Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2022 – ISSN 2582-7820

Editor-in-Chief – Prof. (Dr.) Rishikesh Dave; Publisher – Ayush Pandey

Mergers under Competition Act, 2002: Analysis of Zee & Sony Merger case

Yash Rayakwar[a] Shivani Gaur[b]

[a]Chandigarh University, Chandigarh, India [b]Chandigarh University, Chandigarh, India

Received 21 October 2022; *Accepted* 01 November 2022; *Published* 05 November 2022

To stay ahead of the competition in the market every company aims to grow bigger and better. Over the years, mergers and acquisitions have emerged as the most widely used strategy for inorganic growth. It is widely used to restructure corporate entities. Companies engage in mergers and acquisitions for strategic business reasons, which are mostly financial in nature. This study attempts to determine the impact of the acquiring companies' financial performance before and after the acquisition. This article also goes on to explain legal aspects associated with the term merger, its types, and the role they play in today's market trends in India, it evaluates the positions of Zee and Sony before and after the merger, CCI's take on the merger and a detailed analysis of the ups and downs of the deal.

Keywords: *merger, acquisition, combination, cci, competition act.*

INTRODUCTION

"Competition law is intended to protect competition in the market to maximize consumer welfare. A robust competition law and policy is quintessential for enhancing efficiency and consumer welfare"[1]. The application of laws, rules, and restrictions to ensure that enterprises and companies compete fairly with one another is greatly facilitated by an efficient competition law system. It promotes businesses in becoming more efficient, provides customers with more choices, and aids in price reduction and product/service quality improvement. Although the notion of perfect competition may be a delusion in most areas, effective competition is the goal of any competition law interpretation. Examining corporate rivalry, low barriers, and markets where no single firm can dictate behaviour are all components of the examination of effective competition.

"According to economic theory, prices and quantity prices and quantities equilibrate to levels that generate efficient outcomes". Less developed marketplaces are frequently more susceptible to unfair business practices. By punishing anti-competitive activity including anti-competitive agreements and abuse of dominant situations, competition policies promote competition rather than restrict it.

COMPETITION ACT 2002

The Competition Act 2002 is the successor to the MRTP (Monopolistic and Restrictive Trade Policy) Act 1969 which was the first legislation that was introduced for competition in the market, it was enacted to avert the concentration of power and prohibit any unfair trade practices. The competition policies in India are enforced through the Competition Act, of 2002. To ensure fair competition in the market in 2003, the competition commission was established which became fully functional only by 2009. The Competition Commission of India is the regulatory body that deals with all the matters relating to competition law in the Indian market. It was established under the provision of the Competition (Amendment) Act 2007. They aim to promote competition in India and the Indian market and protect the market from anti-competitive practices by keeping a check on issues namely:

- Avert the formation of monopolies in the market;
- To prevent the abuse of the dominant position;

[1] Abir Roy, *Competition law in India* (first published 2016, Kluwer Law International)

- By prohibiting anti-competitive law agreements;
- By regulating mergers and acquisitions so that they don't have Appreciable Adverse Effects on Competition in India.

OBJECTIVES OF THE COMPETITION ACT

The act aims to provide an infrastructure for competition laws in the Indian market to promote and maintain competitiveness and any acts or practices that may pose a threat to the same are made to be punishable. The act ensures that no particular enterprise gains an upper hand by taking over the majority of the market share. If an enterprise establishes a monopoly in the market, it gives them unparallel bargaining power which they abuse to gain profits by fluctuating market prices, quantity, and also the quality of the goods in the market. This in turn is injustice against the consumers and other manufacturers of the country which beats the whole purpose of competition laws.

MERGERS

A merger is "an occasion when two or more companies or organizations join together to make one larger company" and is synonymous with amalgamation. Merger as such is not defined in any Indian legislation. "Although As per Section 2(1B) of the Income Tax Act, 1961, unless the context otherwise requires, the term "amalgamation", about companies, means the merger of one or more companies with another company or the merger of two or more companies to form one company"[2]. In Layman's terms, a merger or amalgamation is the combining of two or more companies usually by mutual agreements. Mergers are not to be mistaken for acquisitions. In an acquisition, one company buys and subsumes other companies leaving only the buyer in place. On the other hand in mergers, two companies join to make a new company altogether. Mergers happen for several reasons and in several ways.

