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ASSESSING M&As BASED ON THE NEW DEAL VALUE THRESHOLD – A COMPARATIVE ANALYSIS

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ABSTRACT

*The Competition Commission of India ["**CCI**"] has been conducting research studies and surveys to find ways to tackle the new challenges posed in the digital economy. Recently, it came out with the Competition Amendment Bill 2022 ["**Bill**"] which introduces several changes to the Competition Act 2022 ["**the Act**"] in an attempt to align the laws with the current market dynamics.*

These amendments include the proposal to alter the definition of combinations that are notifiable to the CCI to bring under purview as well as the mergers and acquisitions that CCI was unable to scrutinise under the traditional assets and turnover based threshold. For instance, deals with high value like Facebook-WhatsApp deal or Myntra-Jabong deal. The article discusses the introduction of the deal value threshold for notification of combinations and its impact on the competition framework in India. Additionally, a bird's eye view of jurisdictional comparison is attempted to assess the need and viability of the new threshold to assess digital M&As.

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I. INTRODUCTION

"The world stands on the cusp of the Fourth Industrial Revolution (4IR), with Big Tech firms like Facebook (now Meta) implementing mind-boggling tech like the Metaverse (based on Augmented Reality); and others like Google, which have achieved quantum supremacy; and SpaceX, which is on the verge of colonizing space. With these technological innovations becoming commonplace in the coming decades, India not only needs to push for innovation at home but also design robust policy mechanisms to achieve tech sovereignty."[134]

Globally, competition authorities are facing major challenges - to better understand the relationship between competition and innovation and to assess competition among platforms and ecosystems. Competition between platforms is dynamic - Take the business model of Amazon which started with book sales but scaled to offer lucrative cloud services, which was a discovery of the market by offering innovative services. In the case of Instagram - it was a photo app that unexpectedly became a rapidly growing social media platform. It is challenging when the simple economics of price competition and textbook monopoly model does not support the business model of scale economies, tipped markets or ecosystem competition.

In the last two decades, the Indian government has formulated policies and vision statements to keep pace with evolving technologies. These are designed, developed, and framed to strengthen India's technological position globally and for India to emerge as a world leader in the coming years.[135]

One of the changes that the Indian government has attempted to implement to keep pace with the evolving technologies is through competition law by proposing Competition Amendment Bill, 2022 that aims to align the competition policy of India with the technological development that has occurred in the digital economy.

The Bill was introduced in the Lok Sabha on August 5, 2022 and referred to a Standing Committee on August 17 for its opinion. While the Bill undergoes examination, it is important to assess some of the key provisions that it proposes. The Bill, *inter alia*, seeks to amend Section 5 of the Act to regulate mergers and acquisitions based on the size of transactions. The Bill provides that if the value of any transaction in connection with the

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[134] Prachi Mishra and Samyank Bai Leekha, 'Technology Policymaking in India: The need for a paradigm shift' (*Observer Research Foundation,* 15 January 2022) <https://www.orfonline.org/expert-speak/technology-policymaking-in-india-the-need-for-a-paradigm-shift/> accessed 20 December 2022.
[135] ibid.

acquisition of any control, shares, voting rights, etc., exceeds Rs. 2,000 crores, it would require filing a notice of combination before the CCI and empower the Central Government to exempt certain transactions from the requirement to file combination notice under the Act.[136]

This proposal was presented based on the premise that some combinations, especially in the digital economy, are required to be reviewed by the CCI due to the potential competition concerns, however, these combinations do not meet the existing assets or turnover thresholds enlisted under Section 5 of the Article. This is because some business models have low asset values and turnovers but can still make an impact on the competition in the market due to their potential competitiveness. The high deal values of such transactions can indicate the potential of smaller companies with innovative ideas and products.

However, the CCI is unable to review these transactions if the threshold requirements are not met unlike jurisdictions like the US where the agencies are allowed to review and challenge non-notifiable mergers even after the merger has been consummated. The Federal Trade Commission has reviewed 15 non-notifiable transactions and the Department of Justice reviewed 18 non-notifiable transactions in the period 2015-2020.[137] However, since non-notifiable transactions are not reviewable by the CCI in India, the drafters of the Bill thought it necessary to include deal value thresholds to ensure that these high-value deals are reviewed to fill this enforcement gap.

