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MERGER CONTROL IN DYNAMIC MARKETS – Contribution from India

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Merger Control in Dynamic Markets

- Contribution from India –

1. Legislative framework for regulation of combinations

1. The Competition Act, 2002[1] (**Act**) provides for *ex ante* regulation of combinations in India. The term 'combination' has been defined as mergers, acquisitions or amalgamations of enterprises that meet the prescribed financial thresholds[2]. Section 6 of the Act requires that no person or enterprise shall enter into a combination that causes or is likely to cause appreciable adverse effect on competition (**AAEC**) and such combination is void[3]. Parties to a combination are required to give notice to the Competition Commission of India (**Commission**) before consummation of their combination[4]. A combination shall not take effect for a period of two-hundred and ten (210) days from the date of notification or earlier approval by the Commission[5].

2. A combination notified to the Commission would be assessed for its likely AAEC in the relevant markets. For such assessment, sub-section (4) of Section 20 of the Act requires the Commission to have due regard to the following factors[6]:

- actual and potential level of competition through imports in the market
- extent of barriers to entry into the market;
- level of combination in the market;
- degree of countervailing power in the market;
- likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
- extent of effective competition likely to sustain in a market;
- extent to which substitutes are available or are likely to be available in the market;
- market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;

[1] Act No. 12 of 2003 enacted on 13th January, 2003 as amended from time to time.

[2] See Section 5 read with sub-section (3) of Section 20 of the Act.

[3] Sub-section (1) of Section 6 of the Act.

[4] A combination need not be notified to the Commission if the falls within the categories of exemptions notified by the Government under Section54 of the Act or those enlisted under Schedule I of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011.

[5] Sub-section (2A) of Section 6 of the Act.

[6] Sub-section (4) of Section 20 of the Act.

- likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;
- nature and extent of vertical integration in the market;
- possibility of a failing business;
- nature and extent of innovation;
- relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition; and
- whether the benefits of the combination outweigh the adverse impact of the combination, if any.

3. In each case notified, the Commission considers the relevant factors including innovation, efficiencies, likely elimination of vigorous competition and vertical integration. The Commission is further guided by the preamble of the Act, which states that the Commission has been established keeping in view the economic development of the country.

2. Competition Assessment of Dynamic Markets

4. In the current information age, many markets, especially in the digital space, are dynamic and are evolving rapidly. Therefore, at the time of undertaking competition assessment of combinations, the Commission factors in the dynamic nature of such markets. The parameters used to identify the dynamic nature of such markets are: level of innovation in the market, existence of network effects, rate of evolution of the product in its lifecycle *i.e.* the rate at which the products are being enhanced or replaced, and the volatility in market shares of the players in the market. Evidently, these markets are in Information Technology, Telecommunications, e-commerce, platform markets, Pharmaceuticals, agriculture technology *etc*.

5. The broad framework of assessment would still be the same, *i.e.* identification of theories of harm, followed by weighing of adverse effects on competition due to the merger against the merger specific efficiencies. The traditional tools such as concentration analysis, entry and exit, innovation *etc*., used in analysis of static markets, are found useful in the assessment in dynamic markets, but with a cautious approach and wider scope. However, there are many challenges involved in assessing the dynamic markets. This is because of the inability to identify possible entry firms and products in future and the uncertainty and opacity of short-term developments in these market. In addition, there is a challenge to effectively evaluate the merger specific efficiencies, and decide whether such merger is necessary to realise the efficiency claims.

6. The market structure with the presence of a large number of players, presence of a formidable competitor of sufficient scale and size and ease of entry are some of fundamental factors indicative of a competitive market that will not allow any competition harm to play out in the market post combination. The Commission considered the above

factors in the case of acquisition of shares of Flipkart Private Limited by Wal-Mart International Holdings, Inc.[7], a case in the retail e-commerce sector.

7. Depending on the nature of the market, different approaches and metrics are used to reflect the dynamic nature. In the case of merger of Idea Cellular and Vodafone India[8], the Commission noted the market share estimates, not on limited factors, but 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 the new entrant, Reliance Jio Infocomm Limited. In this case the Commission also factored in the chances of future entry in the market. The Commission observed that most of the market share estimates (including in terms of net subscriber additions) do not appear to be reflective of competitive constraints exercised by various Telecom Service Providers (TSPs) on each other particularly because of a new entrant Jio's promotion offer. Therefore, market share estimates were modified by considering Jio revenue based on Average Revenue Per User (ARPU) of the Parties. These were considered as better indicators reflecting competitive constraints. Thus, the competitive pressure by potential competitor is considered in the assessment.

8. The Commission also considers the potential competitive constraints posed by evolution of new technologies. One such case was the acquisition of stakes in Den Networks Limited and Hathway Cable and Datacom Ltd. by subsidiaries of Reliance Industries Limtied[9]. The Commission examined the constraints on Cable TV business from the potential competition of DTH players such as Dish TV, Airtel DTH, Tata Sky, Sun Direct, etc. which had pan-India operations as well as by other Cable TV players such as SITI Cable, etc. The Commission while examining the case(s), *inter alia*, took into consideration, (a) convergence between broadband and broadcasting sector, (b) emergence of a new market for over the top (OTT) platforms and (c) likely product innovation in the customer premise equipment due to 'triple play' service.

9. Switching cost is an important factor while analysing the likelihood in increase in prices post-merger. In the case of Idea Cellular and Vodafone India, the ease with which customers can switch from a primary to a secondary SIM and vice versa, on relative increase or decrease of price of one of the SIM providers, by changing the selection of the SIM in their handset weighed in the decision of the Commission. The near zero switching cost ensures that there is price competition amongst the TSPs to retain customers.

