THE STARTUP HUNGER GAMES: DO MARKET TITANS ELIMINATE FUTURE RIVALS?

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UNDERSTANDING KILLER AQUISITIONS

The phenomenon of 'Killer Acquisition' is an ultimate strategic flex of a dominant firm, essentially acting as a corporate prenup designed to protect a monopoly.[1] It is an intentional manoeuvre where a powerful incumbent firm buys a nascent competitor, usually a tiny start-up with zero revenue but extreme potential. The aim of the incumbent firm is simply to terminate future competition by killing the product or the project by the nascent firm.

This concept is based on the risk that the incumbent firm may lose future revenue to an innovative product developed by a nascent firm, which could succeed and disrupt the incumbent's market share or buying and continuing to develop or operate the product despite the risk of cannibalising its own sales. Therefore, the defining features of killer acquisitions is the it is horizontal in nature, and that the outcome is that product development is terminated.[2]

The transition from theoretical risk to demonstrable harm, the concept was empirically validated in the pharmaceutical sector. In the pharmaceutical sector, approximately 6% of acquisitions qualify as killer acquisitions, amounting to roughly 50 such deals each year. The study further found that transactions valued about 5% below the United States Federal Trade Commission (FTC) turnover threshold were 11.3% more likely to be killer acquisitions than those valued 5% above the threshold.[3] This suggests that these mergers were not subjected to scrutiny by the investigating authorities as they fell below the threshold.

The digital sector also portrays the prevalence of killer acquisitions, the Silicon colossi - Amazon, Apple, Facebook, Google, and Microsoft made around 400 acquisitions globally.[4]

[1] Colleen Cunningham, Florian Ederer & Song Ma, *Killer Acquisitions*, 129 J. Pol. Econ. 649, 650 (2021).
[2] Cunningham et al, *Killer Acquisitions*, page 1.
[3] Cunningham et al, see Table 9 (The intensity of project discontinuation around FTC Review Threshold' on page 58.
[4] Furman review, See para 3.45.

Subsequently, in 2017, The Alphabet (Google), Amazon, Apple, Facebook, and Microsoft collectively expended USD 31.6 billion on start-up acquisitions.[5] These mergers were not deconstructed by enforcement agencies.

The Newport/Covidien case serves as a salient illustration of an alleged killer acquisition.[6] The acquisition, valued at a relatively low $108 million, involved the dominant ventilator manufacturer, Covidien with a $12 billion turnover, purchasing Newport Medical Instruments, which was on the verge of delivering 40,000 low-cost emergency ventilators under a government contract. This innovation represented a substantial market threat to Covidien's existing $10,000 per unit product line, functioning as a "maverick" substitute for mass casualty events. Following the transaction, Covidien intentionally stalled and ultimately terminated the project, despite its competitive viability, arguing unprofitability. The resultant failure to establish a national ventilator stockpile created an acute public health crisis during the COVID-19 pandemic, thereby demonstrating how pre-emptive elimination of a nascent competitor, often facilitated by low transaction values that circumvent regulatory scrutiny, inflicts significant long-term societal and welfare harm.[7]

A prominent example of a potential killer acquisition in India is Zomato's 2020 purchase of Uber Eats' India operations for approximately USD 350 million. By absorbing Uber Eats, a rapidly growing rival, Zomato reduced effective competition and reinforced the duopoly with Swiggy. The acquisition led to the complete cessation of Uber Eats' independent operations, eliminating a nascent competitive constraint that might have pressured prices or driven innovation.[8]

The "killer effect" which triggers discontinuation of the Nascent firm's Products or Services, curbs innovation, Reduces the Pressure on Prices or Quality, causes Market Foreclosure and enables Strategic Acquisition of Data or Users to stifle Competition threatens fair competition and consumers rights. Despite these concerns, there is a "gap" in the regulatory framework as the phenomenon is not addressed or criminalised under the competition act, Further Mergers

[5] The Economist, 26/10/2018, "American tech giants are making life tough for start-ups".
[6] DAF/COMP(2020)5, at 11 (discussing the turnover, product price, contract details, and acquisition value).
[7] DAF/COMP(2020)5, at 11–12 (discussing the acquisition's immediate aftermath, termination of the contract, the subsequent Phillips contract, the public health outcome, and the counterarguments regarding substitution and maverick status).
[8] Zomato Acquires Uber's Food Delivery Business in India, ZOMATO (Jan. 20, 2020), https://investor.uber.com/news-events/news/press-release-details/2020/Zomato-Acquires-Ubers-Food-Delivery-Business-in-India/default.aspx.

rarely trigger interventions by competition authorities unless they involve substantial additions of incumbent market shares.[9] In particular, start-up acquisitions are hardly ever challenged.[10] Practitioners and academics have argued that this lenient approach may be flawed, as it does not take risks to potential competition into account.

