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Review Article

Critical Study on Merger and Cross Border Merger and Their Regulations in India

K Krishnaveni

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Author Affiliation

Guest Faculty, Department of Law, Tamil Nadu Dr Ambedkar Law University, Chennai, Tamil Nadu 600028, India.

Corresponding Author

K Krishnaveni, Guest Faculty, Department of Law, Tamil Nadu Dr Ambedkar Law University, Chennai, Tamil Nadu 600028, India.

E-mail: venubalabl@gmail.com

Abstract

The Paper aims to establish an outline regarding the merger regulation abiding the competition law regime in India, and also deals with cross border merger. It also highlight's Foreign Exchange Management (Cross Border Merger) Regulations, 2018. Firstly, the paper provides a brief overview of Mergers and their regulation in India. and its Various Phases of Historical Development Over the Years. Many Legislations were made About the Merger Indirectly, Secondly, the paper provides the extent and nature of regulation of Mergers under the Competition Act, 2002. The object and extent of regulation of horizontal mergers under Competition law in will also be addressed. conclusion and suggestions shall be made on the source of the research undertaken.

Keywords: Overview; Combination; Mergers; Regulations; Cross border merger.

Introduction

In a merger the legal effect of which is that the merging company will lose its corporate status as a company and will be owned by the company with which it has merged , the merging company will lose its corporate status as a company and will be owned by the company with which it has merged,[1] the merging company's autonomy is lost entirely to the merged company. the term amalgamation is used in the company's act but the word merger and amalgamation are interchangeable. Primarily mergers can be classified into horizontal and vertical mergers. In addition, merger between companies working in various fields are called conglomerate mergers. The consumers by permitting organizations to run more efficiently. However, some reduced the competition, which can lead to higher prices, non-availability of goods or services, and lower quality of products, and less innovation. 'Cross border merger' means any merger, amalgamation or arrangement between an Indian company and foreign company in accordance with Companies (Compromises, Arrangements and Amalgamation) Rules, 2016 notified under the Companies Act, 2013.

The common Practice is to keep the goal. In rare cases, where an enterprise in a dominant position makes a vertical merger with another firm in a (vertically) adjacent market to further embed its position of dominance, the merger may provide a cause for concern. In this paper, analyses the provisions of the Competition Act, 2002 (Hereinafter "Act") and the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (Hereinafter "Combination regulations") with respect to mergers, amalgamation and acquisitions.

Historical Development of Meger Regulation Under the MRTP Act

In Section 23 of MRTP Act 1969, under Chapter III dealing with "Concentration of Economic Power" provided for regulating merger by undertaking

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falling under this act what was necessary to be examined under that section was, where the merger would lead to concentration of economic power. That section also provided for the regulating takeover of an undertaking by an undertaking to which Chapter[2] III applied Chapter IIIA contained section 30A to 30G, regarding the acquisition of and transfer of shares above the prescribed threshold the acquisition or transfer of shares by the entities covered by this chapter. The entire Chapter III and all the parts thereof were omitted in 1991, with the result that mergers and acquisition of shares became subject only to applicable provision of the companies act 1956.

Acquisition of shares under the Companies Act 1956

In the same year by an change in the companies act 1956, section 108A to 108H dealing with the restriction on acquisition, transfer of shares, as set out in section 108A to 108C, were introduced. The central Government's approval was necessary for the acquisition of shares that would lead to an increase in the shareholding beyond the prescribed percentage and for the transfer of shares by the body's corporate holding a specified percentage of shares. By virtue, section 108G, the relevant section would apply when either of the parties to the acquisition or transfer of shares was a dominant undertaking, In MRTP Act. It is needless to add that none of these provisions deals with the effect on competition of acquisition or transfer of shares.

The Securities and Exchange Board of India (SEBI)

The SEBI regulation 1997, as amended up to January 2005, do not require any examination of a proposal for the acquisition or takeover covered by those regulation of the proposal for acquisition or takeover covered by those regulations for the effect of proposal on competition in the business of the enterprises involved in the transaction.[3] The objective is only to ensure that the acquisition of shares or voting rights in or control of target company is done in an open manner, equitable to the shareholders and the public investors. Regulation 10.,11,12 the key provisions', impose an obligation on those who may acquire shares, voting rights, control of target company, in the manner and to the extent set out therein, to make a public announcement to acquire shares, in accordance with the Regulation.

Mergers – The Companies Act 1956

The Legislative provision governing mergers of companies are contained in section 390 to 390A of the companies Act 1956, section 23 and section 24 of the MRTP Act 1969 dealing with merger and takeovers of companies governed by that act were omitted by an amendment of that Act in 1991. The companies Act 2002, has replaced[4] the MRTP Act in its entry Section 2(5) of the competition act describe the mode in which a combination they may be brought about through a merger or an amalgamation, the implications of which shall be considered later section 5 while defining the three modes in which a combination may result, refers to enterprise a wider term that would include entities such as companies and other entities also. Under three Companies act 1956 a scheme of merger or amalgamations as it refers to in the act, is an arrangement between a company and its creditors by which the assets and liabilities of one company are transferred ton other company and if the scheme is approved by the prescribed majority of the merger. Then the transferor company the assets and liabilities of which are transferred by virtue of the order of the court, to the transferee company, will be dissolved, without being would up thereby losing its corporate status and becoming a unit of the transferee company.

