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ANALYSIS OF MERGER AND ACQUISITION IN INDIA: INDIAN COMPETITION LAW

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ABSTRACT

A key factor behind the speed of global expansion by emerging market multinationals (EMMs) has been the adoption of mergers and acquisitions (M&A) as a means to rapidly access new markets, exploiting synergies, assets and capabilities. Indian companies have been active and visible players within this new M&A trend. India's increased M&A deal activity covers both domestic and cross-border deals, and shows that India is very much a country on the economic climb. The objective of the present analytical paper is to give insights and dynamics of the legal perspectives of M&A in India with special reference to analysis of competition Act 2002. There is a growing need to bring a change in the present law and a coordinated approach is required so as to bring Indian law in consonance with the law regarding mergers in other countries. It is important to craft an M&A deal in a very thoughtful manner with lucid and rational guidelines by brazing intricacies of changing economies to ensure complete freedom of trade, competition and protecting the interest of the consumers. Effective and rigorous application of Competition Act is the best way of guaranteeing economic freedom and to extend the benefits to society at large and is the only way to perceive completion act as a people's Act.

Key words: *Mergers, Acquisitions, Intricacies, Competition Act 2002, Legal Aspects.*

INTRODUCTION

"Effective competition regime provides necessary conditions for maximizing the welfare of the consumer... I am convinced that a rigorous application of Competition Act is the best way of guaranteeing economic freedom. It impacts not only the economic environment but also the organisation of society at large. It is in this way that Competition Act is a people's Act." - *Ashok Chawla, Chairperson, CCI.*

India, which has now opened itself to global competition, now has its own competition law. This new law, which seems to be in line with the trend globally, replaces the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969. In the pursuit of globalisation, India has responded to opening up its economy, removing controls and resorting to liberalisations. The natural corollary of this is that the Indian market must be geared to face competition from within the country and outside (Sridhar. 2011). The MRTP Act, 1969 had become obsolete in certain respects in the light of international economic developments relating more particularly to competition laws and hence a need was felt to shift the focus from curbing monopolies to promoting competition so that the Indian market is equipped to compete with the markets worldwide. The preamble of the Competition Act, 2002 states that it is a law to foster and maintain competition in the Indian market to serve consumer interest while protecting the freedom of economic action of various market participants and to prevent practices, which affect competition, and to establish a commission for these purposes (Competition Committee of India or CCI).

In India, mergers are regulated under the Companies Act, 2002 and also under the SEBI Act, 1992. With the enactment of the Competition Act in 2002, mergers have also come within the ambit of this legislation. In the Companies Act, 1956, mergers are regulated between companies *inter alia* to protect the interests of the secured creditors and the SEBI Act it tries to protect the interests of the investors. Apart from protecting the interests of private parties, these objectives are different and mutually exclusive. In the Competition Act, 2002, the objective is much broader. It aims at protecting the appreciable adverse effect on trade-related competition in the relevant market in India (AAEC).The Companies Act, 1956 and SEBI Act, 1992 (though mutually exclusive) aim to protect the interests of private individuals. Whereas, in the Competition Act, 2002, the impact of combinations directly affects the market and the players in the market including the consumers. We may, therefore, safely say that apart from the fact that all these legislations are mutually exclusive, the Companies Act, 1956 and the SEBI Act, 1992 are the sub-sets of Competition Act, 2002 in so far as legal scrutiny of mergers are concerned. This paper is an attempt to examine the merger laws and regulation in India and attempt to answer the following research questions using analytical style:

- What are the existing laws and regulations on merger control in these jurisdictions?
- What are the different types of mergers and what are their effects on competition?
- What are the thresholds limits and substantive assessment procedures for determining fate of mergers in these jurisdictions?

- How are joint venture transactions dealt under competition law by these jurisdictions?

SOURCES OF DATA

This paper has largely has predominantly referred to primary sources, such as statutes, regulations and guidelines, official website of CCI (competition Commission of India) and has also referred to a few relevant commentaries, reports, presentations and observations of jurists and experts in order to elucidate the arguments.

