TECHNOLOGY SECTOR MERGERS AND ACQUISITIONS UNDER INDIAN ANTI-TRUST LAWS

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ABSTRACT

One of the main catalysts for our economy's progress is technology. And this technological transformation of our economy pushes our companies to improve and increase their technological capabilities. To meet their technological requirements, the companies often resort to mergers and acquisitions. The purpose of this study is to examine the approach of the Indian anti-trust laws towards mergers and acquisitions in the technology sector.

INTRODUCTION

The profound impact of technology on our economies has played a significant role in improving competitiveness, productivity and, in general, overall performance across companies.[1]Many companies develop new business models, adapt to technological changes, integrate innovative technologies into their production process and cultivate their inherent potential technological capabilities[2]. However, the Rapid pace of technological changes, shortened product life cycles, scarcity of resources, and increasingly intensive competition have caused significant challenges to the companies. As a result, many companies are forced to source and develop their technology and innovation capability quickly and externally.[3] However, this process can be uncertain, and time-consuming, especially considering that not all companies possess the technical know-how to develop innovative technologies due to their limited knowledge and skills. furthermore, the formidable competition from other technology firms aggravates the challenge of survival in today's fast-paced economy. Hence the companies resort to mergers and acquisitions as a strategic measure to obtain new technological knowledge/capabilities and to mitigate competition in the market. Mergers and acquisition

[1] Elena Ochirova, Literature Review of Mergers and Acquisitions with the Aim to Obtain Technology and Knowledge 2019

[2] Hitt M.A., Hoskisson R.E., Ireland R.D., Harrison, J.S. Effects of acquisitions on R&D inputs and outputs. Academy of Management Journal. 1991;34(3):693- 706. DOI: 10.5465/256412

Daojuan Wang, Technology-Based Mergers and Acquisitions 2015 deals are often part of the company's strategies for development and enhanced efficiency[4]. According to R. Frey and K. Hussinger due to mergers and acquisitions, companies may reorganise effectively their technologies and significantly improve their technology expertise.[5]

For eg. Alphabet Inc., the parent company of Google, expanded its reach into various industries by introducing innovative services such as the 'cost per click '(CPC) online advertising model, online video sharing platform and now digital health and digital homes. They have entered into these markets by acquiring more than 100 promising start-ups. Google's acquisition of Double Click helped them in procuring the targeted CPC model wherein the advertiser needs to pay only once the user has 'actively 'clicked on the advertisement – hence, the name 'CPC'.

Since many companies use mergers and acquisitions as a tool to acquire new technology, it poses a question of whether India's current competition policy framework and merger control in particular, are suitable to address these mergers and acquisitions in the technology sector, as it has demonstrated in the past that these businesses might easily avoid merger reviews and acquisitions despite having a significant impact on the market since they fall below the threshold set by the Competition Act of 2002.[6]

MERGERS AND ACQUISITIONS: COMPLIANCE UNDER THE INDIAN COMPETITION ACT 2002

The term combination can be explained as the acquisition of one or more enterprises by a company or the merger or amalgamation of enterprises. Section 5 of the Competition Act 2002 regulates and restricts combinations that can facilitate and aid anti-competitive activities in the relevant markets. Sub-clause 'c' of the section controls mergers and acquisitions by establishing certain thresholds. The section prohibits any "combination that causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India. The following thresholds apply for determining whether a merger or acquisition becomes a "combination" subject to scrutiny:

[4] Cloodt M., Hagedoorn J., Kranenburg V.H. Mergers and acquisitions: Their effect on the innovative performance of companies in high-tech industries. Research Policy. 2006;35(5):642-654. DOI: 10.1016/j. respol.2006.02.007
[5]Frey R., Hussinger K. The role of technologies in M&As: A firm-level comparison of cross-border and domestic deals. ZEW Discussion Paper. 2006;(06- 069).
[6] A. Srivastava & A. Yadav, Regulating Combinations in Platform Markets: An Indian Perspective, 21-53, Competition Commission of India Journal on Competition Law and Policy 2022.

  - Any mergers or acquisitions, where the enterprise remaining or has been created has an asset value of Rs.1,000 crore or a turnover of Rs.3,000 crore.

