ENHANCING MERGER CONTROL JURISDICTION: ADDRESSING REGULATORY GAPS IN INDIA'S COMPETITION LANDSCAPE

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ABSTRACT

The Competition Act of 2002 serves as a comprehensive regulatory framework for overseeing mergers and acquisitions within India, with enforcement carried out by the Competition Commission of India ("CCI"). Nevertheless, gaps in regulations persist, particularly concerning "killer acquisitions," which refer to transactions falling below the notification threshold. Such acquisitions involve companies purchasing small innovative firms that could potentially emerge as competitors. This article presents a case study examining the merger control activities of the CCI within the Indian market. The goal is to evaluate regulatory gaps and instances of killer acquisitions, aiming to propose solutions for rectification. The study's objective is to enhance understanding of the existing regulatory structure and recommend improvements in competition law enforcement across India. The article initially outlines the Competition Act of 2002 and its subsequent amendments. It proceeds to explore the requirement for mandatory notifications for transactions exceeding a certain threshold, while also highlighting potential gaps in transactions that don't trigger notifications. The concept of killer acquisitions is introduced, emphasizing how these can evade CCI scrutiny when they fail to meet notification criteria. The core of the study entails an in-depth analysis of the CCI's approach to both killer acquisitions and standard merger control, identifying potential deficiencies in the regulatory framework. Proposed solutions to address these shortcomings include revising notification thresholds, broadening the scope of mandatory notifications, and implementing ex-ante reviews for select transactions. In conclusion, the study underscores the importance of evaluating regulatory gaps and killer acquisitions to bolster the efficiency of competition law enforcement in India. The case study on the CCI's merger control practices offers valuable insights into the prevailing regulatory landscape, enabling the formulation of effective enhancements. The study advocates for adjustments in notification thresholds and the introduction of ex-ante assessments to bridge regulatory gaps and elevate competition law enforcement in the Indian context.

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I. INTRODUCTION

In the context of today's interconnected global economy, mergers and acquisitions have emerged as prevalent tactics employed by companies seeking growth and market expansion.[1] While these strategic moves can yield advantages like enhanced efficiency and economies of scale, they also possess the potential to disrupt fair competition within the marketplace. To safeguard against detrimental impacts on competition and consumer welfare, the Competition Act establishes a comprehensive framework for evaluating and controlling mergers and acquisitions.[2] Its objective is to ensure that such transactions align with the principles of fair competition and mitigate any adverse consequences.

In many countries, including India, the competition authorities have established regulatory frameworks for assessing the impact of mergers on competition in the market. However, these frameworks typically only apply to mergers that meet certain thresholds, such as the size of the companies involved or the market share of the merged entity. Mergers that fall below these thresholds are not subject to mandatory notification but can still have a significant impact on competition in the market.

Although there is much room for discussion over how mergers are analysed in terms of competition, an equally pressing issue is, which mergers are chosen for investigation by competition authorities. The systems in place for notifying authorities about mergers and other transactions that may need further scrutiny vary widely from one jurisdiction to the next. Although regulators may be concerned about making the right choice on the next Facebook-Instagram merger, they may also be concerned about whether they will be informed of the next possibly anti-competitive deal.

It is more difficult and expensive to execute reactive rather than proactive measures, even though some bodies have retroactive jurisdiction over mergers that have already been finalised. The need for a robust pre-merger notice procedure for deals that might harm competition has been highlighted. When worries grow about acquisitions designed to suppress inventive would-be rivals, this need becomes even more essential. This is another very contentious issue, although thus far it has only been formally studied by the pharmaceutical sector. The first step for authorities to

[1] Growth through acquisitions: A fresh look (2014) Harvard Business Review <https://bit.ly/3Frf44p>.

[2] Samir R Gandhi and Rishabh Jain (no date) *Merger Control in India: Overview | practical law*, *Thomson Reuters*. <https://tmsnrt.rs/3ZMq58D>.

determine whether this hypothesis is correct, and to address if it is, would be to implement a notification mechanism that records such transactions.

