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Dominance of Horizontal agreement in the Indian Market and the role of Competition Commission of India in Combating Appreciable Adverse Effect prevalent in the Market

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ABSTRACT

Since the inception of antitrust laws in the Indian continent, there has been several changes over the long period of time, we as researcher deduce such changes which has taken place over the time, as the researcher emphasis on the fact that promotion of free enterprise is the sine quo non-feature in the antitrust law. We as Researcher identify the functioning of the Horizontal agreement in the market and study the elements of anti-competitive nature prevalent in such agreement, we further do and detailed analyses of the growing merger and acquisition trend in the country and made an effort to draw a nexus between the M&A agreements and Competition law. The researchers identify the growing trend of M&A and Horizontal agreement is causing appreciable adverse effect (AAE) in the market, thereby the researchers finally make an attempt to provide suggestions which could be adopted by the legislators to overcome such dispute in law and amicably settle matter in order to promote free enterprise in the market.

Keywords: *Competition law, Merger & Acquisition, AAE, Anti-Competitive agreement, Dominance.*

I. WHAT ARE HORIZONTAL AGREEMENTS?

Horizontal agreements[3] are agreements between two enterprise who are in the same line of production via which they directly or indirectly determine the purchase or sale price or, Limit or control the production, supply, technical development, investment or provisions of services or, share the market or source of production or provisions of services or type of good produced or allocation of geographical areas of market or type of goods or services, or the number of customers in the market or any other similar way or, directly or indirectly results

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[3] Anti – Competitive Agreement: test and Tribulation, Mondaq, (5th March,2021), https://www.mondaq.com/india/trade-regulation-practices/250048/anti-competitive-agreements-tests-and-tribulation

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in bid rigging or collusive bidding, such agreements between enterprise are considered as agreement which have appreciable adverse effect (AAEC) in the enterprise, the definition of what constitutes a horizontal agreement is mentioned under section 3(3) of the competitions Act, 2002; The section reads that when two enterprise who are in the same line of production comes into an agreement it is ***per se*** presumed to be anti-competitive and the burden of proof is on the company forming the agreement. We shall further read to understand the literal interpretation of section 3 which broadly deals with anti-competitive agreement and states any agreement which falls within the terms of section 3(3)[4] are void in limni, as per the provisions referred under section 3(2) of the Competition Act, 2002. However, the society is evolving with times and the big enterprise are forming complex agreement which makes it very difficult to determine the anti – competitive nature of the agreement. We refer to one of the legal doctrines propounded by Salmond which deals with the concept of ***"Pigeon Hole Theory"*** this theory was based on the concept that if any of the tort falls within the code such will be penal in nature, however in the modern age the theory of Pigeon Hole however being a masterpiece is not practical in modern day world. The need of the society is to have laws which are flexible and can be molded with the need of the society, when we refer to section 3(1) of the act, we see that any enterprise or association of person enter into agreement which causes appreciable adverse effect in the market such agreement is deemed to be void in limni, for example we can refer to the case of **Ramakant Kini V. Dr. Hiranandani Hospital Powai**[5] in the said matter the court held that section 3(1) prohibits any agreement in respect of provisions of service which causes or likely to cause appreciable adverse effect in the market (AAE) even though the same is not mentioned under section 3(3) or section 3(4).

The Following are the classic types of Horizontal agreements: -

1. Price Fixing
2. Market Sharing
3. Bid Rigging
4. Output Limitation

1. Price Fixing: -

Price fixing occurs when the enterprise which are competitors to each other forms an agreement that has purpose of fixing or controlling or maintaining price of goods and services[ref fig -1]. The price may be on price or discounts available on goods and services.

[4] Competition Act, 2002, section 3(3).
[5] Case No. 39 of 2012.

Price fixing agreement between the potential competitors wherein they lay down a price to sell their goods. Therefore, we can prima facie say that effective price fixing can lead to destitution of competition in the market.

Such Atrocious agreement is itself are unlawful and destroys the very nature of competition in the market in the matter of **Unites states V. Cohen Grocery Co**[6]. the court held that agreements which create such potential power will be held in themselves unlawful or unreasonable in nature and such agreement without the necessity of minute inquiry without a particular price is reasonable or unreasonable as fixed.

We see in the matter of **Arizona V. Maricopa County Medical Society, Catalano Inc V. Target Sales Inc**[7] we see that the agreement which effect to eliminate, minimize or restrict other terms and conditions for sale such as discount allowance, advertising allowance etc may lead to illegal price fixation and are per se void in limni. We see that principle of price related agreements have effect even on professional services as held in the case of **Lewis H Godfarb V. Virginia Law Review**[8]**.** Thus, we can prima facie say that those prices which are fixed via agreement are per se illegal even if they are reasonable in nature.