  - Alternatively, the mergers and amalgamations where the enterprise has assets exceeding USD 500 million worldwide, with at least Rs. 500 crores in India, or turnover exceeding USD 1,500 million worldwide, with at least Rs. 1,500 crores in India.

- For mergers or amalgamations where the group to which the enterprise belongs post-merger has assets worth more than Rs. 4,000 crores or turnover exceeding Rs. 12,000 crores in India.

- Alternatively, for mergers or amalgamations where the group has assets exceeding USD 2 billion worldwide, with at least Rs. 500 crores in India, or turnover exceeding USD 6 billion worldwide, with at least Rs. 1,500 crores in India.

- Additionally, any transaction related to the acquisition of control, shares, voting rights, or assets of an enterprise, merger, or amalgamation, exceeding Rs. 2,000 crores, is considered a combination under Section 5.[7]

It must be noted that, this section further states in its sub-clause that, where either the value of assets or turnover of the enterprise being acquired, taken control of, merged or amalgamated in India is not more than such value as may be prescribed, such acquisition, control, merger or amalgamation, shall not constitute a combination under section 5[8]. Additionally, the central government in its 2011 notification had introduced the target de minimise threshold, which applies to any transaction less than 750 crores or assets a little less than 250 crores in India. Such transactions shall be exempt from the notification even if the combined value of the acquirer and the target company exceeds the stipulated standards. These thresholds were raised to 1000 crores and 350 crores respectively in 2016. However, if any of these transactions result in an adverse effect within the relevant market, such transactions are voidable under section 3 of the act, even if it does not surpass the thresholds mentioned above. Hence as stated in Section 6 of the act, which provides for the regulation of combination, any transaction that

Competition Act, 2002, s 5
[8] IBID

causes or is likely to cause an appreciable adverse effect on the relevant market in India shall be considered void.

Any combination that exceeded the above-stipulated threshold limit was required to be notified to the CCI for pre-merger scrutiny within thirty days of approval of the proposal relating to merger or amalgamation, referred to in clause *(c)* of section 5 of the act, by the board of directors of the

enterprises concerned with such merger or amalgamation[9] , failure to comply shall result in competition law proceedings and penalties.

These thresholds apply to foreign-to-foreign transactions as well, if they have a clear nexus to the Indian relevant market. Hence any merger or acquisition, which has a substantial local nexus to India, cannot be concluded until merger clearance in India has been obtained or a review period of 210 days has passed, whichever is earlier. From the reading of the provision, it is evident that the existing thresholds for merger notice in India are based on a turnover and asset test.

FACEBOOK- WHATSAPP MERGER: IMPLICATIONS

It was the Facebook- -WhatsApp merger that questioned the adequacy of merger thresholds imposed by the Competition Act within a rapidly evolving market which primarily focuses on technology-driven mergers and acquisitions. It is noteworthy that the above thresholds focus only on two aspects: turnover and assets which is a rather traditional approach which prioritises price-related metrics while assessing the competition and market dynamics. However, as the Internet became a medium for transactions, the reliance on assets decreased. As a result, the companies shifted their focus from investing in assets to generating income through data collection. Due to the presence of non-price factors in the entity like data, certain combinations did not require the approval of CCI as they were not crossing the threshold. Yet, they had potential adverse effects on the market.[10] For instance, the Facebook- WhatsApp merger was one such transaction, that was below the stipulated thresholds. Although both Facebook and WhatsApp are US-based companies, they have substantial local nexus to the Indian relevant

Competition Act 2002, s 6
Agrawal, V., "Deal Value Threshold for Combinations", The CBCL Blog, National Law Institute,2023, https://cbcl.nliu.ac.in/guest-posts/deal-value-threshold-for-combinations/

market due to the massive user base it has in India.WhatsApp and Facebook's application 'Facebook Messenger' are direct competitors and the acquisition of the former by the latter can eliminate current competition and/or potential future competition letting Facebook have a dominant position in the market, evidently suggesting that the merger of these two companies can have an appreciable adverse effect on the competition Nonetheless, according to the Competition Act 2002, the CCI, which is India's nodal competition agency, has the authority to review only those transactions that exceed the threshold limits stipulated in the act.