II. <u>THE IMPACT OF THE AMENDMENT</u>

The inclusion of the deal value proposal will cover high-value deals (valued over Rs. 2,000 crores) if the involved undertakings have substantial business operations in India. While it is clear that the transaction has to pass a deal value and local nexus test in order to trigger the mandatory notification requirement, the proposal currently does not provide much guidance regarding the same.

The adoption of this proposal by the Parliament will result in the expansion of the merger control regime in India. The deals that were able to go unscrutinized because the involved undertakings had low turnover and value of assets can now be examined by the CCI if they meet the deal value threshold. For instance, deals like the Facebook-WhatsApp deal ($19

[136] The Competition (Amendment) Bill 2022, cl 6; The Competition Act 2002, §6.
[137] Organization for Economic Co-operation and Development, 'Start-ups, Killer Acquisitions and Merger Control – Note by the United States' (DAF/COMP/WD(2020)23, 11 June 2020) Para 34, <https://one.oecd.org/document/DAF/COMP/WD(2020)23/en/pdf≥ accessed 11 December 2022.

billion), Myntra-Jabong deal ($70 million) and Jio-Facebook deal ($5.7 billion)[138] did not come under the ambit of Section 5 of the Act despite their high values. However, the CCI will be able to assess these transactions under the new threshold.

Facebook acquired WhatsApp in 2014 for $19 billion and essentially its 450 million monthly users worldwide.[139] This deal was, however, unscrutinized by the CCI as it did not meet the asset or the turnover threshold. The merger of the two undertakings has raised competition concerns across the globe. Acquiring WhatsApp, removed it as a potential threat to the monopoly that Facebook holds over the personal social networking market and the combination of user data between the two undertakings can strengthen the data advantage that Facebook possesses. In a recent case filed against the new privacy policy of WhatsApp, the CCI has observed that data collection by Facebook can be used to engage in consumer profiling and track user behaviour across platforms.[140] This can have exclusionary effects in the display advertising market, create high barriers to entry and leverage the data advantage to reinforce its dominant position in related markets as well.[141]

The CCI was unable to assess the risk back in 2014 due to the enforcement gap for mergers in the digital economy. However, the CCI will be empowered to review these kinds of transactions going forward, if the Bill is approved. Other deals that were concerning include the Myntra-Jabong deal worth $70 million in 2016.[142] The acquisition, which has been akin to acquiring the competition, has increased the level of concentration in the market for online fashion retail and likely tipped the scales in favor of Flipkart who beat Snapdeal and acquired Jabong through Myntra.[143] This high-value transaction was also not reviewed by the CCI due to the limitations of the asset and turnover thresholds.

It appears that there was a need to develop the law to allow the CCI to effectively regulate mergers where the sale figures or the turnover of the undertakings do not accurately reflect the competitive potential.

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[138] Anupam Sanghi, 'Facebook-Jio Deal: What India's Competition Regulator Will Have to Consider' (*The Wire,* 10 June 2020) <https://thewire.in/business/facebook-jio-deal-what-indias-competition-regulator-will-have-to-consider> accessed 16 December 2022.

[139] Press, 'Facebook buys WhatsApp for $19B. Yes, it is a big deal' (*Indian Express,* 20 February 2014) <https://indianexpress.com/article/technology/technology-others/facebook-whatsapp-19b-deal/> accessed 15 December 2022.

[140] I*n Re: Updated Terms of Service and Privacy Policy for WhatsApp Users*, Suo Moto Case No. 01 of 2021.

[141] ibid.

[142] Debojyoti Ghosh and Deepti Chaudhary, 'Myntra's Jabong Buy May've Nullified Competition, but what about Profits?' (*Forbes India,* 29 August 2016) <https://www.forbesindia.com/article/boardroom/myntras-jabong-buy-mayve-nullified-competition-but-what-about-profits/44131/1≥ accessed 17 December 2022).

[143] ibid.

Next, the article presents a jurisdictional comparison to examine how different competition authorities have approached the issue of these high value transactions.