MERGERS AND ACQUISITIONS IN INDIA: NEW DYNAMICS

Concept of Merger and Acquisitions: A *merger* is the absorption of one company by another company, including all its assets and liability, when the shareholders of both the firms agree to merge. On the other hand, *acquisition* is the purchase of another firm. Acquiring firm purchases the shares, assets and liabilities of another/acquired firm, which are usually beneficial to the shareholders. Mergers can be done to access market, resources, finance, get expansion, or enhance productivity, shareholders belt, or to offset their profits with losses of the loss making company. Hence, M & A refers to reorganizing the legal ownership, operational or other structures of companies for making it more profitable or better organized for its present and future needs. There are various *advantages* of Mergers over Acquisitions, such as, merger does not require cash, may be accomplished tax-free for both parties. It allows to realize the appreciation potential of the mergers entity, agrees to increase overall net worth of the shareholders of smaller entities and target company shareholders can receive a public company's stock (Sridhar. 2011). Merger and acquisition (M&A) has *further benefits* which the firm gains (Seth Dua. 2006). Benefit of tax laws and incentive from section 72A of Income Tax Act by accumulated losses with profit which defend income from taxation. An opportunity to grow faster with existing market shares through utilization the current large demand for former firms. It helps to eliminate a competitor by buying it out and stop the company's own takeover by a third party. It produces higher corporate potential value than the value of the two separate entities. The *purpose* of a merger is usually to create a bigger entity, which accelerates growth and leads to economies of scale. However, a merger may lead to unwanted socioeconomic implications that are often frowned upon. This was proved when the European commission on competition blocked the merger of GE and Honeywell, which would have been one of the largest industrial mergers in history. This merger however, was earlier cleared by the concerned US agency –the Department of Justice. This clearly shows each country has its own rules on competition. What one perceives as a threat may not be taken the same way by the other.

Categories of Mergers: Categories of Mergers, which are depending upon its nature and course of business, such as, *Horizontal or Annexing Mergers* (a merger of companies engaged in the similar nature of business to consolidate the market share, and to ward off competition*, *Vertical or Streaming* (a merger of companies engaged in different stages of production in an industry, can be up-stream or down-stream), and *Diagonal or Conglomerate* (a merger of companies engaged in different mill falls to bring stability of income and profits and adverse fluctuations arising out of trade cycles) (Seth Dua. 2006). Mergers are classified on the basis of the position of merging parties in the economic chain prior to the merger. The most common types of merger are horizontal merger and non-horizontal merger which include vertical mergers and conglomerate mergers (Tiwari. 2011).

Horizontal Mergers: Horizontal merger occurs when actual or potential competitors of the same product and market and at same level of production or distribution merge. A transaction between two entities 'A' and 'B' producing the same product 'x', to form new entity for better production the product 'x' is horizontal merger. As seen from the explanation above, horizontal mergers are considered as most blemish to competition than the other type of mergers. These mergers have effect on market concentration and use of market power as they lead to, a) reduction in number of market players, and b) increase the market share of the merged entity (Elgers and Clark. 1980). The European Commission's Horizontal Merger Guidelines also mention two similar conditions where horizontal merger affect healthy competition in the market (Barton and Sherman. 1984). These are creation or escalation of dominant position of one firm having high market share post-merger. The second being reduction in competition restrains which existed pre-merger. The ICN Merger Guidelines Workbook produced by a Subgroup of International Competition Network, states theories of competitive harm through mergers, having coordinated or non-coordinated effects. As explained in the EC's Horizontal merger guidelines, and Office of Fair Trading guidance and United Kingdom's Competition Commission Guidelines, anti-competitive affects arising post-merger, but due to non-coordinated action by market players are known as non-coordinated or unilateral effects (Goldberg. 2007). The most common non-coordinated effect of a merger arises when post-merger, the market players are reduced in number and their market power increases, due to which they are vastly empowered to increase profit margins or able to reduce output, quality or variety.

***Non-Horizontal Mergers*:** The other type of mergers is non-horizontal mergers include vertical mergers and conglomerate mergers. Vertical merger occurs when two entities which operate at different but complimentary levels of production chain. Hence, a merger between a raw material supplier and manufacturer of final product from that raw material is a vertical merger. Vertical merger may have backward integration, as the example given above of transaction between supplier and manufacturer and can also be forward integration, for example, between the manufacturer and retailer. Conglomerate mergers are mergers between entities which are not linked or connected in any form. These entities are neither competitor in market nor are vertically connected for manufacturing of particular product. Conglomerate mergers in economic sense can be classified further as : a) pure conglomerate, where merging entities are not connected in any manner; b) product extension merger, where the product of the acquiring entity is complementary to that of acquired entity, and c) market extension merger, where the merging entities seek to enter into a new market. It is generally acknowledged that non-horizontal mergers do not cause harm to competition in the market.