Since Facebook's and WhatsApp's assets and turnovers were limited in India and did not cross the stipulated threshold, this transaction was not deemed as a 'notifiable transaction' that requires notifying the CCI for pre-merger scrutiny, due to which the transaction went unregulated.

Some other deals that went unregulated by the CCI were Zomato's acquisition of Uber Eats in 2020, for 350 million dollars. The deal didn't come under the ambit of notifiable combinations as it did not exceed the assets and turnover-based thresholds, which indicates the inadequacy of the existing framework.

THE NEED FOR A STRINGENT REGULATION: ADDRESSING REGULATORY GAPS AND RISK

The call for more stringent regulation is a consequence of the immense market dominance exercised by major tech companies. In today's digital era, technology is an indispensable part of everyday life and the market share commanded by industry giants is staggering. For instance, according to a New York Times article, over the past two decades, Google has acquired a minimum of 270 companies, including both competitors and nascent competitors. Additionally, they have been involved in 55 conglomerate mergers which have enabled them to enter into new industries.

A company that holds a dominant position in the market may engage in acquisitions for different reasons, one being to acquire the technical or human skills of the target company, a practice known as talent acquisition. Alternatively, they may acquire competitors who could have provided the consumers with cheaper alternatives, aiming to eliminate them from the market and reduce competition. This type of acquisition is commonly referred to as a killer acquisition. Additionally, another major reason for mergers is to gain access to valuable user data. Merging to gain access to valuable user data poses a significant risk if not regulated properly. It can potentially lead to infringement of user privacy, manipulation of consumer behaviour and use of data by creating entry barriers for small firms that do not have access to such large amounts of data, and use the acquired data to to identify competitive threats and stifle competition through acquisition strategies.

In 2020 the US government established a sub-committee to investigate competition in Digital markets, and this committee reported that Facebook used its data advantage to create superior market intelligence (acquired by data) to identify competitive threats by emerging firms and then kill those firms through acquisition strategies.[11]

For instance, Facebook's acquisition of Onavo, a mobile web analytics company that collected data concerning app usage, browsing history, search history, location, personal messages etc helped Facebook identify its fast-growing competitors that could potentially pose a threat to its dominance.

In particular, the data gave information on the growth projection of WhatsApp which revealed that the app posed a competitive threat to Facebook Messenger, this led to Facebook's acquisition of WhatsApp thereby eliminating WhatsApp's competition.

However, this merger also brought significant risks, particularly concerning privacy.WhatsApp had maintained strict privacy policies before its merger with Facebook. The data they collected were kept separate and compartmentalised. The privacy policies of WhatsApp before the merger stated that it does not collect user data, i.e., names, locations, emails, and content of encrypted texts between users. However, after the merger, they changed their privacy policy which led to the sharing of user data with Facebook.

Another instance is Google's merger with the ad agency DoubleClick for USD 3.1 billion. google at that time had no substantial presence in the advertising industry. Google had stated before the Federal Trade Commission and Congress that they would not combine Doubleclick's data with their ecosystem. However, in 2016 google went against its commitment and combined the user data of DoubleClick with data collected through its web

U.S. House Judiciary Committee, "Antitrust Investigation of the Rise and Use of Market Power Online and the Adequacy of Existing Antitrust Laws and Current Enforcement Levels" (2020) ecosystem, which includes a range of service products, such as Google Maps, Google Search, YouTube, and Gmail.

Similarly, Amazon is involved in mergers with the goal of eliminating competition from the market and gaining valuable consumer data. Amazon has acquired more than 90 undertakings to date, with an estimated acquisition cost of more than USD 37 billion and the diversification of their business in every market enabled them to acquire all kinds of consumer data..CNBC observed that the acquisition of Whole Foods provided Amazon valuable data on consumer behaviour, in both physical and online stores. This shows the strategy of Amazon using mergers and acquisitions as a tool to collect data.

Therefore it is evident that the massive dominance of these companies, their market expansion to acquire data, and their extensive history of acquiring competitors to stifle competition in the market raises concerns about potential anti-competitive behaviour.

The theory of harms states that such anti-competitive conduct of firms violates the anti-trust regulations and harms fair competition. Furthermore, their conduct undermines both the consumer's and competitors' interests in the market. Moreover, this behaviour risks hindering innovation, consolidating technology in fewer hands while also potentially leading to privacy violations.