2. Market Sharing:

Marker Sharing is one of the most common forms of horizontal agreement amongst competitors in the market [ref fig – 1]. This agreement of market sharing is called market allocation or market division agreement. Under such agreements the enterprise decide to divide each other between the territory example X and Y two enterprise decide to get into agreement and mark territorial boundaries within which the enterprise would function.

The agreement therefore could be between specific customers which are as follow: -

1) Non – Production of goods in competition with each other;

2) non-selling in each other's allocated geographic territory;

3) non solicitating or sell to each other's existing competitors.

We refer to the case of **United States V. Topsco Assoc Inc**[9] the court held in this case that in price fixing cases Horizontal agreements are formed that divide the customers and the market and coming up to an agreement of non – compete for sale or in those market. We further see that Eliminating competition in the market by fixing the freight rates without liberty to the

[6] 255 U.S. 81 (1921).
[7] 457 U.S. 332 (1982).
[8] 355 F. Supp. 491 (1973).
[9] 405 U.S. 596 (1972).

members of the truck operator union to negotiate freight rates individually is common in the trucking industry in India as held in the case of, **Goods Truck Operators Union[10], Faridabad, Truck Operators Union[11], Rohtak Public Goods Motor Union[12]**.

3. Bid Rigging:

We shall refer section 3(3)(C) Competition Act, 2002 to see the definition of bid rigging limits or controls production, supply, markets, technical development, investment or provision of services; (c) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition [Ref fig – 1]. In the matter of **Chief Materials Manager-I, and M/s Rajasthan Transformers and Switchgears and Ors[13]** , wherein the DG examined the rates quoted by the bidders in the tenders floated by North Western Railways as well as in tenders floated in other railway zones during the relevant period on the basis of various factors viz., pattern of bidding, identical/similar pricing, abstinence from participating in tenders, relationship of key persons, cross shareholdings, use of common IP address etc. However, the Commission observed in the aforementioned case that mere quoting of identical/similar prices was not sufficient to establish that the bidders formed a cartel as there was neither any evidence of anti-competitive agreement nor any circumstantial evidence to establish tacit collusion amongst bidders. Therefore, no case of contravention was made out in the fact and circumstances of the said case. in the matter of ***Excel Crop Care Ltd. v. CCI*****, [14]**where the court held collusive tendering was defined as a practice whereby firms agree amongst themselves to collaborate over their response to invitations to tender. The main purpose for such collusive tendering is the need to concert their bargaining power, though such a collusive tendering has other benefits apart from the fact that it can lead to higher prices. The Court held that "*in an oligopoly, parallel behaviour may not, by itself, amount to a concerted practice*". In a US Case of **Monsanto Co spray-Rite Service Corp.**,[15] which established that there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective. Therefore, the abovementioned cases are evidence enough to indicate that agreement entered thereto between the enterprise which promotes bidding kills the very essence of competition and shall be set aside is such appreciable adverse effect is noticed by

[10] order dated 24.8.1984 in RTP Enquiry No.10/1982.
[11] order dated 13.12.1989 in RTP Enquiry No.13.13.1987.
[12] order dated 25.8.1984 in RTP Enquiry No.250/10983.
[13] [Case No. 07 of 2013].
[14] [(2017) 8 SCC 47].
[15] [465 U.S. 752 (1984)].

the enterprise.

4. Output Restriction

There can be moments when the enterprise forms agreement among themselves to control otherwise restrict the production or supply of goods and services in the market. The objectivity of restricting the supply of productions of a particular good or service is very simple as it would create a rise of price in the market because the demands will be high and the supply will be restricted in the market [ref fig – 1]. Such agreement per se is illegal and are held void under section 3(2) of the act, example we can refer the case of **Builders Association of India V. Cement Manufacturers Association**[16], in the said case the cement companies reduced productions of cement even when demand was positive during the month of November and December 2010 and thereafter raised the price of cement in January and February 2011, the high prizes resulted to cartelization.

