REGULATING TITANS: ENHANCING MERGER CONTROL REGIME TO CURB KILLER ACQUISITIONS PRACTICES IN THE DIGITAL MARKET OF INDIA

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ABSTRACT

The Indian corporate sector has witnessed a significant surge in Merger and acqusiitions during the past two decades of economical reforms, primarily due to regulatory developments and governmental initiatives. Due to the flexibilities imposed by policy, the large, dominant companies have always favoured to enter niche markets or establish monopolies in already-existing ones by acquiring startups that may become future competitors. This raises the potential for monopoly to intensifying rivalry among competitors, which may pose a threat to a healthy competitive market. However, such so-called "killer" or "zombie acquisition" mergers are not well-addressed by the antitrust laws now in effect in India. This paper explores India's merger control regime and its effectiveness in dealing with such killer acquisitions by giant tech businesses in the rapidly changing digital realm. This study examines the challenges faced by the Indian merger control regime such as the notice requirement and the debates around the transactional value, which contrasts with the traditional approach of the Competition Commission of India to merger control. Furthermore, this study undertakes an analysis of the legal framework, objectives of competition policy, consequential effects on innovation and with a particular focus on the impact exerted by the digital industry on India's competition policy landscape. It addresses concerns regarding anti-competitive behavior and explores the strategies employed by large firms that have presented a significant challenge to the competition policy in the Indian market. In order to guarantee fair competition in the digital arena in the Indian Competition Market, the study concludes by highlighting the growing necessity for continual assessment and reform activities such as ex-post assessment and separate notifying conditions for startups.

Keywords: Killer Acquisitions, Merger Control, Antitrust Law, Digital Markets, CCI

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INTRODUCTION

Competition authorities employ a thorough and systematic methodology to assess mergers and acquisitions, determining if they are likely to have adverse effects on competition. In order to comprehensively analyze the complex competitive effects, it is important to conduct thorough research on the company's characteristics and the relevant markets. This will enable an evaluation of the potential anticompetitive effects. However, in the context of merger control, numerous countries employ diverse legal evaluations, criteria, and protocols to assess the potential effects of mergers. The main distinction among various merger control regimes is in their acceptance of defenses grounded in efficiency considerations and the provision of structural or behavioral remedies by merging companies. Varying assessment standards can create the perception that certain purchases are not considered troublesome in some nations, whereas authorities in other countries employ much stricter criteria and evaluation accordingly.

Today's economy is significantly impacted by mergers and acquisitions (M&A). Mergers and acquisitions (M&A) are constantly watched by competition authorities to make sure they foster competition and do not lead to anticompetitive behavior or an entity's undue dominance in the market. There are many different reasons that business mergers and acquisitions might take place. For a company to be successful in achieving its commercial objectives, it may be necessary for the company to acquire new skills and technologies, expand into a new market, or fulfill a certain scale. A market's level of competition can be affected by mergers and acquisitions (M&A) in a number of ways. For instance, a merger may give rise to a new business with substantial market power, which it may use against customers. On the other hand, the merger may be able to increase the efficiency of the newly joined companies by allowing them to utilize the technologies of each other. This would result in enhanced goods and services that are available to a wider range of customers. The mergers and acquisitions (M&A) carried out by big technology corporations in recent decades and their impact on competition have been a significant topic of debate in the ongoing antitrust issues related to large digital platforms. A study on "competition in digital markets" was carried out in 2020 by the majority staff of the House Subcommittee on Antitrust over the United States[1].

[1] "Competition In Digital Markets " (US GOVERNMENT PUBLISHING OFFICE 2022) <https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf> accessed February 15, 2024

Focusing on the acquisitions of prominent technological companies, the study examined their operations. The paper provided an example of notable acquisitions, such as Facebook's acquisition of Instagram in 2012. Proponents of the research contended that it misinterpreted the role of acquisitions in fostering innovation, despite the fact that the study revealed serious issues about acquisition practices in the technology industry that impede competition[2].

There is a rising concern about the substantial influence that major technology corporations have on society, specifically in terms of competition and innovation within the Indian market. This concern is simultaneous to the increasing trend of these companies gaining dominance in the market. Though it has become commonplace for large technology companies to acquire technological startups, there is growing concern that these acquisitions could be used as a means of maintaining market dominance and eliminating competitors. Because of this, these purchases—also known as "killer acquisitions"—have the potential to stifle innovation and, as a result, place severe limitations on consumer choice, which will have an effect on the trading bloc's economy as a whole. The objective of India's merger control regime is to regulate and prohibit mergers that are deemed harmful, while simultaneously safeguarding a competitive environment in the Indian market.

Indian institutions must adapt to the fast-paced digital change by formulating regulatory measures that are suitable for the growing difficulties. The worldwide digital economy is constantly evolving, leading to exponential growth[3]. Thoroughly researching this subject is essential to identify the specific methods via which major technology corporations may be executing strategic acquisitions to maintain their market dominance in the market. Conducting a thorough analysis of this subject can help identify the possible shortcomings in the merger control regulation of the CCI. It can also offer valuable perspectives on how the regulation can be enhanced and reinforced to effectively address the challenges posed by the digital sector. In order to regulate and prevent such purchases while also fostering competition in the Indian market, authorities could develop effective measures and deterrent strategies by thoroughly understanding the underlying factors driving these acquisitions.

