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Written Contribution from Competition Commission of India

On

Challenges faced by young and small competition agencies in the design of merger control

Young competition authorities, which are still at nascent stage of devising their merger control regime face problems in reviewing mergers and acquisitions under antitrust / competition law as well as designing appropriate remedies in merger cases to eliminate any competitive harm that may result as a consequence of a merger. In India, merger control regime was started in the year 2011. The problems faced in merger review in India, which is still at a nascent stage are general in nature but also peculiar to India in certain aspects. The major problems faced by Competition/anti-trust authorities like in India are outlined below:

1. **Growth Policy Dilemma:** State of economic development is a major factor for consideration for the developing countries in formulation of economic policies. Competition authorities in developing countries face a challenge of maintaining a fine balance between economic/industrial growth and promotion of competition without affecting industrial growth of the country. Ease of doing business, inflow of FDI and entry of multinational corporations are critical factors for industrial development. Competition laws and competition authorities need to keep these aspects in mind while formulating laws as well as while analysing mergers/acquisitions.

Here the dilemma before a young competition authority is to strike a balance between allocative efficiency losses that may arise from the combination, and the alleged efficiencies that the size of big firms can produce. For example, a particular merger may increase the concentration in the market, at the same time, as the parties argue; it would also result in 'economies of scale' and 'economies of scope'. Arguably, young competition regimes weigh in favour of checking allocative efficiency losses, rather than accepting efficiency justification.

2. **Evolving market structures and business models:** Increasing product differentiation, dynamic market structures are a major obstacle in defining the relevant market. Many a time young jurisdictions rely on the case laws of mature jurisdictions like EU, US etc for market delineation. However, continuously changing markets as well as

differences in market structure of developing and developed countries makes it difficult to apply the same market definitions. A case in point is new economy business models like aggregators (in taxi and hospitality segment), e-commerce etc. where substantial amount of investment is taking place in India. These new business models that defy the textbook approach make market definition a serious challenge. Also, for such markets, existence of case law from even established jurisdictions is scant, and therefore new antitrust jurisdictions do not have a starting point to begin their competition analysis.

3. **Jurisdictional overlap:** Overlap in jurisdictions of competition law and sectoral regulators lead to inconsistent decisions and disputes. Each sectoral regulator plays a unique role. Objectives of the sectoral regulators are mainly the development of that particular sector, whereas the objective of competition authorities is to promote competition. Competition authorities do not have the expertise required to understand technical issues in complex sectors such as Telecom, E-commerce. Further, certain sectoral regulators have in-built provisions regarding dealing with anti-competitive situations, e.g- in sectors like telecom and electricity, the sector-specific laws have provisions dealing with matters related to competition. In telecom, the regulations stipulate spectrum caps in a telecom circle and entities undertaking mergers and acquisitions have argued that the sector-specific regulations are adequate to cover any concerns about adverse effect on competition and certain acquisitions need not be filed before the competition agency.

4. **Lack of data and resources:** Problems in micro level data required to carry out in-depth economic analysis is not available. For example, a lot of merger cases in US and EU have relied on scanner level data especially in retail markets. Availability of such data is a challenge in young competition jurisdictions. Further, lack of resources and experience acts as hindrance to carry out primary surveys so as to collect data for proper market delineation. In addition, the expertise required to carry out such analysis is also lacking. Neither competition authorities nor stakeholders have the expertise to use sophisticated techniques such as merger simulations, diversion ratios etc. Therefore, young jurisdictions are shying away from using econometric techniques and the analysis carried out is not at par with advanced jurisdictions.

5. **Lack of jurisprudence on certain merger related issues:** In young competition jurisdictions like India, the competition regime is relatively new and jurisprudence is evolving. In such a scenario, the opinion on certain merger related issues among stakeholders

is diverse and not settled. For giving clarity to stakeholders, the Commission has introduced "Pre-filing consultation" process whereby stakeholders can obtain opinion on whether a particular combination is notifiable under the provisions of the Act. Only when, the jurisprudence on various matters related to mergers and acquisitions becomes settled, the merger control process will become much smoother.

