THE TWO M'S IN THE MARKET: MERGER AND MONOPOLY- A COLLAPSE IN THE COMPETITION APPARATUS

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Abstract:

Commencing with the quotation by Bete O' Rourke the article progresses with the definition of mergers. The article acme the need and history of mergers with highlighting the obligation of competition in a market. The basic theme of the article spin around the two concepts, namely mergers and monopoly. It dives deep into scrutinizing how mergers can lead to a monopolistic market. The relevant provisions of competition act for understanding elements required for mergers to be transformed into an anti-competitive practice and establish a monopoly has been examined. The article then probes into the gigantic Disney-Reliance Merger Saga and inspect whether it is an anti-competitive practice after recognizing its key features. The investigation extends to analyze whether it is an egress to a monopolistic market? The ramifications of Disney-Reliance merger in the industry has been culminated. The hypothesis of predatory pricing has been intellectualized. The research invokes many questions regarding the mergers and monopoly, basic question among them is can these two concepts individually be an anticompetitive practice or require an extra element. The role of competition commission of India to judge the recent merger has been debated over. The article concludes with an intriguing question for the readers.

Keywords: Merger; Monopoly; Predatory Pricing; Anti-Competitive Practice; Competition; Disney-Reliance Merger.

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Competition always produces better results than a monopoly

-Bete O'Rourke

The twin-fold hypothesis of Mergers and Monopoly comport as a paradox in the market. The golden triangle of the *3 M's: Merger, Monopoly and Market* has indeed a stasis preserved in the society. The opening quotation sow the seeds regarding the need of Competition and how is it better than Monopoly. The current article has its focus over the question ***whether a merger can lead to a monopoly in the market?*** This is not limited here but extend to the next aspect as to ***whether the monopoly can be an anti-competitive practice, hence influencing the market and the consumers?*** It is pertinent to get accustomed with the cardinal principle of mergers and the anti-competitive practices beforehand and then move forward with analyzing the question.

There are diverse views on the definition of mergers. Authors who have very well defined the idea of Mergers has a list of its own. One of them is ***Sudarsanam (1995)[2], who claims that a merger takes place when two or more corporations come together to contribute and share their resources to achieve common objectives.*** The shareholders of the combining firms often remain as joint owners of the combined entity. Mergers in the words of ***Gaughan[3] (2002), is a process in which two corporations combine and only one survives and the merged corporation ceases to exist.*** Sometimes there is a combination of two companies where both the companies cease to exist and an entirely new company is created. But according to ***Sherman and Hart (2006)[4], a merger is a combination of two or more companies in which the assets and liabilities of the selling firms are absorbed by the buying firm.*** Hence it is evident that in amateur language, it is the combination of two enterprises in order to form a new one and increase the efficiency. Now the question is mergers has emerged long time back,

[2] Business Bliss FZE, 'Definition Of Mergers And Acquisitions' (*UKEssays - UK Essays United Kingdom*, 6 November 2023) <www.ukessays.com/essays/marketing/definition-of-mergers-and-acquisitions-marketingessay.php> accessed 7 May 2024.

[3] Business Bliss FZE, 'Definition Of Mergers And Acquisitions' (*UKEssays - UK Essays United Kingdom*, 6 November 2023) <www.ukessays.com/essays/marketing/definition-of-mergers-and-acquisitions-marketingessay.php> accessed 7 May 2024.

[4] Business Bliss FZE, 'Definition Of Mergers And Acquisitions' (*UKEssays - UK Essays United Kingdom*, 6 November 2023) <www.ukessays.com/essays/marketing/definition-of-mergers-and-acquisitions-marketingessay.php> accessed 7 May 2024.

but ***how is it going to create a monopolistic market?*** It is germane to scrutinize the memoir of mergers and desideratum of competition in the market. Keeping the trends restrictive to India's border, mergers and acquisitions emerged as mechanism to brace up against foreign competition[5] but later it turned into a modus operandi for controlling and acquiring market power. There are various reasons for having competition in the market. It increases efficiency by the enterprises, offers diverse choices to the consumers, better global markets, low prices, quality enhancement.[6] With the escalation of mergers there is a slight chance of monopoly in the market as most of the players will now combine into one leading to reduction in their numbers. This will trigger and sway the market and alter consumer's position in terms of choices. Mergers cannot individually be an anti-competitive practice but it has to have certain element which has an adverse effect on the competition in India. Let's first undergo the relevant provisions of competition law to appreciate the meaning of anti-competitive agreement. There are two relevant provisions here from the idea of this article, i.e. section-4 and section-5 of Competition Act, 2002.

