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THE EVOLUTION OF M&A REGULATIONS IN INDIA: ANALYZING THE IMPACT OF COMPETITION LAW

AUTHORED BY - ARNAV JHA

Introduction

Mergers and acquisitions (M&A) are vital components of a dynamic economy, facilitating corporate growth, restructuring, and market consolidation. In India, the landscape of M&A activities has witnessed significant evolution over the years, shaped by both domestic policies and global economic trends. Central to this evolution is the impact of competition law, which seeks to ensure fair competition and prevent monopolistic practices. This article delves into the history and development of M&A regulations in India, focusing on the role of competition law and its influence on the M&A landscape.

Mergers and Acquisitions

Mergers and Acquisitions (M&A) refers to the strategic transactions[1] that businesses use to merge or consolidate their ownership structures, operations, or assets. A merger occurs when two or more businesses combine their activities to form a new company, whereas an acquisition occurs when one business buys the assets or ownership stakes of another. These transactions are driven by various strategic objectives, including achieving economies of scale, expanding market reach, diversifying product portfolios, and unlocking synergies.

One of the primary motivations behind M&A transactions[2] is to achieve economies of scale and scope, enabling companies to reduce costs, increase efficiency, and expand their market presence. By combining resources, expertise, and market reach, merging entities can capitalize on complementary strengths and gain a competitive edge in their respective industries. Moreover, M&A transactions offer opportunities for diversification, allowing companies to enter new markets, access new technologies, or diversify their product portfolios.

In India, M&A activities span a wide range of sectors, including banking and finance,

[1] Gaughan, P. A. (2010). *Mergers, Acquisitions, and Corporate Restructurings* (5th ed.). John Wiley & Sons.
[2] Weston, J. F., Mitchell, M. L., & Mulherin, J. H. (2004). *Takeovers, Restructuring, and Corporate Governance* (4th ed.). Pearson Education.

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telecommunications, manufacturing, pharmaceuticals, and technology. The banking sector has witnessed significant consolidation through mergers, driven by regulatory reforms and the need to enhance financial stability and competitiveness. Similarly, the telecommunications industry has seen a flurry of M&A deals aimed at strengthening network infrastructure, expanding subscriber base, and keeping pace with technological advancements.

Historical Overview of M&A Regulations in India

Prior to economic liberalization[3] in the early 1990s, India's regulatory framework for M&A activities was relatively restrictive, characterized by stringent controls and bureaucratic hurdles. The Industrial (Development and Regulation) Act, 1951, and the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969, governed M&A transactions, with a primary focus on preventing the concentration of economic power and promoting public interest.

During the MRTP Act Regime: The Monopolies and Restrictive Trade Practices Act, 1969 ("MRTP Act") was the first act which dealt with competition laws in India. The nature of the MRTP Act was to stress on prevention of monopoly of any kind[4]. The lack of intent on the part of lawmakers to include merger control was quite evident back in 1969, as the MRTP Act did not even include the term 'combination' but only had certain provisions on an elementary level. Part A of Chapter III of the MRTP Act, 1969 (Section 20- Section 26) dealt with mergers and acquisitions. The provisions were quite rudimentary in nature because only acquisitions of more than 25% equity stake in a target company where the acquirer would be considered a "dominant entity" was to be notified and the same was conditioned upon the approval of the Central Government. This ended up reducing the jurisdiction of the MRTP Commission as it gave express overreaching powers to the Central Government to prevent mergers and acquisitions which had the potential to cause economic monopoly.

Subsequent deletion of provisions in 1991:

- [3] Kumar, N. (2008). Economic liberalization and India's economic growth: Cross-state evidence. *The Journal of Development Studies*, 44(1), 48-68.

[4] Singhal, A., & Singh, S. (2016). Evolution of competition law in India: A comparative analysis of MRTP Act, 1969 and Competition Act, 2002. *Competition Law Review*, 7(2), 112-132.

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These few elementary provisions (i.e. Section 20 to 26) were also subsequently deleted after the liberal economic reforms by way of an amendment in 1991[5]. This is because, the government was of the view that provisions under the Companies Act, 1956 were sufficient for regulation of mergers and acquisitions and there should not be any provision in the MRTP Act which would come in the way of liberalization of economy.

