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M&A INDIA AND THE NEW BILL- Anuli Chikhalikar¹**Introduction:**

Merger and Acquisition (M&A) activities have been a significant part of the global business landscape for decades. In India, M&A has witnessed a remarkable growth trajectory over the years, reflecting the country's evolving economic landscape and its role in the global market. In this article, we will delve into the world of M&A in India, exploring its historical context, current trends, regulatory framework, key sectors, and the factors that drive M&A activity. We will also discuss the challenges and opportunities inherent in this dynamic field. Even while India's merger and acquisition ("M&A") activity was relatively stable from 2015 to 2019, the country saw a spike in deal prices in 2022 when the country's volume and value of strategic M&A deals reached all-time highs, while dealmaking in most of the rest of the globe decreased². By volume and value, the vast majority of agreements were in the banking and financial services, IT & ITES, fintech, energy, and natural resources sectors. These were followed by the manufacturing, e-commerce, education, and aviation sectors³.

Historical Context:

Even while India's merger and acquisition ("M&A") activity was relatively stable from 2015 to 2019, the country saw a spike in deal prices in 2022 when the country's volume and value of strategic M&A deals reached all-time highs, while dealmaking in most of the rest of the globe decreased. The concept of mergers and acquisitions in India can be traced back to the early 20th century, during the pre-independence era when the Indian corporate landscape was

¹ Student at Amity University

²<https://www.bain.com/insights/india-m-and-a-report-2023/>

³<https://www.bain.com/insights/india-m-and-a-acquiring-to-transform/>

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dominated by family-owned businesses. However, the post-liberalization period in the 1990s marked a significant turning point. India's economic policies were liberalized, paving the way for greater foreign direct investment (FDI) and a more business-friendly environment. As a result, Indian companies began to explore global opportunities, and international players sought entry into the Indian market.

This period witnessed the emergence of several landmark M&A deals. One of the most notable was the acquisition of Jaguar and Land Rover by Tata Motors in 2008. This deal not only signalled India's growing appetite for global acquisitions but also demonstrated the country's ability to manage and nurture renowned international brands.

Competition Law

Sections 3, 4, and 5 of the Competition Act, 2002 (the "Competition Act"), which superseded the Monopolies and Restrictive Trade Practices Act, 1969, mainly address (i) anti-competitive agreements; (ii) abuse of dominance; and (iii) combinations. The Competition Commission of India will regulate combinations that have caused or are likely to cause a significant adverse effect on competition in India under the Competition Commission of India (Procedure in regard to the Transaction of Business relating to Combinations) Regulations, 2011 (the "Combination Regulations").

I. Anti-Competitive Agreements

The Competition Act primarily addresses two types of anti-competitive agreements: Vertical Agreements, or agreements between entities at different stages or levels of the supply chain regarding the production, supply, distribution, storage, sale, or price of goods or services, and Horizontal Agreements, or agreements between entities engaged in similar trade of goods or provision of services. The Competition Act's provisions nullify anticompetitive agreements that result in or are likely to result in an AAEC within India.

Presumably, a horizontal agreement has an AAEC if it: (i) sets purchase/sale prices; (ii) restricts or regulates production supply, markets, technical development, investment, or service provision; (iii) shares the market or source of production or service provision by allocating geographical areas/types of goods or services or number of customers in the

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market; or (iv) leads to bid rigging / collusive bidding. Conversely, agreements that are vertical in nature—like tie-ins⁴, exclusive supply, or distribution contracts, etc.—may be seen to have an AAEC.

II. Abuse of Dominant Position

A company is said to be in a dominating position in India if it can function without interference from rivals or customers, or if it can influence important Indian markets in a way that benefits it. Abuse of a dominating position is forbidden by the Competition Act. The imposition of unfair or discriminatory terms or prices for the purchase or sale of goods or services, predatory pricing, limiting, or restricting production or provision of goods or services, technological or scientific development, engaging in practices that deny market access, etc. are all examples of abuse of dominance.

III. Regulation over Combinations

According to Section 5 of the Competition Act, a "combination" is defined as:

1. the purchase of an enterprise's shares, voting rights, or assets by an individual;
2. the purchase of an enterprise's control in cases where the acquirer already has direct or indirect control over another enterprise carrying out the same business; or
3. a merger or amalgamation between or among enterprises that exceed the financial thresholds outlined in Section 5.