The present structure in India is examined in this article along with the difficulties in spotting transactions that can be considered anti-competitive yet end up going unnoticed. In this article, we analyse both the time limits for applying to contest a merger and the thresholds of India's pre-merger notice process. This article, therefore, makes recommendations that the Competition Commission should have the power to assess mergers and acquisitions that do not meet the notification thresholds under Sections 4 and 5 of the Act.

II. EXISTING ANTITRUST TRANSACTIONS IDENTIFICATION FRAMEWORK IN INDIA

A. Pre-Merger Notifications

When two or more businesses want to combine or acquire one another, they must first inform the CCI.[3] Notifying competition authorities of a merger before it happens helps them determine whether the deal will have a negative impact on competition.

i. Threshold Limit

(a) The Assets & Turnover Test:

The asset test is used to determine the size of the merging entities. Specifically, it looks at the total value of assets (tangible and intangible) held by the merging companies in India. The turnover test is used to determine the market share of the merging entities. It looks at the total revenue generated by the merging companies in India over the previous financial year. If the combined value of the assets or the revenue exceeds a certain threshold, the merger or acquisition must be approved by the CCI.

↳ Parties Test-

If the combined assets of the parties involved in the transaction are more than Rs. 1,000 crores (approximately USD 135 million) in India or the combined turnover is more than Rs. 3,000 crores (approximately USD 405 million) in India, then CCI approval is required.[4]

↳ Group Test-

[3] The Competition Act, 2002, § 5.
[4] The Competition Act, 2002, § 5(a)(i)(A).

If the combined assets of the group involved in the transaction are more than Rs. 4,000 crores (approximately USD 540 million) worldwide or the combined turnover is more than Rs. 12,000 crores (approximately USD 1.6 billion) worldwide, then CCI approval is required.[5]

(b) Transaction Value Test:

The transaction value test is a new threshold for determining whether a merger or acquisition requires approval from the CCI.[6] The transaction value test was introduced in 2020 and came into effect on March 11, 2021.

Under the transaction value test, a merger or acquisition will require approval from the CCI if the following thresholds are met:

1. The combined value of assets of the target company and the acquirer exceeds INR 20 billion (approximately USD 270 million) in India; or
2. The combined turnover of the target company and the acquirer exceeds INR 80 billion (approximately USD 1.1 billion) in India.

In addition to the asset and turnover requirements that were previously in place for CCI clearance, the transaction value test was added. The transaction value test is meant to catch deals involving start-ups and young businesses that have a lot of potential but may not yet have a lot of assets or revenue.

It is important to note that the transaction value test is only applicable if at least one of the parties to the transaction operates in India, and the target company has assets or turnover in India. The CCI has stated that the transaction value test is aimed at promoting innovation and start-ups in India while ensuring that competition in the market is not affected.

ii. Triggering Events

Every acquisition, merger, or amalgamation (domestic or foreign) that does not meet an exemption's criteria and so falls beyond the jurisdiction's thresholds must be reported to and approved by the CCI.[7]

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[5] The Competition Act, 2002, § 5(a)(ii)(A).
[6] *Deal value threshold: Is it a deal breaker?* (2023) *AZB Partners* <https://bit.ly/425Txb0>.
[7] *Merger Control in India: Overview* (2021) *AZB Partners* <https://bit.ly/3LmuhYf>.

Both "merger" and "amalgamation" are undefined under the Competition Act. The purchase of stock, voting rights, or assets, or any change in management or ownership of a company, is considered an acquisition.

Any component of a notifiable purchase, merger, or amalgamation cannot be implemented by the parties until the CCI gives its permission, since the CCI operates under a suspensory framework.

Any moment after the following occurs is when a notifiable transaction should be reported:

1. Consensus among the board of directors (board) in favour of the merger, acquisition or amalgamation
2. Signing of any document relating to a takeover or purchase of control.