[2] Kennedy J, "Monopoly Myths: Is Big Tech Creating 'Kill Zones'?" (INFORMATION TECHNOLOGY & INNOVATION FOUNDATION 2020) <https://itif.org/publications/2020/11/09/monopoly-myths-big-tech-creating-kill-zones/> accessed February 15, 2024

[3] UNCTAD. Digital Economy Report, 2019 p. 38.

CONCEPT OF KILLER ACQUISITION

The term "killer acquisition" lacks a precise definition as it pertains to the act of acquiring something, and it is not commonly used in formal contexts. But the basic idea of the theory is easily explained: an incumbent corporation may have made a particular acquisition in order to restrict potential competition. This could be achieved by eliminating a possible rival or by eliminating a novel product or technology that could have posed a threat to the dominant company's position.

"Killer acquisition" is a term that was coined in 2013 by renowned economist and legal scholar Fiona Scott Morton and her co-author Herbert Hovenkamp. This phrase describes the process whereby larger corporations purchase smaller startup businesses in an effort to drive out any prospective rivals in the future. These kinds of acquisitions frequently take place before the startups' products have reached their full potential or, more frequently, before they have become reputable rivals in the industry. There are serious concerns regarding the influence of these abusive and exploitative practices because of the harm they cause to competition and innovation in the digital economy.

The acquisition of DoubleClick, a company that specializes in advertising technology, was announced by Google on April 13, 2007[4]. They were of the opinion that this action would elevate the organization from a dominant player in in-search advertising to one of the world's foremost technological giants. The deal resulted in Google acquiring DoubleClick's extensive industry network and a thriving display and video advertising business. Additionally, by purchasing a promising business at the start of its development, Google cleverly eliminated a possible rival.

In the digital ecosystem, these kinds of "killer acquisitions" are still common and are made more frequently by large companies due to their expanding financial resources. Over the course of its existence, Google has acquired more than 168 businesses, all the while coming under increased scrutiny from domestic and international antitrust authorities. Most of the well-known BigTech companies have observed this trend, in general. There was a lack of knowledge about the amount of power and influence that emerging Internet corporations would quickly

[4] Yiu T, "Why Did Google Buy DoubleClick?" Towards Data Science (May 6, 2020) <https://towardsdatascience.com/why-did-google-buy-doubleclick-22e706e1fb07> accessed February 15, 2024

gain[5], according to William Kovacic[6], a former member of the Federal Trade Commission who approved the merger between Google and Doubleclick. These businesses currently have a significant amount of influence over nations and governmental entities. Additionally, one of the main victims of their attack has been competitiveness, which has suffered greatly as a result.

TACKLING KILLER ACQUISTIONS: HURDLES AND RISKS

Companies in the BigTech industry have an unquenchable desire. In the past decade, Google, Amazon, Facebook, and Apple have engaged in over 400 acquisitions worldwide[7]. The purchase of Instagram by Facebook in 2012, a vibrant and unconventional digital sharing platform, secured Facebook's position as the leading force in the social media industry for the foreseeable future. Despite the declining relevance of its main social media platform among millennials, acquiring Instagram and WhatsApp would strengthen its position as a dominant force in the technology industry, generating billions of dollars in revenue. Moreover, the Indian market is well acquainted with the complexities that are linked to killer acquisitions. Byju's, a dominant force in the educational technology sector, has purchased potential rivals in the business which will be discussed detailed in foregoing sections. The acquisition of UberEats by Zomato for a total of 350 million dollars, and the acquisition of Jabong by Myntra for the same amount, exemplify the financial benefits that may be obtained within the digital economy[8]. In 2012, Amazon bought Kiva Systems, a robotics business known for manufacturing mobile robotic fulfilment systems. Prior to Amazon's recent acquisition, several competitors such as the Gap, Staples, and Office Depot had already outsourced Amazon's advanced automated storage and retrieval technology. Conversely, the purchase of Amazon resulted in the termination of these agreements, and none of them were subsequently renegotiated under any circumstances. The Kiva organization underwent a complete internal

[5] Lohr S, "This Deal Helped Turn Google Into an Ad Powerhouse. Is That a Problem?" The New York Times (September 21, 2020) <https://www.nytimes.com/2020/09/21/technology/google-doubleclick-antitrust-ads.html> accessed February 15, 2024

[6] "Federal Trade Commission Closes Google/DoubleClick Investigation" Federal Trade Commission (December 20, 2007) <https://www.ftc.gov/news-events/news/press-releases/2007/12/federal-trade-commission-closes-googledoubleclick-investigation> accessed February 15, 2024

[7] Furman J, "Beyond Antitrust: The Role of Competition Policy in Promoting Inclusive Growth" (Searle Center Conference on Antitrust Economics and Competition Policy 2016) <https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160916_searle_conference_competition_furman_cea.pdf> accessed February 15, 2024

[8] "Zomato Acquires Uber's Food Delivery Business in India" Uber Investor (January 20, 2020) <https://investor.uber.com/news-events/news/press-release-details/2020/Zomato-Acquires-Ubers-Food-Delivery-Business-in-India/default.aspx> accessed February 15, 2024

redirection with the aim of improving Amazon's internal storage system. Product support was withheld for its commercial units, resulting in their subsequent disposal. While searching for a reliable substitute, the assistance supplied by Kiva to Amazon resulted in a significant boost in the company's online sales in the United States, increasing from 30% - 40%[9].