Section-4 : Abuse of Dominant Position[6]

(1) *No enterprise or group shall abuse its dominant position.*

(2) *There shall be an abuse of dominant position [under sub-section (1), if an enterprise or a group],--*

(a) directly or indirectly, imposes unfair or discriminatory--

(i) condition in purchase or sale of goods or service; or

(ii) price in purchase or sale (including predatory price) of goods or service.

Explanation.--For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in subclause (ii) shall not include such [condition or price] which may be adopted to meet the competition; or

(b) limits or restricts--

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[5] Beena PL, 'Trends and Perspectives on Corporate Mergers in Contemporary India' (2008) 43(39) Economic & Political Weekly 48.

[6] *Competition Policy* (European Commission) <https://competition-policy.ec.europa.eu/about/why-competitionpolicy-important-consumers_en>. [6] Competition Act 2002, s. 4.

(i) production of goods or provision of services or market therefor; or

(ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

(c) indulges in practice or practices resulting in denial of market access [4][in any manner]; or

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

Explanation.--For the purposes of this section, the expression--

(a) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to--

(i) operate independently of competitive forces prevailing in the relevant market; or

(ii) affect its competitors or consumers or the relevant market in its favour;

(b) "predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors;

[(c) "group" shall have the same meaning as assigned to it in clause (b) of the Explanation to section 5.]

<u>Section-5: Combination</u>[7]

(c) any merger or amalgamation in which--

(i) the enterprise remaining after merger or the enterprise created as a result of the amalgamation, as the case may be, have,--

[7] Competition Act 2002, s.5.

(A) either in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or

(B) in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or]

(ii) the group, to which the enterprise remaining after the merger or the enterprise created as a result of the amalgamation, would belong after the merger or the amalgamation, as the case may be, have or would have,--

(A) either in India, the assets of the value of more than rupees four-thousand crores or turnover more than rupees twelve thousand crores; or

(B) in India or outside India, in aggregate, the assets of the value of more than two billion US dollars, including at least rupees five hundred crores in India, or turnover more than six billion US dollars, including at least rupees fifteen hundred crores in India.

It is evident from the above provisions that these elements are necessary for an anti-competitive practice. The dominant position abused in the market and the combination as in case of mergers will be under the radar of Competition Commission of India. It is then the duty of the commission to reach the conclusion regarding the anti-competitive agreement. Above two were the relevant sections for understanding the concept of mergers and abuse of dominant position in the market. Hence even if there is a merger in the market it will first have to go through scrutiny of the Competition Commission of India.

Merger Inducing Monopoly

The next question is how can monopoly lead to an anti-competitive practice. This is a tricky one to judge, as monopoly leads to lesser competition in the market, so the big players can control the market if they wish do to so. It will also alter the remaining players stance in the market leading to their deterioration in business. Only the big players can control the market and product prize, inducing the affairs which again affect the position of consumers. Along with the minority market holders, consumers are also getting adversely affected with lesser number of choices and higher prices. ***This can be examined with a recent merger announcement which created a swarming effect in the stock market, which is none other than the Disney-Reliance Merger Saga.*** With the depth understanding about this merger, certain key features can be highlighted.

Disney-Reliance Merger Saga

The Walt Disney Company announced a merger of their Indian television and internet streaming assets to form an entity valued at over $ 8.5 billion. The Reliance Group will hold a 63% stake in the new company, with Disney owing the 37% in the entity. ***The merger brings together 120 TV channels owned by the two conglomerates, as well as India's two most popular streaming apps: Disney+ Hotstar and Reliance's JioCinema.[8] On comparison with the other streaming businesses, this merger will occupy the king's throne in the streaming business.*** It will deteoriate the business of other streaming mafias. If we analyse the data statistics, it is evident that in the fourth quarter of 2023, Disney+ Hotstar had 333 million monthly active users in India, according to data from California- based market insights firm Sensor Tower, while JioCinema had 95 million users. Each platform's user base was bigger than that of Netflix and Prime Video combined. Now Disney+ Hotstar and JioCinema will together control around 31% of the streaming user base in India, according to data analytics platform Comscore. Netflix and Prime Video lag far behind with around 8% of the viewers each, Comscore said.