6 **Know-how and resources:** Lack of skilled manpower is another major problem faced by young jurisdictions. Young jurisdictions like India, which have jurisdiction over vast geographical space but not enough skilled manpower to set up regional offices, face constraints in assessing large number of mergers filed and therefore the quality of assessment carried out suffers. Often, optimal allocation of already scarce manpower becomes a challenge. The lack of skilled personnel leads to challenges in handling complex matters. It also contributes to extended delays.

7. **General lack of clarity/ignorance by stakeholders including state owned enterprises:** As the competition regime is at an incipient stage in young competition jurisdictions, the stakeholders are often not clear about notifiability and in some cases not aware of the very need for notifiability of combinations.

8. **Extra-territorial or cross border mergers** pose yet another problem before the young authorities. The future impact of such mergers is difficult to assess. Even if such mergers do have appreciable adverse effect on competition, in the absence of any assets of these multinational companies in developing countries, merger control and designing suitable merger remedies becomes a challenging task. Yet another challenge is imposed by mergers which have impact on competition in developing countries but are not notifiable. Such mergers escape from the competition scrutiny. Further, cross border mergers impose unique challenges like difference in accounting standards and procedures (e.g. – difference in financial year, recognition and computation of turnover in domestic and foreign territories etc.) In such instances, there is a need for international co-operation and co-ordination between competition authorities in the area of merger control, in both bilateral and multilateral form.

9. **Structural bottlenecks**: Markets in young competition authorities are in general, newly opened and thus contain only a few enterprises competing against one another. The evolution from a nascent market containing relatively fewer players to a more evolved market involving more number of players competing for the market share is a time-taking process.

Further, there are structural bottlenecks like high cost of or relative unavailability of capital which can have more serious ramifications in markets requiring high amount of capital to enter. Further, few domestic innovative players in a newly formed market may have high market shares till the time market attracts entry from global players. Also, in less developed countries, certain markets may not be large enough to sustain a high number of competitors. These structural bottlenecks can further increase concentration ratios, which may cross the thresholds given under guidelines formed by established jurisdictions.

10. **Other issues**: Further, the nature and quantum of entry barriers, also need some attention in young regimes. Generally, a merger in a market where entry is easy and timely does not pose much competitive threat. Therefore, in almost all merger cases, due regard is given to the nature of entry barriers. In general, entry barriers could be in the form of capital requirement, legal restrictions, network effects, technological barriers etc. In the context of developing countries, however, a greater scrutiny is warranted to understand the feasibility of a potential entry. Owing to weak financial markets, raising capital may be difficult, which could result in delay in entry, even if the capital requirement is not high in absolute terms. Further, information asymmetry also plays a crucial role when it comes to switching to a new player. This can be primarily for the reason that average consumer in young regime is not as informed as her Western counterpart.

Consequently, the general level of education, cultural ethos, and local preference should be looked at while determining consumer preference. These issues in young regimes have attracted little academic attention so far. Therefore, there is a greater need that academics and institutions involved in the development of competition law assist the young regimes so far as substantive issues are concerned.

Another related issue is the choice of relevant welfare standard. Arguably, the consumer welfare standard suits developing countries as the general population is less well-off and the capital markets are weak. However, in a growing economy the producer surplus and overall economic welfare may also not be ignored. Finding the right mix still remains a challenge for the developing economies. In a merger specific scenario, while the efficiencies emerging out of a combination may be apparent, it is not clear how the same will be passed on to the consumers in any form such as lower prices, better quality of output. For a developing country, such pass on assumes even more importance.

Even the role that efficiencies can play in merger analysis within the socio-economic context of developing countries is not clear. Whereas, the developed jurisdictions have increasingly started taking into account efficiency as mitigating factors, there are only a few examples from developing countries where efficiency could be considered in merger analysis.