Amazon successfully integrated its outstanding operational capabilities with an efficient robotic methodology to retrieve products for delivery in a very efficient and effective manner. This led to an immediate and usable efficiency, which may partly account for the current success that Amazon is experiencing. Alternatively, it may be contended that Kiva's state-of-the-art technology could have been accessible to both Amazon and its rivals, leading to enhanced productivity without granting Amazon an excessively dominant edge.

The act of affluent firms acquiring less innovative startups is commonly referred to as "killer acquisition" or "zombie acquisition," as previously said. This is done to mitigate competitive concerns and reinforce established dominances[10]. This not only impairs consumer welfare, but also disrupts the fair competition in the market. Nevertheless, in most cases, transactions made by killers go unnoticed and are significantly less likely to be detected. Nevertheless, the main rationale behind this is that acquired startups would not have attained the level of ingenuity or prominence that would have attracted the government's attention towards their acquisitions. There are numerous factors contributing to this phenomenon. Typically, the transaction threshold for these acquisitions does not reach the minimum regulatory requirement for notifying antitrust authorities. Regulatory authorities typically do not scrutinize the majority of the assets and turnover involved in these transactions[11].

OVERVIEW OF THE MERGER CONTROL FRAMEWORK IN INDIA

The Competition Commission of India does not regularly perform antitrust evaluations, even though there is a frequent occurrence of killer acquisitions in the digital sector. The high barrier for transactions results in a concentration of market power and hinders consumers' access to alternative options.

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[9] Lunden I, “Amazon’s Share of the US e-Commerce Market Is Now 49%, or 5% of All Retail Spend” Techcrunch (July 13, 2018) <https://techcrunch.com/2018/07/13/amazons-share-of-the-us-e-commerce-market-is-now-49-or-5-of-all-retail-spend/> accessed February 15, 2024

[10] C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. PA. L. REV. 1879 (2020) <https://scholarship.law.columbia.edu/faculty_scholarship/2661>

[11] Madl A, “Killing Innovation?: Antitrust Implications of Killer Acquisitions” [2020] Yale Journal on Regulation <https://www.yalejreg.com/bulletin/killing-innovation-antitrust-implications-of-killer-acquisitions/>

Following the recent directives from the European Union concerning the implementation of Article 22 of the European Union Merger Regulation (EUMR)[12], it is expected that member states, third parties, and domestic antitrust authorities will have the ability to refer small-scale transactions to the European Union Commission for evaluation. Using low-value transactions as a general cover for zombie mergers is not suitable, given these transactions sometimes involve the transfer of significant intangible assets. Under this proposed system, transactions that typically evade notice by regulatory authorities would be encompassed within the range of monitoring. This would greatly help in lowering the number of big players that acquire promising young companies solely because their turnover value falls below the newly established threshold constraint. Due to the constant evolution of the digital market, a substantial amount of mergers and acquisitions are of poor value. Hence, it is relatively easy for a zombie acquisition to be unnoticed when it falls well below the threshold value. The objective of the guideline is to modernize the capabilities of regulators, enabling them to effectively adapt to the demands of the modern era. This is achieved by implementing a provision that permits the referral of transactions of low value for review.

Similarly, the Federal Trade Commission, the regulatory authority responsible for enforcing antitrust laws in the United States, has also modified its oversight of mergers and acquisitions. The Federal Trade Commission (FTC) would make a decision to enforce stricter regulations, considering the market structure, assessing potential harm, and revoking the Vertical Merger Guidelines (VMG) starting from 2021[13]. These rules establish the protocols by which the agencies addressed vertical mergers. In addition, the Federal Trade Commission has conducted ex post examinations of specific technical acquisitions. The regulatory watchdog's assessment of the VMG's efficiency conclusion, which supported an anticompetitive merger, was of special importance. In addition, the Federal Trade Commission has chosen to rigorously enforce its regulatory authority and prevent any transaction that may adversely affect competition. The guideline documents produced in 2020 contain incorrect economic assumptions that lack support from both legal provisions and economic indicators[14]. The Federal Trade Commission

[12] "Guidance on the Application of the Referral Mechanism Set out in Article 22 of the Merger Regulation to Certain Categories of Cases" (Official Journal of the European Union 2021) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021XC0331%2801%29> accessed February 15, 2024

[13] "Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary" Federal Trade Commission (September 15, 2021) <https://www.ftc.gov/news-events/news/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines-commentary> accessed February 15, 2024

[14] Salop S, "The FTC Was Correct to Withdraw the Vertical Merger Guidelines" Promarket (November 22, 2021) <https://www.promarket.org/2021/11/22/ftc-vertical-merger-guidelines-economics-withdrawn-lina-khan-salop/> accessed February 15, 2024

(FTC) stated that the 2020 Vertical Merger Guidelines' approach to efficiency had violated the Clayton Antitrust Act. The law does not acknowledge efficiency as a valid justification for an illegal merger. The Federal Trade Commission (FTC) announcement revealed that the rules relied on an faulty economic theory about the alleged pro-competitive effects of mergers. This was accomplished notwithstanding the absence of any legal or economic rationale behind the theory.

