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Merger and Acquisition in India: An Analytical study with special Reference to Competition Act, 2002

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Abstract

Merger and acquisitions have played a very significant role in phenomenal growth of corporate sector after opening up of Indi an economy.

Though it is one of the fundamental mechanism for corporate restructuring and business synergies but the process regulating mergers and acquisitions is not free from regulatory bottlenecks. There are several judicial, quasi-judicial and regulatory bodies involved in sanctioning a scheme of merger. The introduction of competition watchdog i.e. Competition Commission of India caused an apprehension in the industry that inclusion of another regulator will further complicate and delay the merger process. However, the Competition Act, 2002 and regulations framed thereunder have very systematic and fair approach for dealing with merger cases. This article discusses the statutory framework of M&A approval under the competition law in terms of section 5 and 6 of the Competition Act, 2002 and regulations framed thereunder. In terms of the scheme of the Competition Act, 2002, transactions below a threshold are exempted from the purview of Competition Commission of India. This article discusses the approach of the Competition Commission of India in dealing with merger and acquisition transactions based on the analysis of order passed by the Competition Commission of India in Vodafone and Idea merger case. The author has highlighted some key observations made by CCI while approving the merger of Vodafone and Idea. In majority of the merger cases decided by the Competition Commission of India, it has approved these transactions holding that there is no appreciable adverse effect on competition because of merger or acquisition of a target by an acquirer. In this backdrop, this article also discusses whether the pro-merger approach of Competition Commission of India is in consonance with the objectives of Competition Act, 2002.

Introduction

"The main objective of competition law is to promote economic efficiency using competition as one of the means of assisting the creation of market responsive to consumer preferences. The advantages of perfect competition are three- fold: allocative efficiency, which ensures the effective allocation of resources, productive efficiency, which ensures that costs of production are kept at a minimum and dynamic efficiency, which promotes innovative practices. These

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factors by and large have been accepted all over the world as the guiding principles for effective implementation of competition law."[1]

Merger and acquisition (M&A) process in India is scrutinized by National Company Law Tribunal[2], Securities and Exchange Board of India, Registrar of Companies, Reserve Bank of India, Competition Commission of India ("CCI") and other sector regulators. Though the Competition Act was enacted in year 2002, CCI started functioning effectively only in the year 2009 and provisions related to M&A (referred to as "combination" in the Competition Act, 2002) came into force in the year 2011. In this article relevant statutory provisions in respect of combination and observations made by CCI in its order in respect of Vodafone and Idea merger case have been discussed in detail. The author has first discussed section 5 and 6 of the Competition Act, 2002 ("Competition Act") along with regulations and notifications issued thereunder.

Then, order passed by CCI in combination case of Vodafone and Idea have been discussed, in this article, to detail out the key observations made by CCI which formed basis of the said order. These observations help us in understanding the approach of CCI in dealing with combination cases. In the next segment, the author has discussed whether the pro-merger approach of CCI has helped in strengthening and promoting competition in India. The article has been ended with a conclusion giving summary of the findings of this article in a nutshell.

Statutory framework for combination cases

Under the Competition Act, CCI has been mandated to deal with four types of matters: (i) anti-competitive agreements; (ii) abuse of dominant position; (iii) combination; and (iv) competition advocacy. In terms of section 5 of the Competition Act read with notification[3] dated 4 March. 2016, any M&A will be considered as combination[4] if it exceeds the threshold given in the below table for which notice is required to be filed with CCI:

THRESHOLD FOR FILING NOTICE[5]				
		Assets		Turnover
Enterprise Level	India	Less than INR 2000 crore		Less than INR 6000 crore

[1] CCI v. SAIL, 2010 Comp LR 61(Supreme Court).

[2] Under the Companies Act, 1956, the High Courts were empowered to deal with M&A cases. Now, under the Companies Act, 2013 this power has been vested in NCLT.

[3] Notification bearing no. S.O. 675(E) dated 4 March 2016 issued by the Central Government under section 20(3) of the Competition Act, 2002.