In the event of a hostile takeover, the trigger can be a public statement for the purchase of shares, voting rights, or control, or a completed instrument communicating the acquiring company's desire to acquire control, shares, or voting rights.

The CCI's previous definition of control was "the power to exert decisive control over the management and affairs"[8] of a business, however, this is no longer the case. This has been lowered to include less direct forms of control, such as "material influence," as well as the more traditional forms of "de facto" and "de jure" control over the day-to-day operations of a business.

The CCI often establishes control by looking at the overall effect of a set of rights. Moreover, the capacity to obstruct an entity's special resolutions is seen as one conferring negative control.[9]

The Act aims to be fair to both the Commission's need for information on significant market activity and the ability of small and medium-sized firms to execute transactions by defining appropriate criteria. The merger notice regulations in India are in line with the best practices proposed by the International Competition Network. These standards urge that governments set objective, measurable benchmarks to guarantee a meaningful link to the jurisdiction conducting the examination.

III. THE PREVAILING VIEW

Section 5 of the Competition Act, 2002 defines combinations as mergers and acquisitions which meet certain thresholds relating to assets and turnovers of the concerned enterprises. Section 6 of the Act says that any combination that causes appreciable adverse effects on competition is void and imposes an obligation on the enterprises to notify to the Commission if they are entering into

[8] Independent Media Trust, Combination Registration No. C-2012/03/47.
[9] Sun Life India/Birla Sun Life, Combination Registration No. C-2015/12/362.

a combination. However, the entire Act remains silent about those mergers and acquisitions that do not meet the combination thresholds and may still be anti-competitive. This has led many to take the stance that such transactions cannot be assessed at all by the Commission.

The recent report [10] of the Competition Law Review Committee (2019), affirms this stance. It observed –

"5.4 *The Committee noted that unlike many other jurisdictions, in India unless the notification thresholds are met, the CCI has no power to assess transactions, even if their potential competitive harm is evident. This is because the Competition Act does not grant the CCI any residuary power to assess non-notifiable transactions.*"

Further -

"5.6… *In this regard, the Committee discussed whether Section 20(1) of the Act may be relied upon by the CCI to review transactions that do not meet the asset and turnover thresholds. It was noted that the wording of Section 20(1) was such that it only enabled the CCI to assess transactions that qualified under Section 5, i.e., transactions that meet the asset and turnover thresholds in Section 5. Thus, it was concluded that presently the CCI had no residuary jurisdiction to assess non-notifiable transactions.*"

From the above two extracts, it is clear that the Committee's conclusion that CCI does not have any power to investigate was because Section 20 which examines combinations does not deal with those transactions that do not meet the notification thresholds.

IV. THE CHALLENGES OF IDENTIFICATION OF TRANSACTIONS POTENTIALLY ANTI-COMPETITIVE

As was mentioned above, the minimum transaction size in India may be increased or decreased at the government's discretion. Yet, it is less certain that the average transaction size grows at a linear rate. If the threshold keeps increasing while the average transaction size stays the same or decreases, a growing number of transactions will inevitably come under the notification radar of the Commissions. The United States has reported to the Organization for Economic Co-operation and Development (OECD) that since it began raising its notification standards every year, it has had more difficulties with both completed and non-notifiable transactions.[11]

The Commission is hindered in its capacity to evaluate whether the rises in the transaction-size criteria are representative of trends in transaction size due to the absence of necessity to give

[10] *Report Of Competition Law Review Committee* (no date). Ministry of Corporate Affairs Government of India <https://bit.ly/3mYzcnO>.

[11] Working Party No 3 on Cooperation and Enforcement DAF/COMP/WP3(2014)1.

information on why a transaction exceeds notification levels. The information that merging parties are expected to supply as part of a notice is not enough to permit a study of these patterns over time under the existing structure.

