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DEALING WITH DEAL VALUE THRESHOLD

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Abstract

The consumer has always been at the heart of the Competition law. Because of competition in the market, even the most significant market players have to consistently work on the quality and supply of the goods or services offered to sustain their position. The existence of competition ensures that the market positions are susceptible to change based on the availability of better prices or better quality of goods or services, thereby constantly encouraging the companies to be on their feet to improve their pricing mechanisms and products[2]. All this is done to ensure that the consumer ultimately has the choice among the best prices and products. Thus, with the intention of consumer welfare at its core, competition law requires that any actions that might adversely impact the existence of fair competition, give one or a few companies an unfair advantage over others, or prevent new entrants from entering the market have to be checked. Such acts are called acts having an appreciable adverse effect on competition (AAEC). The Competition law regime in India has primarily believed in checking such anti-competitive behaviour on an ex-ante basis instead of waiting for an issue to arise and then taking action. The Competition Act 2002 was already in place to check such agreements or actions by the market players that might lead to an AAEC.

Introduction

However, the law is like a stream; it must keep flowing. The law needs to keep evolving to consider the changing needs of society because, with the change in society and the needs of the

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[2] 'Competition Commission of India' <http://164.100.58.95/sites/default/files/advocacy_booklet_document/CCI%20Basic%20Introduction_0.pdf> accessed 1 September 2023

people, in addition to technological development, new issues arise almost every day. They naturally have to be taken into account and addressed by the law to prevent the state of anarchy. This development can be through judicial pronouncements by the country's Courts, addressing the issues arising based on eternal principles of justice, equity, and good conscience. However, the same is not very feasible. Another way of dealing with the same is through enacting new legislation to address contemporary issues or incorporating the same into the existing statutes as per the current requirements. The same was true for the Competition Act of 2002. It was, undoubtedly, robust legislation to deal with the significant issues relating to Competition law in the country and to set up a reliable anti-trust regime in the country, but with the advent of technological advancements and to take into account the ever-increasing market size.

There are several actions of the market players that can adversely affect the Competition in any industry. One is the merger between two market players or the other's acquisition of one market player. The same can lead to consolidation of market power, thereby making it difficult for the other smaller players as well, and the same can also be used as a measure to curb innovation. However, it is not the case that mergers and acquisitions are anti-competitive in every instance. The same has to be determined based on the facts and circumstances. For example, two small players merging intending to pool their resources and use the same to advance quality or innovation cannot be termed anti-competitive. On the contrary, curbing such a merger would be antithetical to the ultimate object of the Competition law as it would prevent innovation from being available in the marketplace, thereby restricting the choice of consumers. Thus, a mechanism must be implemented to assess which transactions qualify as anti-competitive. The same is determined by the Competition Commission of India instituted by the Competition Act, 2002. However, the Commission can only take cognisance of some acquisition. Thus arose the need to come up with certain thresholds based on the turnover and assets of the company entering into a merger or acquisition of one company by another; the same has been dealt with under Section 5 of the Competition Act, 2002. The values of the assets and turnover have been changed repeatedly as these thresholds have to be adjusted according to the inflation rates. The

current threshold requirements under the Act stand at rupees one thousand crore worth of assets in India or three thousand crore annual turnover in India[3].

It would be amiss to say that these thresholds haven't been effective, but the law needs to keep pace with changing markets. That is precisely why the Ministry of Corporate Affairs appointed the Competition Law Review Committee (CLRC) to review the existing competition legislations, rules, and regulations and give recommendations to facilitate the creation of a robust competition regime in the country. The Committee, under the chairmanship of Mr. Injeti Srinivas, offered several suggestions. Many materialised in the Competition Amendment Bill of 2022, further enacted as the Competition (Amendment) Actof 2023. The Amendment Act brought several changes, each of which can be made the subject of extensive discussions. However, for this paper, we are concerned with the introduction of a deal-value threshold (DVT) introduced by the Act, which, if satisfied, the proposed combination needs to be reported to the CCI, and the exact needs to be reviewed for possible appreciable adverse effect on competition. The threshold under discussion herein is the deal value threshold, added as Section 5 clause (d) to the Competition Act, 2002. It makes combinations notifiable to the CCI being entered into by the parties to the merger or acquisition exceeding Rupees two thousand crores, provided that either of the parties has substantial business operations in India[4]. Therefore, post-amendment, as per Section 5(d) of the Competition Act, if a transaction relating to acquisition of any control, voting rights, shares, or any merger or amalgamation exceeds the value of rupees two thousand crores and the entity being so acquired, merged or amalgamated has substantial business operations in India, then the same has to be notified to the Competition Commission of India for scrutiny for the simple reason that a transaction of this extent is very well capable of causing an appreciable adverse effect on competition.