[4] As per the Competition Act, 2002, only those types of M&A transactions will be considered as combination, required approval from CCI, which exceed threshold mentioned in Section 5 or by any notification issued by the Central Government by exercising powers under section 20(3) of the Competition Act, 2002

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	Worldwide with Indian leg	Less than USD 1 withat least less than INR 1000 crore in India	OR	Less than USD 3billion with atleast less than INR 3000 crore in India
OR				
Group level	India	Less than INR 8000 crore	OR	Less than INR 24000 crore
	Worldwide with Indian leg	Less than USD 4 billion with at least less thanINR 1000 crore in India		Less thanUSD 12 billion with atleast less than INR 3000 crore in India

It is pertinent to note that in terms of the provisions of section 54(a) of the Competition Act, the Central Government is empowered to exempt any class of enterprise from the application of the provisions of the Competition Act or any provision thereof, in the interest of the security of the State or public interest. A *de minimis* exemption notification bearing no. S.O. 674(E) dated 4 March 2016 has been issued by the Central Government which stipulates that any acquisitions where enterprises whose control, shares, voting rights or assets are being acquired have assets not more than INR 350 crore in India or turnover of not more than 1000 crore in India, are exempt from Section 5 of the Competition Act for a period of 5 years from the date of publication of the notification. Further, in terms of notification bearing no. S.O. 481(E) dated 4 March, 2011 and S.O. 673(E) dated 4 March, 2016, a 'group' exercising less than fifty percent of voting rights in other enterprise is exempted from the provisions of section [5].

Section 6 of the Competition Act provides that no person or enterprise is allowed to enter into any combination which has appreciable adverse effect on competition within relevant market in India and such combination will be void. Section 6 further provides that any person or enterprise proposing to enter into a combination is required to give notice within a period stipulated therein. Further, any combination will come into effect only after two hundred and ten days from the date of notice given to CCI or passing of order under section 31 of the Competition Act, whichever is earlier[6]. Terms like control, enterprise, group, person, relevant market have been defined in the Competition Act. For determining whether a combination has appreciable

[5] http://www.cci.gov.in/sites/default/files/quick_link_document/Revised%20thresholds.pdf (last visited on 11 February, 2023).
[6] Section 6(2A) of the Competition Act.

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adverse effect on competition, CCI will consider the following factors[7]:

a. actual and potential level of competition through imports in the market;
b. extent of barriers to entry into the market;
c. level of combination in the market;
d. degree of countervailing power in the market;
e. likelihood that the combination would result in the parties to the combination being able to significantlyand sustainably increase prices or profit margins;
f. extent of effective competition likely to sustain in a market;
g. extent to which substitutes are available or are likely to be available in the market;
h. market share, in the relevant market, of the persons or enterprise in a combination, individually and as acombination;
i. likelihood that the combination would result in the removal of a vigorous and effective competitor orcompetitors in the market;
j. nature and extent of vertical integration in the market;
k. possibility of a failing business;
l. nature and extent of innovation;
m. relative advantage, by way of the contribution to the economic development, by any combination havingor likely to have appreciable adverse effect on competition;
n. whether the benefits of the combination outweigh the adverse impact of the combination, if any.

In addition to the provisions of the Competition Act, CCI (Procedure in regard to the transaction of Business relating to Combinations) Regulations, 2011 ("Combination Regulations") and some other regulations framed by CCI govern the process of combination. Regulation 4 of the Combination Regulations provides that matters listed in Schedule 1 of the said regulations will ordinarily be considered as not likely to have any appreciable adverse effect on competition.

If it appears to CCI that the proposed combination does not or is not likely to have any appreciable adverse effect on competition, it has mandate to approve such combination [8]. On the contrary, if CCI is of the opinion that the proposed combination has or is likely to have any appreciable adverse effect on competition, it has power to direct that such combination will not take effect.[9] Additionally if CCI is of the view that appreciable adverse effect on competition of a combination can be eliminated by suitable modification it may propose appropriate modification to the concerned parties[10] and if it agrees with amendments

[7] Section 20(4) of the Competition Act.
[8] Section 31(1) of the Competition Act.
[9] Section 31(2) of the Competition Act
[10] Section 6 (3) of the Competition Act.

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submitted by the parties it will approve the combination[11].

II. Key observations of CCI in combination case of Vodafone and Idea

While dealing with proposed combination of Vodafone (VIL & VMSL) and Idea, CCI observed that both the parties to the combination aretelecom service providers with a pan India presence. CCI identified following product segments for the purpose of competition assessment:

i. Retail Mobile Telephony Services;
ii. Enterprise Services;
iii. Internet Service Provider Services ("ISP Services");
iv. National Long Distance Services ("NLD Services");
v. International Long Distance Services ("ILD Services");
vi. Provision of passive infrastructure services through telecom towers;
vii. Provision of passive infrastructure services over fibre optic network;
viii. Intra Circle Roaming Services ("ICR Services"); and
ix. Mobile wallet services.