[2] Income Tax Act 1961, s 2(1b)

COMBINATION

According to the Competition Act 2002, a combination is defined as "the acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises"[3], as well as the control over management or control over the assets of one or more businesses, or a merger or amalgamation of two or more businesses when the combined value of the combining businesses exceed certain thresholds specified in Section 5 of the Act. Therefore, a merger, amalgamation, or acquisition would only be considered a combination it exceeded the financial thresholds outlined in Section 5 of the Competition Act of 2002, and such combinations would be subject to the rules outlined in Section 6 of the Act. The financial thresholds are expressed in terms of the combined asset worth or combined revenue of the merging businesses.

Combinations are regulated by the Indian government to ensure that there is healthy competition in the market. The Competition Act of 2002 declares null and void any combination that significantly harms the relevant market. Small businesses are frequently taken over by large corporations, preventing market competition, if these mergers, amalgamations, and acquisitions are not controlled. Additionally, if these practices are allowed to continue unchecked, they will result in the concentration of wealth in particular economic sectors, which will impede India's economic vision in line with its economic policies.

TYPES OF COMBINATIONS

"Combinations can be categorized into three types – Horizontal Combinations, Vertical Combinations, and Conglomerate Combinations".[4]

Horizontal Combinations: Horizontal combinations are those in which the companies joining forces are rivals with the same level of the production process and produce equivalent goods. These are friendly partnerships between businesses that produce substitute goods.

[3] Competition Act 2002, s 5

[4] Anubhav Khastagir, 'Combinations and Their Regulation under Indian Competition Law' (*Lexlife India,* 20 September 2021) <https://lexlife68840978.wordpress.com/2021/09/20/combinations-and-their-regulation-under-indian-competition-law/> accessed 17 October 2022

Combinations of this kind help the combined company because they make the market less competitive, increase the product's market share, and boost performance and profits. However, monopolistic tendencies in the market frequently result from horizontal combinations. As a result of the reduced competition in the market and the combined businesses' tendency to increase their cost margins by cutting back on staff, which results in widespread unemployment, consumers face issues as a result of higher product prices set by companies with a dominant market position.

The Vodafone and Idea merger

The largest telecommunications company in India, comprising Vodafone India and Idea Cellular, merged in August 2018 to take over 35% of the market. Both businesses operate in the telecommunications industry and provide consumers with services including phone, mobile, internet access, data, etc. One of the most well-known examples of horizontal integration is this merger"[5].

Vertical Combinations: Vertical combinations are those in which two or more businesses that are involved in different stages of the manufacturing and production process combine to form a cohesive whole. Restructuring the product's production and supply chain reduces the cost of production and boosts the combination's competitiveness in the market as well as its efficiency and effectiveness in the production process.

Conglomerate Combinations: The term "conglomerate combination" refers to the amalgamation of businesses operating in completely distinct business markets. When two businesses offering distinct products in various business sectors are combined, such combinations occur. When businesses want to strengthen their positions in various markets and boost their profit margins, which is unlikely if they do not combine, they form conglomerates. Conglomerate combinations frequently result in the monopolization of an enterprise in various markets and may result in a

[5] 'Horizontal Integration Strategy (with Examples)' (*StudiousGuy*) <https://studiousguy.com/horizontal-integration-strategy-with-examples/> accessed 17 October 2022

loss of product quality. Conglomerate mergers can lead to an increase in "market share, synergy, and cross-selling"

THRESHOLDS FOR COMBINATIONS

The financial thresholds for combinations set by Section 5 of the Competition Act, 2002 are to regulate such large-scale mergers and acquisitions in the country. The current thresholds as revised by the Government of India are stated below:

	APPLICABLE TO	ASSETS	TURNOVER
Enterprise Level	India	₹2,000 cr.	₹6,000 cr.
	World-wise leg with India	$ 1 bn. ₹1,000 cr.	$ 2 bn. ₹3,000 cr.
Group Level	India	₹8,000 cr.	₹24,000 cr.
	Worldwise leg with India	$ 4 bn. ₹1,000 cr.	$ 12 bn. ₹3,000 cr.

SECTION 5 Of the Competition Act talks about a combination

- Combination under the act means the acquisition of control, Shares, and voting rights which are a part of turnover and brands IPR and undertaking which are assets.
- Merger and amalgamation between and amongst enterprises when the combining parties exceed the threshold set in the act.

- The thresholds are specified in the act in terms of assets and donors in India and outside India.
- Entering into combinations which causes are likely to cause an appreciable adverse effect on competition within the relevant marketing India is prohibited and the such combination would be void.

CASE ANALYSIS: ZEE AND SONY MERGER

"The merger of **India's largest** media conglomerates, Zee Entertainment Enterprises Limited (ZEEL) and Sony Pictures Networks India (SPNI), has to be one of the **largest multi-billion-dollar mergers** in the media industry"[6]. While the merger gets the nod from the Competition Commission of India (CCI) with certain modifications. "After that in a shareholder meeting, 99.99% of ZEEL's equity shareholders approved the proposed composite scheme of arrangement"[7].

