Present Scenario of Mergers and Acquisitions in India: In Perspective of Competition Law

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Introduction

The Mergers and Acquisitions (M&A) have gained pervasive importance for restructuring the business organizations in India. M&A are a very dynamic field and have been a distinctive features of the economy. Some financial organizations took the initiatives to restructure the economic sector by adopting M&A policies. Once an organization has developed certain size of business then opened up both domestic and international spheres. Then competition in the global market has embolden the Indian business to go for mergers and acquisitions as an important strategic choice. M&A is the major strategic tools to expand several possible ways for the business organizations with help of major shareholders and key managers. The economic growth is through establishing a new business in existing product markets or establishing firms in the new markets.

In the last few years, India had witnessed a substantial slowdown in the M&A But over the year's present trend of mergers and acquisitions in India have changed and there is rapid growth which immediate effects of the mergers and acquisitions have also been diverse across the various sectors of the Indian business organization were involved in huge transactions. It is strongly believe that due to new bankruptcy law, in becoming years, M&A activity encourage foreign investments in IT sector, healthcare, energy, pharma, e-commerce and banking & financial services.

Conceptual Overview of M&A

A mergers is a combination of two or more companies into one company, wherein the merging entity loses its identity. No fresh investment is made through this process. However, an exchange of shares

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takes place between the entities involved in such a process. Generally, the company that survives is the buyers which retains its identity and the seller company is extinguished.[2]

And in a scheme involving a mergers, where under the scheme the undertaking, property and liabilities of one or more companies, including the company in respect of which the compromise or arrangement in proposed are to be transferred to another existing company, it is a **mergers by absorption.**[3]

In a 'cash merger', also known as a 'cash-out merger', the shareholders of one entity receives cash instead of shares in the merged entity. This is effectively an exit for the cashed out shareholders. And "triangular merger" is often resorted to, for regulatory and tax reasons. As the name suggests, it is a tripartite arrangement in which the target merges with a subsidiary of the acquirer. Based on which entity is the survivor after such merger, a triangular merger may be forward (when the target merges into the subsidiary and the subsidiary survives), or reverse (when the subsidiary merges into the target and the target survives).[4]

An **acquisition**, on the other hand, is aimed at gaining a controlling interest in the share capital of the largest company. It can be executed through an agreement with the persons holding a majority interest in the company's management, such as members of the board or shareholders commanding a majority of the voting rights, or through purchasing shares in the open market or purchasing new shares by private treaty or by making a takeovers offer to the shareholders. Based on the objective profile of an offer, business combinations such as mergers, acquisitions or takeovers could be categorized as vertical, horizontal, circular, or conglomerate mergers.[5]

The term '**amalgamation**' is an arrangement or reconstruction by a legal process by which two or more companies joined together to form a new company and as a consequence the amalgamation companies loses their existence and their shareholders becomes the shareholders of new company or

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[2] P.L. Beena, *mergers and acquisitions India under globalization* (1st publication, Routledge Taylor & Francis group New Delhi, 2014) 03.

[3] Dr. D.K. Jain, *Company law ready reckoner* (7th edition, bharat law house new delhi 2016)1207.

[4](http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Mergers___Acquisitions_in_India.pdf) accessed on 27/03/2017

[5] P.L. Beena, *mergers and acquisitions India under globalization* (1st publication, Routledge Taylor & Francis group New Delhi, 2014) 04.

the amalgamated company. In the case of an amalgamation, a new company may come into existence or an old company may survive while amalgamated company may lose its existence.[6]

Vertical Combinations

A vertical combination is one in which a company takes over or seeks a mergers with another company in order to ensure backward integration or assimilation of the sources of supply or forward integration toward market outlets. This is done to safeguard the source of supply of raw materials or intermediary products for final production, to reduce inventories of raw materials or finished goods, and to optimize working capital investments. The acquirer company gains a strong position due to the imperfect market of its intermediary products and also through control over product specifications. However, these gains must be weighed against the adverse effects may increase barriers to entry through vertical integration which would help discriminate between different purchasers by monopolization of raw materials supplies or distributive outlets.[7]

Horizontal Combination

A horizontal combination is a mergers of two competing firms belonging to the same level industries that are at the same stage of the industrial process. These mergers are carried out to obtain economics of scale in production by eliminating duplication of facilities, operations and broadening the product line, reducing investment in working capital, eliminating competition through product concentration, reducing advertising costs, increasing market segments and exercising better control over the market.[8] It is also an indirect route to achieving technical economics of large scale.

