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Mergers & Acquisition



Pro – competitive rationale of M&A

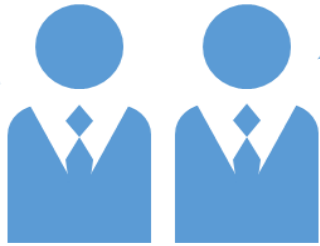
- Economies of Size and Scale
- Economies of Vertical Integration
- Complementary Resources
- Surplus Funds
- Industry Consolidation

But Anti-competitive effects

- Accumulation and exercise of Market power

Pre-merger

Buy my product for Rs 100 and take one year service free



Buy my product for Rs 98 and take six months service free

Wow! Competition between them is benefiting me



Post-merger

Buy my product for Rs 102. No free service!



Their merger has adversely affected me!





Ex Ante or Ex Post:



Agreements and Abuse of Dominance: Ex-post

- Combinations: Ex-ante- Implications?
- Merger to monopoly or near monopoly - likely to be prohibited based on probable AAEC.
- Why? Ex-Ante
 - Cost of remedies
 - Uncertainty
 - preventing future abuses
 - maintaining competitive markets
 - outcomes for consumers.
 - Exclusive reliance on ex post control - ineffective.



Combination- Competition Act 2002



Section 5:

- An Acquisition,
- Merger or
- Amalgamation
- which meets the relevant asset or turnover thresholds stipulated under the Competition Act is a “combination”.



Thresholds as provided in MCA notification



		Assets		Turnover
Enterprise level	India	> INR 2000 crore	OR	> INR 6000 crore
	Worldwide (with India component)	> USD 1 bn with at least INR 1000 crore in India		> USD 3 bn with at least INR 3000 crore in India
OR				
Group Level	India	> INR 8000 crore	OR	> INR 24000 crore
	Worldwide (with India component)	> USD 4 bn with at least INR 1000 crore in India		> USD 12 bn with at least INR 3000 crore in India



Combination- Exemptions



- Target Exemption/ De minimis
 - assets in India <INR 350 crores OR
 - turnover in India < INR 1000 crores.
- PFI, Banks, venture capital funds & FII
 - pursuant to an investment agreement or a loan agreement [Section 6(4)]
 - Requires intimation.
- Government of India by Notification [Section 54]
- CCI (Combinations Regulations 2011 [Schedule-I])



Notification and Approval of Combination



- Combinations
 - Which causes or likely to cause
 - An Appreciable Adverse Effect on Competition (AAEC)
 - Within relevant market in India
 - Shall be void [Section 6 (1)]
- Mandatory to file notice - form prescribed & fees
 - Get approval from the CCI [Section 6(2)]
- Shall come into effect within two hundred and ten days from the day of filing the notice or orders passed under Section 31, whichever is earlier [Section 6(2A)]



Is it an Acquisition, Merger or Amalgamation?

YES

Is it Excluded or Exempted?

NO

Are the Notification Thresholds exceeded?

YES

TRANSACTION IS NOTIFIABLE



Types of Mergers



- Merger, Acquisition and Amalgamation
- Types of Mergers
 - Horizontal Mergers: Mergers between producers of substitutes, i.e. products / services within the *same relevant market*
 - Vertical Mergers: Mergers between producers of complements, i.e. products / services are “inputs” to one another
 - Conglomerate Mergers: Mergers between producers of competitively unrelated products



Theories of harm



Merger does not create, protect, or enhance **market power** - should be cleared

Market power: “the ability profitably to sustain prices above competitive levels” where “competitive constraints” are not effective.

- **Unilateral effects:** Permit the merged firm to raise the price of some or all of its products, without any change in the nature of competition.
- **Coordinated effects:** : the creation of market circumstances that change the nature of competition such that the merged firm and its rivals are able to tacitly coordinate their actions in order to compete less intensively

Factors of Section 20(4) of the Competition Act, 2002 including Unilateral effect and Coordinated effects.



सत्यमेव जयते

Merger Review



- Defining Dominance – Ability of enterprise to behave/act independently of the market forces
- In a perfectly competitive market no enterprise has control over the market.
- For adducing evidence for ‘Dominance’ in a monopoly - relevant market has to be defined.
- Commission shall have due regard to the
 - “relevant geographic market”
 - “relevant product market”
- to determine whether a market constitutes a “relevant market” for the purposes of this Act [Section 19(5)]



Relevant Product Market



Relevant product market is defined in terms of substitutability or smallest set of products which are substitutable among themselves such as Car Market may consist of small cars, mid size cars, luxury cars *etc.*

Relevant factors:

- (a) physical characteristics or end-use;
- (b) Prices;
- (c) consumer preferences;
- (d) exclusion of in-house production;
- (e) existence of specialised producers;
- (f) classification of industrial products



Relevant Geographic Market



Conditions of competition for supply of goods / provision of services / demand of goods / services - distinctly homogenous & distinguished from conditions prevailing in neighboring areas.

- regulatory trade barriers;
- local specification requirements;
- national procurement policies;
- adequate distribution facilities;
- transport costs;
- language;
- consumer preferences;
- need for secure or regular supplies or rapid after-sales services.



Economic concepts in regulation of mergers



- Existing Competitors
 - The constraint provided by existing competitors can be assessed by analysing market shares.
 - As a firm's market share increases it is less likely to face a competitive constraint from other firms
- Market share is the starting point for analysing 'market power – Also see incremental market share
- Size & resources of the enterprise
- Size & importance of the competitors
- Economic power – commercial advantage over competitors/dependence of consumers



Economic concepts in regulation of mergers-



Potential competitors – prevents sustained price increase

- Can new firms enter market? – likelihood, timeliness & sufficiency
- Is the market is 'contestable' ?
- Can the firm raise entry barriers to remove the threat of potential competition?
- What is the growth rate of the market



Economic concepts in regulation of mergers



Buyer Power - The following can result in buyers having a strong bargaining position versus suppliers:

- buyer can easily switch substantial purchases from one supplier to another
- buyer could commence production itself (backward integration) or sponsor new entry
- buyer is an important distribution outlet for the seller



Modifications / Remedies - Powers of CCI



[Section 31]

- Approve that combination which is not likely to have any AAEC.
- Direct that the combination shall not take effect which is likely to result in AAEC.
- The Commission may approve with suitable modification to the combination.



Discussion on case laws (Case studies)



Bayer/ Mansanto (Pharma Sector)

Idea/Vodafone (Telecom Sector)

Jet/Eithad (Airlines Sector)



THANK YOU



What is Notifiable

Acquisitions of:

- Share
 - Any security
 - Indirect acquisition of shares of a downstream entity
- Voting Rights
- Assets
- Control
 - including positive, negative, direct, indirect, joint or sole

Demergers and Joint Ventures

Mergers and Amalgamations

Interconnected Transactions: Analyse separately, file together, implement after approval.



Facilities for filing notices

- Pre filing Consultation
 - identify information - filing complete & correct Form.
 - identifying additional information required
 - Identify key issues - to seek consultation
- Do-It-Yourself Software
 - Online software - facilitates in identifying the notifiability of any proposed transaction