Regulation of Mergers under the Competition Act, 2002

In India, Mergers are regulated by the Companies Act, 2013, Income Tax Act, 1961, SEBI Act, 1992, SEBI Takeover Code, 1994, Foreign Exchange Management Act, 1999 and the Competition Act, 2002.The regulation of mergers was required to be enacted, primarily, with the objective of taking measures to avoid anti-competitive agreements and abuse of dominance as well as to regulate mergers and takeovers which result in misrepresentation of the market. The regulatory framework with respect to mergers under the Competition Act, 2002 has been provided in Sections 5, 6, 20, 29, 30 and 31 read along with Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011.and Draft Competition (Amendment) Bill, 2020.

As per the financial threshold requirement stated in the Act, an acquisition of either control, shares, voting rights or assets of another entity shall be a combination within the meaning of the Act if the value of the combined assets or turnover of the acquiring entity as well as the entity being acquired is more than the amounts specified in the act.

Recently,[5] the Central Government has provided an exemption to enterprises on the basis of their

value of assets and Turnover. The exemption provides that an enterprise, whose control, shares, voting rights or assets are being acquired has either assets of the value of not more than rupees three hundred and fifty crores in India or turnover of not more than rupees one thousand crores in India. Such enterprise is exempted from the above stated requirement for a period of five years.

Cross border merger Regulations:

In the cross border merger classified into inbound merger and outbound merger, first one inbound merger means the company issue the shares and transfer of some securities and security to a person resident outside India in accordance with the pricing guidance entry routes, sectoral caps, attendant conditions and reporting requirements for foreign investment as laid down in Foreign Exchange Management[6] (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017 tis regulation also apply to the joint venture and wholly subsidiary company also .The resultant company may acquire and hold the assets outside India ,and the company also open a bank account in foreign country in the oversea of jurisdiction for the purpose of putting through transactions incidental to the cross border merger for a maximum period of two years from the date of sanction of the Scheme by NCLT.

Outbound merger means a person resident in India may acquire or hold securities of the resultant company in accordance with the Foreign Exchange Management (Transfer or issue of any Foreign Security) Regulations, 2004. a resident individual may acquire securities outside India provided that the fair market value of such securities is within the limits prescribed under the Liberalized Remittance Scheme, The guarantees or outstanding borrowings of the Indian company which become the liabilities of the resultant company shall be repaid as per the Scheme sanctioned by[7] the NCLT in terms of the Companies, The resultant company may acquire and hold any asset in India which a foreign company is permitted to acquire , Where the asset or security in India cannot be acquired or held by the resultant company under the Act, rules or regulations, the resultant company shall sell such asset or security within a period of two years from the date of sanction of the Scheme by NCLT and the sale proceeds shall be repatriated outside India immediately through banking channels. Repayment of Indian liabilities the resultant company may open a Special Non-Resident Rupee Account (SNRR Account) in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016 from sale proceeds of such assets or securities within the period of two years shall be permissible.

Valuation and Approval

The valuation under the Rule 25A of the Companies (Compromises, Arrangement or Amalgamation) Rules, 2016. A foreign company incorporated outside India may merge with an Indian company after obtaining prior approval of Reserve Bank of India and after complying with the provisions of sections 230 to 232 of the Act and these rules , The transferee company shall ensure that valuation is conducted by valuers who are members of a recognized professional body in the jurisdiction of the transferee company and further that such valuation is in accordance with internationally accepted principles on accounting and valuation. A declaration to this effect shall be attached with the application made to Reserve Bank of India. Any transaction on account of a cross border merger undertaken in accordance with these Regulations shall be deemed to have prior approval of the Reserve Bank as required under Rule 25A of the Companies (Compromises, Arrangement and Amalgamations) Rules, 2016.

Conclusion

In India merger regulation was developed step by step, form the companies act and MRTP act also discussed about the merger regulation indirectly, after the globalization and the economic advancement in the world, we need a stronger legislation to regulate merger (amalgamation and acquisition), also with cross border merger also be regulated. Because to safeguard the public interest, it means it secure[8,9] the consumer and the competitor in the marker if the merger was not regulated then all the dominate companies will merge wit the another company and it will become a dominant position in the market ,it will affect the consumer and the new entrant in the market to avoid dominance and safeguard the public interest is the goal for the merger regulation in India ,then CCI only regulating the mergers if any companies not binding with competition act provision then any one can file a petition before the CCI regarding the irregularity in the merger, The CCI has published prefiling consultation guidance note where by the parties are encouraged to show draft form filing to the relevant case. The officer at the CCI and the parties can avail the assistance of the case teams at the CCI to fill-up relevant form before filling,

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