10. There is no fixed timeframe to assess the effects of merger in a market. However, in case of dynamic markets generally this timeframe is relatively shorter i.e. between 2 to 5 years depending on the position of the market on the adoption curve, compared to a longer duration of over 5 years up to 10 years as observed in the case of static markets such as iron and steel, industrial gases, and mobility services *etc*. In the case of acquisition by PVR of DUL's film[10] exhibition business (i.e. multiplexes and single screens); the Commission noted the impact on competition of imminent entries in the relevant markets in the next 3-5 years.

[7] Order dated 8th August, 2018 in Combination Registration No. C-2018/05/571

[8] Order dated 3rd October, 2017 in Combination Registration No. C-2017/04/502

[9] Order dated 21st January, 201 in Combination Registration No. C-2018/10/609 and C-208/10/610

[10] Order dated 4th May, 2016 in Combination Registration No. C-2015/07/288

3. Efficiency Claims in Dynamic Markets

11. The digital markets also promote dynamic / innovation efficiencies that are pro-competitive. In a merger analysis, the biggest challenge is to verify such assertions. The Commission has been neither explicitly rejected nor accepted, at the face value, such efficiency arguments. Recognising dynamic / innovation efficiencies at times require a nuanced trade-off between better investment in technology and higher costs in short-run. Qualitative assessment of this trade-off involves studying development of concerned market for past few years and predicting evolution of the market in the near future.

12. A reference case in this context is the acquisition of Den Networks Ltd. and Hathway Cable and Datacom Ltd. by Reliance Group. The Commission had received two separate notices from certain entities belonging to the Reliance Group for acquisition of Den Networks Ltd. and Hathway Cable and Datacom Ltd. Reliance Group was present in the upstream business segment for broadcasting (*i.e.* whole supply of TV channels) and licensing of TV content. On the other hand, both the targets had downstream business operations for aggregation and distribution of television channels. They were acting as distribution platform operators (DPOs) for TV channels through cable TV. The targets were also engaged in the provision of wired broadband internet services (Wired-BIS). The Commission noted that the products / services of the both the targets exhibit horizontal overlaps in aggregation and distribution of broadcast TV channels to homes; retail supply of audio-visual (AV) content; provision for wired broadband internet services (Wired-BIS); and supply of advertising airtime on TV channels.

13. The order of the Commission did not explicitly mention about the evolving nature of distribution of AV / TV content. However, from the information available in public domain, it appeared that the industry was evolving towards a bundled service of Wired-BIS, direct-to-home (DTH) / Cable TV, telephony and / or mobile connection (along with Wireless-BIS) may be provided at a relatively cheaper price to the consumer. Post-combination, RIL was expected to introduce such bundled services and its competitors were also seen to match their capabilities to offer similar service(s). To protect the interest of consumers who may not prefer to move to such bundled service(s), the Commission accepted necessary modifications voluntarily submitted by the parties. To ascertain about advancement of the distribution of AV content, the Commission had to look into the probable evolution of a composite market for AV content and its impacts on consumers.

4. Remedies in Dynamic Markets

14. In mergers that is likely to impede dynamic / innovation related competition in rapidly changing market, the Commission has largely imposed behavioural remedies. In one such merger Bayer – Monsanto case[11] (relating to agricultural / agro-chemical sector), which involved both the traditional as well as innovations market, the Commission imposed both, behavioural as well as structural remedies, keeping that in mind. The behavioural remedies on innovation markets were:

- development of the new traits (both Genetically Modified (GM) as well as non-GM)

[11] Order dated 14th June, 2018 in Combination Registration No. C-2017/08/523

- Indian agro-climatic data owned and used by the parties for its digital applications commercialized in India;
- commercialized digital farming platform(s) for supplying/selling agricultural inputs to agricultural producers in India; and digital farming applications commercialized in India.

15. The Commission, while imposing behavioural remedies in cases of aforesaid innovation markets, faced an onerous task regarding the suitability of the remedy to be imposed. The main challenge was to arrive at a remedy envisioned that would be proportionate to address the competition harm as well as determine the adequate time period for which such remedies was to be imposed to allay competition concerns.

16. The remedy imposed by the Commission in the said case gave due consideration to how the remedy would preserve the competitive landscape of the concerned innovation market(s) and the incentives of the merging parties post-remedy. The Commission, imposed behavioural remedy for a period of 7 years, from the closing of the Bayer/Monsanto transaction, on development of the new traits (both Genetically Modified (GM) as well as non-GM). However, in the case of agro-climatic data, commercialized digital farming platform(s) and digital farming applications commercialized, in India, the remedy is to operate for a period of 7 years from the commencement of commercialization of digital farming product(s) or digital farming platform(s), subject to a total period of 10 years from the closing of the transaction.

5. Conclusion

17. It may be concluded that at the time of undertaking competition assessment of combinations, the Commission factors in the dynamic / innovation nature of Information Technology, Telecommunications, e-commerce, platform markets, Pharmaceuticals, agriculture technology *etc*. Nevertheless, the broad framework for assessment of mergers concerning these markets would broadly remain same. In addition, the potential competitive constraints posed by evolution of new technologies are also factored in the broad framework. On the aspect of timeframe, to assess the effects of merger in a market, though there is no fixed metric, this timeframe in general is relatively shorter in the case of dynamic markets. Given that dynamic / innovation efficiencies require trade-off between better investment in technology and higher costs in short-run, qualitative assessment of this trade-off involves studying development of concerned market for past few years and also, predicting evolution of the market in the near future. It is always a challenge before the Commission to judge the suitability of the remedy to be imposed, as generally, behavioural remedies are imposed in such dynamic / innovation mergers, if required.