In compliance with the Indian Merger Control System, a merger filing must be made to the Competition Commission of India (CCI) [15]. When a company is under control, there is a merger, amalgamation, acquisition of assets, voting rights, shares, or turnover-based merger filing thresholds, all of which require this filing. It is possible that no application is required if, on the other hand, the transaction is exempt from any rules or notices issued by the authorities. Further, it is not possible to complete transactions that require notification in full or in part before receiving approval from the CCI due to the mandatory and temporary nature of the merger control. This holds true even in cases where the transactions under scrutiny involve linked procedures or transactions. The Competition Commission of India (CCI) has the authority to impose a monetary penalty if the parties involved in a transaction that requires notification fail to inform the CCI or proceed with the transaction, either partially or completely, without obtaining permission from the CCI[16]. There cannot be any important information omitted from the merger file, and all information and disclosures must be accurate. Failing to ensure this could have financial penalties in addition to other repercussions like the approval being withdrawn.

IMMINENT TRANSFORMATIONS IN INDIA'S MERGER CONTROL LANDSCAPE

The two laws that set up the framework for merger control in India are the Competition Act, 2002 and the Competition Commission of India (Procedure with regard to the transaction of business related to combinations) Regulations, 2011 (Combination Regulations). In order to maximize operational effectiveness and maintain compliance with changing legal requirements, the Combination Regulations went through continuous revisions.

[15] Competition Act, 2002, §5, §6
[16] Competition Act, 2002, §43A

The Competition (Amendment) Act, 2023 (Amendment Act), which significantly amends the current legislation, received assent from the President at early 2023.

The Amendment Act has granted the Competition Commission of India (CCI) the power to carry out more thorough assessments. In addition to the asset- and turnover-based criteria, the concept of a deal value threshold was applied in order to accomplish this goal. This was done by amending Section 5 of the Act, which deals with mergers. The Competition Commission of India must approve any transaction involving company assets, the purchase of management, votes, shares, or an amalgamation or merger that has a value greater than INR 20 billion[17]. This is in cases where the business being taken over, combined, bought, merged, or acquired has "substantial business operations" in India. The responsibility of determining the parameters for defining "substantial business operations" lies with the CCI. The Competition Commission of India (CCI) now has more authority to oversee international transactions valued at more than 20 billion Indian Rupees (INR), provided that the target company has significant business operations in India. Indirect transfers of shares of a target company in India by two foreign firms would be subject to taxation if the company has substantial assets. The 2012 amendment to the Indian tax law mandated this requirement.

As demonstrated by Facebook's acquisition of WhatsApp, "killer acquisitions" are common in online markets. Notwithstanding the acquisition's significant influence on the digital market, the Competition Commission of India (CCI) did not investigate it since the Indian portion of the deal was below the asset and turnover thresholds stipulated by the Act at the time. The sum of $19 billion was spent to acquire WhatsApp in the United States[18].

Multinational corporations often set up development centers or other financially profitable business operations in India when it comes to information technology. The parent company's outside operations are built upon these operations. In spite of their comparatively small financial value, these operations could be considered important business ventures in India. Because of the Amendment Act, international purchases of these kinds of businesses will now be examined under the Act.

Furthermore, this alteration will impact business mergers and acquisitions that encompass the amalgamation of expansive multinational enterprises with factories or manufacturing

[17] Competition (Amendment) Act, 2023, No. 9 of 2023

[18] Collis, David, Ashley Hartman, and Aakash Mehta. "$19B 4 txt app WhatsApp...omg!" Harvard Business School Case 715-441 (January 2015, Revised May 2018).

operations in India. Furthermore, mergers of this nature can be subject to the jurisdiction of the Act (as amended by the Amendment Act).

Moreover, corporations may suffer from regulations governing mergers and acquisitions that fall short of the new deal value threshold, and investor support for these companies may decline. Investors might be required to go through the entire CCI approval process under this clause. This occurrence happens because early-stage investors usually want to get out quickly by selling their stake to well-known tech companies or other businesses in order to earn a sizable return on their investment. But if the merging companies don't operate in the same market category, there may be some relief available through the "green channel" approval process.

