

Gun Jumping in Combination Regulation in India

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Abstract

Market is a dynamic concept. Whenever there is competition in market, the players in the market try to make more profits without following regulations. In these efforts they try to skip most significant regulations and want to continue the activities without observing regulations. It creates irregularities and possibilities of going the market into anticompetitive activities. Competition Commission of India after enforcement of the Competition Act in India has become a vigilant agency to keep an eye on every kind of irregularities which can give weight to the activities related to creation of appreciable adverse effect on competition. Skipping regulations for mergers is the concept of gun jumping which now has become a irregularity of serious nature.

INTRODUCTION

Gun Jumping is a term used by most of the competition authorities worldwide when there is a combination through M&A transaction without informing to the authorities. It is said that the term has its origin from the story where the participants in running competition make their steps to run before the sound of gunshot and got disqualified. Competition Law in India is new so the hands of this law is not strong enough but gradually to give teeth to the CCI every possible provision is provided to curb any anticompetitive activity and combination. In India various threshold limits and exemption are provided even after that if a combination has legs out of that limit it must be informed to the CCI within thirty days of trigger point.

In Gun Jumping the companies or other competitors in the market form a combination through acquisition, merger or amalgamation but without informing the Competition Commission the companies execute the proposal of acquisition, merger or amalgamation. Combination in itself is not a problem but to maintain a healthy competition, to promote competition and to avoid any possibility of abuse of dominance, cartelisation or any other anti-competitive practice it is mandatory to the companies to inform proposal of any combination which comes under section 5 of the Act and the procedure used here are as per the procedure of section 6 of the Competition Act and regulations related combination of the Competition Commission of India.

If a broad analysis is done then, “gun jumping” tells about a merger which has been done without observing legal requirements.ⁱ There may be two types of Gun Jumping, first is gun jumping by procedure which occurs at the time when the parties who are going to merge, fail to observe notifications which are mandatory and also avoiding waiting period for clearance.ⁱⁱ Second is substantive Gun Jumping, here the merging parties are prior competitors and following malicious practices to dominate the market by mergers and acquisition without any legal information.ⁱⁱⁱ

The questions to be dealt in this research papers are: what is the statutory framework for combination regulations in India to curb the anticompetitive combinations made under M&A transactions? What are implications for future combinations from CCI orders?

STATUTORY FRAMEWORK

Section 5 of the Competition Act, 2002 provides about the combination with various threshold limits. Section 6(1) of the Act advocates *“No person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within relevant market in India and such combination shall be void.”* So the Act is very strict on those combinations which are having appreciable adverse effect on competition.

Section 6 subsection 1 of the Act is very important which provides that subject to section 6(1) *“any person or enterprise, who or which proposes to enter into a combination, shall give notice to the commission, in the form^{iv} as may be specified, and the fee which may be determined, by regulations, disclosing the details of the proposed combination within thirty days”* of the trigger point. Here the trigger point as given under the same subsection in sub-clauses (a) and (b) are the approval of proposed merger and amalgamation by the board of directors and execution of any agreement.

Thus if the proposed merger and acquisition combination are exceeding the limits of threshold and not coming within the preview of exemptions^v then the proposed combination shall be notified to the commission within thirty working days from the triggering point. If the parties do not file information within thirty days in the prescribed forms^{vi} then under section 43A of the Competition Act, 2002 a penalty shall be imposed by the commission on such person or enterprise and this penalty may be extended to one percent of the total assets or total turnover. According to the regulation 48^{vii} a *“show cause notice shall be given to the party in ordinary meeting of the commission and a reasonable opportunity shall be provided to the party to represent his case before the commission.”* After that *“Secretary shall issue a show cause notice giving not less than fifteen days asking for submission of explanation in writing within the period stipulated in the notice.”* *“The Commission shall, on the receipt of the explanation, and after oral hearing if granted, proceed to decide the matter of imposition of penalty on the facts circumstances of the case.”*

After sending the information to the Competition Commission of India, a prima facie opinion shall be formed by CCI to allow or not to allow the proposed combination. CCI can decide itself or send the notice of proposed combination to the Director General (DG) for the findings of any anticompetitive part in the combination. However it is not compulsory to send it to DG. They have to clear combination in two hundred ten days if not then it will be deemed an automatic approval.

Here according to the Regulation 5(9) of Combination Regulation, 2011 *“Where, in a series of steps or individual transactions that are related to each other, assets are being transferred to an enterprise for the purpose of such enterprise entering into an agreement relating to an acquisition or merger or amalgamation with another person or enterprise, for the purpose of section 5 of the Act, the value of assets and turnover of the enterprise whose assets are being transferred shall also be attributed to the value of assets and turnover of the enterprise to which the assets are being transferred.”*

Some Orders of The Competition Commission of India

CASES WHERE THE CCI CONDONED THE DELAY DUE TO THE FIRST YEAR OF IMPLEMENTATION:

1- Electromags Automotive Products Pvt. Ltd. And The Bombay Burmah Trading Corporation Ltd. Combination Case^{viii}

Facts of the case

Commission received a notice for the approval of the proposed combination between Electromags Automotive Products Pvt. Ltd. and The Bombay Burmah Trading Corporation Ltd. and delay in filing the notice on 16th December 2011 was condoned. On the 7th February 2012 Commission received a reply of show cause notice.