Threshold limits: Threshold limits are important aspect of all competition policies, as these limits determine which transaction is to be notified to or which needs to be reviewed by the competition authorities. The laying down of threshold limit also eases the pressure of competition authority of inspecting all mergers, as done in mandatory notifying systems and allows the authorities to focus only on most likely mergers to affect transactions. It is important to note that threshold limits are used in order to provide a straightforward mechanism in determining the jurisdiction of competition authorities over a transaction and should not be considered as means of substantive assessment over the transaction.

APPLICABILITY ON INDIAN & FOREIGN ENTITIES

The Indian and foreign companies will fall under the Act only if they fulfill the following criteria as presented in figure 1 where 1 crore = 10 million (mn):

		ASSETS		TURNOVER	
In India	No Group	INR 1000 Cr.		INR 3000 Cr.	
	Group	INR 4000 Cr.		INR 12,000 Cr.	
In India and Outside		ASSETS		TURNOVER	
		Total	India	Total	India
	No Group	USD 500 mn	INR 500 Cr.	USD 1500 mn	USD 1500 Cr.
	Group	USD 2000 mn	INR 500 Cr.	USD 6000 mn	USD 1500 Cr.

Figure 1: Business Limits for the Companies

Today's global economy is characterized by multi-directional flows of products, services, people, ideas and capital. A complex web of interconnections is bringing new opportunities and options to companies and individuals around the world. Most notably, we have seen firms from emerging economies expanding at a speed and scale that is transforming the nature of global business. A key factor behind the speed of global expansion by emerging market multinationals (EMMs) has been the adoption of mergers and acquisitions (M&A) as a means to rapidly access new markets, assets and capabilities. Indian companies have been active and visible players within this new M&A trend. India's business environment has become increasingly amenable to M&A, particularly cross-border transactions (Goldberg. 2007). India's increased M&A deal activity covers both domestic and cross-border deals, and shows that India is very much a country on the economic climb. The signs were there for all to see last year, and at by the final portion of 2010, expectations for the Indian M&A scene in 2011 were high. Companies in the Asia-Pacific region, India and China in particular, were expected to be the most acquisitive buyers in 2011 as attractive valuations and domestic competition continued to drive deals globally, according to Bloomberg's M&A Global Outlook survey. It was predicted that overseas firms may target Indian pharmaceutical and consumer firms, and local enterprises will seek natural resources, said Bank of America, ranked No. 3. As we come to the mid-way point of 2011, so far it seems that these predictions are ringing true.

A report by Merger market, the independent M&A intelligence service, revealed that during 2011, the number of M&A deals in India rose impressively by 270 per cent, with 57 deals occurring, valued at $18.3 billion. Also according to the report, statistics show that 35 out of the 57 transactions of Indian companies announced in the first quarter of 2011 were inbound deals, compared to 27.1 per cent for China and 14.3 per cent for Japan. This further highlights India as an attractive investment option for global investors. Despite the ongoing wave of corporate scandals and political corruption, India will continue to entice suitors on the back of strong fundamentals such as its growing population. Inbound M&A drove deals in 2011 with India proving itself an attractive investment destination as it lured buyers in the energy, insurance and IT space, Looking at the most active law firms in terms of Indian M&A during 2011 so far, according to Mail. Today, Morgan Stanley tops the financial advisor league table by value, having advised on $12.9 billion worth of deals, with Yes Bank coming out on top in terms of value, participating in five deals in 2011. A business identity goes for mergers and acquisitions for strengthening a disjointed market and for elevating their functional competence in order to boost their competitive streak. Many countries have propagated Mergers and Acquisitions Laws to control the operations of the trade units within. The reliable factors for merger and acquisition contracts in the favour of

India are Dynamic government policies, Corporate investments in industry, Economic stability, and "ready to experiment" attitude of Indian industrialists. Sectors like pharmaceuticals, IT, ITES, telecommunications, steel, construction, etc, have proved their worth in the international scenario and the rising participation of Indian firms in signing M&A deals has further triggered the acquisition activities in India. In spite of the massive downturn in 2009, the future of M&A deals in India looks promising. Most of the mergers and acquisitions in India corporate world have been successful in elevating the functional competence of companies but on the flip side this activity can lead to formation of monopolistic power. The anti-competitive results are accomplished either by synchronized effects or by one-sided effects. An open and unbiased competition is ideal for capitalizing on the consumers' interests both in contexts of capacity and worth.