The preferred definition of "value of transaction" is any valuable payment, regardless of whether it is direct or indirect, immediate or deferred, in the form of cash or otherwise. The broad definition of transaction value is expanded to include various components such as non-compete fees, consideration related to interconnected transactions within a 2-year period prior to the execution of transaction documents, consideration for commercial arrangements within 2 years of the closing of the notifiable transaction, consideration for options and securities based on their converted value, and consideration for contingencies.

As per the Draft Regulations, the board of directors (or any comparable approving body) must examine the value that is deemed important in cases when the transaction documentation does not fully represent the real worth of the transaction. Furthermore, the Draft Regulations state that if it is not feasible to determine the exact value of the transaction with a high level of confidence, the notifying party should assume that the threshold of INR 20 billion (approximately USD 240 million or EUR 224 million) has been met and act accordingly. To avoid inadvertently breaking the rules, it's probable that parties will be pressured to think that their transaction surpasses the INR 20 billion level. The unclear inclusion rules and thresholds are the reason behind this.

In relation to the transaction value, the suggestion "substantial business operations in India" is well-defined. The subsequent factors will ascertain whether a target is deemed to possess significant business operations in India: (i)ten percent or more of its entire worldwide user base, subscriptions, revenue, or visits occurred in India in the twelve months prior to the deal's execution date. (ii) the target's gross merchandise value (GMV) in India during the twelve months prior to the date of deal execution is equal to or greater than ten percent of its total

global GMV; (iii) the target's turnover for the previous financial year in India is equal to or greater than ten percent of its total global revenues.

Establishing a clear and objective qualification criterion for identifying key business operations from the outset would enable Parties to use this test more efficiently and use it as a quick filter to determine whether or not notification requirements can be avoided. Nevertheless, some transactions (across various sectors) are likely to meet the criteria for notice, even if the "target" company has minimal assets or revenue in India. This is due to the extensive scope employed to identify substantial business operations.

JURISDICTION ANALYSIS OF CCI

The use of turnover criteria as a criterion for determining jurisdiction provides a significant challenge in terms of jurisdictional decision-making. The appeal of turnover thresholds stems from their ability to provide a clear and definitive criterion, known as a "bright-line" rule, which instills a strong sense of certainty in determining which transactions are subject to examination. The process of finding the most suitable thresholds is rather difficult. The criteria should be set at an optimal level to avoid capturing an excessive number of transactions, which could lead to the implementation of regulatory limits. However, they should also not be set too high, since this could make the system overly liberal.

In addition, the criteria ought to be established in a manner that ensures they include only transactions that have the potential to have a competitive influence inside the state in which the law is applicable. In order to demonstrate that there is a relevance to the law, it is necessary to have a "jurisdictional nexus" that is rational in nature. However, if a specific regulation that regulates merger control includes well-defined turnover criteria, implementing these rules becomes fairly simple. The difficulty posed by killer acquisitions is that turnover standards may not be applicable to ambitious startups, as their turnover is either non-existent or insufficient. One possible solution to this problem is the implementation of complementary thresholds. An intuitively appealing threshold is one that is determined by the value of the transaction under consideration.The presence of this jurisdictional prerequisite, together the existing turnover thresholds, would enable the investigation of a transaction that is characterized by a large value but low turnover.

The matter of determining the suitable value threshold is debatable; however, it is inevitable that a transaction such as the acquisition of WhatsApp by Facebook for €19 billion would

undergo scrutiny in a value-based system. For startups, the requirement of "substantial business operations in India" and its related conditions provide a difficulties due to the inability to ascertain the specific thresholds for user count, merchandise value, or turnover that would fulfill these prerequisites.

ADVANCEMENTS IN MINORITY ACQUISITIONS: EXAMINING LEGAL PERSPECTIVES

The obligation to report minority acquisitions is the most urgent and significant subject of conversation within the Indian merger control system. A minimum of thirty working days has been granted to private equity, finance, and fund investors to close their investments during the CCI's analysis of the applications. The problem stems from the CCI's expansive and arbitrary interpretation of what constitutes control. Most potential exemptions, including minority financial investments, are evaluated based on this interpretation.

Following the application of the EU's standard of decisive influence in several cases, the ruling in the Ultratech/Jaiprakash case [19], The Competitive Commission of India (CCI) has reduced the threshold for the United Kingdom's assessment of material influence[20] on the target firm's management, affairs, and strategic business decisions. This situation posed a significant challenge for investors in financial, institutional, and private equity sectors due to its subjective and ambiguous nature. This is especially true given that the CCI still takes a broad and ambiguous stance toward minority protection rights, which are crucial for investors in these kinds of investments. As a result, there have been numerous unnecessary and precautionary filings.

Due to their failure to disclose prior acquisitions, notices are now being sent to an increasing number of financial investors as a result of the Commission's media-scanning efforts. Many times, it is unclear if a noncontrolling minority acquisition by a financial or institutional investor—that is, an acquisition made solely for investment purposes or as part of the investor's regular business activities would qualify for the financial investor exemption because it is a passive investment as opposed to an active or strategic one. To safeguard the value of their investment, the investor may be eligible for this exemption if they secure a seat as an observer

[19] UltraTech Cement Limited: Combination Regn. No. C-2015/02/246 (2018)

[20] "Mergers: Guidance on the CMA's Jurisdiction and Procedure" (Competition and Markets Authority 2022) <https://assets.publishing.service.gov.uk/media/61d71895e90e070375c22f1a/CMA2_guidance_publication.pdf > accessed February 15, 2024

on the board of directors of the target company or certain standard minority protection rights. It appears that the Commission's position is that special privileges require obtaining a large amount of control over the target and need to be declared, even if the investor ends up with less than 25 percent of the company's shares.