III. JURISDICTIONAL COMPARISON

A. The European Region

The note will first assess how European countries have attempted to regulate these combinations and whether they have been effective.

i. PayPal – Honey Science eal (Germany)

In 2017, Germany decided to amend its Competition Act to include that a concentration notification requirement would apply if the transaction value of a merger or acquisition exceeded EUR 400 million and the target undertaking had substantial operations in Germany. The domestic activity in the digital sector is measured through criteria like monthly active users, unique visitors, etc and the local nexus can be established through the location of consumers and location assets if it is used for business activity.[144] The business activity in Germany must also be significant for it to fall within the contours of Section 35 (1a) of the German Competition Act.[145]

For a demonstration of how the test for the deal value threshold is applied, let us take a look at the PayPal and Honey Science acquisition.

Background –

PayPal's main products include digital wallets that allow users to make and receive payments. Honey's main product is a free browser extension that automatically finds and applies promotional and discount codes for users when checking out during online shopping. Advertisers provide codes to online retailers on a commission basis. The acquisition will allow PayPal to provide better and or more personalized services to consumers beyond the core checkout services.[146]

PayPal notified the German competition authority about its acquisition of Honey Science for approximately $4 billion as it exceeded the deal value threshold and Honey Science had considerable operations in Germany.

[144] Bundeskartellamt, 'Guidance on Transaction Value Thresholds for Mandatory Pre-Merger Notification (Section 35 (1a) GWB and Section 9 (4) KartG)' (July 2018).
[145] ibid.
[146] *PayPal/Honey Science*, B6-86/19 (Germany).

Assessment of Local Nexus –

The authority considered factors like a large number of domestic users, considerable partnerships with retailers, the rendering of services in Germany, and the fact that the turnover did not reflect the economic and competitive potential (however, it acquired considerable investment showing its potential).

Substantive Analysis –

1. The business model of Honey Science had significant indirect network effects. Transaction platforms are often monetized on a larger scale only years after entering a market and the sales figures do not reflect competitive potential in the initial years.

2. The authority assessed the acquisition considering PayPal's relatively strong market position in the internet payment market and the possible conglomerate or vertical effects like market foreclosure or bundling practices. However, several fast-growing payment service providers (Klarna, WireCard, Apple Pay, Google Pay) have emerged and therefore, it concluded that it is unlikely that the transaction will have substantial anticompetitive effects.

Examining mergers via the deal value threshold seems like a cautionary step by jurisdictions to ensure that the big digital mergers do not adversely affect competition. Let us look at other cases to assess whether this threshold has been effective in filtering out potentially problematic mergers.

ii. Facebook – Giphy Deal (Austria)

Austria introduced a similar threshold in 2017 for transactions exceeding EUR 200 million and if the target is active in Austria to a significant extent.

In 2020, Facebook (Meta) acquired Giphy for approximately $400 million, but failed to notify the Austrian Federal Competition Authority [**"AFCA"**] of the transaction even though it exceeded the deal value threshold and Giphy had sufficient domestic activities in Austria. Meta was fined 9.6 billion EUR for failing to notify the transaction.[147]

Background - Giphy provides a searchable GIF library whose GIFs and stickers can be accessed through most of the popular social media platforms via an API.

[147] Austrian Federal Competition Authority, 'Facebook fine for illegal merger now final' (31 August 2021) <https://www.bwb.gv.at/en/news/detail/facebook-fine-for-illegal-merger-now-final> accessed 18 December 2022.

Competition Concerns found by the AFCA - The AFCA found that the acquisition could potentially reinforce the dominant position of Meta in social media and online advertising by (1) Restricting non-discriminatory access to Giphy for other services;

(2) Obtaining sensitive information about rivals through the other apps integrated interface to the Giphy library and;

(3) Stifling potential competition between Meta and Giphy in online advertisement.[148]

Substantive Analysis –

i. The Cartel Court affirmed that the transaction could strengthen Meta's position in the market and impede competition. There was a possibility the transition could result in denial of access or limited access to Giphy's service for Meta's competitors.

ii. However, the Court found a remedy and allowed the transaction based on the conditions that – non-discriminatory access to Giphy's GIF library be provided; to grant alternative GIF libraries be granted access visa API to Giphy's GIF library to allow the establishment of an additional GIF provider.[149]

The deal value threshold enabled Austria to assess a digital merger and provide remedies to ensure that the potential adverse effect on competition could be avoided while allowing the merger. However, this deal was not so lucky in the UK.

