SECURITIES AND COMPETITION LAW

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ABSTRACT

The Essay deals with various factors that affect securities and competition like Insider Trading, Mergers & Acquisitions, market disruptions, denial of essential facilities.

First aspect is the Insider Trading and its implications on competition law.It sets out the mechanism through which insider trading is carried out and consequential harmful effects on competition.It also highlights how the corporate governance norms are not adhered to because of insider trading.

The zeal of the corporate world is to maximize it's profits by taking actions that are detrimental to the interest of investors and also find a place here.

The impact of mergers and acquisitions on economy and preventive actions which are detrimental to competition have also been stated.

The other significant aspect deals with market disrupters in Indian market which range from policies of government to private players.

The last aspect deals with crucial issue of essential facilities developed by enterprises should be shared with others who wish to enter market and want to compete and doctrine of essential facilities ahs developed abroad and its applicability in content of Indian Market has been examined.it has also been concluded that Indian economy's,social and market conditions needs to be taken into account while judging essential facilities.

Definition of Insider trading and its implication on Competition law

Insider Trading generally means trading in the shares of a company by the persons who are in the management of the company or are close to them on the basis of undisclosed price sensitive information regarding the working of the company, which they possess but is not available to others.

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Insider Trading means trading by an insider[5] of a company in breach of trust or confidence in the stock of the company on the basis of non-public price sensitive information to the exclusion of others.

Harmful effects of Insider Trading and its working mechanism

Insider Trading gives a negative impact for both, the investors and the country. It curbs the fair quantum of demand and supply for the stocks and leads to an artificial increase in the price of stocks, thereby inducing the innocent purchasers to purchase the stock at a very high price than that of its original value.

In the modernized era, wherein the Capital Markets all over the world is infested with the disease of Insider Trading it is pertinent to know about the working mechanism of this Doctrine. In this type of a transaction an Insider in a company buys the stock, and shares the price sensitive information with a small group of people who buys the stock and spread the word. As a result, an artificial demand is created for the particular stock and when the prices of the stock hit the satisfactory level the insider exits the market along with his small group of people by selling the stocks thereby making profits. Soon after selling, the stocks plummet resulting in huge losses.

Insider Trading and its implications on Competition Law

Corporate Governance refers to a terminology which is often associated with the aspect of ensuring transparency to Stake Holders. It is founded on four pillars namely righteousness, truth, perseverance, and social justice. In India most of the big companies are listed on any one of the recognized stock exchanges namely BSE or NSE. The actions of the companies that are listed in the stock exchanges have a bearing on their stock prices in the market when their securities are traded. In such cases care must be taken to ensure that the actions of the company are fair and not detrimental to its investors.

But unfortunately in today's corporate world most of the corporate actions are detrimental to the interest of the investors resulting in injustice and pecuniary problems. Stock prices often respond to corporate actions such as Mergers, Acquisitions, Issuance of Bonus Shares and Rights Shares, Stock Split etc when it is executed much ahead of public announcement. Insider Trading strikes at the very root of market integrity as it is the most heinous frauds that take place in the corporate sector.

Insider Trading and Corporate Governance are opposed to each other as they are contradictory in nature. They are contradictory in the sense that the former curbs transparency to the share holders of the corporate entity while the latter promotes the same. Hence it is regarded as a menace to Corporate Governance. Competition law is a law that promotes or seeks to maintain market competition by regulating conduct by companies. Competition law is implemented through public and private enforcement and no illegal means of competition is allowed. Competition law has become increasingly intertwined with intellectual propery, such a copyright,and trademark and in some jurisdictions trade secrets. It does not ensure a fair and equitable competition among companies. People may have a view about a particular company that this company is functioning well and is earning a good amt of profits in its operations.

Land Mark Cases

Securities Exchange Commission VS Rajat Gupta

The Securities Exchange Commission's (SEC) complaint alleged that Rajat.K.Gupta tippe d his business associate Rajaratnam who was the Founder and Managing Partner of Galleon Management certain confidential (insider) informations worth billions which Rajat had learnt in the course of his duties when he was a member of the Board of Directors of the Goldman Sachs Group, Inc. The complaint alleged that Gupta disclosed material non- public information concerning Berkshire Hathaway Inc's 5 million US Dollars investment in Goldman Sachs in September 2008.

Rajaratnam used the information he learned from Rajat to trade profitably in Galleon hedge funds. By engaging in this conduct Rajat and Rajaratnam violated Section 10(b) of the Securities Exchange Act, 1934 , Exchange Act Rule 10b-5 and Section 17(a) of the Securities Act of 1933. On June15, 2012 in a parallel criminal case arising out of the same facts, Gupta was convicted on one count of conspiracy and three counts of securities fraud.

On October 24, 2012 Gupta was sentenced to two years in prison and one year of supervised release, and ordered to pay a fine of 5 million US Dollars.