The intricate condition of obtaining fewer than 10% shares solely for investment purposes has made it difficult to grant the exemption to financial investors. This is due to the fact that the exemption is also subject to a more stringent requirement, which states that any advantageous rights granted to the acquirer would result in the exemption being revoked. The stance adopted by the CCI makes matters even more ambiguous. The CCI states that even if a new investment is less than 10% and does not grant a board seat or special rights—which are requirements for considering the investment to be solely for financial purposes—it is likely to be considered a strategic investment if the financial investor already has investments in a company that competes with, is related to, or enhances the business of the target company. This casts doubt on the financial investor's exemption's applicability. While our most recent observations suggest that CCI may be willing to take the investor's profile into account when analyzing their complementary, competing, or vertically connected projects, minority financial investors still expect CCI to provide them some objectivity and confidence on this matter.

DELVING INTO THE BYJU'S-AAKASH ACQUISITION

Aakash Educational Institutions, usually referred to as "Aakash," was a notable acquisition made by BYJU's in 2021[21]. The Competition Commission of India (CCI), has granted its consent for the acquisition of Aakash, determining that there is no substantial possibility of an adverse effect on competition that can be considered substantial. Nevertheless, there is a potential for the misuse of market power given that BYJU's holds a dominant position as India's leading and rapidly growing educational technology company, valued at $18 billion[22]. The online market of BYJU's can be considered the "relevant market" as defined by the CCI in the context of Fast Track Call Cab Pvt. Ltd. v. ANI Technologies Pvt. Ltd[23]. BYJU's currently

[21] "CCI Approves Proposed Combination Relating to Think & Learn Private Limited (BYJU'S) Acquisition of Certain Stake of Aakash Educational Services Limited (AESL) and Thereafter Merger of BYJU's and AESL" Public Information Bureau of India (June 8, 2021)

[22] Abrar P, "Edtech Giant Byju's Is Raising $300 Mn, Valuation May Touch $18 Bn" Buisiness Standard (October 5, 2021) <https://www.business-standard.com/article/companies/edtech-giant-byju-s-is-raising-300-mn-valuation-may-touch-18-bn-121100400847_1.html> accessed February 15, 2024

[23] Fast Track Call Cab Pvt. Ltd. Vs. ANI Technologies Pvt. Ltd. (6 of 2015)(2017). Available at https://www.cci.gov.in/antitrust/orders/details/108/0

maintains a commanding market position in the field of educational technology, boasting 2.4 million subscribers, the highest among all other educational technology platforms[24]. Furthermore, with a current valuation of $18 billion, it holds the title of being the most valuable educational technology firm worldwide. Due to its acquisitions, it has the capacity to exploit its position by coercing other firms to exit the market, which would constitute a breach of Section 4 of the Act. Moreover, due to its aggressive acquisition strategy, including the recent acquisition of a recruitment agency, there is a possibility for the emergence of adverse externalities, such as "market tipping," which may arise from the creation of "network effects.

An instance of a phenomenon referred to as "network effects" occurs when the value of a product is contingent upon the quantity of individuals, clients, or consumers who are actively utilizing it. Consequently, the value of the product grows in direct correlation to the number of users, leading to an escalation in the "network effects." BYJU's is strategically creating a scenario known as "Indirect network effects" where the value of its acquired educational technology startup (complementary product) is being increased, thereby boosting the value of BYJU (the original brand). BYJU's growing dominance in the education technology sector may lead to a "market tipping" scenario in the industry. Moreover, in cases when market tipping is employed to establish a monopoly, it is crucial to evaluate if the dominant firm has the capacity to generate anticompetitive consequences and exercise control before any abuse occurs. This measure is implemented to proactively mitigate the possibility of any actual misuse taking place.

Consequently, the influence of BYJU's "network effects" will intensify when the institution acquires additional educational technology startups. This will lead to a market shift in favor of BYJU's, thereby making it arduous for other competitors to acquire users, thereby impeding real competition.

THE TANGLED WEB SITUATION

Under the competition law mechanism, the most frequently endorsed legislative modification is the decrease in transaction thresholds, leading to an expanded jurisdiction of regulatory authorities. The minimal deal values and negligible target exclusions that grant organizations

[24] Dash S, "From BYJU'S to Unacademy – Competition in India's Fast-Rising Online Education Sector" Business Insider (September 21, 2020) <https://www.businessinsider.in/business/startups/news/from-byjus-to-unacademy-competition-in-india-fast-rising-online-education-sector/articleshow/78228490.cms> accessed February 15, 2024

exemption from reporting transactions to CCI, provided that the transaction is below a certain threshold, are two factors contributing to the frequent lack of notice of killer acquisitions by regulatory bodies. As previously said, this occurrence is fairly common. If the barrier to mergers and acquisitions in India is reduced to 2,000 crores, as suggested in the revision, it would have a substantial impact. Given its relatively lesser value, it will expand the range of CCI's jurisdiction and encompass a larger number of transactions requiring notification.