After identification of the product offerings of the entities, for the assessment of the impact of the proposed combination on competition in retail mobile telephony services, CCI examined the level of concentration in each market and impact of the proposed combination on the same. CCI took note of the market share estimates in each telecom circle, based on various relevant competitive metrics such as overall quantum of spectrum, total number of subscribers, net subscriber additions, gross revenue, gross revenue adjusted for revenue of Reliance Jio Infocomm Limited ("Jio")

CCI undertook a concentration analysis of the parties to the merger and noted that the issue of market shares and concentration is also dealt by the guidelines for transfer/merger of service licences on compromises, arrangement and amalgamation of companies, issued by Ministry of Communications and Information Technology, Government of India in 2014 ("DoT Merger Guidelines"). As per the DoT Merger Guidelines, in case of merger or acquisition or amalgamation proposals that result in market share in any service area exceeding 50 percent, the resultant entity should reduce its market shares to 50 percent within a period of one year from the date of approval of merger or acquisition or amalgamation ("Market Share Caps"). As regards holding of spectrum by a TSP[12], the Commission noted that the spectrum holding in a licensed service area is subject to cap of 25 percent of the total spectrum assigned and 50 percent of the spectrum assigned in a specific band. ("Spectrum Caps"). The parties to the merger submitted to CCI that they will comply with the Spectrum Caps and the Market Share Caps. Here, CCI examined the level of concentration in each market and impact of the proposed combination on the same. CCI observed that marketis highly concentrated with pre-combination

[11] Section 31(7) of the Competition Act.

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HHIs exceeding 2000 in all telecom circles (except Haryana, Mumbai and Punjab where HHIs are more than 1800). With respect to the position of the parties in various telecom circles, CCI observed that combined share of the parties will be less than fifty percent in all telecom circles except Gujarat, Haryana, Kerala, and Maharashtra. CCI examined the impact of the proposed combination on the level of concentration as reflected in incremental HHI. Such examination was undertaken for 14 telecom circles wherein the combined market share is estimated to be more than 30 percent. CCI observed that the change in HHI are significant in respect of all the 14 telecom circles, ranging from around 400 in Andhra Pradesh to around 1500 in Kerala. Therefore, it was viewed by CCI that the proposed combination is likely to result in significant combined market share of the parties while also causing significant change in concentration in 14 of 22 telecom circles viz., Andhra Pradesh, Delhi, Gujarat, Haryana, Kerala, Kolkata, Madhya Pradesh, Maharashtra, Mumbai, Punjab, Rajasthan, Uttar Pradesh (E), Uttar Pradesh (W) and West Bengal.

It was also observed by CCI that the spectrum holding of the merged entity may exceed Spectrum Caps in terms of total spectrum assigned in the telecom circles of Gujarat, Haryana, Kerala and Maharashtra. But CCI was of the view that the spectrum seems to be fairly distributed between the various TSPs and there is a significant quantity of unsold spectrum in each telecom circle which may also obviate any access issues.

In respect of the buyer's power, CCI noted, based on a comparison of the mobile subscriber base as per Telecom Regulatory Authority of India (1,035 million as of Jun'16) and the estimated number of unique mobile users in India by GSM Association (616 million as of Jun'16), that approximately two third of customers tend to have multiple SIMs (known as multi-SIMing). Customers can therefore easily and quickly switch from a primary to a secondary SIM and vice versa, when the relative price of one of their SIM providers (or any of the services offered by them) increases or decreases, by changing the selection of the SIM in their handset. The Commission also noted that in terms of the Mobile Number Portability Regulations, 2009 (MNP Regulations), subscribers are able to switch their primary SIM / service provider seamlessly (with minimal or no charge and without any significant time taken or effort for switching), while retaining their existing mobile telephone number. In terms of TRAI Subscriber Report, as on 31 December 2016, more than 254 million subscribers have used the facility of Mobile Number Portability. Because of the near zero switching cost, there is price competition amongst the TSPs to retain customers. CCI noted that the presence of competitive constraints from buyer side are also reflected in the churn rates for the Indian retail mobile telephony services market in general and parties in particular and was of the opinion that there is significant constraint on the TSPs from the buyer side in the mobile retail telephony services market.

In terms of presence of competitors in the market for the retail mobile telephony services, CCI noted that post-merger of Vodafone and Idea, there will be at least five private TSPs including Bharti Airtel, RCOM & Aircel, Jio, Tata and the merged entity and one state owned TSP i.e.,

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BSNL/MTNL in all telecom circles. After examining the size and resources of these competitors, CCI formed a view that the competitors are in a position to exercise adequate competitive constraints on the merged entity and to eliminate any likelihood of appreciable adverse effect oncompetition resulting from the proposed combination.

