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"Competition Law concerns in an M&A Transaction"

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Introduction

A Merger and an Acquisition transaction brings with it, a lot of compliances and regulatory processes to be checked and looked for. A lawyer really has to undergo a lot of hard work and deadlines to execute an M&A Transaction. From a company's incorporation documents to all the profit and loss and financial statements are thoroughly scrutinised during such transactions. Regulatory aspects like Employment Law, IPR and Tax Law related compliances are expected to be well taken care of. One such regulatory concern during an M&A Transaction which cannot be ignored or avoided is Competition Law. A good lawyer can never overlook Competition Law related matters in a Transaction like this. In this article below, we will see, what are the actual concerns and scenarios relating to Competition Law where a lawyer needs to be vigilant and negligence of any kind is not affordable.

What is Competition Law

Competition Law is a law enacted to promote and maintain fair market competition by regulating anti-competitive conduct by companies. National Competition Law principally governs within the territorial boundaries of the nation-states and it usually does not cover activity beyond territorial borders unless such a transaction is expected to have an impact at a national-state level. The protection of International Competition is governed by International Competition Agreements. Competition Law has 3 main fundamentals:

- Restricting agreements or practises that disallows free trading and competition between businesses which embraces the subjugation of free trade by Cartels.
- Outlawing a firm's abusive behaviour which is dominating a market or an anti-competitive practise that tends to lead to such a dominant position.
- Administering the mergers and acquisitions of huge corporations, including joint ventures.

History of Competition Law in India

Before the Competition Law, 2002 came into existence, there prevailed The Monopolies and Restrictive Trade Practises Act, 1969 in India. One of the fundamental purposes of The Monopolies and Restrictive Trade Practises Act, 1969 back then, was to suppress and prevent the formation of a monopoly of any kind. The indifference of the Policymakers with respect to merger control was quite palpable back then because The Monopolies and Restrictive Trade Practises Act, 1969 did not even have the term 'Combination' and only had a few provisions at the very basic level. Mergers and Acquisitions in The Monopolies and

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Restrictive Trade Practises Act, 1969 have been discussed from section 20 to section 26 of Chapter III in Part A.

The government was of a view that provisions laid in the Companies Act, 1956 relating to mergers and acquisitions were sufficient for their regulation and no separate regulation relating to mergers and acquisition was required in The Monopolies and Restrictive Trade Practises Act, 1969. This view of the government eventually leads to the deletion of the rudimentary sections from 20-26 of The Monopolies and Restrictive Trade Practises Act, 1969 by way of an amendment in 1991. The government also contained a thought that these provisions might come in the way of liberalisation of the economy.

Merger control regime in India

The Ministry of Corporate Affairs, after comprehending the failings of The Monopolies and Restrictive Trade Practises Act, 1969 vis-à-vis a notification dated August 28, 2009, rescinded The Monopolies and Restrictive Trade Practises Act, 1969 to make the way for Competition Act,2002. The legislative intent was to present a pro-competition law instead of simply concentrating on deterrence of monopolies which was an important feature of The Monopolies and Restrictive Trade Practises Act, 1969. Though the Competition Act, 2002 commenced in the year 2009, it was only on June 1, 2011, when the provisions relating to combinations of the act officially took effect. The Operative and Substantive provisions for merger regulation are under sections 5 and 6 whereas, section 29 to section 31 in addition to the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations,2011 lay down the time-bound procedural requirements in relation to combinations.

As the merger control provisions came into effect in the year 2011, the following factors became the nitty-gritty 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;
- Identification of the overlaps of the 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 with the conditions given under section 20(4) of the Act.

It is important to know that not all combinations are required to be notified. Mentioned below are the transactions under section 5 of the Act which constitute combinations for the tenacities of the Act:

- Direct and indirect acquisition of control, shares, assets or voting rights or control of an enterprise;

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- Acquiring of control over another enterprise when such person has direct or indirect control over another enterprise engaged in production, distribution or trading of similar, identical or substitute goods or provision of similar or identical or substitutable service; and
- Mergers and amalgamations of two or more enterprises. There are no definitions provided for merger or amalgamation in the Act, these terms are interpreted in accordance with the Companies Act, 2013 and general commercial usage.