While similar theories of harm were reviewed by both jurisdictions, the outcome has been different.

iii. Facebook – Giphy Deal (UK)

Substantive Analysis –

Apart from the vertical concerns found in Austria, the Competition and Markets Authority ["**CMA**"] also found horizontal concerns - the merger would also reduce dynamic competition in display advertising as the efforts to innovate and expand by Giphy could potentially make it a new entrant in the market.[150] It was noted that the behavioral remedies proposed by Meta were insufficient and that a structural remedy was required to resolve the

[148] Austrian Federal Competition Authority, 'Meta (Facebook)/Giphy merger: AFCA appealing against conditional clearance' (4 March 2022) <https://www.bwb.gv.at/en/news/detail/meta-facebook-giphy-merger-afca-appealing-against-conditional-clearance> accessed 15 December 2022.
[149] ibid.
[150] *Meta v Competition and Markets Authority,* Case No: 1429/4/12/21 (2022) (UK).

competition concerns. The nature of the substantial lessening of competition found in the merger was dynamic and not time-limited which could not be addressed by the remedies.[151] Further, the difficulty in specifying Meta's obligations, and the risk of circumvention of obligations and the difficulty in the enforcement and monitoring of the obligations were found.[152]

The above cases reflect how the same transaction, when assessed by different authorities, can lead to dissimilar outcomes. While similar vertical concerns were raised in the cases, Austria cleared them after imposing some conditions on Facebook, however, UK concluded that the only way to resolve the competition concerns was through the divestiture of Giphy. The CMA preferred structural remedy over behavioral remedy as they addressed the competition concerns of the merger at its source and monitoring and enforcement of behavioral remedies were quite difficult. In these merger analysis cases, the authorities are required to predict future market conditions and therefore, it is likely that these predictions will differ. Austria chose to take a more liberal approach by clearing the merger subject to conditions, while the UK chose to address the concerns by prohibiting the transaction.

iv. Meta – Kustomer Deal and Illumina – GRAIL Deal (European Union)

The European Commission has been a key competition regulator when it comes to the digital economy. The EU decided to take a different approach to tackle these mergers rather than introducing a deal value threshold. It proposed the Digital Markets Act ("**DMA**") which states that gatekeepers under the DMA are required to inform the Commission about any intended concentration that involves another provider of services in the digital sector irrespective of whether it is notifiable or not.[153] This sector-specific regulation allows the Commission to assess any merger involving gatekeepers to ensure that the competition in the market is not harmed. Further, the referral system (Article 22) of the EU Merger Regulations can be used by the member states to request the Commission to review a transaction if it (1) affects trade between the member states and (2) threatens to significantly affect competition.

To assess whether the transaction can significantly affect competition, the following factors are considered: "*the creation or strengthening of a dominant position of one of the undertakings concerned; the elimination of an important competitive force, including the elimination of a recent or future entrant or the merger between two important innovators; the*

[151] ibid.
[152] ibid.
[153] Digital Markets Act 2022, art 14 (EU).

reduction of competitors' ability and/or incentive to compete, including by making their entry or expansion more difficult or by hampering their access to supplies or markets; or the ability and incentive to leverage a strong market position from one market to another by means of tying or bundling or other exclusionary practices."[154]

Further, an indicative list of cases where the turnover of the target company is not a true estimate of its actual or future competitive potential includes -

(1) a start-up or recent entrant with significant competitive potential that has yet to develop or
(2) implement a business model generating significant revenues (or is still in the initial phase of implementing);
(3) an important innovator or undertaking conducting potentially important research;
(4) an actual or potential important competitive force;
(5) access to competitively significant assets;
(6) provides products or services that are key inputs/components for other industries.[155]

This mechanism is not sector specific and therefore, any potential problematic mergers can be assessed at the EU. Earlier this year, the Commission reviewed the acquisition of Kustomer by Meta for $1 billion under the referral mechanism.