CCI also took note of certain efficiencies resulting from the proposed combination, inter-alia, from consolidation of spectrum holdings, reduction in overlapping national infrastructure, de-duplication of fresh equipment etc. CCI also assessed the impact of reduction in number of competitors on the competition. CCI observed that out of 220 countries 213 countries have 4 or less operators, 6 countries have 5 TSPs andonly India will have more than 5 TSPs and therefore, reduction on number of competitors at this stage is not likely to have any adverse effect on competition in mobile telephony markets.

CCI, while deciding this case, considered all the relevant factors particularly the buyer power and extent of competition likely to be sustainedpost the proposed combination and decided that despite the effect of increasing concentration in certain telecom circles, the proposed combination is not likely to have any appreciable adverse effect on competition in the market for retail mobile telephony services or any of itssegments in any of the telecom circles in India.

With respect to enterprise services like fixed voice, fixed data, converged communications, Internet of Things offerings (IoT) and cloud collaboration, CCI examined the market as a whole and various segments/sub-segments forming part of the enterprise services. The CCI observed that Idea does not have any significant presence in overall enterprise services segment or any of its sub-segments. Therefore, it decided that the proposed combination is not likely to significantly change the level of concentration or cause any appreciable adverse effect on competition in India in the market for enterprise services.

With respect to ISP services , CCI observed that there are several ISPs including the major TSPs, and wireline service providers, who have either an ISP license or a Unified License with ISP authorization. CCI also observed that both Vodafone and Idea are amongst smaller players engaged in provision of ISP Services. The combined market share of these two entities is approximately four percent, which is insignificant while there are other significant competitors viz., BSNL, Airtel and Tata with market shares of around forty two percent, twenty three percent and eight percent, respectively. Therefore, it held that proposed merger is not likely to significantly change the level of concentration or cause any appreciable adverse effect on competition in India in the market for ISP Services.

With respect to NLD Services [12], CCI observed that these services are generally meant for captive consumption as most mobility operators use their own NLD services. CCI observed that

[12] National Long Distance as per the NLD Licence agreement is defined as "… the carriage and delivery of switched bearer telecommunication service over a long distance network i.e., a network connecting different Short Distance Charging Areas (SDCAs)".

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the combined market share of the combined entity in India would be around 23 percent with Vodafone and Idea's respective share being 13 percent and 10 percent and it would continue to face significant competitive constraints from other competitors such as (i) Airtel (including Telenor India), biggest player in this segment with a market share of around 30 percent; (ii) BSNL, with a market share of around 17 percent; (iii) RCOM-Aircel with a market share of around 15 percent and others. CCI also examined whether the merged entity will have ability or the incentive to foreclose the market at circle level and it observed that there are around 29 active providers of NLD Services in India (including all the major TSPs) with at least 9 operators in every circle and there are no long-term contracts for provision of NLD Services and the maximum lock in period for most of the contracts is 12 months. Therefore, CCI viewed that the merged entity is not likely to have ability or incentive to foreclose the market and that the proposed combination will not materially result in the restriction of choices available to customers for the provision of NLD services.

With respect to ILD Services, it was observed by CCI that the combined market share of the parties in India would be around eighteen percent and would continue to face significant competitive constraints from other competitors such as (i) Airtel, biggest player in this segment with amarket share of around thirteen percent; (ii) RCOM-Aircel, with a market share of around seventeen percent; (iii) Tata with a market share of around nine percent and others. CCI also examined whether the Merged Entity would have ability or the incentive to foreclose the market at circle level and it observed that there are at least eight ILD operators in every circle and there are no long terms contracts for provision of ILD Services. Therefore, CCI held that the merged entity is not likely to have ability or incentive to foreclose the market and that the proposed combination will not materially result in the restriction of choices available tocustomers for the provision of ILD services and it is not likely to cause any appreciable adverse effect on competition in the market for ILD Services in India.

In relation to provision of passive infrastructure services[13] through telecom towers, CCI observed that the parties own standalone tower networks which they use to operate their own networks and also to host third party TSPs and Vodafone India and Idea hold 42 percent and 11.15 percent respectively in Indus Towers, a joint venture inter alia between entities of Bharti Infratel Limited, Vodafone India and Idea. CCI observed that both Idea and Vodafone have insignificant presence with their combined market share being less than 5 percent in terms of number of standalone towers and/or number of tenancies and the assessment does not change significantly even if Idea's share in towers/tenancies of Indus Towers is considered. Therefore, CCI viewed that the proposed combination is not likely toresult in an appreciable adverse effect in market for provision of passive infrastructure services through telecom towers India.

Similarly, with respect to provision of passive infrastructure services over fibre optic network, ICR Services and Mobile Wallet Services, CCI viewed that the proposed combination is not

[13] Ibid

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likely to cause an appreciable adverse effect on competition in the market for provision of mobile wallet services in India after taking into consideration the insignificant market share of the combined entity and presence of many competitors in the market etc.