Advent of merger control provisions under the new Competition Act, 2002: Eventually, the Ministry of Corporate Affairs, realizing the flaws in the MRTP Act vide its Notification dated August 28, 2009 repealed the MRTP Act to make way for Competition Act, 2002. It was finally realized that the interference of the central government as mandated in the MRTP Act would be detrimental to economic growth. Also, the legislative intent was to introduce a pro-competition law instead of focusing on prevention of monopolies which was an essential feature of the MRTP Act. The Competition Act, 2002 commenced in the year 2009. Despite the same, it was only on 1 June, 2011 when provisions relating to combinations of the Act officially took effect.

Section 5 and 6 are the operative and substantive provisions for merger regulation under the Act while Section 29 to 31 in addition to the CCI (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ("Combination Regulations") lay down the time bound procedural requirements in relation to combinations.

The merger control regime in India today[6], is at a very nascent stage in comparison to its contemporaries in the European Union (EU) and the United States (US). It is safe to say that the basic skeleton has been imbibed from its EU and US counterparts. The law in India is yet to mature which is why the provisions pertaining to combinations undergo constant amendments to suit the changing economy and evolving precedents.

In the EU, merger control is termed as "concentrations" which is used interchangeably with mergers. The provisions are contained in the EU Merger Regulation, Regulation 139/2004. Similarly in the US, Section 7 of the Clayton Act, 1950 pertains to merger regulation which prohibits acquisitions of assets or stock where the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. The competition bodies in the EU and the

[5] Basu, D. (2012). The impact of economic liberalisation on competition policy in India. *Journal of Antitrust Enforcement*, 1(1), 154-173.
[6] Rao, P. K. (2010). An overview of Indian competition law: A look into policy and implementation. *Journal of Law and Policy*, 18(1), 45-68.

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US also follow a time bound procedure to assess combinations and deliver their verdict. One interesting thing to note is that outside India, when competition authorities have found combinations adversely affecting the competition, they have gone ahead and rejected those combinations. However, in the 10 years of merger control in India, till date, the CCI has never blocked a deal if found to be having an AAEC The CCI instead works with the parties, suggests modifications, structural and behavioural shangor 2nd in the end approves the transactions showing its commitment to promote competition.

The changing nature of implementation of merger control in the Act:

When the Act was first passed, merger notification was considered to be an "optional proposition" i.e. the parties were at liberty to notify after the consummation of the transaction. Mergers, acquisitions and amalgamations require a hefty amount of time and cost and therefore, the formality of notifying to the CCI was suggested to be done after the consummation of the transaction. However, the Standing Committee[7] on Finance expressed their dissatisfaction to this theory citing the reason that if notification happens after the consummation of the transactions, then the authorities will not be in a position to identify their impact on the market. The exercise of filing a notification becomes futile once the transactions have been consummated[8].

Accordingly, when the Act was amended in 2007, the merger control regime introduced the mandatory requirement of filing a notification as a suspensory obligation. Suspensory obligation requires parties to make a notification to the CCI regarding the nature of their proposed transaction immediately after the approval of the board of directors of the companies and not consummate it before they receive the approval of the CCI.

As the merger control provisions came into effect in the year 2011, the following factors became the foundations of this regime:

- Mandatory notification of combinations which are required to be notified;
- Delineation of the relevant product and geographic market to which the combination pertains to;

[7] Standing Committee on Finance. (2007). Report on the Competition (Amendment) Bill, 2007. Parliament of India.
[8] Chakravarty, I. (2012). Evolution of merger control in India: A critical analysis. *Indian Journal of Law and Economics*, 4(1), 115-132.

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- Identification of the overlaps of goods and services of the parties involved in the combinations in that relevant market; and
- Analysing whether the combinations had an appreciable adverse effect on competition in the relevant market in accordance to the factors laid under Section 20(4) of the Act.