Circular Combination

In a circular combination, companies producing distinct products in the same industry seek amalgamation to share common distribution and research facilities in order to obtain financial capacity by eliminating costs of duplication and promoting markets enlargement. The acquiring company obtains benefits in the form of economies of resource sharing and diversification.[9]

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[6] Dr. D.K. Jain (n 3) 1207.

[7] ibid 4.

[8] Abir Roy & Jayant Kumar, *Competition law in India* (1st edition, Eastern law house private ltd Calcutta 2008) 123.

[9] Beena (n 4) 5.

Conglomerate Combination

A conglomerate combination is the amalgamation of two companies engaged in unrelated industries. The basic purpose of such an amalgamation is the effective utilization of financial resource and enlargement of debt capacity through improve financial management so as to services the by shareholders by increased leveraging and higher earnings per share and lowering average cost of capital, thereby raising the present worth of the outstanding shares. It enhance the overall stability of the acquirer company and improves the balance in the economy's total portfolio of diverse products and production processes. Through this process, the acquired firm gets access to the existing productive resources of the conglomerate, which results in technical efficiency. Furthermore, it can have access to the greater financial strength of the present acquirer, which provides a financial basis for further explanation by acquiring potential competitors. These processes also lead to changes in the structure and behavior of acquired firms since they open up new possibilities.[10]

Joint Ventures

The formation of a joint venture could lead to anti-competitive effects. This depends on the intention of the parties regarding the use of the joint venture as a vehicle for their purpose and whether they limit their own right to compete, which may or may not be for a limited duration. The purpose of the joint venture may be for the entry of the joint venture parties into a new business, or new entry into a competitive market, which requires the expertise, specific skills and the investment of each of the joint venture parties. The execution of a joint venture agreement setting out the rights and obligations of each of the parties is a norm for most joint ventures. The joint venture parties may also incorporate new companies which will engage in new business. In such a case, the byelaws of the joint venture company would incorporate the agreement between the joint venture parties.[11]

Analyzing Mergers and Competition Law

The mergers or acquisitions have been refused by the competition authorities if the merger create a situation wherein the effect may be to substantially lessen competition or which tends to create a monopoly.[12] If, it would immediately create a monopoly or give the parties markets power but those

[10] Beena (n 4) 5.
[11] T.Ramappa, *Competition law in India, policy, issues and developments* (1st edition, oxford university press New Delhi 2006)224-25.
[12] Clayton Act 1914, S 7. (http://gwclc.com/Library/America/USA/The%20Clayton%20Act.pdf) accessed on 30/03/2017.

concept of any competition with and without the mergers. Then the competitive situation without the mergers is sometimes referred to as the counterfactual. So competition authorities have the responsibility to intervene an anti-competitive outcome.[13]

For the purpose of whether a combination would have effect on competition in relevant market, the commission shall have due regard to all following factor, namely: actual and potential level of competition through imports in the markets; extent of barriers to entry into the market; level of combination in the market; market share in relevant market, of the persons or enterprise in a combination, individually and as a combination; nature and extent of vertical integration in the market; possibility of a failing business; nature and extent innovation and whether the benefits of the combination outweigh the adverse impact of the combination , if any competition law of various countries use the words combination or concentration, which includes the aspect of merger, amalgamation or joint venture.[14]

The competition effect of the mergers rests on the understanding of the competition constraints under which the firm operates and one has to analyze by using various mechanism whether the merger would result in competition harm.

[13] International Competition Network, Mergers Guidelines Workbook, April 2006 (http://www.internationalcompetitionnetwork.org/uploads/library/doc321.pdf) accessed on 31/03/2017.
[14] The competition Act 2002 , S 5.