DEAL-VALUE THRESHOLD AS A CHECK ON KILLER ACQUISITIONS?

POST AMENDMENT DEAL- VALUE THRESHOLD

The Deal-Value Threshold (DVT) under the Competition (Amendment) Act, 2023, inserted via Section 5(d), poses the question of whether it is an effective mechanism to 'kill off' killer acquisitions?

Under the regime, a combination must be notified to competition commission of India (CCI) when the two concurrent conditions are met firstly, the value test which requires a transaction value exceeding Rupees two crore (Rs. 2000 crore) and secondly, the business test where the target enterprise has substantial business operations (SBO) in India:

(I) The Value test

The "value of transactions" includes considerations in all forms whether they are direct or indirect, immediate or deferred, cash or otherwise. It is inclusive of Consideration for covenants, undertakings, obligations or restrictions imposed on the seller or any other person, even if agreed separately. Furthermore, interconnected steps and transactions, incidental and ancillary arrangements, call options or share acquired based on options in an agreement,

[9] A rare exception was the Federal Trade Commission (FTC)'s intervention against the acquisition of HeartWare by Thoratec, a maker of left ventricular assist devices, in 2009 on the grounds that "HeartWare alone represents a significant threat to Thoratec's LVAD monopoly," In re Thoratec Corp., FTC File No. 091-0040, Decision and Order (July 30, 2009), https://www.ftc.gov/sites/default/files/documents/cases/2009/07/090730thorateadminccmpt.pdf. Similar arguments played a role in the FTC's treatment of the proposed acquisition of the small rival Pacific Biosciences by Illumina and the acquisition of College Park by Ossur, both producers of prosthetic devices, OECD, Killer Acquisitions in Health and Technology Sectors 22 (2020).

[10] Crémer, de Montjoye & Schweitzer, *Competition Policy for the Digital Era* 2019, European Commission ("EU Report"); Furman et al., *Unlocking Digital Competition* 2019, UK Government ("Furman Report"); and Scott Morton, Weyl, & Teece, *Committee for the Study of Digital Platforms: Stigler Committee Report* 2019 ("Stigler Report"); see also Salop, *The First Principles Approach to Antitrust*, 81 Antitrust L.J. 1 (2016); Salop & Shapiro, *Designing Antitrust Rules for Assessing Unilateral Market Power on the Internet*, 161 U. Pa. L. Rev. 1663 (2017); Hovenkamp & Shapiro, *Antitrust Limits on Startup Acquisitions*, 10 J. Antitrust Enforcement 44 (2017); and Bryan & Hovenkamp, *When Startups Threaten Monopoly: Antitrust and Killer Acquisitions*, 3 J. Antitrust Enforcement 150 (2020).

estimated future payments are all entail under the value of transactions.[11]

These transactions are proved through the total economic considerations, through evidences such as a share purchase agreement, banking records, valuation reports and regulatory filings.[12] Interconnected steps must be aggregated using term sheets, board minutes, or correspondence, with substance prevailing over form in order to establish such transactions.[13]

(II) The business test

Under the 2024 Combination Regulations, an enterprise is considered to have "substantial business operations" in India if it satisfies any one of the following three tests:

I. User Test –the user test providers of digital services, at least 10% of the enterprise's total global business or end users must be located in India.[14]

II. Gross Merchandise Value (GMV) Test – GMV test states that the enterprise must have a gross merchandise value in India during the twelve months preceding the relevant date that is (a) 10% or more of its total global GMV and (b) exceeds INR 500 crores (approximately USD 59.5 million or EUR 53.7 million). The monetary requirement in clause (b) does not apply to digital services.[15]

