ANTI-COMPETITIVE AGREEMENTS VIS-A-VIS MERGERS AND ACQUISITIONS - A COMPARISON BETWEEN INDIA, US AND EU

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Abstract

Prior to closing, M&A transactions often entail information exchanges between parties for various reasons. This information that is shared both prior and post the completion of the transaction are to comply with the provisions of the anti-trust laws of the concerned nations to ensure a fair and free market that is devoid of monopolistic entities. The anti-competitive agreements entered into by rival corporations and firms play a major role in keeping the new mergers and combinations that will swallow up the free market at bay. The regulation and enforcement of these anti-competitive agreements and anti-trust laws differ from nation to nation. In this article, the legal provisions and precedents of anti-competitive agreements of India, United States of America and the European Union and the roles they play in the mergers and acquisitions that are transacted in their respective free markets are examined.

Keywords: *anti-trust law, anti-competitive agreements, market monopoly, free market, India, USA, the EU*

INTRODUCTION

Every country needs to carefully monitor marketplace competition to ensure that it does not devolve into unfair competition. Only when a country has a strict Competition Law can it exert control over the market's exploitative dynamics. However, a country's strict competition legislation should encourage fair market competition, which would enable every market participant survive in the market.

Anti-trust regulations are crucial in ensuring that commercial transactions like mergers and acquisitions profit from competitive prices and high-quality goods and services. These objectives are met through anti-trust laws, which promote and develop competitiveness while also prohibiting anti-competitive acquisitions and corporate activities. Almost every developed country has built a comprehensive legal structure to deal with restrictive contracts, marketplace power abuse, and the disclosure and regulation of mergers and acquisitions that represent a risk to competition over the past few decades.

With legislations dating back to 1969, India's competition law jurisprudence is older than those of most other emerging countries. The Monopoly and Restrictive Commercial Practices Act of 1969 was the very first competition law, created primarily to avoid economic power concentration and ban monopolistic or unfair trade practises. According to the Competition Act, 2002, an authorisation from the Competition Commission of India (CCI), India's only antitrust body, is necessary before executing particular M&A transactions. Prior to closing, M&A transactions often entail information exchanges between parties for reasons such as due diligence, merger control notifications, interim covenant fulfilment, and integration planning. All of these information exchanges must be done in accordance with the 2002 Competition Act.

Information exchange prior to completion of the merger or combination between transacting parties is subject to specific constraints under competition law. However, it is widely acknowledged that these constraints must be weighed against the necessity for all parties to analyse and safeguard the value of relevant firms ahead of and throughout an M&A transaction.

To begin with, not all information sharing is restricted. Competition problems occur when rivals (or other firms) communicate competitively sensitive information (CSI). In general, CSI refers to strategic information that, if disclosed, might minimise the rivalry and uncertainty that define market behaviour under normal competitive situations. As a result, CSI often refers to information that is sensitive (e.g., linked to pricing, discounts, expenses, or delivery circumstances), individual (connected to a specific market player), private, and current (or forward-looking).

Back-end company operations such as human resources, IT, and regulatory compliance are less likely to be classified as sensitive. However, in some cases, such material may be considered CSI and should be assessed for sensitivity before being shared.

ANTI-COMPETITIVE AGREEMENTS

Competition Act of India, 2002

Section 3(1) forbids and declares void any arrangement between firms relating to the manufacture, supply, distribution, storage, purchase, or control of commodities or the provision of services that has or is likely to have a significant detrimental effect on competition inside India. There are no examples of anti-competitive activities or behaviour in the law. This provision has a very broad and comprehensive reach. Section 3(3) defines anti-competitive agreements and practises that can be made or followed by businesses that provide similar or identical goods or services, as well as cartels. This section presumes that the agreements or methods used by that type of businesses have a significant negative impact on competition. They are infringement of the Act in and of themselves. The word "vertical constraints" is used in Section 3(4). These are limitations that apply to businesses at various steps of the manufacturing phases in various markets. This includes both the delivery of products and the provision of services. The rule of reason should be applied to vertical constraints. In each scenario, the appreciable adverse effect on competition must be proven. The exceptions to Section 3 are provided in Section 3(5). The first set of exceptions protects an owner of any

intellectual property rights enumerated in the subsection's provisions against any violation of those rights, as well as the right to establish reasonable restrictions to safeguard those rights. The provisions of an agreement pertaining only to the export of goods or the provision of services overseas are also exempted under Section 3(5).

US Anti-Trust Laws vis-à-vis India

Unlike the Indian enforcement structure, which is made up of a single body of legislation and a single institution of authority, the US enforcement model is made up of many authorized bodies of institutions and multiple legislation. In the United States, the Antitrust Division of the US Department of Justice and the Federal Trade Commission are in charge of enforcement. The former is part of the executive branch of government, whereas the latter, like the CCI, is an autonomous administrative agency.