The apparent question bound to arise at this juncture is the need to introduce this additional threshold when the assets and turnover thresholds are already in place. The reason for the same is that the committee felt that several acquisitions that might have had an appreciable adverse effect on competition escaped the scrutiny of CCI, especially in the digital sector.

[3]Competition Act 2002, s 5.
[4]Competition Act 2002, s 5(d).

Need for Deal Value Threshold (DVT)

Introducing a new threshold is always done to fill an enforcement gap. This holds in the current situation as well. The Review Committee (CLRC) felt that some mergers and acquisitions combinations were escaping the Competition Commission of India (CCI) scrutiny under the de-minimis exception as their assets and turnover were lower than the prescribed thresholds[5]. Moreover, it was felt that simply lowering the asset and turnover threshold would not answer the problem as the same would lead to more false positives than bringing the proposed combinations that are capable of causing an appreciable adverse effect on competition within the review of the Commission because many such varieties involved parties whose turnover and assets were valued lower than the prescribed thresholds but they were valued highly owing to their innovation or technical know-how. Thus, considering that the acquirer would be willing to pay for the target party would be a more sound indicator of a combination being capable of adversely affecting competition. This scenario was mainly observed in the digital markets.

Need in digital markets

A few acquisitions were made in the digital markets that could be qualified to consolidate market power. Still, the CCI could not review the same as they needed to meet the existing thresholds of assets and turnover. Examples are the WhatsApp acquisition by Facebook, UberEats by Zomato, and other digital market acquisitions[6]. These were termed killer acquisitions. Killer acquisitions refer to acquisitions where, post-acquisition, the innovation, as well as the resources of the acquired property, are used solely to enhance the acquirer, and the acquired newcomer more or less ceases to exist[7]. Such transactions were at high risk of escaping review under the pre-amendment regime because, more often than in the digital market, the companies are more focused on increasing their user base initially and might even do so at the extent of little to no

[5]Ministry of Corporate Affairs, *Report of the Competition Law Review Committee-2018* 128
[6]Abdullah Hussain &PrernaParashar, *Merger Thresholds and Merger Thresholds in the Digital Economy* 32
[7] 'Organisation for Economic Co-Operation and Development <https://one.oecd.org/document/DAF/COMP(2020)5/en/pdf>
'Merger Control and Jurisdictional Creep' (*Nortonrosefulbright.com*2023) <https://www.nortonrosefulbright.com/en/knowledge/publications/502bc473/merger-control-and-jurisdictional-creep> accessed 28 August 2023

turnover. It is pertinent to note here that the data is held to be more significant than monetary assets and turnover in the digital market. These market players might not have assets or turnover to the extent of being controlled by CCI for scrutiny but might be valuable because of innovation or the data they hold. Thus, a need for the introduction of deal value was felt in the digital market.

However, it would be pertinent to note here that the novel deal value threshold is made applicable universally and is not restricted to application in the digital sector only. Thus, it is reasonable to venture into the cause of applying such a threshold to other industries when the transactions escaping pertain to the digital sector only. Why would the CCI burden itself with reviewing the transactions crossing a specific value in different markets when the enforcement gap was noticed only in the digital market?

Now, here's the catch. The Committee saw this deal value threshold as applicable in every market capable of innovation with limited assets and where the same might not instantly generate turnover to the extent to cross the thresholds prescribed under the Act. The only other requirement is that these innovations be perceived as future competitors by the incumbent market players or as an opportunity to venture into new industries. One such example is the pharmaceutical industry.