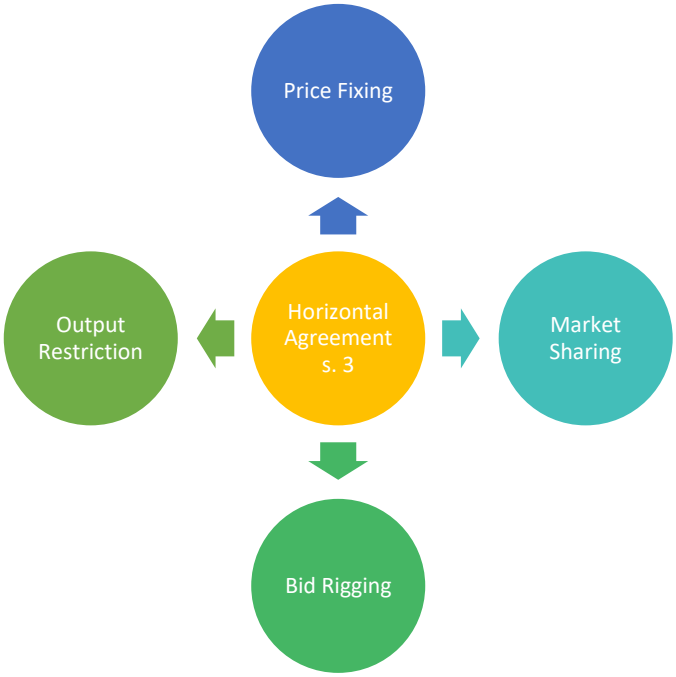

Fig – 1[Different Types of Horizontal Agreement]

II. WHAT IS APPRECIABLE ADVERSE EFFECT ?

Appreciable adverse effect is created in the market when the enterprise in the market enters into anti-competitive agreement under section 3, in simple terms those AAE is caused with the free and fair competition in affected in the market. In order to determine the true essence

[16] Case No. 29 of 2010.

of AAE in the market we shall refer the clauses mentioned thereto in section 19(3) and 20(4[17]) of the Competition Act,2002.

Section 19(3)[18] of the competition Act, 2002 reads that agreement entered under section 3 of the competition Act, 2002 causes AAE when the following parameters are satisfied.

A) Creation of barrier

B) Barrier to Entry into market

C) Accrual of benefits of the customer

D) Restriction in production, supply of goods and services.

E) restriction in Technological know How

Section 20(4) of the competition Act,2002 reads that when a combination under competition Act causes AAE and what are the parameters mentioned thereto: -

A) Potential level of import in the market

B) Extent of barrier un the market

C) Level of Combination in the market

D) Countervailing power of the market

E) Substantial increase in price of profit margin

F) effective competition likely to sustain in the market

G) Extent to which substitute are available

H) Market share in the relevant market

I) Combination would result in removal of effective competitors in the market

J) nature and extent of vertical and horizontal integration

K) Possibility of failing business

L) nature and extent of innovation

M) Relative advantage by way of contribution to the economy

N) benefits whether overweighing the adverse effect in case of competition.

III. DOES INVESTMENT AGREEMENT CONSTITUTE AS ANTI-COMPETITIVE?

Investment agreement in simple terms is those agreement via which two enterprise share their

[17] Competition Act,2002, section 20(4).
[18] Competition Act, 2002, section 19(3).

resources on agreed terms and conditions in order to complete a task, we shall note that investment agreement is quite different from the Joint venture, this agreement is covered under section 5 and 6 of the Competition Act, 2002. Time and often we have seen two big enterprise who are horizontal in nature merge their resources via investment agreement. The question remains whether it is anti-competitive or not! While we see the prerequisite of anti-competitive agreement in case of horizontal agreement are mentioned under section 3(3) of the Competition Act, 2002, we see that if an agreement is formed which comes under the provisions mentioned under clause (a) to (d) shall per se be termed as anti-competitive however we see that the scope of section 3 which deals with anti-competitive agreement are not restrictive but wide, as we refer section 3(1) we see that any agreement which causes AAE in the market will be deemed to be anti-competitive in nature and thus the responsibility shall be on the person on whom the burden lies. We can therein prima facie say that investment agreement are not anti-competitive per se however if it contravenes with section 3(1) and section 3(3) of the act which reads *No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India"* further *"Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which,* (b) **limits or controls production, supply, markets, technical development, investment or provision of services;** (c) **directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition** Such agreement will be rendered void.

IV. EU TAKE ON ANTI-COMPETITIVE HORIZONTAL AGREEMENT

EU or the European Union is one of the leading body to promote competition laws in Europe and throughout the world, so it is important to be aware of the EU rules in the area of Anti-competitive Horizontal Agreement, as the EU model is looked upon throughout the world.

The European Commission of the European Union under Article 101(1)[19] of the Treaty on the Functioning of the European Union (TFEU) has prohibited cartels and restrictive agreements.

