Luthra & Luthra
Law Offices

37th National Convention of Company Secretaries, Hyderabad

SESSION: LEAD THE MARKET UNDER COMPETITION REGIME

TOPIC: MERGERS UNDER NEW COMPETIOTION REGIME

G R Bhatia
Partner
Luthra & Luthra Law Offices

07.11.2009

Dimensions of law-intertwined

THE COMPETITION ACT, 2002

- All the dimensions of law are inter-twined
- Integration of function/structure,
- Combination includes acquisition, merger, amalgamation and joint venture.
- Acquisition/Merger/Amalgamation/Cartel

Rationale for Regulation of Combinations

- Better to prevent firms from gaining anticompetitive market power than to control such market power after its creation.
- Easier to deal with ex ante merger.
- Structural remedy post merger is as formidable as 'to unscramble an omelette and turn it back to egg',
- combination regulation is forward looking.
- Certainty is preferable than later on hassles.

Remedies with CCI:

- Approve/ block the combination
- Approve modification,

  - Divestment of some assets or business

  - Requiring access to essential inputs/facilities

  - Dismantling exclusive distribution agreements

  - Removing non-compete clauses

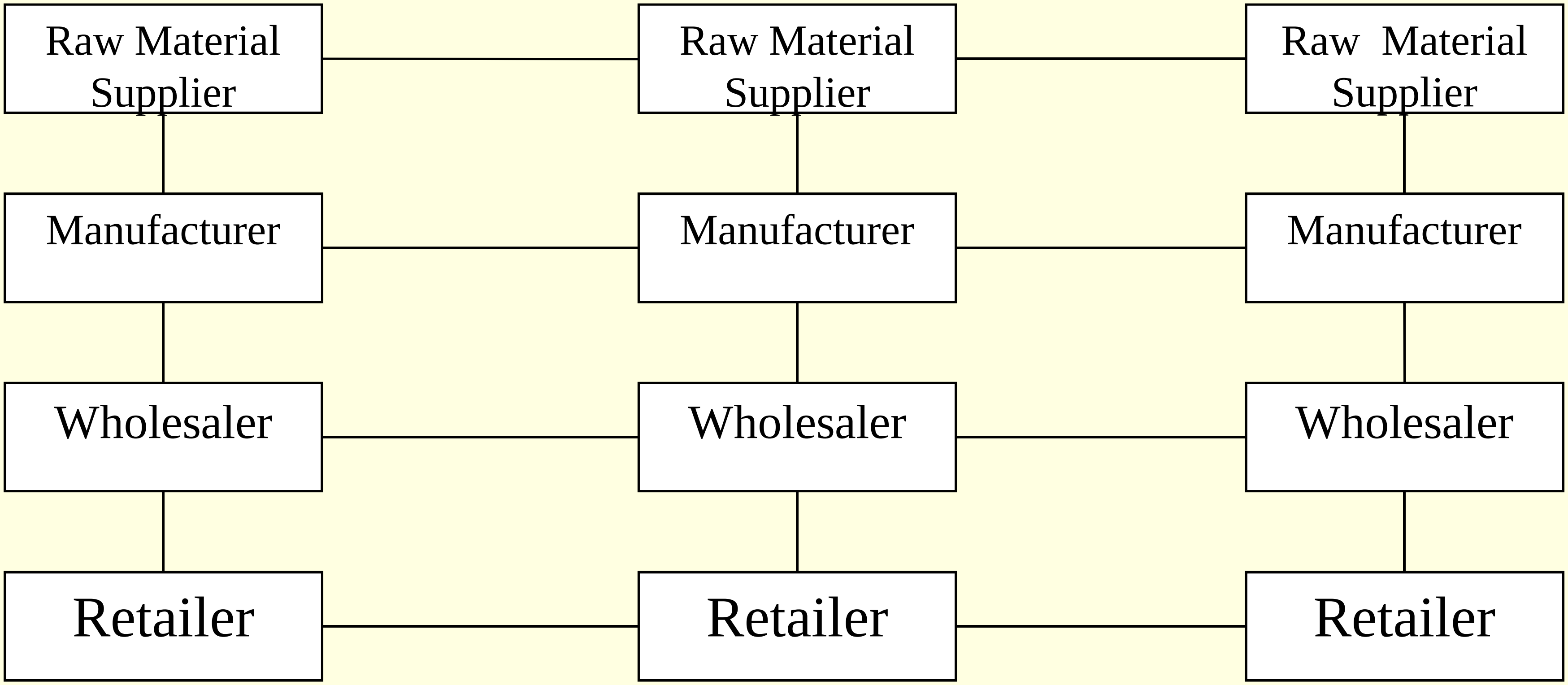
  - Imposing price caps or other restraints on prices