Efficacy in the Pharmaceutical Industry

Killer acquisitions are no stranger to the pharmaceutical industry as well. Thus, deal value thresholds can also help ensure competition in this industry. For example, in the pharmaceutical sector, a company may be acquired by a pharmaceutical mammoth while developing a new drug for a disease without side effects instead of existing medicines available for the same ailment to consolidate its market power. In doing so, it is evident that if the mammoth truly sees potential in the new company, the amount of consideration would be insignificant to them. Such acquisitions can happen in cases of a drug recently approved by the relevant authorities, a drug still undergoing development, or in the process of obtaining appropriate approvals from the medical authorities[8]. An example of a killer acquisition in the pharmaceutical sector is Pfizer's acquisition

[8]'Guidance on Transaction Value Thresholds for Mandatory Pre-Merger Notification (Section 35 (1a) GWB and Section 9 (4) KartG) II Contents' (2018)

of Biohaven Pharmaceuticals. Thus, the pharmaceutical industry is also prone to the acquisition of target players by the incumbents because they see value in the innovation even though the same may not meet the pre-existing thresholds of assets and turnover. Therefore, it is only reasonable to bring such transactions under scrutiny. Moreover, having faced the horrors of COVID-19, it would not be without merit to state that it is of utmost importance to ensure competition in the pharmaceutical industry and prevent any adverse effect on the same, as the best medicines ought to be available to the consumers at the best price. Other markets that could probably benefit from this newly introduced deal-value threshold are

Once again, it is okay if these acquisitions would necessarily be anti-competitive. Still, it is only reasonable to bring such cases under scrutiny where one party is willing to invest or pay consideration to the extent of rupees 2000 crores or more for acquiring or merging with another company without substantial assets or turnover, which begs the question of whether or not the same is purely to pool resources for the betterment of both or an illicit agreement curbing innovation at its nascent stage and ensuring the supremacy of the incumbent market leaders.

Lack of Residuary Powers to the Commission, unlike under EUMR and US Antitrust Regime

The abovementioned reasons bring home the reasoning of the Competition Law Review Committee behind the suggestion of introducing a new threshold. But the question remains whether the same was the only solution to the perceived enforcement gap. There are, of course, conflicting answers to the question. It was the best move to fill the enforcement gap in the absence of residuary powers afforded to the Competition Commission of India (CCI). At the risk of over-simplifying, vesting the Commission with residuary powers refers to empowering the Commission to take suo moto cognisance of mergers and acquisitions or the basis of a report made to them to assess any merger or acquisition which it feels is capable of causing an appreciable adverse effect on competition. Some might argue that the CCI already has such

<https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2> 27

power under Section 20 of the Act, but the same is a flawed interpretation. The power under Section 20 can be exercised only concerning the mergers,acquisitions, or transactions specified under Section 5. Thus, the power under the same cannot be termed a residuary power. Therefore, the Commission can only scrutinise any combination that it feels might be anti-competitive with a complaint made to the Commission. The introduction of the same could help takecognisance of the transactions capable of causing an appreciable adverse effect on competition without dealing with the administrative burden of false positives. Even developed jurisdictions like the United States and the European Union have empowered anti-trust authorities to assess non-notifiable mergers[9].

Another possible solution could be an ex-post assessment of mergers and acquisitions after a reasonable period like five years or such period that the legislature deems fit so that the actual anti-competitive effect that a merger or acquisition has had on the market. The same is relevant as some transactions might not threaten the competition at the outset but might adversely affect the match. Furthermore, it is an easy way of taking cognisance of the mergers and acquisitions that may have escaped assessment by the CCI by availing protection under the "de-minimis" exemption owing to low turnover and assets. There is indeed no dearth of examples of such acquisitions. Acquisition of TaxiForSure by Ola, Jabong by Myntra, and the merger of PVR and Inox are just a few out of the lot[10].

Practices of Foreign Jurisdictions

It would now be suitable to delve into the practices adopted by other competition regimes concerning the efficacy of the deal value threshold. Whether the same has already been implemented in other jurisdictions, and whether it is feasible for us to draw parallels from such jurisdictions. It would also be worthwhile to take into account why some of the countries have refrained from implementing the said threshold.