LEGAL PERSPECTIVES OF M&AS IN INDIA

The legal attributes of M&A: M&A is like any other commercial deal with several governing laws. M & As are critical in corporate life and are considered as inevitable tools for inorganic growth. Trend shows that companies tend to entail more M&As to meet various commercial purposes with monetary affluence. M&As have become a strategic/tactical choice for the growth of Indian companies. International and Indian M&As have facilitated companies to attain the next platform and maximize the value for stakeholders. Practical experience also shows an equal number of cases adversely. M&A transaction has three major *challenges* in the current competitive scenario – (1) commercial understanding including valuation & consideration to deal with negotiations, and business due diligence, (2) legal compliances to implement the transaction; and (3) post transaction implementation issues, known as HR issues like organizational design and cultural differences after M&A which are more behavioural than legal, to achieve the desired advantages of a M&A. Legal complexity depends on the nature, size, geographical coverage and mode of transaction of business. There are many laws and provisions, which directly or indirectly govern the procedure of M&A. Detailed understanding of such laws covered in the subsequent sections. Mergers (or amalgamations) of Indian companies are highly regulated and require *various approvals*, first by BOD of the companies involved, by the shareholders and creditors, by Central Government through Regional Director of Ministry of Corporate Affairs & Official Liquidator and finally by the High Courts of the states where the registered offices are situated. Thus, the whole process takes 5-6 months. If the Merger involves one or more listed companies, then additionally, prior approval of the Stock Exchanges where the securities of the company are listed would be required.

Provisions under Mergers and Acquisitions Laws in India: Provision for tax allowances for mergers or de-mergers between two business identities is allocated under the Indian Income tax Act. To qualify the allocation, these mergers or de-mergers are required to full the requirements related to section 2(19AA) and section 2(1B) of the Indian Income Tax Act as per the pertinent state of affairs. Under the "Indian I-T tax Act", the firm, either Indian or foreign, qualifies for certain tax exemptions from the capital profits during the transfers of shares. In case of "foreign company mergers", a situation where two foreign firms are merged and the new formed identity is owned by an Indian firm, a different set of guidelines are allotted. Hence the share allocation in the targeted foreign business identity would be acknowledged as a transfer and would be chargeable under the Indian tax law. As per the clauses mentioned under section 5(1) of the Indian Income Tax Act, the international earnings by an Indian firm would fall under the category of 'scope of income' for the Indian firm.

Laws governing Mergers and Acquisitions regarding India: Governing of laws are there in the legal aspects of the corporate industry to make mergers and acquisitions (M&As) in India. The Indian Companies Law, i.e. Companies Act 1956, is the leading law with other numerous laws, which directly or indirectly govern the procedure of M&A, like, The Industries Development and Regulation Act, 1951, SCRA 1956, The Companies Act 1956, Section 72A of Income Tax Act, 1961, Foreign Exchange Regulation Act (FERA) 1983, Sick Industrial Companies (Special Provisions) Act (SICA), 1985, Indian Stamp Act 1989, The Monopolistic and Restrictive Trade Practices (MRTP) Act 1969, & 1991, SEBI Takeover Regulations, 1997, and The Competition Act 2002. Sectors like, public utilities, banking - insurance, broadcasting, telecommunication and transportations are mostly affected by the regulations mentioned above (Goldberg. 2007).

The Industries Development and Regulation Act, 1951 enacted to develop and regulate certain companies and it contain provisions relating to liquidation and reconstruction of companies where Central Government manages and controls such companies. The Companies Act 1956 contains provisions relating to amalgamations like the definition of amalgamation, arrangement, unsecured creditors; the provisions that give power to the high court to sanction and enforce the amalgamation, provisions relating to proving of necessary information to parties concerned in the scheme of amalgamation, provisions relating to preservation and protection of account books and papers of amalgamated company. SCRA 1956 (Securities Contracts (Regulation) Act, 1956) refers for a contract for or relating to the purchase or sale of securities or government security which is created and issued, whether before or after the commencement of this Act, by the Central Government or a State Government for the purpose of raising a public loan and having one of the forms specified in clause (*2*) of section 2 of the Public Debt Act, 1944 (18 of 1944).