Order of Commission

Considering all facts and circumstance of the case and taking the view that the year was the first year of implementing of enforcement of provisions of combination of the Act no penalty is required to be imposed.

2- Similar type of order was given by the CCI in **Siemens Limited (SL) and Siemens Power Engineering Private Limited (SPEL) Combination case**.^{ix}

3- Reckitt Benkiser Investment India Private Limited and Halite Personal Care India Private Limited Combination Case.^x

The Commission observed that RB group will remain the ultimate controller so here there is no appreciable adverse effect on the competition so Commission approved the combination and condoned the delay due the first year of implementation of the provisions of combination of the Act.

CASES WHERE HUGE PENALTY WERE IMPOSED WHICH CHANGED THE WHOLE UNDERSTANDING OF GUN JUMPING

4- JET ETIHAD CASE^{xi}

A show cause notice has been sent by the commission saying that some part of the proposed combination has already been consummated and implemented, so why the penalty should not be imposed. Party in its reply to the show cause notice contended that the LHR transaction was separate transaction during the ordinary course of business and it also comes under the item 10 of the exemption list given under the schedule 1 of the Combination Regulation, 2011.

Order of the Commission

The Commission though approved the proposed combination but it does not have any bear on the power of imposing penalty under 43A of the Act. The Commission did not get satisfied

with the contention of party regarding the consummation of a part of LHR transaction given in the reply of show cause notice and the Commission imposed a huge penalty of “The Commission, therefore, in exercise of powers under Section 43A of the Act imposes a penalty of INR 1,00,00,000 (Rupees one crore) on Etihad as the obligation to give notice to the Commission, as per Regulation 9 of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations 2011, was on Etihad.” It was the huge penalty imposed by the Competition Commission of India first time in India on not informing under the power of section 43A of the Act.

- This case clears the intention of CCI that any violation of rules under Competition Act and Combination Regulation shall be punished and it was the visible that in future the companies have to observe all the rules strictly. Party cannot consummate the proposed combination before the approval of CCI.

5- Thomas Cook India Ltd.^{xii}

Order of Commission

Commission held that market purchase must not be seen in isolation. Commission denied the every contention of the parties in which the parties was emphasising under regulation 9 of Combination Regulation, 2011 there is no need to inform the exempted separate transaction. Commission said all the purchase, subscription including market purchase were decided on the same day and announced in the same press conference so market purchase is also a part of combination which the parties consumed before the approval of CCI. According to the circumstances parties informed all the transactions so there was no intention to conceal the market purchase, though the CCI has power to impose a penalty of 1 percent of total turnover or the assets whichever is higher but here observing all the circumstances a penalty of INR 1,00,00,000 (Rupees one crore) is imposed on the Parties.

- In the above case again CCI showed its strictness and firmness regarding the rules under Competition Law and consummation prior approval shall not be tolerable.

6- TOIL Case^{xiii}

In this case a combination was proposed where fifty percent of the issued and paid-up equity share capital of Trent Hypermarket Limited (THL) is going to be acquired by Tesco Overseas Investments Limited (TOIL) and notice received by the Commission in this regard on 31st March 2014. Acquirer gave notice regarding it after a delay of 73 days which is exceeding the limit of 30 days from the **trigger point**. Acquirer contended that the triggering point does not start from the date of seeking approval from Ministry of Commerce & Industry (DIPP), Foreign Investment and Promotion Board, Department of Industrial Policy and Promotion, Ministry of Finance (FIPB) and till that time there was no intention to acquire the shares.

Order of Commission

Here the commission says according to the rule of 1 percent of turnover or assets whichever is higher the penalty is of INR 600 crores but considering the fact that the party voluntarily inform the CCI even after the delay of 73 days Commission imposed nominal penalty of INR 3 crore only on the Acquirer. It was the big penalty in India in these types of cases and also a warning for other companies if they do not file notification in time will face rigorous consequences. All the above Orders of CCI are very important and gives a new direction to the rules of Gun jumping and Combination Regulation in India. It has huge future

Implications in India as the parties going to form a combination will have to be very cautious about the concept of trigger point, notification, consummation prior approval.

➤ *“Now under the CCI Procedure for Combination, Amendment Regulation 2015 has excluded requirement to notify in case of intimation to central government or State Government.”^{xiv}*

8- Dewan Housing Finance Corporate Limited (DHFL) and First Blue Homes Finance Limited Combination case^{xv}

In the above case companies filed the proposed combination with a long delay of around 388 days on the wrong legal advice that there is no need to file the information where the merger or amalgamation is happening between the holding and subsidiary company. In this case Board of Directors of each of the parties to the combination approved the scheme by their respective resolution passed on 28th September, 2011, so according to section 6(2) of the Act the **trigger point** started on 28th September, 2011 and parties to the combination ought to have given the notice to the commission within 30 days of the approval of the scheme by the board of directors of the parties to the combination but the notice was filed on 19th November, 2012 with a delay of around 388 days. Considering all the facts and circumstances the Commission imposed a penalty of five lacs rupees only which is very nominal amount with respect to the total assets and turnover of the companies. So the commission is very strict regarding section 43A of the Act and companies in future can't give an excuse of delay due to the wrong legal advice.