The Securities Exchange Commission (SEC) ordered Rajaratnam to disgorge his share of profits gained and losses avoided as a result of Insider Trading plus pre-judgment interest.

2. Mergers & Acquisitions (combinations)

It means any situation in which the ownership of two or more enterprises is joined together. The globalisation of the economy resulted in increasing the competition within and outside the Indian market. There has been rapid increase in cross- border merger and acquisitions activities of the Indian companies. The situation became so alarming that the immediate need was felt to prevent activities which was detrimental to the competition and which caused appreciable adverse effect in the market. The competition Act, 2002 was enacted with an objective for promoting competition and protecting the interest of the consumer. The competition act, 2002 mainly deals with three kinds of agreements like anti-competitive agreement, abuse of dominance and regulation of combination. Section 3 of the competition act prohibits from entering into any kind of arrangement pertaining to production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or are likely to cause an 'appreciable adverse effect on competition'' in India. Section 4 of the act contains provision pertaining to abuse of dominant position by an enterprise. Under the monopolies act, a threshold of 25% was constituted as apposition of strength in the market. But this threshold limit does not find any place under the competition act. Competition act for the purpose of determining the abuse of dominant position is mainly concerned with the relevant geographic market and the relevant product market. **Section 6 is considered to be a vital provision pertaining to combination. This section provides provision for the regulation of combination. Under this section the competitions act restrains from entering into any agreement that cause or are likely to cause an appreciable adverse effect on competition within the relevant market in India.**

In business world joining of ownership may take many different forms, and may be either amicable and consensual, or unwelcome and hostile. In India Mergers are regulated under the Companies Act and also under the SEBI Act. With the enactment of the Competition Act in 2002, mergers also come within the ambit of this legislation.

Let us consider an illustration. Air India and Indian (erstwhile Indian Airlines) have combined. Consequent upon that, the market share of the combined entity has increased considerably. The enhanced market share may cause:

i) barriers to entry to other competitors; (competitors may not have market to trade)

ii) rise in passenger fares;

iii) poor quality of service . . . continuation sheet

On the contrary, it may not cause any concern at all if we look at the following factual issues:

i) Passengers have wider choice (Jet Airways, Spice jet, Kingfisher, Air Deccan, Indigo, Go Air, foreign airlines etc.

ii) with wider choice, the combined entity may not be able to create entry barriers;

iii) in order to maintain an optimal passenger base (for successful and viable business venture) the combined entity may have to provide competitive level price for tickets and maintain highest or at least similar levels of quality of services that its competitors would extend.

In India Merger as a part of the combinations has been defined in section 5 of the competition act and the provisions relating to the regulation of the combination is defined in section 6 of the Act. Merger is an ordinary practice in the business world. It has several advantages like increasing efficiency and economy but there are several detrimental effects of merger. The effects are so severe that there was need felt to control merger. Any merger is considered to be prejudicial if it causes "Appreciable Adverse Effect" on competition. The term appreciable adverse effect has not been defined in the Competition act but any kind of merger having this effect is prohibited under the competition act. Section 20(4) of the Competition Act, 2002 provides the substantive test whether the combination has or is likely to have ―appreciable adverse effect on combination -. The substantive test encompasses examination of certain factors incorporated in the above section.

Some of the factors are:-

a)Restraining entry of new players in the market.
b) Advantage of the combination to the economy of the country.
c) Extent of elimination of competition from the market.
d) The availability of substitutes in the market.
e) Whether the benefits of combination outweighs the adverse effect on competition

3. Market disrupters in the Indian Market

Market Disruption is a situation where **markets** cease to function in a regular manner, typically characterized by rapid and large **market** declines. **Market disruptions** can result from both physical threats to the stock exchange or unusual trading (as in a crash).

One of the largest disruptions in the Indian market is the low prices quoted by the new entrant. The latest example is that of Reliance Jio. One of the major disruptions in the Indian telecom sector started with the launch of Reliance Jio on September 5, 2016. The launch announcement offered the lowest rate (worldwide) for the Internet data at Rs 50 per gigabyte (GB). Also, all its services were offered free, on promotional basis, till December 31, 2016 (which was further extended till March 31, 2017).

The two major macro developments took disrupted the whole Indian market with their power.. Since, due to demonitisation, there was monetary transactions taking place in market .there was no business being carried on for several weeks.GST was a biggest reform in indirect taxation system of India. It removed most of the Indirect taxes and made the taxation system quite easy for entrepreneurs. Moving on with more market disruptions happening in the India , no one can forget the Insolvency and Bankruptcy Code 2016. Companies like J.P Infrastructure, underwent insolvency proceedings and the process of Insolvency and Bankruptcy Code 2016 is still under due progress. Another major disruption is the FDI. There is some concern that foreign direct investment may disrupt local industry and economies by attracting the best workers and creating income disparity. Furthermore FDI creates problems like Trade Deficit, Inflation in the economy, and political corruption.