The Sherman Act, adopted in 1890, is the oldest federal antitrust legislation, dealing largely with anti-competitive agreements and monopolies exerted by businesses. The Clayton Act of 1914 prohibits exclusive supply, mergers, pricing discrimination, and tying, among other economic activities. The Sherman Act and the Clayton Act are independently enforced by the Department of Justice and the Federal Trade Commission. If the infringement necessitates criminal prosecution, however, the DOJ has exclusive jurisdiction to prosecute.

The Sherman Antitrust Act deems illegal any contract, combination in the form of trust or otherwise, or conspiracy in restriction of trade or commerce among the different States or with foreign nations (1890)[1]. The Supreme Court in National Society of Professional Engineers v. United States, held that "the problem with Section 1 is that …cannot mean what it says. The statute says that 'every' contract that restrains trade is unlawful. But . . . restraint is the very essence of every contract; read literally, § 1 would outlaw the entire body of private contract law."[2]

[1] S.1, Sherman Antitrust Act (1890)
[2] 435 U.S. 679, 687-88 (1978)

Price fixing, whether referred to as cartelization, bid-rigging, or something else, is inherently illegal under US antitrust law. All naked horizontal agreements to raise prices, limit output, or split markets are subject to the same sweeping censure. These are referred to as "per se" illegal, inferring that they can't be justified on the basis that the parties lacked market power or had no substantial effect.[3]

Broadcast Music, Inc. v. CBS is a landmark case in this evolution. The main music licencing companies (ASCAP and BMI) had produced blanket licences that were so popular that the great majority of music licences were with ASCAP or BMI rather than with individual composers. This near-complete absence of price competition, according to the court of appeals, constituted "price fixing" and hence unlawful per se. The Supreme Court overturned the decision. "Price fixing" became less of a factual declaration that initiated the analysis and more of a legal finding declared after the analysis under the Court's new approach. “Whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, . . . or instead one designed to increase economic efficiency and render markets more, rather than less, competitive” is the question that must be answered in order to classify conduct[4].

EU Treaty vis-à-vis India

The Treaty on the Functioning of the European Union established the basis for EU competition law. The Treaty covers a broad range of subjects; nevertheless, the most significant legal progress has been made in the domain of competition law, which is covered by Articles 101 and 102.

Each constituent state of the EU also has its own national competition authorities and legislations, which are often pertinent to agreements and activities between EU constituent states through trade law practises and Appellate antitrust laws. The European Council framed the institutional framework for competition law enforcement because the Treaty did not specify it. The European Commission was tasked by the Council with the responsibility of ensuring

[3] *United States v. Socony-Vacuum Oil* Co., 310 U.S. 150 (1940)
[4] 441 U.S. 1 (1979)

the Treaty's conformity as well as enforcing, implementing, and developing the EU's competition policies and legislations.

The European Union's cartel-busting policy is established by Article 81 of the Treaty. Cooperation, coordinated action, and overt and covert agreements between rival companies functioning in the Single Market are all prohibited under this clause. It establishes a blanket prohibition on corporate coordination that may impact cross-border commerce between the constituent states. The European Court of Justice has affirmed on several instances that even the mere possibility of a negative impact on trade is enough to justify prohibition. In ***Vereniging van Cementhandelaren v EC Commission***, the Court determined that in the framework of a single-member-state agreement, "…the effect of reinforcing the compartmentalisation of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about and protecting domestic production."[5]

This certainly benefits the average EU consumer, whose economic independence is often limited to activities carried out within the Member State of residence. The Court emphasised the proactive aspect of EC competition legislation in ***Ets Consten Sarl and Grundig-Verkaufs Gmbh v EC Commission***[6], which is again to the benefit of consumers in the European Union.

A bare reading of the Article indicates, "concerted practises", which are informal and generally covert forms of cooperation, as well as strategies employed by associations of companies that have the ability to shape EU consumers' needs and wants, would be subject to enforcement and penalties. In ***ICI Ltd v EC Commission (Dyestuffs)***[7], the idea of coordinated practise was established.

If certain rigorous requirements are satisfied, the EU is authorized to accede in the face of cooperative action between companies under Article 81(3). This is beneficial to EU consumers

[5] [1972] ECR 977

[6] [1966] ECR 299

[7] [1972] ECR 619

since it means that cooperative efforts that benefit the economy or market dynamics will not be penalised and will not result in action.

The Indian competition law guideline is comparable to the European enforcement system, and the Act's provisions, as well as the CCI's powers and functions, are based on the Treaty's relevant provisions and the EC's powers. Though the Act shares many similarities with the regulatory structures in the United States and the European Union, the models vary greatly in terms of enforcement levels and quality.