Background - Kustomer provides customer service and supports the Customer relationship management ["**CRM**"] software market.[156] Popular messaging channels, like Meta's Messenger, are used by businesses for consumer interaction and form an important input for customer service and support for CRM software providers.

<u>*Substantive Analysis –*</u>

The Commission was concerned that Meta would have the ability and the incentive to engage in foreclosure strategies to the detriment of Kustomer's rivals and new entrants by denying or degrading access to the API for Meta's messaging channels resulting in the reduction of

[154] European Commission, Commission Guidance on the Application of the Referral Mechanism set out in Article 22 of the Merger Regulation to Certain Categories of Cases, C(2021) 1959 final, para 15 https://ec.europa.eu/competition/consultations/2021_merger_control/guidance_article_22_referrals.pdf.
[155] ibid para 19.
[156] European Commission Press Release, 'Mergers: Commission Clears Acquisition of Kustomer by Meta (formerly Facebook), Subject to Conditions' (27 January 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_652> accessed on 19 December 2022.

competition in the market for the supply of CRM software.[157] In response, Meta guaranteed free, non-discriminatory access to its publicly available APIs for its messaging channels CRM software providers and new entrants and made a core API access-parity commitment.[158] The transaction was cleared on the premise that these commitments are complied with by Meta.

The system is not restricted to the digital sector.

In 2021, some Member States referred the Illumina-GRAIL merger worth $7.1 billion to the EU using this mechanism.

Background –

GRAIL is developing a blood-based early cancer detection test that can contribute significantly to the fight against cancer.[159] Illumina is currently the only credible supplier of NGS systems for genetic and genomic analysis that GRAIL is required to develop and process these tests.[160]

Substantive Analysis –

The Commission was concerned that with this transaction, Illumina would have the ability and incentive to cut off GRAIL's rivals from accessing its technology, or otherwise disadvantage them. It found that Illumina would have had the ability and the incentive to engage in foreclosure strategies against GRAIL's rivals.[161] While the undertaking proposed several commitments, the Commission concluded that these were not sufficient to address the competition concerns and prohibited the transaction.

The EU referral mechanism seems to be effective in examining nascent mergers when they may raise competition concerns. However, this mechanism works due to the structure of the EU regulatory framework where the European Commission can assess the cases that affect trade between Member States. The Commission concluded that a deal value threshold was

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[157] ibid.
[158] ibid.
[159] European Commission Press Release, 'Mergers: Commission Prohibits Acquisition of GRAIL by Illumina' (6 September 2022) <https://ec.europa.eu/commission/presscorner/detail/es/ip_22_5364> accessed on 19 December 2022.
[160] ibid.
[161] ibid.

not a proportionate solution due to the difficulty in setting the threshold at the right level.[162] Setting up a value threshold that is too high is not helpful, whereas setting it too low can result in furthering the cost of compliance and filing for undertakings that may prove to be irrelevant.[163] The referral mechanism, therefore, seemed like an appropriate way to assess non-notifiable mergers if they can impact competition between the member states.

Next, the article will discuss how the Asian region regulates high value transactions. The approach in this region is mixed. While Japan introduced the deal value threshold for merger notification in its merger control, Singapore has chosen to assess such cases under its voluntary notification merger system.

B. The Asian Region

i. Google – Fitbit Deal (Japan)

In 2019, the Japan Fair Trade Commission ["**JFTC**"] amended its merger policies to explicitly recommend that the parties to a combination that do not meet the combination filing criteria (asset or turnover threshold) should voluntarily consult with the JFTC before implementing the proposed transaction if the value exceeds an and it affects domestic consumers. The local nexus is established if the business base or R&D base of the target is located in Japan if it conducts sales activities targeting Japanese consumers and if the total Japanese turnover exceeds JPY 100 million.[164] Further, the JFTC has the power to review transactions regardless of whether the parties consult with the JTFC; or whether the transaction fulfils the criteria mentioned if it considers that its necessary to scrutinize the impact on domestic competition.