Additionally, emerging companies may face insurmountable barriers to entry into the market due to the overwhelming dominance of these firms. Thus highlighting the urgent need for a revised and more assertive regulatory framework.

The 2023 COMPETITION ACT AMENDMENTS: OVERVIEW

From the above reading, it is understood that the advent of the digital economy has rendered the tools of competition analysis more or less futile, antitrust authorities around the world are expanding their toolsets to contend with these novel changes in the competitive landscape.[12]India, recognising the need to adapt to the current economic model, introduced significant amendments in 2023.

[12] Rakchhandha, R., "The Digital Economy and Killer Acquisitions: A Comparative Analysis of the CCI's Merger Thresholds for Digital Markets" 2022, SSRN.

Previously, India's competition law framework relied primarily on turnover and assets as the threshold criteria to determine reporting obligations to CCI, however, the Competition Law Review Committee in its 2019 report highlighted the inadequacy of such criteria in the current economic paradigm and there was a need for a threshold which was based on transaction size and the deal value.

Consequently, the Indian parliament approved the Competition Amendment Act, of 2023, on April 11, 2023. The amendments incorporated the recommendations of the committee, to counter the dominance of Big tech and improve the overall efficiency of its regulatory mechanisms. The Amendment Act was published in the Official Gazette, although it is yet to come into force.

The concept of deal value threshold has been incorporated into section 5 by amending the section in addition to the asset and turnover-based criteria. The Amendment Act now provides that any transaction related to the acquisition of control, shares, voting rights or assets of an enterprise, or merger or amalgamation having a value exceeding INR 20 billion (approx. US$ 245 million) will require CCI approval if the enterprise being acquired, taken control of, merged or amalgamated has "substantial business operations" in India. It has been left to the CCI to define "substantial business operations." Although the act provides a 'de minimis exemption', those transactions can still be vetted by the CCI if the deal value thresholds are met. Hence the amendment significantly expands the scope of review of the CCI.

The amendment also brings killer transactions with the purview of the CCI's regulatory authority, thus transactions like the Facebook -WhatsApp merger will fall under the jurisdiction of the CCI, even if the total assets or the turnover of the companies are below the required thresholds. Hence, foreign companies that have development centres and other revenue-generating business operations in India shall be regarded as "substantial business operations" in India. The global acquisition of such business shall be regulated by the CCI even if the assets and turnover value of those transactions are below the required thresholds.

The draft regulations have also explained the determination of the 'value of transactions' and the 'substantial business operations in India'. According to the draft the value of the transaction shall include:

- Direct or indirect forms of valuable consideration, whether immediate or deferred, including non-competition agreements and interconnected transactions,

- Arrangements entered into as part of the transaction or within two years after, like technology assistance or licensing agreements.

- Options and securities assuming full exercise of such options.

- occurrence or non-occurrence of any uncertain future events.[13]

The explanation to regulation 4 states that in circumstances where the true and complete value of the transaction is not recorded in the agreement executed between parties, the value considered by the board of directors, or a similar approving authority of the acquirer should be considered as the transaction value[14].

Additionally, the explanation also proposes that, in case the transaction value of a deal cannot be determined with reasonable certainty, the notifying party will be required to presume that the threshold of INR 2,000 crores (Indian Rupees Two Thousand Crores) has been met.[15]

According to the Draft Regulations, a target entity must have substantial business operations in India if it meets any of the following criteria:

1. If the number of users, subscribers, customers, or visitors in India within the 12 months before the deal execution date comprises 10% or more of its total global user base.

2. If the target's gross merchandise value (GMV) in India over the same period constitutes 10% or more of its total global GMV.

3. If the target's turnover in India for the preceding financial year accounts for 10% or more of its total global turnover.[16]

All of the above-mentioned conditions indicate that the target entity has significant business operations in India. Therefore, it can be easily concluded that the inclusive and broader scope

Competition Law Amendment Act 2023, draft regulations, reg 4(1)
Competition Law Amendment Act 2023, Draft Regulations, reg 4, Explanation (c)
Competition Law Amendment Act 2023, Draft Regulations, reg 4, Explanation (g)
Competition Law Amendment Act 2023, draft regulations, reg 4(2)

of these new amendments can ensure that a greater number of transactions that can potentially cause appreciable adversible effects shall fall within the scope of notifiable combinations, leading to a fairer market.