[9]Aryan U and KAPOOR S, 'Critical Analysis of the Inadequacy of Deal Value Threshold in Regulating Digital Markets (an Overview of the Regulatory Framework and Parallel Jurisdictions)' [2023] Social Science Research Network <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4427580> accessed 28 August 2023

[10]Bandarupalli V and Guest, 'The Need for an Ex -Post Assessment Framework to Tackle Killer Acquisitions in India' (*IndiaCorpLaw*, 21 August 2022) <https://indiacorplaw.in/2022/08/the-need-for-an-ex-post-assessment-framework-to-tackle-killer-acquisitions-in-india.html> accessed 27 August 2023

Firstly, this concept of deal value threshold is a concept that has been explored previously. It is not a concept of Indian origin. It has been discussed in jurisdictions like the European Union, Germany, South Korea, etc. Thesame has already been implemented in Germany and Austria as early as 2018[11]. It is their successful implementation of the same that has, somewhere or the other, inspired our country to undertake the same. However, assuming that we have implemented the threshold similarly to the German and Austrian jurisdiction would be folly.

Germany and Austria

These transaction value thresholds were introduced in Germany vide the German Competition Act, 2017, and in Austria vide the Austrian Cartel and Competition Law Amendment Act, 2017. From there, the inspiration to adopt a deal value threshold was derived. However, it is essential to notice that the clarity with which they have implemented the same has yet to be imbibed. Germany and Austria have jointly issued a guidance paper stating the specific meanings attributed to the terms "value of transaction" and "substantial business operations"[12]. They have gone to the extent of devising different tests for determining whether an entity has substantial business operations in India. For example, in the case of digital markets, significant business operations are determined based on the number of users in the country.

On the contrary, other jurisdictions have chosen to stay away from deal value threshold as the anti-trust authorities in such jurisdictions already being vested with residuary powers are already empowered to look into or require any merger or acquisition not meeting the already in force thresholds, mostly being assets and turnover, do not feel the need of imposing an additional entry thereby increasing the burden both of the authorities as well as the companies merging or being acquired. Thus, they choose not to implement the deal value threshold because of the absence of any enforcement gap. This situation holds with reference to France, Ireland, and the United States.

[11]B, Chandra Lekha and B, Chandra Lekha, The Deal Value Threshold: The New Age of Competition Regulation? (May 28, 2023). Available at SSRN: https://ssrn.com/abstract=4461461 or http://dx.doi.org/10.2139/ssrn.4461461

[12] 'Guidance on Transaction Value Thresholds for Mandatory Pre-Merger Notification (Section 35 (1a) GWB and Section 9 (4) KartG) II Contents' (2018) <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2>

European Union

Even the European Union discussed the introduction of deal value as a threshold for notifying mergers to the antitrust authorities. Still, the same was rejected as it was felt that there did not necessarily exist any enforcement gap owing to the EU referral system, wherein Article 22 of the European Union Merger Regulations (EUMR) provides that the European Commission can review a merger if the same is referred to the Commission by a member State, irrespective of the fact whether such merger or acquisition falls within the national thresholds of the Member State or not[13]. Thus, it is felt by the EU that any combination capable of having an appreciable adverse effect on the Competition would already be notified either at the National or EU levels. In such a scenario, the enforcement gap can not be proven when the Commission is vested with residuary powers. Further, the report published by the European Commission titled "Competition Policy for the Digital Era"[14] states concerning the implementation of the deal-value threshold that the EU thought it prudent to wait for Germany and Austria to implement and see the impact.

Having seen the reasoning behind introducing the new threshold and the related practices in other jurisdictions, it would now be reasonable to see how implementing such a threshold might not be the answer to killer acquisition and may, in turn, raise some other issues.