Yet, the Act's definition of "transaction size" may not provide a complete picture of whether or not a merger raises competition concerns. The Act is a sector-neutral piece of legislation, meaning that it may be applied in a variety of ways and with reasonable certainty. Yet, the Commission acknowledges that pre-merger notice is less likely to detect anti-competitive implications in deals in smaller markets.

Pre-merger notice standards that consider the magnitude of the transaction and the parties involved are a simple method to set a benchmark that is objective and does not unfairly punish smaller economic participants. Yet, this does not imply that the size of the parties or the magnitude of the transaction will necessarily correlate with the risk of anti-competitive behaviour.

Furthermore, no matter if a transaction needs to be reported or not, the Commission cannot question transactions that have happened more than a year ago. Despite the limitations of a threshold that rises yearly, this limitation period restricts the ability to start a study of any significant merger that would not have been reportable under the existing threshold system.[12]

This situation best demonstrates the trade-off between giving the business community assurance and allowing the Commission time to respond to a possibly anti-competitive non-notifiable transaction. An advantage of making sure parties are satisfied a deal cannot be overturned is that it gives the Commission a very small window of time to detect and respond to any false negatives supplied by the threshold.

Although the Commission has the authority to order divestitures about anti-competitive behaviour outside of the context of mergers, the standard for this action is purposefully quite high, requiring the Commission to demonstrate that all other available remedies would not resolve the competitive challenge.

If a merger significantly reduces competition, the proper remedy is to "restore competition to the degree that it can no longer be claimed to be considerably less" than it was before the merger. But, it is not necessary that the cure fully restore competition to pre-merger levels, which renders the

[12] Kaur, R. Competition Law in India: An Overview, International Journal of Law, Volume 5, Issue 2, Pages 47-53, 2019.

outright reversal of a transaction improbable in cases when a more restricted structural solution may serve to deem the lowering of competition 'non-substantial'.[13]

It is important to note that not all agencies have residual jurisdiction or even time-limited authority, as is the case in India, to examine mergers that do not meet statutory requirements. Thresholds may prevent an antitrust body from investigating a transaction, even under voluntary notification regimes.

V. REFORMS IN THE CURRENT COMPETITION FRAMEWORK IN INDIA

A. Ex-Post Assessment of Transactions

Acknowledging the risks associated with killer purchases is crucial, necessitating a liberal and careful ex-post evaluation. When a purchase is reviewed after it has already been finalized, this is called an ex-post evaluation. Given that the impacts of killer acquisitions are sometimes not seen for quite some time, this strategy is especially effective against them. The need for expanded CCI ex-post review powers in circumstances involving abuse of dominance and a material detrimental impact on competition is a primary worry with the ex-post examination of killer acquisitions. Newer conceptions of damage, such as the emerging competitor theory, need a categorical recognition of mergers as killer acquisitions. If authorities don't detect and examine a killer acquisition until there's clear confirmation of an AAEC, the impacts will unfold perniciously and the object welfare of the consumer will be seen to suffer.

A recent Secretarial Note from the Organization for Economic Cooperation and Development (OECD) titled "Startups, Killer Acquisitions, and Merger Control"[14] suggested ex-post evaluation as a beneficial additional tool to reduce killer acquisitions.

One example of a killer acquisition that was subject to ex-post assessment was Facebook's acquisition of Instagram. In 2012, Facebook acquired Instagram for $1 billion. At the time, Instagram was a fast-growing photo-sharing app that posed a competitive threat to Facebook's dominance in the social media market. Following the acquisition, Facebook integrated Instagram's features into its platform and limited the competitive threat posed by Instagram.