However, it is crucial to understand that lowering the threshold is not an immediate solution to such a complex problem. Regulators worldwide have focused their efforts on loosening requirements to broaden their regulatory jurisdiction. These two issues may arise as a consequence of this:

- Since there is a pressure on an already overwhelmed regulatory system, CCI must effectively manage the excessive number of transactions now within its administrative jurisdiction. Considering this, coupled with the proposed Amendment Bill's shorter review period, the Commission's ability to perform thorough due diligence would be heavily burdened.
- Stifle innovation and impede lawful commercial activities. Strategic partnerships and collaborations are likely to be crucial in driving growth and fostering innovation, especially in the technology sector.

Apple's acquisition of Beats Electronics enabled the firm to go from a relatively minor consumer audio brand to a vast technical empire[25]. Given the government's aggressive measures, this acquisition would have been an unintended consequence, as it did not pose a significant threat.

Regulatory authorities are considering whether to adopt a prudent retrospective evaluation of the acquisition of lethal weapons[26]. Ex post evaluation refers to the analysis of acquisitions after the transaction has been completed. In the digital economy, where the effects of a transaction can only be assessed after a specific duration, this is highly advantageous. Consider the Google-DoubleClick deal, which only became a subject of antitrust scrutiny once Google

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[25] "Apple to Acquire Beats Music & Beats Electronics" Apple (May 28, 2014) <https://www.apple.com/in/newsroom/2014/05/28Apple-to-Acquire-Beats-Music-Beats-Electronics/> accessed February 15, 2024

[26] Argentesi E and others, "Merger Policy in Digital Markets: An Ex-Post Assessment" [2019] SSRN Electronic Journal <http://dx.doi.org/10.2139/ssrn.3507256>

had transformed into a dominant force in advertising that had significant influence across other sectors.

IMPORTANCE OF POST-ACQUISITION EVALUATION FOR STARTUPS

An ex-post assessment that is both permissive and cautious must be conducted in light of the inherent uncertainty surrounding killer purchases. An ex-post assessment refers to the review of an acquisition once it has been concluded. This is particularly advantageous when addressing killer acquisitions, as the consequences of these acquisitions are not apparent until a specific duration has elapsed. An important issue related to the evaluation of killer acquisitions is the need to enhance the existing ex-post review powers of the CCI in cases involving abuse of dominance and a appreciable adverse effect on competition (AAEC). Acquisitions that involve growing ideas of harm, such as the nascent competitor theory, should be unequivocally acknowledged as killer acquisitions. This is because it is essential that the transactions be acknowledged as such. If the authorities fail to identify and examine a potentially harmful purchase until there is substantial evidence of an Anticompetitive Effect, the consequences of the acquisition will unfold discreetly, ultimately leading to a detrimental impact on consumer welfare.

Analyzing the effects of a nascent purchase does not always require a framework that is significantly different from any other horizontal acquisition. The primary determinant of competitiveness is the incumbent's ability and incentive to increase prices and/or limit innovation or quality. Therefore, the evaluation should focus on the degree to which the purchased entity's current products can be replaced by other products both now and in the future. If the products of the acquired firm, whether currently available or potentially available in the market, cannot be substituted with those of the acquiring entity, then the probability of the transaction being considered a killer acquisition is greatly increased. When considering the purchase of potentially disruptive firms and competitors, it is crucial to carefully consider the possibility of disruption. Based on the findings of the Furman study[27], there is an inverse relationship between the probability of a killer acquisition and the level of competition in the

[27] "Unlocking Digital Competition" (Digital Competition Expert Panel 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf> accessed February 15, 2024

relevant market. Consequently, it is important to prioritize ex-post evaluation in markets that already suffer from a lack of competitiveness.

Furthermore, it is crucial to consider the Norwegian model[28], which entails the competition authorities maintaining a registry of significant corporations that are required to notify the authorities of their transactions and acquisitions. This technique efficiently alleviates the burden on agencies to identify purchases made by killers. Nevertheless, it is vital to ensure that the process does not transform into a cause of annoyance for the companies.

THE NEED OF STARTUP ACQUISITION REFORM

The Combination Regulations have undergone several amendments to adapt to the fast evolving digital business landscape in the country. These amendments specifically included scenarios that are not covered by notification requirements. These situations encompass minority acquisitions, gradual acquisitions, routine investments, intra-group transactions, and other such scenarios. These situations are typically unlikely to raise worries over competition. The Combination Regulations were revised to include the submission of green channel route (GCR) cases. These submissions enable automatic approval to be granted as soon as the merger notice is filed, as long as there are no overlaps in terms of market competition between the acquiring group and the target firm. In addition, the CCI does not perform any substantial assessments of the transaction. It is worth mentioning that these provisions were not included in the Act as they were gradually included into the Combination Regulations. Hence, the associated prerequisites are absent from the Draft Regulations. The incorporation of the broad provisions for various exclusions and considered approval is the reason for this, as stipulated by the Amendment Act. The Ministry of Corporate Affairs, the relevant nodal entity, is expected to provide extensive guidance on a range of exemptions and approvals to make up for the lack of exemptions and considered approvals in the Draft Regulations.