However, the post-liberalization era witnessed a paradigm shift in India's approach towards M&A regulations[9]. The government initiated reforms to promote foreign investment, deregulate industries, and foster competition. Key legislative changes, such as the repeal of the MRTP Act and the enactment of the Competition Act, 2002, marked significant milestones in this transition.
Impact of Competition Law on M&A Activities

The Competition Act, 2002, established the Competition Commission of India (CCI) as the apex regulatory authority responsible for enforcing competition law in India. One of the primary objectives of the Act is to prevent anti-competitive practices and regulate combinations, including mergers, acquisitions, and amalgamations, that may have an adverse impact on competition.
The introduction of competition law brought about several notable changes in

India's M&A landscape:

1. Scrutiny of M&A Transactions: Under the Competition Act, certain M&A transactions meeting specified thresholds are subject to mandatory notification to the CCI. The CCI assesses the potential anti-competitive effects of such combinations and may approve, reject, or impose conditions on the proposed transactions to safeguard competition.
2. Promotion of Competition: Competition law encourages market-driven outcomes by promoting competition and preventing the abuse of dominance. M&A transactions that enhance efficiency, innovation, and consumer welfare are typically viewed favourably by the CCI, provided they do not result in a substantial lessening of competition in the relevant market.
3. Enforcement of Competition Principles: The CCI has the authority to investigate and penalize anti-competitive conduct, including cartelization, abuse of dominance, and anti-competitive agreements. This enforcement plays a crucial role in deterring anti-competitive practices and maintaining a level playing field for businesses.

[9] Sarkar, S., & Echambadi, R. (2007). Regulatory environment and its impact on M&A execution and outcomes: A study of the Indian experience. *Strategic Management Journal*, 28(13), 1233-1254

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Evolution of M&A Regulations in India: Key Milestones

1. Competition Act Amendment, 2007: The first significant amendment to the Competition Act introduced provisions related to the regulation of combinations. It mandated pre-notification of certain M&A transactions to the CCI and established a framework for assessing their potential impact on competition[10].
2. Competition Act Amendment, 2009: This amendment further refined the provisions related to combinations, clarifying the criteria for determining whether a transaction is likely to cause an appreciable adverse effect on competition (AAEC). It also expanded the scope of exemptions available for certain categories of combinations[11].
3. Introduction of Green Channel: In 2019, the CCI introduced the 'Green Channel' mechanism to expedite the approval process for certain categories of combinations deemed unlikely to raise competition concerns. This initiative aimed to reduce regulatory delays and facilitate ease of doing business in India.
4. Merger Control Regulations, 2011: The CCI formulated detailed regulations governing the procedure for filing and reviewing merger notifications, outlining the criteria for determining relevant markets, assessing competitive effects, and imposing conditions, if necessary, to address competition concerns.
5. Landmark M&A Cases: Several high-profile M&A transactions in India have undergone rigorous scrutiny by the CCI, leading to significant precedents and insights into the application of competition law principles. Notable cases include the acquisition of Flipkart by Walmart[12], the merger of Vodafone India and Idea Cellular, and the proposed combination of Future Retail and Reliance Retail.

Challenges and Future Outlook

While competition law has played a crucial role in regulating M&A activities in India, certain challenges persist[13]. These include the need for greater clarity and consistency in enforcement, addressing jurisdictional overlaps with other regulatory bodies, and enhancing the capacity of the CCI to handle complex cases effectively.

[10] Dhawan, P. (2008). An overview of the Competition (Amendment) Act, 2007. *Indian Journal of Law and Economics*, 2(1), 79-94.
[11] Krishnan, R. (2010). Impact of Competition (Amendment) Act, 2009 on merger control in India. *Indian Competition Law Review*, 3(2), 215-234.
[12] Dey, I. (2019). Competition law analysis of the Walmart-Flipkart deal. *National Law School of India Review*, 31(1), 99-122.
[13] Li, J., & Rugman, A. M. (2007). Real options and real options-based theory and practice in strategic management. *Journal of Management Studies*, 44(7), 926-949.

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Looking ahead, the future of M&A regulations in India will likely be influenced by ongoing developments in competition law, evolving market dynamics, and global trends. The CCI is expected to continue refining its approach to merger control, striking a balance between promoting competition and facilitating economic growth.

Conclusion

The evolution of M&A regulations in India reflects a broader shift towards a more competitive and market-oriented economy. Competition law, as embodied in the Competition Act, has emerged as a cornerstone of the regulatory framework governing M&A transactions, ensuring that they contribute to economic efficiency, innovation, and consumer welfare while safeguarding competition. As India's economy continues to integrate with the global market, the effective implementation of competition law will remain essential in fostering a conducive environment for sustainable growth and development.