  - Refrain from conduct inhibiting entry of others

Other laws/bodies regulating mergers

- **Companies Act, 1956**
- **Sick Industrial Companies (Special Provisions) Act, 1985**
- **SEBI (Substantial Acquisition of Shares and Takeovers) Regulation, 1997**
- **Regulatory Authorities also regulate mergers**

Horizontal & Vertical Combinations



Luthra & Luthra
Law Offices

Motivation for Combinations

- To diversify to reduce business risks;
- To achieve optimum size to reap the benefits of scale;
- To reduce duplicate expenses to improve the profitability;
- To serve the customer better;
- To have cohesiveness in control
- To grow without gestation period;
- Inorganic growth is believed to be much faster compared to organic growth

Adverse Effects of Combinations

- Horizontal merger reduces number of players
- Market share post merger goes up;
- Embracing unhealthy reduces the tax liability
- Rivalry in firms is friendly to consumers;
- Mergers often fails to harmonize human relation.
- Unilateral/Coordinated effects

Case Law-from competition l perspectives & facts

Volvo/Scania (2000)
IBM/SBCS (2004)

- In the first 6 months of 2009: Indian Companies were involved in 136 transactions: 34 inbound deals – 31 outbound targets. *Venture Capital.
- In 2008: China ranked first (1539 deals) and India ranked third (536 deals). China ranked first in terms of transaction value ($59.24 Billion) as well as in terms of number of transactions (1539 deals)
- India is ranked third with 536 deals worth $23.01 Billion.

* **Source – BW – Thomson Reuters M&A Deal Tracker.**

The Competition Act, 2002

- The Act provides for ex ante regulation of certain combinations.
- Mandatory Pre-Notification - Failure attracts penalty
- Suspensive Jurisdiction
- Filing triggered when aggregate exceeds prescribed value of assets or turnover .
- Caliberated thresholds when parties have***'operations in India or outside'*** or belong to a ***'group.'***

Triggering Limits

Operations of Combining Parties	**Combining Parties**	**Group to which Combining Parties (post merger) belong.**
In India	Total value of assets > Rs.1000/-crores or turnover Rs.3000/- crores.	Total value of assets of more than Rs.4000/- crores or turnover of more than Rs.12000/- crores
In India or Outside	Aggregate value of assets > $500 mn (incldg. at least in India Rs.500 crores or turnover > $1500 mn (incldg. at least turnover of Rs.1500 crores in India).	Aggregate value of assets of more than $2 bn (incldg. at least assets of Rs.500 crores in India) or turnover of $6 bn (incldg. Rs.1500 crores turnover in India.

Contd….

- Filing of notice & review thereof- 2 phases;
- Comprehensive definition of ‘group’ and ‘control’
- To be governed by the CCI (Combination) Regulations, 200_which are being fine tuned;
- Acquisition -PFIs, banks, FIIs & VCFs not covered- need to notify;

The Proposed Competition Commission of India (Combination) Regulations, 200_

- Some transactions are proposed to be exempted – as not causing aaec,
- Option to file short / long form with varying initial review period,
- Details of parties/nature & purpose/products and market share/intended structure or control, distribution facilities, Multi-Jurisdictional Filings/Rulings
- Filing Fees of Notice –Rs. 40 lakhs
- Opportunity of being heard to an objector

Inquiry by the CCI

- The CCI shall inquire into whether a combination is likely to cause an appreciable adverse effect on competition.
- CCI to consider-
- extent of imports, barrier to entry, innovation, substitutes;
- level of combination, countervailing power,
- likelihood of increase in price or profits, removal of effective competitor,
- falling business, contribution to economic development, balancing pros and cons.

Luthra & Luthra
Law Offices

Take away

- CCI to issue Guidelines with Helpline Manual
- Need for multi phase filing;
- Need to omit Section 108A to H of the Companies Act, 1956;
- Treatment of subsidy, aid and taxes in determining 'turnover',
- Turnover in different service sectors to be clarified
- PSUs to be treated on stand alone basis and not as same 'group'
- Encouragement to parties to inform changes
- Provide for preliminary conference;
- Review of threshold limits/indexation/conversion

Role of Company Secretary

- Pre merger,
- Filings of notice,
- Coordination with other Authorities-High Court- SEBI,
- Coordination with other Regulators,
- Coordination in multi jurisdictional filings,
- During the review of the notice by the CCI,
- Post merger

Thank You

Luthra & Luthra
Law Offices

G R Bhatia
gbhatia@luthra.com
+91 11 4121 5100
9818196048