[19] Treaty on the Functioning of European Union, Article 101(1)

Article 101(1) of the TFEU prohibits the arrangements between enterprises or associations of enterprises which may effect the trade between the member state of the EU and the acts which has the capacity to effect prevention, restriction or distortion of competition within the EU. Specifically all this restrictions and prohibitions apply to the agreements and practices which:

- *Directly or indirectly fixes the buying and selling prices.*
- *Which limits the productions, markets, technical advancements and investments or controls them.*
- *Shares the source of supply or shares the market.*
- *Applying dissimilar condition to equivalent transactions with other trading parties*[20].
- *Make the conclusions of contracts conditional on acceptance of unrelated obligations.*

This Article is applicable in in expressed written contracts, oral agreements, non-binding arrangements and other type of informal collusion. The intent of the agreement does not matter is the effect of the agreement is anti-competitive and appreciable.

The Treaty under Article 82 says that any organisation or institution with a dominant position cannot abuse its dominant position in the common market.

Penalty prescribed under the European Commission under Article 101(1).

The European Commission under Article 101(1) of the TFEU has placed a threshold of 10% of an undertaking or association's turnover a fine. The European Commission and the National Competition Authorities of the respective countries has the power to enforce Article 101(1) and start an investigation.[21]

Exemption from Article 101(1) is given to an agreement provided that he agreement meets some specific criteria and do not contain any potentially restrictive provisions beyond those which are permitted by the commission. [22]

V. IS MONOPOLY INHERENTLY BAD?

A monopoly is a situation where there is a single seller or service provider with no competitor in the market. Monopoly power is the power using which a single firm can influence and

[20] Ibid
[21] Ibid
[22] Practical Law Competition, EU cartels and restrictive agreements a quick guide., Thomson Reuters Practical Law, (11 March 2021, 9P.M). https://uk.practicallaw.thomsonreuters.com/0-381-3369?transitionType=Default&contextData=(sc.Default)&firstPage=true

even set the price of the goods or even influence the quantity of goods supplied in the market to control the market.[23]

From the above statement the question that arise is 'are monopoly bad' or 'are monopoly inherently bad'?

The concept of monopoly is controversial and it is looked upon as evil by the business fraternity, but monopoly comes with several advantages along with the disadvantaged for which it is so in famous. Some of the advantages of monopoly are as follows: -

a. Economies of scale:- In a market if there is a monopoly of a firm or a company it can increase its output by increasing the production which will lead to a decrease in average cost of production, which in turn will decrease the final price of the product for the consumers. This is very important for the industries with high fixed cost. The steel sector mostly adopts this process.

b. Research and development: - The high amount of profit which the monopoly firms earn can be used to conduct research and development for improving and developing the products, cutting the cost of production and patents. This gives the firm the money poly power and greater confidence to take risk and fund more research. We can see this method applied by the pharmaceutical companies.

c. Monopoly firms tend to be most efficient and dynamic: - Firms gain the monopoly position by providing better products and services to the consumers. They prove to be more efficient than any other competitors in the market. Apple has a monopoly in certain section of the market as they prove to be innovative and produces innovative products.

d. Monopoly firms can subsidise loss making services: - The profits generated by the monopoly firms can be used to subsidise the firm's less profitable part which provides socially useful services and products, which helps the society at large.

Some of industries where monopoly happens to be the best possible option are as follows:

- Pharmaceutical Companies: - The patents that these pharmaceutical companies acquire, encourages the companies or the firms to invest and develop more new kinds of drugs as the patent is the provisional guarantee that only they can produce that drug and will have the market for that drug only to them.

[23] Manoj Kumar, Monopoly: Meaning, Definitions, Features and Criticism, Navigation, (15 March 2021, 9 P.M.) https://www.economicsdiscussion.net/monopoly/monopoly-meaning-definitions-features-and-criticism/7268

- Electricity distribution: - Electricity distributors should be the very efficient to provide electricity to every home, offices and factory in a particular region, so here the economies of scale plays a huge role as in having a comprehensive network and being efficient in production of electricity.

- Public transportation: - Monopoly of a particular organisation in local public transportation assures that it will enable an efficient timetable for buses and trains and will provide a uniform fare.[24]

Some disadvantages of Monopoly are as following: -

a. Higher price point than any competitive market: - In a monopoly market the demand of a product is inelastic so the consumers have no other alternative and the firms or the companies can increase the price at their will.

b. Decreasing consumer base: - As the price of goods increases the consumer base starts shrinking as not all initial consumers are able to buy the product and avail the service with increasing price.

c. Price discrimination: - It is a common practice in monopoly firms or companies to charge contrasting prices for the product or services from customer to customer. The uniformity of price may not prevail always.

d. Inferior goods and services: - As there is minimum or no competition in a monopoly market, some monopolistic firm or company may voluntarily produce inferior goods and services as they know people will not stop buying their products as there is alternative of their products.