If we dive deep into the backstory, JioCinema has paid around $2.8 billion to get the exclusive digital rights of one of the most-viewed sporting events in India i.e. Indian Premier League (IPL) cricket tournament. Disney in itself has a tremendous amount of content including the series by Marvel which indeed rules the hearts of a huge percentage in the kids and adult population. Other than this, there are other diverse shows targeting the remaining audiences. This poses certain questions, that ***if one company is offering diverse qualities of products at a reasonably lower price (reference to the Jio-Internet), what is the requirement to move to another one? But this is an menacing contention as choosing only one market player will***

[8] Bhattacharya A, 'Reliance and Disney team up to crush Netflix and Prime Video in India' [2024] Rest of World <https://restofworld.org/2024/ambani-reliance-disney-merger/>

lead to monopoly. Now it will be the discretion of that one player to set the prices. Till the time we perceive this as a commercial weapon, we will transform into a compulsive user of that product. Certainly, this raises another discourse, whether size is all that matters in case of a merger to create monopoly? Are we to judge, that since a merged company has larger size, it is creating a monopolistic market? This reminds me of a divulgence by the ***Chief Justice in the Standard Oil case mentioned in the journal of The University of Chicago Law Review[9], which highlighted that nowhere at common law can there be a prohibition against the creation of monopoly by an individual.***

Is Monopoly an Anti-Competitive Practice Intrinsically?

A mammoth company does not vow monopoly or anti-competitive practice. There should be many other essential features or elements to be classified as an anti-competitive practice, hence invoking the role of Competition Commission of India. Coming back to the previous segment, if there are certain dominant players in the market, it is quite possible that predatory pricing may come into picture. ***Predatory Pricing is a process of pricing so low that competitors quit rather than compete, permitting the predator to raise prices in the long run as defined formally under explanation for section 4 of the Competition Act, 2002[10].*** The predator, already a dominant firm, set its prices so low for a sufficient period of time that its competitors leave the market and others are deterred from entering.[11] If we relate this with an example in India, a slightly crooked circumstance where Reliance Jio offered internet at an extremely lower price, it did affect the other market players but did not lead to their egress. This can be a form of predatory pricing and now snapping back in 2024, to the swarming merger which caused a havoc in the stock industry i.e. Reliance-Disney Merger which is one of the biggest news in business. ***Analysing its ramifications, it will deteriorate the business of other service providers namely Netflix, Amazon Prime Video etc.*** Consumers will be restricted to a single producer leading to a situation of consumers converted into puppets in the hands of that single producer. They would not even deviate from that one producer due to the addiction caused in the beginning of this journey. Competition will be reduced in the market affecting the needs

[9] Levi EH, 'The Antitrust Laws and Monopoly' (1947) 14(2) The University of Chicago Law Review 153
[10] Competition Act 2002, s. 4.
[11] *Predatory Pricing* (ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT) <https://doi.org/chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.oecd.org/competition/abuse/2375661.pdf>

and beliefs of consumers. The whole object of the Competition Act, 2002 will be frustrated which is to ensure fair trade competition in the market.

But can we certainly say that this Reliance-Disney merger is indeed an anti-competitive practice and also a monopolistic approach? No, certainly not, since size does not owe to existence of monopoly or an unfair practice. Though this is indeed one of the biggest merger, but that does not permit us to assume it to be an anti-competitive practice. ***If mergers were individually an anti-competitive practice, it would have been banned by the Competition Commission of India way back in the past.*** But that's not the case, it is still in existence, hence for a merger to be a monopoly and categorize as an anti-competitive practice, it has to have certain other features, like abuse of dominant position, predatory pricing etc. ***Though Reliance-Disney is a huge merger but prime facie we can not conclude any anti-competitive practice. Additionally, for a monopoly to exist there has to be only one player in the market, but we do have other players, namely Netflix, Amazon Prime Video etc.*** There is no question on the fact that this merger will adversely affect the other players and their business, but there is no mala-fide act done on the part of the combining entities. Making strategic business plans and working them out leading to gain of profit cannot be considered as an anti-competitive practice. ***The Competition Commission of India (CCI) is entrusted with this duty to analyze whether this merger is anti-competitive or not after delving into the detailed documents.***

<u>Epilogue</u>

Till the decision of Competition Commission of India (CCI) regarding the Reliance-Disney Merger is delivered, I leave my readers to ponder upon certain facts and questions. Mergers are significant in the market place and increases efficiency but does it collapse the smaller businesses? ***Can Mergers lead to Monopoly?*** Yet another indispensable question which has not been dealt in a lot detail in this article is: ***Are Monopolies always baleful?*** With this I arrive at the concluding remark of this article and would end the article with an affirmation and a question, Mergers usually do not appear to be a vicious weapon prime-facie and might increase efficiency but it is a double-edged sword which can cause sinking of the market structure if the balance is lost. This paves way for my last question and the last line of this article: ***Are we***

structuring a world where mergers will cause collapse of the business and stock market and mark the establishment of a MONOPOLISTIC MARKET?

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