The United States Federal Trade Commission (FTC) conducted an ex-post assessment of Facebook's acquisition of Instagram, in the year 2020.[15] The FTC found that the acquisition was

[13] *Merger control and the increase in deal uncertainty* (no date) *Financier Worldwide* <https://bit.ly/3mSrw6G>.
[14] *Start-ups, Killer Acquisitions and Merger Control* (no date) <https://bit.ly/3lgsOIg>.
[15] Oreskovic, A. (2012) *FTC clears Facebook acquisition of Instagram*, *Reuters*. Thomson Reuters <https://reut.rs/3YNygzV>.

anti-competitive and had harmed competition in the social media market. The FTC filed a lawsuit against Facebook, seeking to force the company to divest Instagram and unwind the acquisition.

Ex-post assessment of killer acquisitions can provide several advantages for antitrust authorities in promoting fair competition in the market. Here are some of the advantages of ex-post assessment in killer acquisitions:

1. Identification of anti-competitive behaviour: Ex-post assessment allows antitrust authorities to identify anti-competitive behaviour after a merger or acquisition has taken place. This helps to prevent dominant firms from eliminating competition by acquiring potential rivals, which can lead to higher prices and reduced innovation.
2. Better understanding of market dynamics: Ex-post assessment can provide antitrust authorities with a better understanding of the dynamics of the relevant market, including how competition has been affected by the merger or acquisition. This knowledge can help authorities to make more informed decisions about how to address any anti-competitive behaviour.
3. More effective enforcement: Ex-post assessment allows antitrust authorities to enforce competition laws more effectively. By identifying and addressing killer acquisitions, authorities can help to promote fair competition and protect consumers.
4. Development of case laws: Ex-post assessment can lead to the development of case laws, which can be used to guide future decisions by antitrust authorities. This can help to promote consistency and predictability in antitrust enforcement.
5. Flexibility: Ex-post assessment provides greater flexibility to antitrust authorities in addressing anti-competitive behaviour. In some cases, remedies such as divestitures or behavioural remedies may be more effective in addressing anti-competitive behaviour than blocking a merger or acquisition.

A fledgling acquisition's scrutinization approach may be the same as that used for any other horizontal purchase. One must give primary consideration to the capacity and motive of the incumbent to increase prices and/or decrease innovation or quality. So, the substitutability of the purchased company's present goods should be a primary consideration. An acquisition is more likely to be a killer buy if the target company's goods have little to no competition in the market

or if they overlap with the target company's existing product line. If you're looking to grow your business, you should pay special attention to who you're acquiring and why.[16]

The Furman report states that the possibility of a game-changing acquisition decreases as the level of competition increases in the relevant areas. Hence, in existing uncompetitive marketplaces, ex-post evaluation has to be given more weight.

The Norwegian model[17], in which, competition authorities keep a list of significant corporations that are obligated to tell the authorities of their purchases and actions, is also worth considering in addition to the aforementioned framework. As a result, this methodology is effective since it places less of a responsibility on the agencies to find game-changing purchases. The procedure must not be too burdensome for the businesses, however.

B. Merger Intelligence

One of the problems with spotting anti-competitive deals is that it's hard to know which ones are really bad for business.[18] For deals that don't meet the standards, such as creeping or serial acquisitions, an efficient merger intelligence system may help identify them so they can be reviewed formally. When properly implemented, active intelligence-gathering systems improve the chances that questionable dealings will be uncovered before the statute of limitations lapses.

Notification of a transaction's pre-merger status is not required in many countries. This includes the United Kingdom, Australia, and New Zealand. Some governments may not depend on legislative obligations to learn about potentially problematic transactions but instead could use methods like encouraging parties to submit representations and actively monitoring the market.

As the Commissioner only has a year to file a challenge to a merger, potentially anti-competitive non-notifiable mergers must be identified as soon as possible in India. To better identify potentially anti-competitive transactions, the Commission should strengthen its intelligence-gathering efforts by establishing a dedicated intelligence-gathering unit.