Section 72A of Income Tax Act, 1961 made provisions to encourage restructuring of companies by giving special treatment/benefits to companies. The benefit is that the loss of amalgamating/target company shall be allowed to set off and carried forward by amalgamated/ acquirer company. But the benefit will be available only if certain conditions are fulfilled like (a) there is an amalgamation of the company of an industrial undertaking (b) the amalgamated company continues to hold 75% in value of assets of amalgamating which is acquired as a result of amalgamation for five years from effective date of amalgamation (c) the amalgamated company carry out the business of amalgamating company at least for period of five years (d) the amalgamated company fulfils others such conditions as may be prescribed (by Rule 9c) to ensure revival of business of amalgamating/target company or to ensure that amalgamation is for general business purpose. Acquisition of an Indian Listed Company is mainly governed by the SEBI (Substantial Acquisition of Shares & Takeover) Regulations, which is also called ***SEBI Takeover Regulations 1997***. It comes under the head of securities laws. These Regulations mandate an Open Offer by the Acquirer of a *Listed Company* to acquire at least 20% more stake in the Listed Company from the public shareholders at a price equal to or more than the price at which it acquires the substantial stake (15% or more). This provision is meant to give an exit opportunity to public shareholders who might not be interested to continue with the new management. In the case of *Non-listing Company*, the process is much simpler through private agreements to cover commercial consideration and cost aspects.

Foreign Exchange Regulation Act (FERA) 1983 is essential to deal cross border.

Sick Industrial Companies (Special Provisions) Act (SICA), 1985 contains provisions to relating to sick companies. The objective is to find out any sick or potentially sick companies so that quick preventive and remedial measures can be taken to revive the company.

Indian Stamp Act 1989 is enacted to collect stamp duty which varies from state to state in relation to conveyance during amalgamation to raise government revenues.

The Monopolistic and Restrictive Trade Practices (MRTP) Act 1969, was enacted to ensure that the various activities in the economic system does not result in the concentration of economic power in hands of few business houses by controlling monopolies and by prohibiting monopolistic and restrictive trade practices. But this power has been removed in ***MRTP Act 1991*** and the companies need not have any permission required for going into scheme of amalgamation. But this Act no more valid because of enacting the new law i.e. Competition Act 2002.

THE COMPETITION ACT 2002

It is incorporated replacing MRTP Act, in same objectives to prevent practices that have adverse effect on competition, to promote and sustain competition in market, to protect the interest of consumers, to ensure freedom of the trade carried on by any other participants in market and to regulate mergers and acquisitions. The reason is that competition enhances capacity and capability and increases competitiveness which is essential in market. The Competition Act, 2002 was passed by the Parliament in the year 2002, to which the President accorded assent in January, 2003. It was subsequently amended by the Competition (Amendment) Act, 2007. In accordance with the provisions of the Amendment Act, the Competition Commission of India and the Competition Appellate Tribunal have been established. The Competition Commission of India is now fully functional with a Chairperson and six members. The provisions of the Competition Act relating to anti-competitive agreements and abuse of dominant position were notified on May 20, 2009. This is an Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto.

Important Provisions of the Competition Act 2002
Section 3: Anti-competitive agreements-

(1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.

(2) Any agreement entered into in contravention of the provisions contained in sub-section (1) shall be void.

(3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or

decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which-

(a) directly or indirectly determines purchase or sale prices;

(b) limits or controls production, supply, markets, technical development, investment or provision of services;

(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;

(d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition

provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of se vices.

(4) Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including-

(a) tie-in arrangement;

(b) exclusive supply agreement;

(c) exclusive distribution agreement;

(d) refusal to deal;

(e) resale price maintenance, shall be an agreement in contravention of sub-section, if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

(5) Nothing contained in this section shall restrict-

(i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under-(a) the Copyright Act, 1957 (14) (b) the Patents Act, 1970 (39) (c) the Trade and Merchandise Marks Act, 1958 (43) or the Trade Marks Act, 1999 (47) (d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48) (e) the Designs Act, 2000 (16) (f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37)

(ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export. Prohibition of abuse of dominant position

Section 4: Abuse of dominant position-

(1) No enterprise shall abuse its dominant position.