In 2021, at the request of the JFTC, Google submitted detailed plans for its acquisition of Fitbit for $2.1 billion.

Substantive Analysis –

The JFTC was concerned, *inter alia*, that Google would provide discriminatory treatment to Fitbit's competitors regarding interoperability with Android Smartphones, access to all the

[162] EU – Margrethe Vestager, 'The Future of EU Merger Control' (Speech, 11 September 2020), <https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en> accessed 19 December 2022.
[163] ibid.
[164] Japan Fair Trade Commission, 'Policies Concerning Procedures of Review of Business Combination' (17 December 2019) <https://www.jftc.go.jp/en/pressreleases/yearly-2019/December/191217.html> accessed 13 December 2022.

Android APIs, technical supports, etc.[165] However, it accepted the remedy proposed by Google that it would ensure that certain Android APIs are available, without access charge, under the same terms as other Android APIs that Google group makes available as part of AOSP on a non-discriminatory basis and committed to not discriminate by withholding, denying or delaying access to the API's functionalities.[166] Among other remedies, Google also proposed that it would report to the JFTC once every six months for 10 years to enable monitoring of the compliance of remedies.[167] The transaction was allowed on the premise that Google would implement all the accepted remedies.

ii. <u>Uber – Grab Deal (Singapore)</u>

Singapore is another leading Asian country that has assessed digital mergers. It has a voluntary merger notification regime that does not require parties to notify their transactions to the Competition Commission of Singapore ["**CCCS**"]. The parties are required to conduct a self-assessment and examine the competitive effects of their transaction and ensure compliance by relying on the confidential advice mechanism available to them. This merger framework allows Singapore to assess problematic mergers and take action while reducing costs for businesses involved in unproblematic mergers.[168] However, the parties are wary of consummating a transaction which may raise competition concerns and risk imposition of remedies that may be costly for them, and therefore, they notify the authority voluntarily.[169]

Uber and Grab had to bear such costs – remedies and financial fines.

<u>Background –</u>

Uber sold its Southeast Asian business to Grab for a 27.5% stake in Grab in March 2018 and completed the transaction without notifying the CCCS. CCCS was quick to respond and made its final decision in September 2018.

<u>Substantive Analysis –</u>

[165] *Google/Fitbit* (2021) (Japan) <https://www.jftc.go.jp/en/pressreleases/yearly-2021/January/210114r.pdf> accessed 13 December 2022.
[166] ibid.
[167] ibid.
[168] Organization for Economic Co-operation and Development, 'Disentangling Consummated Mergers – Experiences and Challenges – Note by Singapore' DAF/COMP/WD(2022)44 (14 June 2022) <https://one.oecd.org/document/DAF/COMP/WD(2022)44/en/pdf> accessed 10 December 2022.
[169] ibid.

The CCCS noted that the transaction removed Grab's closest competitor (Uber) in ride-hailing platform services, and Grab was able to increase its fares and commissions.[170] Grab has a high market share and it imposed exclusive obligations on taxi companies, making it difficult for new entrants to expand in the market. CCCS concluded that the transaction led to a substantial lessening of competition and imposed remedies like - ensuring Grab drivers are free to use any ride-hailing platform; removing Grab's exclusivity arrangements with any taxi fleet; maintaining Grab's pre-merger pricing algorithm and driver commission rates; requiring Uber to sell Lion City Rentals vehicles (Uber's subsidiary involved in car rental business for private hire) to any potential competitor and not to Grab without CCCS's prior approval.[171]

The Competition Appeal Board upheld the decision of the CCCS in January 2021.[172]

iii. Comments on the Remedy in Uber-Grab Deal

While the remedies imposed managed to mitigate the effects caused by the transfer of tangible assets, they were unable to remedy the intangible part of the transaction – driver and customer network that moved to Grab, or to divest Uber's network, pre-transaction, to another competitor once it had been dismantled.[173] While the merger could not be completely reserved, the several remedies imposed by the CCCS managed to maintain contestability in the market.[174] Financial penalties were also imposed to act as a deterrence.

The Uber-Grab deal showcases the difficulty of dismantling a transaction that has also been consummated. It can be argued that the mandatory notification system with a deal value threshold can be desirable if they prove to be an effective way to prevent the problematic merger from being consummated since it is extremely difficult to completely reverse a completed transaction.