[16] *The need for an ex -post assessment framework to tackle Killer Acquisitions in India*, *IndiaCorpLaw* <https://bit.ly/3YN2FyA>.
[17] *Norwegian Competition Authority* (2022) *Konkurransetilsynet* <https://bit.ly/3FpyBlv>.
[18] *Your company just got bought out. what do you do next?* (2018) *Harvard Business Review* <https://bit.ly/3FrYlxH>.

VI. PROPOSAL FOR LEGISLATIVE REFORM

The Competition Act, of 2002 empowers the CCI, to assess certain types of mergers and acquisitions known as 'combinations', which cross certain thresholds as specified under the Act. However, the Act is silent concerning the Commission's power to assess transactions that do not meet these thresholds, which has led many to assume that these transactions are not assessable according to the scheme of the Act.

The solution to this problem is to expand the scope of section 20(1) such that it also applies to combinations that are not required to be reported or are excluded from reporting. The exemption in Section 5 might be modified to exclude situations in which the CCI has a "reasonable suspicion" that a "killer acquisition" has taken place, which can be done by providing for a proviso under the exception clause. Officials, however, need to specify what constitutes reasonable suspicion to avoid arbitrary enforcement. For example, if the incumbent has the power and motive to increase prices and/or decrease innovation or quality, then there is reason to suspect that they will do just that.

According to sub-section 20(1), the ex-post control must be made within a year. It's possible that in such a short amount of time, the implications of a game-changing purchase won't be fully realized. There may not be enough time to gather sufficient data for a reliable evaluation of the acquisition's impact on the market. Nevertheless, in the event of a more extended period, it may be more difficult to discern the effect of the merger on the market and consumer welfare because other events unrelated to the acquisition may have drastically affected market circumstances. What's more, the killer acquisition would have already done a lot of harm.

It's important to keep in mind that ex-post facto evaluation deadlines might vary widely across various countries and regions. The United States is unique among countries in that there is no formal deadline. In the United Kingdom, this period is shortened to four months, whereas in Canada and Mexico, it's one year from the merger that an intervention is required.

Companies may be uneasy with a flexible time range since it leaves them vulnerable to investigation at any moment following the merger. On the other hand, the authorities may lay out a detailed framework detailing the situations in which ex-post evaluation is required and the appropriate method for carrying it out. Such knowledge may be incorporated into business decisions, making them more certain. Hence, it would be helpful to extend one year under section 20(1), if the CCI creates an effective mechanism for an ex-post evaluation

VII. CONCLUSION

In conclusion, the regulatory gaps in killer acquisitions pose a significant challenge for competition law enforcement in India. The Competition Act, of 2002 and its subsequent amendments provide a comprehensive framework for regulating mergers and acquisitions, but these gaps can potentially harm competition and innovation in the market. These transactions can escape scrutiny by the CCI, and if these transactions result in anti-competitive behaviour, it can harm competition and consumers.

The Competition Act, of 2002 provides a comprehensive framework for regulating mergers and acquisitions, but there are regulatory gaps in non-notifiable transactions and killer acquisitions that can potentially harm competition. The proposed case study of the CCI's merger control in the Indian market can provide insights into the existing regulatory framework and suggest ways to improve it.

The study suggests revising notification thresholds and expanding the scope of the mandatory notification requirement to address the regulatory gaps. Lowering the notification thresholds can help increase the number of transactions that require CCI approval, ensuring that more transactions are subject to scrutiny. Additionally, expanding the scope of the mandatory notification requirement can help capture more non-notifiable transactions that can potentially harm competition.

Introducing ex-ante scrutiny of certain transactions can also help ensure effective competition law enforcement in India. Such scrutiny can help prevent anti-competitive transactions from taking place and ensure that companies do not acquire potential competitors to eliminate competition in the market.

Overall, addressing the regulatory gaps in non-notifiable transactions and killer acquisitions is crucial for promoting competition and innovation in the Indian market. The proposed case study and solutions can help strengthen the regulatory framework and enhance competition law enforcement in India. This, in turn, can create a level playing field for all market participants and promote consumer welfare.