All the above cases are guiding the new parties to take care about the rules and deep analysis of every fact and circumstances with full awareness before filing the notification. It has lots of future implication now the parties will be very cautious. Gun Jumping will not be tolerated if the CCI find it visible. The above cases have changed the mind set of big corporates towards CCI and rules of Combination Regulation. Now the game is under strict compliance not like take it easy.

Analysis and Implication on the market

In the above cases we can observe that Competition Commission of India is very strict regarding the imposition of penalty under section 43A of the Competition Act, 2002 if the party does not file the proposed combination before the CCI within the period of 30 days from the trigger point. Here the CCI makes it clear that trigger point is the time when the party seeks the approval for the combination from any statutory authority. According to the Combination Regulation, 2015 communication to the central or state government about the combination is not a trigger point.

Competition Commission of India is very strict regarding imposing penalties under section 43A of the Act in Gun Jumping cases and analyse every aspect like why the parties are delayed to communicate about proposed combination to the Commission under section 6(2) of the Act and even the approval of the combination does not bear any effect on the application of section 43A of the Act. Parties cannot escape from the penalties if they do not follow the Combination regulations regarding it. Question is regarding the trigger point if the party has intention of acquisition and communicating it to the some companies as well as to the statutory authority for the approval then the company has to file it to CCI for every

separate intention of communication within 30 days. Even after that company would acquire only share with one company. It creates a problem when before the combination party have to give it for approval and it may be possible that party was not going to execute it even after that approval (CCI can take maximum time of 210 days for approval.) which is creating an example of bad economics.

In some cases like Jet Etihad and recently in the **SCM Soilfert Limited (SCM) & Deepak Fertilizers and Petrochemicals Corporation Limited (DFPCL) Combination Case^{xvi}** though the party communicated all the information of proposed combination and CCI also approved the combination but some part of combination was already consummated before the approval which is the clear case of Gun jumping. In the SCM and DFPCL case CCI imposed the penalty of INR Two Crores (INR 2,00,00,000 only). So the CCI does not listen to any excuse but the penalties are very nominal compare to the total turnover and assets which is very less rather than the 1 percent of total turnover or asset.

The most important point is that if any investment is done with a strategic intent than it would not come under the phrase 'solely made as an investment'. It would be require to inform to the CCI even after if it qualifies the exemption given under schedule 1 of Combination Regulation, 2011. The complexity is that how will the Commission know the intent of the party. If any company is acquiring some part of shares in another company then how we can say that it is without strategy or it does not have any strategic intent. So there are some complexities are involved here.

Now the companies cannot take it easy, before any combination the companies have to make all the strategy then they can proceed further. Ignorance of competition issues and Competition Commission of India may be resulted in hefty penalties even though the intention was bonafide or does not have any appreciable adverse effect on competition. Companies are now more cautious and analyse the every aspect of competition before any combination or other activity. Even to acquire 5% or less share company will have to think twice.

Conclusion

From the different orders of CCI we can conclude that competition authority deals the matters of Gun Jumping very strictly. In future combinations companies are not going to ignore the Competition Commission of India. Every little combination even the acquisition of 5% shares will have lot of analysis to find that whether it has any strategic intent and to avoid any penalty it becomes somehow compulsory to inform every combination to CCI even though it has very little importance or does not have any appreciable adverse effect. Thus the things are not as it was in early time not the Orders of CCI has great future implication. It has given a new direction, new approach, and new awareness to the parties who are going to observe the rules of Competition Law and Combination Regulation in future. Combination regulations in India and section 5 and 6 of the Competition Act play very important role in merger and acquisitions. At the time of any merger or acquisition we need to pay attention towards submitting of information and move to the merger as per the required regulations otherwise the acts of gun jumping may lead to serious market misconduct and activities of anticompetitive in nature. So as per the law, first one must has to submit every required document to the CCI for the approval of merger and acquisition. Competition Commission of India must keep an eye on every merger activities to check on the any malicious activity which may create anticompetitive situation in future. In the concept of Gun Jumping

following the time limits for regulations becomes necessary because the unnecessary delay may give lacuna to the parties and space to misuse the situation. Though the concept seems very little but the significance of it is highly valuable.

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ⁱⁱ *Id.*

ⁱⁱⁱ *Id.*

^{iv} See Regulation 5 of The Competition Commission of India (Procedure in Regard to the Transaction of Business Relating to Combinations) Regulations, 2011.

^v *Id.* see schedule 1.

^{vi} *Id.* see schedule 2.

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