Thus, CCI made a detailed analysis of the facts in relation to the parties to the merger like their products and services, market conditions, number of competitors, buyer's ability to avail alternative products or services and relevant product market and relevant geographic market etc. On a comprehensive analysis of these factors, CCI reached to the conclusion that the proposed combination is not likely to have any adverse appreciable effect on the competition.

I. Pro-merger approach of CCI

From the perusal of the order of CCI in the above case, we understand that the approach of CCI in dealing with merger cases is very sound and comprehensive. The benefits of merger are assessed from various angles like economies (efficiencies), benefits to customers and opportunities and constraints for new entrants etc. In a short span of seven years, CCI has approved more than 430 mergers cases and it has steadily emerged as an effective merger control regulator. The CCI has adopted an approach akin to mature antitrust jurisdictions and has interpreted control to include negative control.

We find that there are certain concerns with respect to CCI's ability to deal with combination cases. The term 'appreciable adverse effect on competition' is not well defined and elucidated in the Competition Act. The assessment of a vertical merger is much more complex than horizontal mergers and the same approach cannot be used to adjudge both the types of mergers. However, the Competition Act does not specify or describe the approach to be followed for the evaluation of vertical merger. The factors enlisted in the legislation are not effective in case of vertical mergers. On the contrary, the European Commission has been more elaborate in specifying the approaches which need to be adopted through its dedicated guidelines for non-horizontal mergers. In determining market share and market concentration, barriers to entry, welfare objectives, benefits to consumers and efficiency considerations, the CCI may take cue from the practices followed by its counterpart in European Union.[14]

By and large, it is an undisputed fact that CCI's approach in M&A transactions has been quite sincere and accommodative to industry requirements. A *de minimis* exemption and enhancement in threshold given in section 5 of the Competition Act have ensured that only major transactions come within the purview of CCI. The author feels that a more rigorous approach by CCI is required for scrutinizing horizontal merger proposals. For example, in Vodafone and Idea merger case, CCI viewed that there are other players (Bharti Airtel, RCOM & Aircel, Jio, Tata and one state owned TSP i.e., BSNL/MTNL) in all telecom circles.

[14] Murdul Dadhich, "Regulation of vertical Mergers - major takeaways for India from the European Union, available on https://www.lexology.com/library/detail.aspx?g=925d4e99-56ef-4af0-8df4-d5b331ca3520 (last visited on 13 February 2023).

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However, it is very evident that as of now there are only two private operators (Airtel and Jio) in addition to the merged entity who will be able to sustain themselves in the market. While MTNL/BSNL has operated as a typical Government company, insulated from competitive forces, concentration of telecom business in hands of three major operators is certainly not a very good sign for competitiveness of telecom sector[23].

Though CCI has followed a balanced and positive approach towards merger transactions but on occasions, when it was warranted, CCI has taken a tough stand and asked parties to make suit amendments in their arrangements like in Jet-Etihad deal, PVR case etc. In a span of less than a decade, there is no apparent indication that pro-merger approach of CCI has harmed to the interests of customers or society at large but the true impact of CCI's pro-merger may be ascertained only in a longer run of two-three decades.

Conclusion

With statutory framework in place and CCI rapidly evolving as an efficient competition watchdog, the future of M&A transactions from the perspective of the competition law is on a solid footing. We may hope that in coming years, more focussed and intense approach will be adopted by CCI in determining impact of M&A transactions on competition. The practices followed by USA and EU will help us in adoption and implementation of best practices. Engagement of people with better exposure of market and technology may help CCI in making better analysis of the likely impact of the proposed merger on the competition. Since the market data and other details submitted to CCI by the partiesto the merger is always not revealing all the relevant facts required for forming a rationale decision, CCI has to look at these transactions fromthe lens of the industry people and try to understand the real intent and aspiration of the parties by materializing the scheme of proposed merger. Many times, a merger may not be very harmful from the perspective of competition law but it may have adverse effect on other aspects of economy (for example, merger of Vodafone & Idea is causing loss of jobs for many employees of these companies due to consolidation of business). In such circumstances, the question is whether CCI will remain a spectator or it will highlight these concerns.

Further, while deciding whether the proposed combination is likely to have appreciable adverse effect, CCI should not look into current market conditions but it should have a holistic view of market dynamics and the future possibilities and emerging trends for the sector (in which parties are operating). In absence of a futuristic approach, there is a possibility that a harmless transaction of present time may soon turn into a tragedyfor competition in the market.