III. Turnover Test – Turnover test is determined by an enterprise's turnover in India during the preceding financial year must constitute (a) at least 10% of its global turnover and (b) exceed INR 500 crores, with the monetary requirement again inapplicable to digital services.[16]

EXEMPTIONS FOR THE DVT THRESHOLD

The DVT has certain exemptions, and the combinations falling within these categories are not

[11] Morgan, Lewis & Bockius LLP, *Competition Commission of India Provides Updated Deal Value Threshold* (Sept. 19, 2024), https://www.morganlewis.com/pubs/2024/09/competition-commission-of-india-provides-updated-deal-value-threshold.
[12] competition Act, 2002, § 5, No. 12 of 2003 (India); Combination Regulations, 2011, Reg. 5(9).
[13] *Brown Shoe Co. v. United States*, 370 U.S. 294, 330–31 (1962); *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 498–99 (1974).
[14] Competition Commission of India (Combinations) Regulations, 2024, Reg. 6(1)(a) (India).
[15] Id. Reg. 6(1)(b).
[16] Id. Reg. 6(1)(c).

obligated to notify the CCI, thereby tempering the reach of the DVT.

(i) De minimis rule

The De minimis rule or target-based exemption permits parties to avoid notification even when the deal value exceeds ₹2,000 crore, provided that the target enterprise's Indian assets do not exceed ₹350 crore or its Indian turnover does not exceed ₹1,000 crore.[17]

(ii) Exemptions from Mandatory Notification under the CCI (Combinations) Regulations, 2011

Certain categories of transactions remain exempted from mandatory notification under the Competition Commission of India's regulatory framework. Specifically, Schedule I of the CCI (Combinations) Regulations, 2011 exempts, inter alia, acquisitions of less than twenty-five percent of shareholding undertaken solely as an investment without conferring control, intra-group restructurings, bonus issues, stock splits, and acquisitions of assets not directly related to the acquirer's business. These transactions, therefore, fall outside the purview of mandatory filing requirements irrespective of the aggregate deal value.[18]

(iii) Statutory and Government-Mandated Exemptions

Combinations which are executed in compliance with statutory requirements, court-sanctioned schemes, other directions issued by governmental authorities. Further, transactions expressly exempted by the Central Government under Section 54 of the Competition Act, 2002 such as specific bank amalgamations or consolidations of central public sector enterprises are excluded from the deal value threshold notification requirements.

STARTUPS AT RISK: ASSESSING THE DVT'S ROLE IN CURBING KILLER ACQUISITIONS

The amendment introducing the Deal-Value Threshold under the Competition Act was aimed at enhancing the CCI's ability to prevent anti-competitive acquisitions, particularly those targeting startups, by focusing on the transaction value rather than solely on asset or turnover

[17] Notification S.O. 988(E), Ministry of Corporate Affairs (Mar. 27, 2017); extended by Notification S.O. 2039(E) (May 16, 2024).
[18] Competition Commission of India (Procedure in Regard to the Transaction of Business Relating to Combinations) Regulations, 2011, Sch. I.

thresholds. However, the current framework is not foolproof, as it lacks a robust system of checks and balances.

The combinations which fall below Rs. 200 Crore are not required to notify CCI as they do not meet the statutory threshold under the Amendment act. This threshold serves as the primary filter for CCI scrutiny, ensuring that only combinations of significant economic size are examined for potential anti-competitive effects.[19] In July 2023, Car tech ltd. acquired Sobek auto which was OLX's Indian auto business, the deal was for about Rs.535 crore below the DVT threshold. After the acquisition Car tech shut down Sobek's customer to business operations while retaining its classifieds arms[20], a move that mirrors the classic killer acquisition pattern of eliminating a potential rival without triggering regulatory scrutiny. Similarly, there are multiple deals that take place below the threshold which ends up shutting down a start-up and ultimately eliminates the product from the market.