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[170] Infringement Decision in relation to Acquisition of Uber's Southeast Asian Business by Grab and Uber's Acquisition of a 27.5 per cent Stake in Grab, (CCCS 500/001/18) (Singapore) <https://www.cccs.gov.sg/public-register-and-consultation/public-consultation-items/uber-grab-merger> accessed 10 December 2022.
[171] ibid.
[172] CCCS Media Release, 'Competition Appeal Board upholds CCCS's Infringement Decision Against Uber for Anti-competitive Merger with Grab' (13 January 2021) <https://www.cccs.gov.sg/media-and-consultation/newsroom/media-releases/cab-upholds-cccs-id-against-uber-for-anticompetitive-merger-with-grab> accessed 9 December 2022.
[173] OECD (n 168).
[174] ibid.

IV. THE TAKEAWAYS

The evolution of merger control in all jurisdictions reflect that the digital market is rapidly evolving. The above analysis reflect that various jurisdictions are now assessing digital mergers. The merger control systems have either a mandatory notification system (like India and EU) or a voluntary notification system (like Singapore). Mandatory notification system enables a cautious and effective way of preventing potential harm in a particular market on the platform ecosystem. However, it would require sophisticated market analysis to define the particular relevant market that is affected by the deal. The traditional thresholds like the assets and turnover value which trigger notification requirements for mergers and amalgamations have proved to be inappropriate for assessing certain mergers, especially within the digital sector. Whereas, in a voluntary notification system, the innovation in the digital market is incentivized, giving way to collaboration amongst various markets on a digital platform. For instance, the liberal approach by the CCCS allowed the Uber-Grab deal despite it being a horizontal merger. However, as a consequence of adopting the liberal approach, the CCCS had to penalize Uber for the Uber-Grab deal and impose various remedies to rectify the harm caused to competition by the deal. In contrast to the voluntary notification system adopted by Singapore, there is consistency in the case of mandatory notification merger control system.

It was realised, world over, that jurisdictions would have to come up with alternate method to analyse these mergers as digital companies tended to have low assets and turnover value even though the companies were big and had a significant impact on competition. Some jurisdictions like Germany and Japan have used transaction value method for mergers which trigger notification requirements or other means to assess mergers that some of them have the potential to cause significant impact on competition in the markets.

Therefore, the Indian competition authority has to get equipped to analyse deals on the platform ecosystem and balance the potential benefits versus the possible harms, considering the unique India market dynamics. For example, the Facebook-Giphy deal in the Indian context can have a different impact as compared to the Austrian and UK market. Therefore, guidelines by the Indian competition authority would help in drawing out the safeguards for assessing the market dynamics of India. Guidelines will give consistency as the market dynamics in India are different from those in other jurisdictions. The Indian competition authority cannot impose copycat fines or remedies based on analysis in other jurisdictions

and needs to assess deal based on the relevant geographic market which requires an independent analysis. This reflects the need for more sophisticated tools to understand and analyse tech markets. The competition authorities will have to make the merger control process collaborative to so as to understand the products and/or services on the digital platform and the business models of the parties concerned before they come to correctly define and assess those digital markets.

The discussion above, suggests that adopting a transaction value method for assessing digital mergers, by itself, may not be enough. The discussion reflects that there are other ways to assessing digital mergers rather than the notification obligation for combinations reaching a specified transaction value. The Indian competition authority can look at alternatives like providing the CCI the power to assess non-notifiable mergers if it is of the opinion that a particular non-notifiable merger can potentially cause harm to competition. This can reduce unnecessary additional legal compliance for the undertakings and reduce administrative burden on the CCI as well.

Finally, if the Indian competition authority has chosen to proceed with the deal value transaction method, there is a need for guidance, note or clarity on the test for establishing local nexus of the deal. Other jurisdictions have provided clarity on this to assist the undertakings in assessing whether they need to notify the relevant competition authority about their deal, however, the Indian competition authority has remained vague regarding this very important aspect of the proposed amendment.

