The EU has blocked conglomerate mergers such as of GE/Hon- eywell which were passed by the U.S and 11 other districts just on the basis of being too large and might grow dominant which was seen as unnecessary by other jurisdictions. The EU is more towards blocking conglomerate mergers and not in favour of such mergers.

The UNITED STATES on the other hand was in the early 1960's and 1970's towards prevention of con- glomerate mergers or were not very welcoming of such mergers. In the recent years they have disregarded and evolved from the old economy theories of harm and are more towards facilitation of such mergers. The DOJ and the FTA are the bodies that in the U.S. review mergers broadly. The section 7 of the Clayton Act governs mergers in the U.S.

We can say in the recent years conglomerate mergers have not been seen as a potential threat once they have been throughly examined and any possible change of an AAEC or anti-competitive practise has been negated through modifications suggested by the authorities. Gone are the times when too large a company is considered a threat to the market.

Companies indue in such mergers to expand, tap into markets they have not yet explored, to diversify their markets and diversify risks related to a single market.

Recommendations:

The guidelines in INDIA need to be updated and include more inclusivity. India is very limited when it comes to reviewing the transactions in the markets. The thresholds are the determining point whether a transactions will be reviewable or not, this approach has to change. The act needs to include reviews of those mergers which are a potential threat to the competition **refernces** but still cannot be reviewed by the commission due to not meeting the threshold. Unlike the EU and other jurisdictions India does not have the residuary or referral system hence India has a limited reach. This reach has to be expanded. There should be conglomerate combinations specific guidelines as India facilitates such mergers through the green channel but does not use the word theoretically.

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