Once the category of the transaction is identified under section 5, lawyers are required to check, whether such a transaction is required to be notified to the Competition Commission of India. In light of the Ease of Doing Business, small transactions are exempted from filing a notification, the government of India has exempted those combinations where the company which is to be acquired, also known as the Target Company has:

i. Assets not exceeding INR 350 crores; or
ii. Turnover not exceeding INR 1000 crores.

In a case where only a certain division of an enterprise has to be acquired, then the financials of that particular division will be assessed as per Target Exemption Thresholds. This first level of assessment which is usually done at a rudimentary level has a motive to filter out transactions that need not be notified to the Competition Commission of India.

In a situation where the transacting parties do not get the above Target Exemption, then as a part of the second level of assessment, the assets and turnover of the parties combined together are to be tested on the basis of certain jurisdictional thresholds which is termed as the Parties Test and the Group Test. If the parties breach the threshold limits for these tests then the transaction mandatorily is required to be notified to the Competition Commission of India. Whereas otherwise, if these thresholds are not breached by the combining parties, the transaction then gets an exemption from the Competition Commission of India scrutiny. As because the thresholds are fairly high, many transactions are often exempted. It is also, to be noted that, foreign transactions having required assets and turnover present in India, fall under the purview of this Act. Below mentioned are the threshold limits for Parties and Group Test:

Following limits are the limits which are to be calculated after combining both the Acquirer and the Target company-

- <u>For Group Test</u>
  i. Assets exceeding INR 20 Billion; and
  ii. Turnover exceeding INR 60 Billion
- <u>For Parties Test</u>
  i. Assets exceeding INR 80 Billion; and
  ii. Turnover exceeding INR 240 Billion

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The combination regulations which came to effect on June 1, 2011, broadly embodies the below-mentioned issues to be dealt with in the regulation of mergers, acquisition and amalgamations:

- Forms of notice for the proposed transaction (i.e. Short Form- Form I or Long Form-Form II);
- Notification process and procedures;
- Prima facie examination of the Competition Commission of India;
- The transactions which are not likely to have an Appreciable Adverse Effect and are hence exempted;
- Orders of the Competition Commission of India; and
- Miscellaneous provisions.

Certain transactions even after falling under the definition of a combination, are not normally required to be notified as they are not likely to cause any Appreciable Adverse Effect in the relevant market in India. Such transactions are cited under Schedule 1 of the Combination Regulations. To abide by the Competition Commission of India regulations, parties need to file either a short form (Form I) or long form (Form II) depending upon the complexity of the transaction which is termed as a 'Notice' under section 6(2) of the Act. The following notice is a very heavily researched and informative piece of document with a lot of annexures explaining every bit of the proposed transaction. The requirement of mandatory notification prior to completion does not apply to:

- Financing facility;
- Acquisition or subscription of shares undertaken by foreign institutional investors;
- Venture capital funds;
- Public financial institutions; and
- Banks.

The merger control regime in India is obligatory and any violation of the same amount to 'Gun-Jumping'. The Competition Commission of India treats gun-jumping as:

- Failure to notify the combination; or
- Failure to notify a part of the combination; or
- Delay in notifying; or
- Part payment or performance is done before the approval being granted by the Competition Commission of India.

The assessment of the Competition Commission of India finally culminates into an order passed by the Competition Commission of India under section 31 which defines the fate of the combinations and suggested modifications if any.

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Conclusion

The evolution of Competition Law throughout the years has definitely been phenomenal. The recognition of the need to regulate the transactions was well understood and worked upon. The Competition Act, 2002 has definitely helped in securing fair competition in the market and through regulating the formation of monopolies and cartels, it has also been able to help certain business from falling. The Act has also been successful in regulating the conduct on unjust low prices or predatory pricing by large retailers. It has surely been helpful in mitigating the price war between small and large retailers. The core objectives of the Act which relates to welfare, efficiency and free and fair competition in the market have been touched upon and met with the help of such a regulation which was surely a need of the time. The Competition Act, 2002 through such regulations and objectives will definitely help to save a lot of small businesses and retailers.

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