However, these regulations come with their shortcomings. For instance, the regulations can overburden the CCI with numerous cases since more transactions shall fall within the notifiable combinations, including those transactions that do not cause an appreciable adversible effect on the market. Moreover, although draft regulation has set out the determination of the value of transactions, it remains unclear on other parameters that could be deemed to be considered while computing the value of the transaction. These are some of the few shortcomings of the draft regulations.

INTERNATIONAL MERGER REGULATIONS: GLOBAL PERSPECTIVES

The deal value threshold in India was inspired by global jurisprudence from countries like Germany and Austria where it already exists. The Austrian competition law prescribes that any transactional value that exceeds EUR 200 million or the Combined aggregate turnover exceeding EUR 300 million worldwide and EUR 15 million in Austria or if the Target company has significant domestic activities shall constitute a notifiable combination.[17]

German law prescribes that any transactional value that exceeds EUR 400 million or has a combined aggregate turnover exceeding EUR 500 million worldwide and EUR 25 million in Germany is subject to the merger thresholds.[18]Section 35 of the German Act against Restraints of Competition establishes the minimum deal value threshold of USD 400 million for merger notifications and thus any target company with significant domestic operation with a transaction value exceeding USD 400 is subject to merger control examination by the German antitrust authority, this is subject to specific turnover-based threshold requirements.

Although the concept of substantial business operations is new to India, it was already integrated into many countries' legal jurisprudence like the USA, Austria, Germany, the European Union, and South Korea and these countries are successful in their incorporation and enforcement. One of the many criteria used by all these countries to identify a combination is

[17] Federal Cartel Act 2005
Federal Cartel Office (Bundeskartellamt), "Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35(1a) GWB and Section 9(4) KartG)"

by determining whether the company holds a strong market position. In jurisdictions like Germany and Austria, any company that has 'significant domestic operation' meets the prescribed deal value thresholds. Antitrust regulators in Germany and Austria have suggested that factors like the number of active users, the location of the target, the location of customers, and the place of research and development can determine whether a party has substantial operations in a country.[19]

In the UK if it is found that the company has a firmly established position in the market, then it is deemed that the company holds a strategic position in the market, meaning the activities of the company can significantly affect the market.

However, the UK still relies on turnover thresholds and has not yet incorporated the deal value thresholds. However, the United Kingdom's antitrust regulator may scrutinise any transaction where the parties acquire or supply at least 25 per cent of specific goods or services within the country, irrespective of the deal's monetary value.

CONCLUSION

The 2023 amendment to the Competition Act brings forth a shift from the conventional approach to a framework of law that is better suited to the current economic paradigm, shaped by technological advancements. Our regulatory frameworks had often appeared inadequate and obsolete for a rapidly evolving digital economy and the new amendments seek to modernise and equip our competition law for the realities of the current economic landscape. The introduction of the deal value thresholds and the incorporation of factors like substantial business operations in India aims to address the shortcomings of the previous thresholds which solely relied on assets and turnover of the companies. This transition is particularly important in light of the changing nature of business, where innovative digital technology-driven entities may not fit neatly within the old framework.[20] The updates aim to ensure that the competition regulatory framework remains relevant and responsive to the changing economy.

Sahu, U., "Revaluing Transactions: Navigating the Competition law Terrain with Deal Value Threshold" (2024), Manupatra Articles, https://articles.manupatra.com/article-details/Revaluing-Transactions-Navigating-the-Competition-law-Terrain-with-Deal-Value-Threshold

[20]IBID

As stated, the amendments do come with shortcomings. The lack of judicial precedents can cause uncertainty and interpretational challenges during the enforcement of the law. Additionally, it may lead to a significant burden on the CCI due to increased cases to review and regulate. For startups, the modifications bring forth increased complexities in their compliance posing a challenge to the source-constrained enterprises. Hence it is pertinent that the regulators and policymakers consider these shortcomings to ensure a balanced and more effective approach in implementing the amended regulations. Despite these challenges, the policymakers remain confident that the new amendments will effectively promote fairness and innovation in the market.