e. Hindrance for new players: - Big companies who dominates a particular section of a market tend to cause problem or restrict anyone from entering that section of the market to end their monopolistic power by becoming an alternative to the existing company.

f. Restricting output in a market: - It restricts the output in the market which result in increase of price and the consumers are left with reduced choice which again amounts to reduced consumer surplus. [25]

Given the advantages and the disadvantages of monopoly in the market we can say that monopoly is not always evil because it gives more opportunities to conduct research and

[24] Tejvan Pettinger, Advantages and Disadvantages of Monopolies, Economics Help (11 March, 2021, 10 P.M.) https://www.economicshelp.org/blog/265/economics/are-monopolies-always-bad/
[25] Monopoly, Economics Online, (15 March, 2021, 11 P.M.) https://www.economicsonline.co.uk/Business_economics/Monopoly.html

develop amounting to innovation, efficiency and high productivity but on the other hand it is exploitative to the consumers, s given that we can say that monopoly is good and not evil in few selected industries like electricity, public transportation and pharmaceuticals.

In conclusion we can say that monopoly is not inherently bad when it is creating wealth in the common market.

VI. GROWING TREND OF MERGER AND ACQUISITION AGREEMENTS

Merger is mentioned under Section 5[26] (Combination) of the Competition Act, 2002. Merger is an agreement which unites two or more existing companies into one new company.

Acquisition is defined under Section 2(a) of the Competition Act, 2002, it states that *acquisition means directly or indirectly, acquiring or agreeing to acquire-*

(i) Shares , voting rights or assets of any enterprise; or

(ii) Control over management or control over assets of any enterprise.[27]

In simple terms acquisition means when one company purchases or acquires the lion share or all the shares of another company to gain control of that company.

Merger agreements are the agreements using which two or more companies who decide to combine their business can merge the companies together. This kind of agreements contains the details of the financial terms of the merger, the contingencies such as antitrust clearance or stakeholder's approvals and also the provisions to terminate the merger in the event when one or more parties seek to terminate the merger of the companies. On the other hand an acquisition agreement is a contract which is made when one company decides to acquire or purchase another company. Each of these agreements have unique terms of acquisition.

Global trend of mergers and acquisition agreement:

As of 2014 Mergers and Acquisitions all over the globe was the highest since 2007, it was 23% more than the previous year and the amount of money spent on mergers and acquisitions were $732.8 billion for Q1 of 2014 and a total of $3.6 billion at the end of the year, this gave a good start for 2015 as first quarter of 2015 had $902.2 billions in its first quarter.

Industries or sectors where we saw the most Mergers and Acquisitions taking place since early 2000s are as follows: -

[26] The Competition Act, 2002 §5
[27] The Competition Act, 2002 §2(a)

- Healthcare: - Healthcare all over the world is regularised by certain legislations of the respective state which makes it more or less impossible for small organisations or companies to run a sustainable business, to compete in this market, these small companies are depended on being absorbed by any better capitalized companies to sustain in this market.

  As of 2014 Healthcare generated a M&A revenue of $ 126billions.

- Real Estate was the second most targeted revenue generating sector in 2014, Real Estate industry generated $113billions M&A revenue in 2014.

- Retail business was the third most targeted revenue generating section as of Q1 of 2015 with a revenue of $45.5 billions

- Technology and telecommunications is a seen a massive hike in mergers and acquisition deals throughout the word since the early 2000s.

  The sector generated a revenue of $344bn. in 2014, $654 bn. in 2015, $502bn. in 2016, $295bn. in 2017, $468bn. in 2018, $394bn. in 2019 and $328bn in 2020 through mergers and acquisition deals globally.[28]

Top 10 global mergers and acquisition in 2020

1. On 4th February , 2020 Koch Equity Development LLC acquired the software company Infor Inc for the value of $13 billions. It was one of the biggest M&A of 2020.
2. On 10th June, 2020 Just Eat Takeaway.Com took over Grubhub Inc an online platform which helps in delivering food for an amount of $ 7.3 billions.
3. On 24th February, 2020 Intuit Inc. took over Credit Karma Inc. another software company for a value of $7.1billions
4. On 13th January, 2020 Visa Inc. acquired Plaid Inc. an I.T. Services provider for $5.3 billions.
5. Investor Group acquired Corelogic Inc another I.T. Services for the value of $4.4 billions on 26th June, 2020.
6. RSA Security Inc SPV acquired RSA Security Inc for $2.1 billions on 18th February, 2020.