(2) There shall be an abuse of dominant position under sub-section (1), if an enterprise,-

(a) directly or indirectly, imposes unfair or discriminatory-condition in purchase or sale of goods/ services; or price in purchase or sale (including predatory price) of goods/services.

(b) limits or restricts-production of goods or provision of services or market therefore; or technical or scientific development relating to goods/services to prejudice of consumer; or

(c) indulges in practice or practices resulting in denial of market access; or

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

Section 5: Combination

Acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises, if—

(a) any acquisition where,

(i) the parties to the acquisition, being the acquirer and the enterprise, whose control, shares, voting rights or assets have been acquired or are being acquired jointly have, either, in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or 5 Ins. by Competition (Amendment) Act, 2007, 6 Ins. by Competition (Amendment) Act, 2007, 7 Ins. in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India.

(ii) the group, to which the enterprise whose control, shares, assets or voting rights have been acquired or are being acquired, would belong after the acquisition, jointly have or would jointly have, either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or 8Ins. in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India, or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India.

(b) acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of similar or substitutable service, if—

(i) the enterprise over which control has been acquired along with the enterprise over which the acquirer already has direct or indirect control jointly have, either in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or 9 Ins. in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or 7 Subs. by Competition (Amendment) Act, 2007 for: " in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars or turnover more than fifteen hundred million US dollars; or" 8 Subs. by Competition (Amendment) Act, 2007 for: " in India or outside India, in aggregate, the assets of the value of more than two billion US dollars or turnover more than six billion US dollars; or" 9 Subs. by Competition (Amendment) Act, 2007 for "in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars or turnover more than fifteen hundred million US dollars.

(ii) the group, to which enterprise whose control has been acquired, or is being acquired, would belong after the acquisition, jointly have or would jointly have, either in India, the assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or 10Ins. In aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India, or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India.

(c) any merger or amalgamation in which—

(i) the enterprise remaining after merger or the enterprise created as a result of the amalgamation, as the case may be, have, either in India or outside, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or 11Ins. in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India.

(ii) the group, to which the enterprise remaining after the merger or the enterprise created as a result of the amalgamation, would belong after the merger or the amalgamation, as the case may be, have or would have, either in India, the assets of the value of more than rupees four-thousand crores or turnover more than rupees twelve thousand crores; or 12Ins. in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India, or turnover more than six 10 Subs. by Competition (Amendment) Act, 2007 for " in India or outside India, in aggregate, the assets of the value of more than two billion US dollars or turnover more than six billion US dollars; or" 11 Subs. by Competition (Amendment) Act, 2007 for " in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars or turnover more than fifteen hundred million US dollars; or" 12 Subs. by Competition (Amendment) Act, 2007 for: "in India or outside India, the assets of the value of more than two billion US dollars or turnover more than six billion US dollars", 11 billion US dollars, including at least rupees fifteen hundred crores in India.

Section 6: Regulation of combinations

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

(2) Subject to the provisions contained in sub-section (1), any person or enterprise, who or which proposes to enter into a combination, 13 (shall) give notice to the Commission, in the form as may be specified, and the fee which may be determined, by regulations, disclosing the details of the proposed combination, within 14 (thirty days) of— 13 Subs. by Competition (Amendment) Act, 2007 for "may, at his or its option", 14 Subs. by Competition (Amendment) Act, 2007 for "seven days"

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

(b) execution of any agreement or other document for acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of that section. 15[(2A) No combination shall come into effect until two hundred and ten days have passed from the day on which the notice has been given to the Commission under sub-section(2) or the Commission has passed orders under section 31, whichever is earlier.]

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

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

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

Memorandum of Understanding (MoU) between Competition Commission and Federal Antimonopoly Service (Russia) has been signed on December 16, 2011 in the presence of Prime Minister Dr. Manmohan Singh and Russian

President Mr. Dmitry Medvedev in Moscow. The MoU aims to enhance cooperation between the two Competition Authorities.