It does not satisfy the ICN recommended practices of merger notifications and review procedures

As per ICN Recommended practices of merger notifications and review procedures, an additional threshold must be introduced only when there is clear proof of an enforcement gap, which is present in the Indian context in the absence of residuary powers. The acquisitions enumerated above escaping assessment and scrutiny by the Commission prove the enforcement's existence. In this respect, this threshold does help bring under the ambit of review the

[13]'Summary of Replies to the Public Consultation on Evaluation of Procedural and Jurisdictional Aspects of EU Merger Control' (2017) <https://ec.europa.eu/competition/consultations/2016_merger_control/summary_of_replies_en.pdf> accessed 29 August 2023

[14]Crémer J, De Montjoye Y-A and Schweitzer H, 'Digital Era a Report by Competition Policy Competition' (2019) <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>

combinations (mergers and acquisitions) that are entered into with the anti-competitive intention of either consolidating market power, eliminating potential threats or as a means of expanding new lines of business by market leaders using their financial resources by buying out nascent industries thereby reaping the benefits of the innovation of their innovation or technical know-how. However, the question of the efficacy of DVT in filling this enforcement gap remains debatable, as has been discussed in the later part of this essay.

Another recommendation of the ICN concerning thresholds for pre-merger review states that theentry introduced must be based on criteria that can be made with clarity and substantial objectivity[15]. It is not the case, at least in India's respect, wherein considerable and easily noticeable gaps are present that the legislation should have addressed. Still, the responsibility has been conveniently shirked off on the shoulders of the Commission to frame regulations regarding the specifics of the threshold implementation. These gaps in the legislation have been discussed as follows:

Lack of clarity on deal value

Various essential questions, such as the method of calculation of deal value, whether the parties would do the same to combination or the Commission itself, what would be included under the umbrella term of deal value, whether deferred consideration would form a part of the same unfortunately remain unanswered in the Amendment act. We can only hope that the Commission, vide its regulations, provides clarity on the same, subsequently putting the anxious minds of all the stakeholders at ease. With clarity on such a significant issue, the threshold is a source of clarity for businesses intending to enter into mergers or acquisitions.

Further, it remains to be seen whether, in cases where a part of consideration is deferred, such deferred consideration would form a part of the DVT of rupees two thousand crores. Another problem concerning the same is that the possibility of a change in deal value from the date of announcement of a merger or acquisition to the date of the actual transaction must be addressed

[15] ibid.

owing to the fluctuation in share prices of either of the parties[16]. Moreover, it has to be taken into account that the advent of development and new developments happening almost every day calls for consideration of various aspects of a transaction. A transaction might be based on data sharing or other forms of care not being monetary. The provision under Section 5(d), as it stands, does not consider such transactions.

The administrative burden on the CCI

The logistical requirements must always have precedence in the minds of legislators while undertaking the process of policymaking. The number of notifications that are bound to arise due to the introduction of DVT is far beyond the capability of the CCI to address[17]. Moreover, importance also needs to be laid on the fact that the Amendment has reduced the time limit for deciding whether a combination is harmful to the Competition. With the increase in notifications, it is necessary to reduce the timeline to ensure smooth functioning. However, it cannot be said whether the same is practically viable, taking into account the present resources at the disposal of the Competition Commission of India.

Lack of clarity on substantial business operations

The Amendment Act clarifies that the "substantial business operations" are to be seen about the target entity and has once again left it to the Commission to define the phrase. Whether the Commission will follow the German and Austrian examples and define different assessment methods for other markets or adopt uniform criteria remains to be seen. Seeing how the same applies to digital needs is of utmost interest. Strategies like market share that the target entity holds in a particular industry can also be used to define the same, but as long as the same remains undefined, it will have to be dealt with by the CCI based on facts and circumstances. The

[16]cbclseconduser, 'Deal Value Threshold for Combinations - CBCL' (*CBCL*10 August 2022) <https://cbcl.nliu.ac.in/guest-posts/deal-value-threshold-for-combinations/> accessed 29 August 2023

[17]Bloomberg, 'CCI's Resource Woes: India's Antitrust Agency Squeezed by Staff Vacancies, Workload' (*The Economic Times*9 March 2023) <https://economictimes.indiatimes.com/news/india/india-antitrust-agency-squeezed-by-staff-vacancies-and-workload/articleshow/98508824.cms?from=mdr> accessed 1 September 2023

German example of using the number of users to indicate substantial business operations for digital players could also be emulated[18].