The two prong test laid under section 5(d) fails to address the issues for early stage startups in with limited Indian operations. Even if a startup has high technology or a dynamic product with a fierce market potential but the Indian users, revenue or assests are below the prescribed threshold an acquisition can proceed without CCI's scrutiny. For instance, consider a hypothetical scenario in which a global technology firm acquires a Bengaluru-based artificial-intelligence startup for ₹3,000 crore. If the startup derives less than 10% of its users or turnover from India, the deal would satisfy the value test but fail the SBO test, and thus would not trigger CCI review. Analogously, in the U.S., Meta's acquisition of Kustomer, Inc. a customer-service software company with negligible Indian presence raised competitive concerns internationally but would not have required Indian merger notification due to its minimal domestic operations.[21]

Under the post-amendment DVT regime, CCI notification is triggered based on the relevant date of transaction completion.[22] This creates a potential loophole, as acquirers can structure an acquisition in multiple smaller tranches, each individually below the ₹2,000-crore threshold

[19] Competition Act, 2002, § 5(d), as amended by Competition (Amendment) Act, 2023.
[20] *CarTrade Tech to acquire Sobek Auto for Rs 537 crore*, BUS. STANDARD (July 11, 2023), https://www.business-standard.com/article/companies/online-platform-cartrade-tech-to-acquire-sobek-auto-for-rs-537-crore-123071001076_1.html.
[21] Press Release, Meta Platforms, Inc., *Meta to Acquire Kustomer* (Nov. 30, 2020), https://about.fb.com/news/2020/11/facebook-to-acquire-kustomer/; see also European Commission, Case M.10262, *Meta/Kustomer* (Jan. 27, 2022).
[22] Competition Act, 2002, § 5(d), as amended by Competition (Amendment) Act, 2023.

and potentially failing the SBO test. By doing so, the overall acquisition could escape CCI scrutiny, even though, in substance, the total transaction consolidates control over the target and could substantially reduce competition.

The DVT measures acquisitions primarily through monetary metrics as transaction value, turnover or GMV however the startup ecosystem functions on strategic values from intangible assests including user data, algorithms, intellectual property rights etc. Viewing this through a prism, the monetary lens of DVT only captures one dimension of start up's worth, refracting other crtical facets. Just as the light spilts into multiple colours through a prism, a start up's value radiates across non-monetary dimensions therefore acquisitions that appear small in terms of monetary metrics may still kill competition by removing other aspects.

These illustrations demonstrate that the DVT threshold, while useful for screening large transactions, is insufficient to prevent acquisitions that effectively kill startups and restrict dynamic growth in the market.

CROSS-JURISDICTIONAL INSIGHTS ON MERGER CONTROL AND STARTUP SAFEGUARDS

A comparative analysis of foreign legal frameworks demonstrates alternative mechanisms that integrate both quantitative thresholds and substantive antitrust scrutiny, offering lessons for addressing these gaps.

European Union (EU) Legal Framework

The European Union regulates mergers and acquisitions under the Merger Regulation (Council Regulation (EC) No. 139/2004), which prohibits concentrations that significantly impede effective competition, particularly by creating or strengthening a dominant position.[23] The Regulation requires notification when the combined worldwide turnover of the parties exceeds €5 billion and the EU-wide turnover of each of at least two parties exceeds €250 million.[24]

Beyond numeric thresholds, the substantive legal assessment evaluates whether a transaction would harm competition by eliminating actual or potential competitors, reducing innovation,

[23] Council Regulation 139/2004, art. 1, 2004 O.J. (L 24) 1 (EU).
[24] Id. arts. 2–6.

or strengthening market dominance.[25]The European Commission applies a market analysis framework, assessing the relevant product and geographic markets, barriers to entry, buyer power, and potential foreclosure effects.[26]Importantly, even acquisitions of small or early-stage firms can be challenged if their removal would substantially alter competitive dynamics. The Commission may impose remedies, structural or behavioral, or block the merger entirely to preserve competition, reflecting a preventive approach grounded in law rather than purely financial metrics.[27] The review of Microsoft's acquisition of LinkedIn exemplifies this approach, where the Commission examined not only the turnover but also strategic implications for innovation and market access.[28]

United States (U.S.) Legal Framework

In the United States, the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act, 1976) establishes a mandatory pre-merger notification system for transactions exceeding statutory size-of-transaction and size-of-person thresholds, enforced by the FTC and DOJ Antitrust Division.[29] The substantive legal standard derives from Section 7 of the Clayton Act, which prohibits mergers that "may substantially lessen competition, or tend to create a monopoly."[30]