The above analysis also reflects that setting a transaction value at which the notification requirement in merger control is to be triggered is very tricky. Establishing a threshold trigger transaction value is not black or white and does not apply equally in all jurisdictions. Germany decided to set the trigger value at EUR 400 million, Austria at EUR 200 million and Japan at JPY 40 billion, whereas India has decided to set the trigger transaction value at 2000 crore INR (approximately EUR 227 million). The European Commission decided to not opt for the transaction value threshold in merger control and one of the reasons was the difficulty in determining at what value the transaction should be notifiable to the authorities.[175] Too low of a transaction value may lead to overregulation, whereas, too high of a value will not prove to be very beneficial in tackling problematic mergers and

[175] Margrethe Vestager (n 162).

amalgamations. Therefore, authorities need to have a nuanced approach when setting a transaction value to trigger notification requirement under merger control.

V. VALUE-BASED THRESHOLD – THE FLAWS

The deal value threshold provides various benefits when it comes to the regulation of problematic mergers wherein the competitive potential of the undertaking is not reflected in its size or sale figures. However, the deal value threshold is not without its flaws.

1. The introduction of value-based thresholds can create an administrative burden for the competition authorities and the undertakings. This is especially true in India if this proposal is viewed along with Bill's amendment that provides a shorter time period for merger review. The CCI will be required to review cases faster, however, the number of cases being filed will increase. Since the new threshold will be introduced, the cases may require several follow-up questions and consultations with the CCI which the authority may not be able to accommodate given the shortened timeline.

2. There is also a risk that overregulation could potentially result in a chilling effect on innovation.[176]

3. It must also be noted that the current proposal is vague at best. It is unclear whether the Government is going to specify exemptions to the deal value threshold and on what basis. Without clarification on this, the wide ambit of the clause could catch a large number of cases. This could also result in diverting the resources of the Commission to these transactions which may lead to false positives and unnecessarily reduce resources that could have been applied for other significant cases.[177]

4. Further, it can be difficult to determine the value of transactions[178] and lead to confusion regarding whether the transaction has to be notified to the CCI. It could potentially increase gun-jumping cases as well if sufficiently clear guidelines are not formulated by the CCI. It will also be difficult to determine the local nexus in such transactions as well. Since this threshold for merger control is not a very old concept, it can also be difficult to find solutions from other jurisdictions as well.

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[176] EU – Summary of Replies to the Public Consultation on Evaluation of Procedural and Jurisdictional Aspects of EU Merger Control (July 2017) on the Functioning of the EUMR's Jurisdictional Thresholds and the Case Referral System.
[177] ibid.
[178] ibid.

VI. CONCLUSION

The introduction of a threshold on the size of transactions seems like a step in the right direction to tackle digital mergers with potential competition concerns for India. However, it is clear that the CCI must release guidelines to clarify the parameters and extent of the proposed provision to enable the effective implementation of the merger control system.

Under the amendment proposed, the Bill defines "value of transactions" as "*every valuable consideration, whether direct or indirect, or deferred for any acquisition, merger or amalgamation.*"[179] However, this definition is vague and open to interpretation. The CCI will have to provide further guidance on what constitutes direct and indirect consideration. Further, acquisition of control can also result in a merger or amalgamation under Section 5 of the Act, however, the definition of "control" provided under Clause 6(c) of the Bill is also vague. The standard of proof to define control in competition law is lower than that of in the Indian company law, however, the CCI has not released any guidance as to what "material influence" constitutes. The local nexus test must also be expanded on by the CCI if it wishes to effectively tackle the issue of nascent M&As through a deal value threshold.

Many questions remain unanswered. Without clear guidelines, unambiguous answer, this step will be ineffective and have adverse consequences for the regulators and undertakings alike. It is also pertinent to note that while an effective mechanism can be constructed through deal value threshold to examine potentially concerning mergers, the Indian competition authority needs to develop its theories of harm in merger analysis. This development would require a deeper market analysis by experts conducting detailed substantive analysis into the conditions of the market at present and the potential competitiveness in the market in the future. Therefore, the CCI should also focus on the substantive analysis of mergers if it wishes to effectively deal with potentially problematic nascent mergers.

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[179] ibid.