<u>The Destiny of essential facilities in India</u>

In the article, the author Mr.Sundar Ramanathan, has dealt with free market system, particularly the crucial issue ‘whether the essential facilities developed by enterprises should be shared with others, who wish to enter the market and want to compete?’

In India, the Competition Commission of India (CCI) has played a pivotal role by application of the doctrine of ‘**essential facilities’**. It has disposed of large number of matters, imposing large penalties, which has put the industry on the alert. CCI is now increasingly viewed as a key player in ensuring free play of market forces in our economy. The CCI is likely to address key policy and regulatory issues, on the subject. The CCI is viewed as a key player in ensuing fair play.

International application of the doctrine

The doctrine of ‘essential facilities’ has been traced beginning with the case of **Terminal Railroad Association,** in which the US Supreme Court in 1912, held that the terminal railroad association, exercising exclusive control over every means of railroad access to St. Louis, could no longer enjoy the monopoly in restraint of trade. Since no non-member could pass through St. Louis without using the facilities as a result of the geographical and topographical conditions, therefore the actions of the terminal company would be anti-competitive. The Supreme Court concluded that the facilities were “public utility” and denial of access would have adverse impact upon trade and commerce and accordingly, that non-discriminatory access was provided to all users.

The next case dealt in is on the permissibility of sharing essential facilities, and is popularly known as **Associated Press case**. The matter related to the admission policy of Associated Press, an organization of 1200 newspapers as members, whose bye laws prohibited the sale of news to non-members. The court held that the action was anti-competitive and would result in blocking new entrants into the market. However, it was observed that the Associated Press unlike other commercial entities, had responsibility to safeguard public interest in dissemination of information.

In the matter of **Verizon Communications Inc. v. Law Offices of Curtis**, it was held in 2004 that the U.S. Supreme Court has never recognized the essential facilities doctrine. The Verizon was providing access to its network on a discriminatory manner to the detriment of the competitors and was therefore acting contrary to the provisions of the Sherman Act (the competition law statute in USA). The Court deprecated the attempt to monopolize found that it could not be established that there was no alternative access and held that directing firms to share their infrastructure would not be in line with the underlying purpose of competition law as it may lessen the incentive for enterprises to invest in economically beneficial facilities.

The EU Commission has taken a more conservative position on “access to common facilities” and ruled in the **‘Sea link’** case that the dominant undertaking should not exercise its dominant position in one market to protect its position in another market and where the competitor is already subject to certain level of disruption by the dominant undertaking there is a duty cast upon the dominant undertaking not to take any action further precipitating disruption. The Commission observed finally that a competitive disadvantage could not be imposed by the dominant undertaking by altering its own schedule. The Commission defined that the essential facility would mean a facility which is indispensable to provide services to consumers as opposed to facility that is required to improve the competition among the competitors.

In yet another judgment in the **Magill case** the European Court of Justice held that the TV broadcasters were the only sources of the basic information which was indispensable for the emergence of the new product for which there was consumer demand and this was determinant for the relevance of the term “essential facilities”. The refusal by broadcaster to grant license for weekly T.V. listing and thus reserving the secondary market to themselves was held justified

In another important case of **Oscar Bronner,** the ECJ observed that the refusal to supply raw materials or services, it was held that the refusal by the dominant undertaking to provide access to its distribution / home delivery system was not an abuse of a dominant position.

Applicability of the doctrine in India

In the Indian context the political, economic and social conditions of India are quite different and distinct from the western world. Until the early 1990, industries were penalized for producing more than the quantities prescribed in the license. Moreover, state funded and owned enterprises were allowed a monopoly in most industries from bread, oil and gas, power, telephones to airlines. After the reforms were introduced in 1991, public sector enterprises got access to their own unique resources that were not made available to private enterprise. The significant question which arose was whether these companies can now be compelled to share their facilities built at a huge cost on a fair and non-discriminatory basis to new entrants in the name of promoting competition. Another question is: whether it is prudent to duplicate facilities or compel companies to share the same but on terms that are reasonable and fair to all concerned and is it within the scope of CCI? Section 4 of the Competition Act provides that limiting markets, practices resulting in denial of market access and leverage to protect another market are specific instances of abuse of dominant position. Whether essential facilities can be covered under any of these categories and whether the doctrine can be applied. Furthermore, regard should be had to the fact that the courts in Europe have applied.

The essential facilities doctrine in the background of the Special Responsibility of the Dominant Undertaking, a concept that new in India. Though the policy makers too have, wherever felt necessary, specifically mandated access to information / resources like in the case of the interconnection agreements for telecom and open access in the case of the electricity distribution. Therefore, the CCI may well have to go beyond the law and opine on policy as well, which it may be well equipped to do.

It will be interesting to see how the CCI applies the doctrine however, I subscribe to the view that instead of applying the doctrine in the form developed in the western jurisdictions, the Indian economic, social and market conditions should be taken into consideration while adjudging upon the essential facilities doctrine for this will determine the destiny of our country in the long run.