The Competition Commission of India (CCI) has the power to investigate "combinations" within one year of their execution[29]. The Act contains a definition of the term "combinations" in section 5. As per Section 5, agreements that do not need to be reported to the CCI are those where the target entity's assets or turnovers fall below specific thresholds. Since these

[28] "Annual Report on Competition Policy Developments in Norway" (Directorate for Financial and Enterprise Affairs 2021) <https://one.oecd.org/document/DAF/COMP/AR(2021)26/en/pdf> accessed February 15, 2024
[29] Competition Act, 2002, §20(1)

acquisitions fall within the threshold limits, the effectiveness of the CCI in combating killer acquisitions is compromised.

To address this issue, it is necessary to broaden the scope of section 20(1) to include non-notifiable and exempt combinations. This can be achieved by incorporating a provision into the exemption clause outlined in section 5, which specifies that the clause will not apply if the CCI possesses a reasonable suspicion of a purchase involving a killer. To prevent any arbitrary decisions, it is necessary that the authorities offer a clear explanation of what makes a reasonable suspicion. Several factors can lead to reasonable suspicion, such as the incumbent's ability and intention to raise prices and/or reduce innovation or quality.

As per subsection (1) of section 20, the ex-post evaluation must be finished within one year. Conversely, it is possible that this extended duration may not be adequate for assessing the impacts of a killer acquisition. If the time frame is too short, there may not be enough data available to assess the impact of the acquisition on the market. Conversely, as the time frame is extended, it becomes more challenging to ascertain the impact of the merger on the market and the well-being of customers. This is because unrelated events may have occurred, which could have significantly affected the market conditions, apart from the acquisition. Furthermore, such killer acquisition would have already inflicted substantial harm.

It should be noted that many countries worldwide have diverse time limitations for ex-post evaluation. This is a factor that should be considered. The United States of America is the only jurisdiction that does not have a legislated time constraint. In the United Kingdom, the intervention must occur within a four-month timeframe, while in Canada and Mexico, the review or notice request must be submitted within one year of the merger.

Businesses may face uncertainty due to a variable timeline, as they are subject to potential inspections at any given time after the merger is established. The authorities can construct a comprehensive framework that outlines the specific situations in which the need for ex-post evaluation will arise, as well as the appropriate mechanism for conducting such evaluation.Extending the term of one year stipulated in section 20(1) would be beneficial, given that the CCI establishes a proficient framework for conducting ex-post evaluations.

CONCLUSION

The existence of "killer acquisitions" by large technology companies in the fast-evolving digital landscape undoubtedly presents significant risks and challenges to the regulatory

structure overseeing mergers and acquisitions. The paper thoroughly examined and analysed the legal framework, specifically focusing on the India's merger control system, the existing enforcement gaps, and the competition policy objectives in the digital industry. Furthermore, it has undertaken a thorough examination encompassing its jurisdictional criteria and its impact on the competition policy, with a specific focus on the digital industry. Moreover, the growth of big companies and the emergence of technology giants have highlighted the notion of killer acquisitions. These acquisitions possess the capacity to suppress innovation and manipulate competition within the digital market. These new innovations have led to significant concerns, particularly regarding the anticompetitive practices employed by these major technology companies. Consequently, there is a pressing requirement for effective regulatory interventions.

The CCI has consistently shown its dedication to addressing and preventing anticompetitive practices by technology companies. The effort is made to ensure that every player within the India's trading block are working under fair and equitable conditions. However, it has been noted that the India's merger control mechanism is facing a growing array of challenges in adapting to the swiftly evolving digital environment. There is an increasing demand for continuous assessment and improvements in this field, as indicated by the debate surrounding notification obligations, merger thresholds, and the complex situation that competition authorities and policymakers are currently facing.

Notably, in addition to improving the merger control modifications, the Amendment Act and the Draft Regulations also modify a few other elements along the way. As formalized in the Draft Regulations, one example of this is the pre-filing consultation method. Due to the increasing digitalization of the global economy, it is not unexpected that numerous merger control regimes have struggled to adapt to the evolving circumstances. Given the current state of the economy, it is crucial for the competition authorities to ensure that the existing standards are sufficient for identifying and dealing with Killer Acquisitions and other transactions that may arise due to the current economic conditions. It is crucial to examine all possible solutions in the context of avoiding adverse effects on customers, preventing anticompetitive consequences, hindering innovation, and potentially affecting the supply of products and services, among other factors. However, authorities must also be careful not to giving in to excessive regulation, as this can impede consumers from enjoying the advantages of acquisition synergies and innovation.