Parties to the Combination are:

(i) Culver Max Entertainment Private Limited (CME) (earlier known as Sony Pictures Networks India Private Limited (SPNI);

(ii) Bangla Entertainment Private Limited (BEPL);

(iii) Zee Entertainment Enterprises Limited (ZEEL); and

(iv) Essel Group Participants"

(i) CME 'Culver Max Entertainment Enterprise limited' (formerly known as Sony Pictures Network) is a wholly owned indirect subsidiary of 'Sony Group Corporation. CME is a part of the SGC group. CME is the owner of several General entertainment channels in India. (GEC), film, sports, and children's entertainment channels. CME's digital entertainment service provider goes by the name of Sony LIV, it offers OTT services in India and Internationally. It

[6] Ayushi Jain , '*Mergers and Acquisitions in India – An Analysis of the Current Legal Landscape with Special Reference to Zomato – Uber Eats and ZEEL Merger*' (2022) 5(2) IJLMH <https://doij.org/10.10000/IJLMH.113033> accessed 17 October 2022

[7] 'Zee Entertainment's Equity Shareholders Approve Proposed Merger with Sony Pictures Networks India with a Thumping Majority' (*EquityBulls,* 15 October 2022) <https://www.equitybulls.com/category.php?id=321014> accessed 17 October 2022

also has an Independent Production venture called STUDIO NEXT. CME holds a viewership of 700 million in the Indian Market and is available in 167 countries.

(ii) BEPL 'Bangla Entertainment private limited' is also a wholly-owned indirect subsidiary of SGC. BEPL is predominantly engaged in

- The acquisition of TV content, events, and rights for motion pictures.
- Generation of revenue from advertising of Telecast of TV content.

(iii) ZEEL 'ZEE Entertainment Enterprises Limited is a major entertainment and media corporation with operations in 190 countries and a presence in the Film, broadcasting music, live entertainment, and digital content. ZEE5 offers OTT services in India and other countries as part of ZEE's digital entertainment video platform. ZEE is a corporation that is also listed in the BSE Stock Exchange and NSE Stock Exchange of India Ltd.

Purpose of the Merger:

The merger between ZEE and Sony will result in the creation of a giant in the entertainment industry. After this merger takes place the combined revenue of the company will be $2 billion, and it will have access to over 25% of the broadcasting market share. The company formed after the merger will have 92 TV channels, two OTT platforms, and two film production and distribution companies. After analysing this merger experts have concluded that it fulfills all the criteria for a perfect marriage between two entities as they have minimum overlapping. Sony has a strong foothold in the Sports broadcasting market whereas zee does not as in 2016, "it sold its sports network business (TEN Sports Portfolio) to Sony for $385 million at a handsome return which was originally brought by Zee from Dubai's TAJ Group for $107 million". Zee has a strong presence in the broadcasting segment but it's still considered a rookie in the OTT market in comparison to Disney+Hotstar, Amazon Prime, and Netflix.

Terms and Conditions of the Merger

- Post-merger the Majority shares for the newly formed entity will lie with the stakeholders of SPNL. The merged entity will be led by Mr. Puneet Goenka who is currently the CEO of ZEEL the new CEO and MD.
- The SPNL shareholders will have 52.93% and the ZEEL shareholder will have 47.07% of the shares of the merged entity, while the promoter group would have received 3.99%. It has been decided that the CEO of the merged company will be the CEO of ZEEL, but the majority of the board members shall be from SPNL.[8]
- As part of the merger, the shareholders of Sony will also inject growth capital into SPNL, giving it an estimated $1.575 billion at closing that it can employ to pursue additional growth prospects.

HURDLES DURING THE MERGER

The conflict between INVESCO and ZEEL:

The announcement of the merger took plasmid in the conflict between ZEE's promoter family and its largest shareholder, INVESCO which holds a 17.88% stake in ZEE. At the beginning of 2020, under section 100 (2)(a) of the Companies Act, 2013, INVESCO called for an extraordinary general meeting where they proposed the removal of 3 Directors including the CEO Mr. Puneet Goenka as well as demanded change in the company's corporate governance policies. Additionally, the requisition had suggested adding 6 independent directors to ZEE's board of Directors. But Mr. Puneet Goenka refused to resign and instead began talks with Sony about the merger.