[28] S.O'Dea, Global technology and telecommunications M&A 2014-2020, Statista, (16 March, 2021 6P.M.) https://www.statista.com/statistics/860615/global-technology-and-telecommunications-manda/

7. BMC Software Inc. took over Compuware Corp for $ 2 billions on 2nd March, 2020.

8. Zynga Inc. acquired Peak Oyun Yazlim & Pazatlama AS for the value of $1.9 billions on 1st June, 2020.

9. On 6th February, 2020 Forescout Technologies Inc SPV acquired Forescout Technologies for $1.9 billions.

10. On 26th March, 2020 Microsoft Corp. acquired Affirmed Network Inc for the value of $1.4 billion.[29]

The latest trends as of 2020 shows that most mergers & acquisition throughout the world was mostly in the technology sector.[30]

Mergers and Acquisitions in India

The corporate sphere throughout the world becomes fascinated by the concept of mergers and acquisition, and it is no different in India. In India the concept of Mergers and Acquisition gained its prominence after the relaxations of the economic policy, which was Liberalisation, Privatisation and Globalisation in 1991. Since 1991, after the removal of the constrictive arrangements we saw the culture of M&A increasing in the Indian economy.

The trend of M&A in India was low from 2000-2008, due to the global economic crisis but since 2010 we are seeing an up rise in M&A in the country.

The M&A culture has grown more and more popular since 2015. More Foreign investments are coming in since the incorporation of Corporate Insolvency Resolution Process (CIRP) under the Insolvency and Bankruptcy Code, 2016 (IBC).

Since 2019 the two most prominent type of M&A deals in India are Foreign investments and acquisition of start-ups.

In the 21st century we saw many Mergers and Acquisitions deals in India, here are some of the top M&A deals initiated the country -

1. Flipkart acquired Myntra in 2014 for Rs. 2000, then Myntra acquired Jabong in 2017 making it the top apparel e-commerce company in India, then again in 2018 Wal-Mart took over Flipkart by acquiring 81% of its shares for $16 billions, defeating Amazon and stopping it from becoming a monopoly in Indian E-commerce.

[29] Deals industry insights, PWC, United States (21 March, 2021, 6 A.M.) https://www.pwc.com/us/en/services/deals/industry-insights.html
[30] Diganth Raj Sehgal, Top Mergers and Acquisition deals in 2020, iPleaders (21 March 2021, 6 A.M) https://blog.ipleaders.in/top-mergers-acquisition-deals-2020/

2. In 2008, Ford motors made a loss of $520 million on its luxury motor subsidiary "Jaguar-Land Rover" then Tata motors acquired Jaguar Land Rover for a value of $2.3 billions in 2008 and made a profit of $3.4billions from Jaguar Land Rover as of 2019.

3. In 2006 Indian Steel giants Mittal Steel merged with the Luxembourg City based steel giants "Arcelor Steel" after the UK based company was generating consistent losses, the deal was valued at $33.1 billion dollar which is the bigger M&A deal till date. Currently ArcelorMittal is the biggest steel company in the world.

4. In 2018 TATA steel acquired Bhushan Steel for an amount of Rs. 35200 crores through Insolvency proceedings under the NCLT.

5. Vodafone a British telecom company acquired Hutchison Telecommunications International Ltd, a Hong Kong based company running in India in 2007 for a value of $11.2 billion which was the largest telco deal at that time. Then in March 2017 Vodafone India announced a merger with Idea cellular, in 30th August 2018 this merger was approved, Vodafone group held 45.2% of the newly formed company named VI (Vodafone-Idea) and Aditya Birla Group the parent company of Idea cellular held 26% of the company. This merger made VI the second largest telecom service provider in India

6. Zomato acquire Uber Eats for Rs. 2,492 crores, Zomato won the bid against competitor Swiggy. This kind of Mergers or Acquisitions are common these days as start-ups consistently require funds and deep pocketed companies can only back these companies.

7. Ola Cabs the only competitor to Uber acquired a start-up cab company "TaxiForSure" as it ran out of money and had to increase the fare which ended being a failure so Ola cab acquired it.

8. UPL Ltd the Indian crop production and agrochemical industry acquired Arysta LifeScince Inc. of the United States for a value of $4.2billion, which made UPL Ltd. the 5th largest agrochemical company in th world.

9. LIC a cash rich Government organisation acquired 51% of IDBI which was generating repeated losses. Without this acquisition IDBI would have become a private company which would have been bad for the morals of the stakeholders and employs of other PSUs.