Further, factors like the marketability of the product or service offered by the target entity in the Indian markets and the local nexus of the entity with the same can be valuable considerations in defining this aspect. The definition of "substantial business operations" will further determine the extent of jurisdiction of the Commission while determining whether specific mergers have an anticompetitive effect on the Indian markets.

The reasoning behind legislation abstaining from defining these terms might be that the meaning afforded to these terms might need alteration from time to time to keep pace with the rapidly evolving market. Still, with clarity on these material issues, implementing the new threshold remains manageable. It is challenging to analyse the effect of such performance with certainty critically.

It might hurt the nascent start-up industry

India is a new bird in the sky of the start-up industry. The start-up sector in India is still at a developing stage. In such a situation, introducing such a threshold might adversely affect the morale of the start-ups as they would have to bear the pressure, and the costs of notifying their transactions to the CCI might have the exact opposite impact than the one desired. Bringing such transactions under scrutiny might lead the acquisitions happening at an even earlier developmental phase of the start-up for a consideration lower than the threshold. Therefore, the innovation would be curbed even before reaching a specific potential if the same is seen as a threat by the incumbent[19]. This might also reduce the valuation of such start-ups, which ought to be highly owing to their innovation, technical know-how, and perceived ability to pose a danger to the market position of the incumbents.Further, in today's fast-paced market, time is of the essence, and in such a situation, making a start-up wait for approval can have devastating effects as the same can hurt the share market rates of either of the parties.

[18]The, 'DEAL VALUE THRESHOLD in INDIA: UNRAVELLING the BOUNDARIES of "SUBSTANTIAL BUSINESS OPERATIONS"' (*Tcclr*9 July 2023) <https://www.tcclr.com/post/deal-value-threshold-in-india-unravelling-the-boundaries-of-substantial-business-operations> accessed 29 August 2023

[19]Feyen E and others, 'Fintech and the Digital Transformation of Financial Services: Implications for Market Structure and Public Policy' (2021) <https://www.bis.org/publ/bppdf/bispap117.pdf>

Although it is customary for India, a developing economy, to make policy decisions by relying on the anti-trust policies adopted by foreign jurisdictions, in the present scenario, the emulation of Germany to introduce a deal value threshold might not necessarily be a move that our economy presently needs. Germany and South Korea, being developed economies, do not parallel the market conditions and the market needs of our economy[20]. At the current stage of development, there is a need for an impetus to be provided for the growth of start-ups. In light of the same, adding additional regulatory requirements might not be as judicious as the Commission currently considers it. The different threshold burdens the nascent companies, thereby being adverse to the ease of doing business policy[21], which is undoubtedly the need of the hour. At this particular point in our economy, it is consequential to strike a balance between providing a favourable atmosphere for startups to flourish and regulating the activities of businesses to prevent malpractices. Protection of the consumer's interests has to be balanced with the needs of companies, as both are necessary for the sustainable and wholesome development of the economy.

Conclusion

It is still early to make a statement conclusively on whether the deal value threshold would be crucial in limiting the reach of anti-competitive practices and end-killer acquisitions. The same is a good step with a faulty implementation. In the absence of clarity regarding the critical issues like the definition of real value and substantial business operations, the provision needs to be more complete, as earlier mentioned. The hope that the Commission will come up with ways to address the issues above and make adequate administrative arrangements to deal with the prospective surge of notifications is the only way that the deal value threshold can prove beneficial and address the anti-competitive practices it was introduced to address.

[20] 'Public Mergers and Acquisitions in South Korea: Overview | Practical Law' (*Practical Law*2021) <https://uk.practicallaw.thomsonreuters.com/2-502-1572?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 1 September 2023; 'The Legal 500' (*Country Comparative Guides | The Legal 500*2019) <https://www.legal500.com/guides/chapter/germany-merger-control/> accessed 1 September 2023

[21] Pande A, Mahima Cholera and Verma D, 'Big-Data Mergers in India: Changing Landscape and the Way Forward' (*Bar and Bench - Indian Legal news*8 July 2023) <https://www.barandbench.com/law-firms/view-point/big-data-mergers-in-india-changing-landscape-and-the-way-forward> accessed 1 September 2023