U.S. antitrust authorities evaluate both current and potential competition, giving effect to the potential competition doctrine, which targets acquisitions of early-stage firms that could emerge as competitors.[31] Enforcement tools include blocking transactions, requiring divestitures, or negotiating consent decrees to preserve market structure. The acquisitions of Instagram and WhatsApp by Facebook demonstrate the framework's capacity to intervene in high-strategic-value transactions, even when the targets' immediate revenues were minimal, focusing on the elimination of future competition rather than transaction size.[32]

Through this lens, the U.S. framework integrates notification requirements with detailed substantive legal scrutiny, ensuring that strategic acquisitions of early-stage or technologically

[25] Id. arts. 2–6; European Commission, *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, 2004 O.J. C 31/5.
[26] Id.
[27] Id.
[28] Id.
[29] Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §§ 18a–18b.
[30] 15 U.S.C. § 18 (Clayton Act, 1914).
[31] U.S. v. Facebook, Inc., Case No. 1:20-cv-03590 (D.D.C. filed Dec. 9, 2020).
[32] FTC v. Instagram, 2012–2014 (transaction filings and FTC reviews), https://www.ftc.gov/enforcement/cases-proceedings.

significant firms are assessed for their competitive impact.

Both the EU and U.S. frameworks illustrate a preventive, competition-focused approach that combines quantitative thresholds with substantive analysis of market effects, potential competition, and strategic significance. Unlike India's DVT, which relies primarily on transaction value and Indian-specific operational metrics, these regimes can capture acquisitions of early-stage startups and strategically important firms, imposing remedies or blocking deals where competition would be substantially harmed. For India, these examples underscore the need for a more nuanced, legally robust framework that incorporates not only monetary thresholds but also potential market impact, innovation, and strategic importance, to effectively prevent "killer acquisitions" and safeguard the startup ecosystem.

ENHANCING THE DEAL-VALUE THRESHOLD REGIME: REGULATORY REFORMS FOR STARTUP PROTECTION

To address the limitations of the post-amendment Deal-Value Threshold (DVT) and enhance the Competition Commission of India's (CCI) capacity to prevent anti-competitive acquisitions of startups, several reforms merit consideration. Primarily, the DVT could be recalibrated for startups, or a complementary **"strategic startup" test** could be instituted, whereby CCI scrutiny is triggered when a transaction involves a startup of high technological or innovative potential, possessing critical intellectual property, proprietary algorithms, or strategic data, and whose acquisition may have a disproportionately adverse impact on competition relative to its turnover or assets.[33] Such a mechanism would ensure that strategically significant early-stage enterprises are subject to review even where the monetary value of the transaction falls below the statutory ₹2,000 crore threshold, echoing the U.S. potential competition doctrine. In addition, regulatory provisions should mandate the **aggregation of staged or tranche-based acquisitions** to capture the economic substance of the transaction, thereby preventing circumvention of notification requirements.[34] The assessment framework could also be expanded to incorporate **intangible assets, user data, intellectual property, and other non-monetary sources of competitive advantage**, reflecting the full spectrum of a startup's strategic significance, which may not be adequately captured by turnover or Gross Merchandise

[33] Clayton Act § 7, 15 U.S.C. § 18 (1914); U.S. v. Facebook, Inc., Case No. 1:20-cv-03590 (D.D.C. filed Dec. 9, 2020).
[34] Competition Act, 2002, § 5(d), as amended by Competition (Amendment) Act, 2023.

Value metrics alone.[35] Finally, proactive sector-specific **monitoring and reporting obligations** could be introduced for high-risk industries, including fintech, artificial intelligence, and health technology, thereby enabling early detection and evaluation of transactions that may pose competitive risks.[36] Collectively, these reforms would enhance the preventive efficacy of the Indian merger control regime, aligning it with international best practices while safeguarding the dynamism and growth potential of the startup ecosystem.

[35] Pulukuri Kotayya v. Emperor, AIR 1947 Mad 86 (India); Council Regulation 139/2004, arts. 2–6, 2004 O.J. (L 24) 1 (EU).
[36] European Commission, *Merger Remedies Study*, 2011, https://ec.europa.eu/competition/publications/studies.