10. ONGC acquired 51% of Hindustan Petroleum (HPCL)[31]

[31] Vivek Tiwari, Top 10 Indian Merger and Acquisition Deals, Finology Blog,(22 March, 2021, 3P.M.)https://blog.finology.in/investing/merger-and-acquisition-deals-startup

The pattern that is visible from the recent Mergers and Acquisitions throughout the world, gives us the clear picture of the trend of mergers and acquisition, which shows that majority of mergers and acquisitions throughout the world are mainly taking place with a start-ups as a party to the merger or acquisition, which needs capital for existing and growing. The industries which are getting more and more engaged with M&A deals are the technology, software and IT services sectors. Since the 1990s Mergers and Acquisition in India has exponentially grown mostly because to the relaxation of rule in 1991, M&A has grown more than 100% from the 90s to 2010-2020. But on the other hand we saw a growing trend of Mergers and Acquisition globally but it has shown a dip in the numbers of deals because of the 2000 stock market crisis and the 2008 stock market crisis caused by the Lehman Brothers which brought a global recession throughout the world. Everything North America and Asia have had a growing trend of Mergers and Acquisitions globally.[32]

VII. ROLE OF COMPETITION COMMISSION OF INDIA IN COMBATING ANTI-COMPETITIVE HORIZONTAL AGREEMENT.

The Competition Commission is the only antitrust authority in the country pertaining to competition law and it is the statutory authority which is established under the Competition Act, 2002. The role of the Competition Commission of India or the CCI is to prevent and eliminate any kind of practice which will have adverse effect on the free trade and organic competition, promote and sustain competition, protect the interest of the consumer and to ensure that the freedom of trade remains intact among the companies and business houses, irrespective of their capital capacity throughout the markets in India, as it is stated under Section 18 of the Competition Act, 2002[33]

Focusing only on the Anti-Competitive horizontal Agreements the Competition Commission of India(CCI) has laid down the duties, powers, functions and penalties to be imposed on in CHAPTER IV and VI of the Act, which will help the CCI to restrict and scrutinize the Anti-Competitive horizontal agreements.

The Competition Commission of India under Section 19[34] of the Act can inquire into any alleged agreement which might be in contravention of Section 3 of the Act and might cause an appreciable adverse effect on the competition. The commission can inquire any alleged agreement under Section 19 by following the procedures laid down under Section 26 of the

[32] Viral Upendrabhai Pandya, Mergers and Acquisitions Trend- The Indian Experience, International Journal of Business Administration Vol9, No.1, (22 April, 2021, 5:30P.M.)
[33] The Competition Act, 2002 §18
[34] The Competition Act, 2002 § 19

Competition Act , 2002. As stated in Section 26[35], on receipt of a reference from the Central Government or a State government or on the commissions own knowledge or any information received under Section 19 of the Act, if the commission reaches to an opinion that there exists a prima facie case of anti-competitive agreement, the commission shall direct the General Director to initiate an investigation, if the CCI reaches an opinion that no prima facie case of anti-competitiveness exists the CCI will dismiss the matter and will pass an order deemed fit by them and send a copy of the order to the concerned authority. The Director General after receiving the direction will investigate and submit a report of his finding to the CCI within a prescribed time. The CCI may forward this report to the parties concerned. If the report of the Director General has no mention of the contravention of Section 3, the commission shall invite objections for the party who alleged. The CCI will dismiss the objection if it agrees with the Director General and if after the objection the CCI is of the opinion that the further instigation is required the Commission will direct the Director General to do so. Now if the Director General is of the opinion that there is a contravention then the CCI shall inquire as per the provisions of the Act.

After the inquiry as per Section 19 and 26 the commission can give the following order as per Section 27[36] of the Act to the enterprises or the association or enterprises or a person or association of persons associated in such anti-competitive agreement : -

- To discontinue such an agreement and not to enter such an agreement in future.
- Impose a penalty, as the CCI deems fit, which shall not be more than 10% of the average turnover of last three years.
- Order the concerned party to modify the agreement in the prescribed manner by the Commission.
- Pass any order the commission deems fit and direct the enterprises of the parties concerned to strictly abide by the recommendation of the commission.

The commission also has jurisdiction regarding this matter under Section 32[37], if the acts of anti-competitive agreements takes place outside India.

The commission can issue an interim order or an interlocutory orders under Section 33 of the Act to temporarily restrain the parties to continue the agreement concerned until the conclusion of the inquiry or until further order of the commission, if they find any

[35] The Competition Act, 2002 § 26
[36] The Competition Act, 2002 § 27
[37] The Competition Act, 2002 § 32

contravention to Section 3 of the Act.

If the party concerned in the inquiry by the commission is found to be in contravention of the rules and orders of the commission, the party will be penalized under the provisions of Chapter VI of the Act which is Section 42 to 48. The penalty shall not be more than the average of the turnover of last 3 years.