ANTI-COMPETITIVE MERGERS AND ACQUISITIONS: EU & USA VIS-À-VIS INDIA

There are three types of mergers: (1) a merger between direct competitors (known as a horizontal merger), (2) a merger of firms operating at different levels in the supply chain (known as a vertical merger), and (3) a merger of firms operating in completely different industries (known as conglomerate mergers). Because horizontal mergers often create the most serious competition problems, antitrust laws are primarily concerned with this kind of mergers.

The merger review process is among the most prominent places where antitrust legislation works to maintain competitive markets. Mergers and acquisitions that have the potential to "significantly decrease competition or tend to form a monopoly" are prohibited under the US Antitrust Act. This clause allows antitrust enforcers to ask a court to stop corporations from joining if the combination will significantly reduce competition by generating, increasing, or enabling the exercise of market power.

The Hart–Scott–Rodino Antitrust Improvements Act of 1976 amended the United States' antitrust laws, particularly the Clayton Antitrust Act. The Hart-Scott-Rodino Act mandates that corporations planning to merge should file relevant details with the federal government and specifies a set of deadlines for federal antitrust enforcers to complete the merger examination.

It is critical to tie the existing merger enforcement measures in India to those in the US and EU regulations. Horizontal mergers, or mergers of enterprises in the same market, are regulated

the worst in the United States under the Sherman Act and the Clayton Act because they are most likely to have anti-competitive consequences. Vertical mergers, such as those involving suppliers and customers, are regarded much more leniently.

The antitrust laws of the United States and the European Union handle nearly interchangeable classifications of anti-competitive actions and combinations, although they differ somewhat in terms of parameters and enforcement methods. While US antitrust law aspires for maximal competition dispersion, EU antitrust law advocates for competitive power diffusion moderated by collaborative efforts. Both statutes provide distinct types of redressals.

The US antitrust law is essentially systemic, in that it considers remedies such as monopoly dismemberment and the imposition of damages in private cases; whereas, the EU antitrust law regards regulation of monopolistic behaviour as the proper remedy, rather than dismemberment of the violators.

If the combined market share exceeds stipulated limitations, a severance of undertaking can be required, as in the cases of Standard Oil and AT&T, and as is being considered in the Microsoft case. However, Indian law does not take this approach; severance of enterprises can only be compelled if the merged undertaking's high market dominance is deemed to be against the public interest. However, in a developing country, it is necessary to create monolithic organisations capable of competing with international competitors on the basis of sheer scale and productivity gains. As a result, the lack of enforcement rules is a boon, as it allows capital and asset accumulation to continue unrestricted. The new law should not be overly restrictive in terms of pre-merger formalities, but should instead enable the merger to proceed without hindrance. The only issue to consider is whether or not the combination would result in higher consumer burden.

In this perspective, it's encouraging to see that the Supreme Court, in the Hindustan Lever case, recognized the liberalization process and the efforts made by Parliament, indicating that the measures were not anti-merger, even though the merger resulted in an increase in market share.

The prospective merger of Hindustan Lever Limited with Tata Oil Mills Co. Ltd was the subject of the Hindustan Lever lawsuit. HLL had a 54 percent soap market share and an 83 percent detergent market share. TOMCO has a 24 percent market share in soaps. In a separate judgement, the Supreme Court allowed the merger of HLL and TOMCO, stating that a merger cannot be terminated based on future events.

The Indian competition law has set thresholds for the application of antitrust rules to mergers and acquisitions, but antitrust laws in the United States are primarily concerned with the actual effect of mergers and acquisitions. Moreover, the Indian Competition Act's limitations have made antitrust rules stricter and more cautious, potentially limiting India's share of worldwide M&A. Because cross-border mergers and acquisitions are the newest trend in worldwide business, Indian antitrust legislation must be liberalized to align with international antitrust rules.

CONCLUSION

The current Indian law appears to be too strict and cautious to entice global players to invest in Indian companies. Given cross-border M&A will be a viable opportunity for many Indian firms as a corporate extension or development model, it is critical that Indian anti-trust regulations be on the same level as US or EU anti-trust rules.

The free market's top participants should remember that anti-trust regulations are important because they restrict the government's monitoring to a bare minimum. It's a viewpoint that's pro-market and, more crucially, pro-competition, which translates to pro-consumer. That is what major countries' Anti-trust Divisions or Competition Commissions anticipate.

Several nations' competition frameworks and guidelines have intersected significantly during the previous 10 years. Moreover, the overwhelming agreement that free market economies are the greatest means for growth and that competition law plays a vital role in ensuring the effective functioning of these markets is the strongest evidence of this evolution.