CONCLUSIONS

The practice of mergers and acquisitions has attained considerable significance in the contemporary corporate scenario which is broadly used for reorganizing the business entities. Indian industries were exposed to plethora of challenges both nationally and internationally, since the introduction of Indian economic reform in 1991. The cut-throat competition in international market compelled the Indian firms to opt for mergers and acquisitions strategies, making it a vital premeditated option. In India, the concept of mergers and acquisitions was initiated by the government bodies. Some well known financial organizations also took the necessary initiatives to restructure the corporate sector of India by adopting the mergers and acquisitions policies. The Indian economic reform since 1991 has opened up a whole lot of challenges both in the domestic and international spheres. The increased competition in the global market has prompted the Indian companies to go for mergers and acquisitions as an important strategic choice.

The new Competition Act, 2002, has indeed sought to promote a merger-friendly line of thinking. Mergers notified are cleared quite quickly and The Competition Act, 2002 itself lays down stringent time lines - the Commission must take a view within 90 working days from the day it has obtained complete information failing which the merger is deemed to have been approved Further, the Commission may initiate suo-motu enquiry into merger only within a period of one year from the day the merger has taken effect25. These provisions adequately dispel any apprehension of inordinate delay or unbridled scrutiny into mergers. The Indian Competition Law has largely developed its lineage from the developed jurisdictions such as the EU and US and is in fidelity with these laws. The law amongst other provision regarding merger control provides for definite threshold limits, the factors to be taken into consideration before determining the fate of a merger, prescribed time period for merger notification and the remedies. These provisions help the Competition authorities to work towards its duties of preventing adverse effects on competition, protecting interest of consumers and ensuring freedom of trade. However, there are certain factors which need to be deliberated upon and need further skilled escalation. Importantly, amongst these is a need for lucid and cogent guidelines or strategy principles on types of mergers and there effects.

Combinations are economic enhancing trade practices hence they necessarily need to be encouraged by all so as to ensure ultimate benefit to the end consumers. However, there is a flip side of it too. Today's combination may be tomorrow's dominance and though dominance is not frowned upon under the CA but its abuse surely is. Abuse of Dominance (AoD) is mandatorily prohibited under the law. Therefore, every acquirer (not the target) has to be Competition Law Compliant even post combination and has to remain so forever if it desires to remain in healthy business practices. An essential facet with regard to merger regulations is with respect to setting of threshold limits. Though the Indian law, being progressive in nature mentions both individual and group while describing thresholds, needs to mull over the fact that setting monetary thresholds needs timely restructuring, as the economic and commercial factors keep shifting very rapidly in developing countries like India. The developed jurisdiction have clutched the intricacies of changing economies and market structures which is yet to be confronted and brazened out by India.

SUGGESTIONS

- There should be lucid and rational guidelines or strategy principles on types of mergers and their effects.
- To meet the challenge, intricacies (ins and outs) of changing economies and the market structure should be brazened out by India to ensure that adverse competition is prevented, ensuring complete freedom of trade and protecting the interest of consumers.
- The law should be beyond ensuring the thresholds requirements, even if, the transaction is not meeting the threshold requirements but is affecting the competition or is anti-competitive; there should be an adequate authority to the commission to take the actions against the transaction.
- There is a need to define certain definitions for clarity and proper functioning of the commission like, that of failing firm, insignificant local nexus.
- In Indian competition law factors relating to ability of national entities to compete in the international markets have to be deliberated and resolve further for smooth and effective functioning.

REFERENCES:

Sridhar. 2011. Strategic Financial Management for CA Final. *Shroff Publishers & Distributors Pvt. Ltd.*: Mumbai.

Seth Dua. 2006. Joint Ventures & Mergers and Acquisitions in India. *Lexis Nexis: New Delhi*: 222-304.

Tiwari. 2011. Merger Under the Regime of Competition Law: A Comparative Study of Indian Legal Framework With EC and UK. *Bond Law Review*. 23 (1): 7.

Elgers and Clark. 1980. Merger Types and Shareholder Returns: Additional Evidence, Financial Management. 9(2): 66-72.

Barton and Sherman. 1984. The Price and Profit Effects of Horizontal Merger: A Case Study. *The Journal of Industrial Economics*. 33(2): 165-177.

Goldberg. 2007. Merger Control in Competition Law Today. *Oxford University Press*, Oxford.

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