The Competition Commission of India also has a **leniency program** under which the companies or individuals who disclose to the CCI their role in any anti-competitive activity and co-operate with the investigation conducted by the CCI, will be rewarded either by reduction or complete waiver of the penalty payable by the company of the individual. This leniency program has been found to be extremely effective in tackling cartel cases. The leniency program is mentioned in Section[38] 46 of the Act.

The Competition Commission of India follows the above process to restrict the Anti-competitive horizontal agreements in India and the agreements concerning any Indian party to the agreement.

VIII. JUDICIAL INTERPRETATION IN CASE OF HORIZONTAL AGREEMENT

The Judicial Interpretation of the Horizontal Agreement can be explained using the following cases i**) Builders Association of India v. Cement Manufactures Association[39], or famously known as the Cement Cartel case.**

ii) M/s. A.R. Polymers Pvt.. Ltd & Ors. v. Competition Commission of India & Anr. Director General [40] or famously known as the Shoe cartel case.

i) In the matter of **Builders Association of India v. Cement Manufactures Association** the Competition Commission of India held that the presumption of anti-competitive agreement can be reasoned or deduced from the intention or conduct of the parties along with the circumstantial evidences. In this matter although there was no agreement, circumstantial evidence of parallel prices, increased or decreased and parallel amount of production of goods signified that the parties had form a cartel to determine purchase and sale prices and has started controlling the production, supply, investment and development of products creating a monopoly for this association. The CCI had the wide discretion of imposing fines of up to 10% of the average of the annual turnover of 3 years or 3 time the profit earned in the duration of the cartel. As the CCI had no other guidelines

[38] The Competition Act, 2002 § 46
[39] Case No. 29 of 2010.
[40] MANU/TA/0008/2014

except the maximum penalty the CCI imposed a fine of $1.13 billion against the 10 largest cements manufactures in the country and the Cement Manufacturers Association. The defendant of the case. Appealed to COMPAT as they had the power to revise and reverse the finding of CCI or to reduce the amount of fine. COMPAT ordered the defendants to deposit 10% of the fine in escrow. The defendants again appealed to the Supreme Court of India where the Court upheld the findings of CCI and the fine ordered by COMPAT.

In this matter we can see the **Per se rule** was used while delivering the decision as the CCI had presumed that there was an anti-competitive horizontal agreement and it was the onus of the defendants to prove themselves that there was no such agreement of cartel in the first place, which the defendants failed to show

ii) In the matter of **M/s. A.R. Polymers Pvt.. Ltd & Ors. v. Competition Commission of India & Anr. Director General** the Competition Commission of India fined 11 rubber shoe manufacturers for bid rigging in the supply of rubber shoes sole on a customer acquisition scheme, in this case, there were signs of collusion which the CCI found sufficient to deduce an agreement near identical bid prices and similar quantity quotes and even similar explanations for quantity and price bid. The CCI also found sensitive information of one competitor in the file of another making it clear a that there was an agreement for bid rigging among the competitors. There again the CCI has followed the **Per se Rule**.

The Competition Commission of India being a quasi-judicial body has interpreted horizontal agreement under Section 3(3)[41] with the **Per se Rule,** which means the accused enterprise or person on whom are the allegations, will be presumed to be true until the accused or the defendant proves that such allegation is false. The Per se rule is also called the Rule of Presumption as the onus of prove that there was or is no such arrangement is on the defendant at the first place.

IX. CONCLUSION

In last 30 years competition in India has grown significantly due to the relaxation of the economic policies adopted by the government in 1991, and the Competition Commission of India has done a great job in regulating the competition in India despite being understaffed. The process that CCI follows to engage with the parties to the agreement or any arrangement so that any ambiguity can be eliminated, The CCI has always kept a open door policy to clarify any issues brought by the parties. The aim of the commission is to ensure free trade and protect the issue of the parties but this aim of the Act and the CCI would not be effective

[41] The Competition Act, 2002 § 3(3)

until cartels and all anti-competitive activities are removed, for that the parties should keep an check on the activities of their enterprises so that they do not enter any anti-competitive activities. The CCI should also make a mandatory training session for the concerned parties so that they are aware of the rules and regulation and the fine that might be imposed on them if they breach this rules and regulations.

Though the CCI has tried its level best to eradicate anti-competitive agreements it has only achieved partial success, because the Competition Jurisprudence in India is not as old as the Sherman Act and Clayton Act of the US or the Treaty of the EU, but it can be presumed that that the CCI is taking adequate steps to become one of the optimum competition regulator in the world.

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