After INVESCO filed a petition under Section 98 of the Act before National Company Law Tribunal, Mumbai seeking an order that the requisitioned EGM be called and held, ZEE was directed by NCLT to take into account the demands put forward by them. On October 1, 2021,

[8] 'CCI Approves Sony-Zee Merger with Certain Modifications – Articles' (*ZEE5,* 4 October 2022) <https://www.zee5.com/articles/cci-approves-sony-zee-merger-with-certain-modifications> accessed 17 October 2022

Zee rejected the demand and claimed it to be invalid/illegal and at the same time filed a suit and an interim application therein before the Bombay High Court, inter alias requesting an injunction to prevent INVESCO from adopting any measures or acts that would advance the requisition, including calling for and holding EGM under sec 100(4) of the act. The Ld. Single Judge vide the impugned order granted ZEE the injunction.[9]

CCI's concern about the merger:

In its 21-page notice, CCI in its initial review said that the proposed merger deal will potentially heart the competition by having unparalleled bargaining power because it will create an entity over 92 channels in the country.[10] After the deal, in broadcasting and OTT platforms the only competition for ZEEL-SPNI will be Disney Star India and Viacom18. Zee is well-known in the regional market, whereas Sony is well-known in sports networks. The combined entity will offer a wider variety of channels and services; as a result, this merger may give the combined entity more negotiating power with distributors and advertisers. It might be able to pressure distributors and marketers for a greater price or commission or even to walk away from an agreement.

As per the statistics, "With a combined viewership of 26.7%, Zee and Sony are likely to surpass Disney Star in the broadcast segment (the current leader at 20%) and compete with Viacom18 to acquire rights to more sports properties to build its portfolio. The ZEEL SPN combined entity will command an ad revenue market share of 27%, largely at par with Disney Star's 26.5%. ZEEL reported advertising revenue of ₹4,396.5 crores in FY22"[11].

In response to the CCI 21-page notice, Sony-Zee submitted "voluntary remedies" To ease the watchdog's concerns, in the written agreement although these did not include structural

[9] *Zee Entertainment Enterprises Ltd v Invesco Developing Markets Fund* [2022] SCC OnLine 630 (Bom)
[10] 'Sony-Zee Merger Can Hurt Competition, More Scrutiny Needed, India Watchdog Finds' (*The Hindu*, 1 September 2022) <https://www.thehindu.com/business/sony-zee-merger-can-hurt-competition-more-scrutiny-needed-india-watchdog-finds/article65837439.ece> accessed 17 October 2022
[11] Lata Jha, 'Zee-Sony to Escalate War for Ads, Content' *(Live Mint*, 12 October 2022*)* <https://www.livemint.com/industry/advertising/zeesony-to-escalate-war-for-ads-content-11665516488971.html> accessed 17 October 2022

adjustments like the sale of specific channels to lessen the risk of competition. Instead, they have suggested, behavioural remedies such as to all channel distributors, such as direct-to-home satellite operators, on fair and non-discriminatory terms for a certain period after the deal and to assuage concerns over the entity's strong market position with advertisers, the parties proposed creating and their merged entity was open to offering mandatory pricing incentives and discounts operating "independent advertising verticals" for a certain duration.[12]After the tussle between ZEE-Sony and CCI anti-trust watchdogs, on Oct. 4, the CCI has given conditional approval to the proposed merger of Zee Entertainment and Sony Group's Indian unit. But this approval has been given subject to "certain modifications" which were accepted by the ZEE-Sony and after that ZEEL proposed to shut down its major regional language channel to ease the threat to competition.

ANALYSIS

As per media experts, the ZEE-Sony merger is the perfect marriage ever held in the Indian entertainment industry. Although the merger has gotten a clean chit from the CCI subject to certain modifications it does not imply that after the said modifications the merged entity will lose its dominant nature or will not have any major impact on the market. This merger will result in the formation of an economical and well-structured entity. Since it is a horizontal type of merger, as a result, there will be less competition in the market. Consequently, to the reduction of competition in the market, the merged entity will get ample space to expand. This may make the smaller entities of the market, which are growing organically susceptible to risk.

CONCLUSION

The CCI ensures fair competition among the entities. So, the consumer gets the opportunity to select the best services or products for themselves. The set thresholds under section 5 of the competition act, 2002, compel the entities to notify the Competition Commission of their merger

[12] 'Exclusive: Sony, Zee Offer Concessions to Ease India Watchdog Worry Over Mergers - Sources' *(U.S. News & World Report,* 12 September 2022*)* <https://money.usnews.com/investing/news/articles/2022-09-12/exclusive-sony-zee-offer-concessions-to-ease-india-watchdog-worry-over-merger-sources> accessed 17 October 2022

and acquisition deal. The CCI proceeds with an investigation for the sole purpose to ensure the competition in the market is not being compromised.