The combined asset value and turnover of the target and acquirer in the case of an acquisition, the combined asset value and turnover of the combined resultant company in the case of an amalgamation or merger, and the combined asset value and turnover of the "group" to which the target/resultant company will belong as a result of the proposed acquisition/merger are the factors used to determine the financial thresholds for a combination.

⁴ In a tying arrangement, the buyer agrees to buy a different product from the seller, referred to as the "tied" product, in exchange for the seller selling one product, referred to as the "tying" product. If the buyer agrees to refrain from buying the tied product from any other seller, the seller's sale of the tying product is likewise seen to be a tying arrangement.

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The Competition Commission of India (CCI) has been granted extraterritorial jurisdiction under Section 32 of the Competition Act. This means that any acquisition that exceeds certain limits and has assets or turnover in India will be scrutinized by the CCI, regardless of the location of the acquirer and target.

Current Trends :

The M&A landscape in India has continued to evolve, and several key trends have emerged in recent years:

1. **Digital Transformation:** The digital revolution has had a profound impact on M&A activity in India. Companies operating in the technology and e-commerce sectors are actively seeking acquisitions to expand their digital capabilities, gain access to new markets, and stay competitive in the rapidly changing business environment.
2. **Pharmaceutical and Healthcare:** India's pharmaceutical industry has been a significant player in the M&A market. Companies are focusing on acquiring assets, intellectual property, and technologies to strengthen their research and development capabilities and expand their global reach. Healthcare M&A activities have also gained momentum, driven by the increasing demand for healthcare services and infrastructure.
3. **Banking and Finance:** The banking and financial sector has seen significant consolidation in recent years. The merger of public sector banks, such as the merger of Dena Bank, Vijaya Bank, and Bank of Baroda, is an example of the government's efforts to create stronger, more competitive financial institutions.
4. **Renewable Energy:** The renewable energy sector is witnessing substantial M&A activity as India strives to reduce its carbon footprint and meet its clean energy targets. Investments and acquisitions in solar, wind, and other renewable energy projects have gained traction.
5. **Startups and Innovation:** India's startup ecosystem has been a hotspot for M&A activity, with larger companies seeking to acquire innovative technology, talent, and market share.

This trend has accelerated the growth of startups and created opportunities for entrepreneurs.

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Competition (Amendment) Bill, 2023

The Competition (Amendment) Bill, 2023 became the Competition (Amendment) Act, 2023 ("Amendment Act") on April 11, 2023, following its passage by the Lok Sabha and Rajya Sabha on March 29, 2023, and April 3, 2023, accordingly. The Competition Act of 2002 (the "Act") is to undergo substantial changes as proposed by the Amendment Act.

India's present competition legislation is set to be revised by the planned Competition (Amendment) Bill, 2023 in response to instances of anti-competitive behavior by large firms, notably in the technology sector. Among these are well-known issues concerning Amazon's purported anti-competitive actions in India and Google's legal dispute with the Competition Commission of India (CCI). The Competition (Amendment) Bill, 2023 draws inspiration from such legislation in other nations, including Australia's recent legislation mandating digital companies to pay news publishers for their content and Europe's Digital Markets Act. Should this Bill be approved, it will have a substantial effect on how big enterprises operate in India and improve the level playing field for all companies.

The following are the salient features of the 2023 Bill:

- (a) Section 510 of the main Act has to be amended to include a clause titled "deal value threshold," which stipulates that any deal worth more than Rs 2000 crores (roughly USD 242 million) must receive approval from the Competition Commission of India (CCI) before moving forward with the combination. Furthermore, the CCI's outer time range for passing orders has been shortened from 210 days to 150 days.
- (b) The definition of "control" as stated in Section 5⁵ has been changed by the proposed Bill to read as "the ability to exercise material influence over the management, affairs, or strategic commercial decisions."

⁵ The current framework defines "control" to include controlling the affairs or management by (i) one or more enterprises, either jointly or singly, over another enterprise or group; (ii) one or more groups, either jointly or singly, over another group or enterprise".

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(c) In order to expedite transaction approval, the Amendment Act has shortened the timescales under the present framework and made other adjustments to the procedural requirements.

The previous Act stipulated that a combination would take effect 210 (two hundred and ten) days after the date of notification to the CCI⁶. This timeframe has now been shortened to 150 (one hundred and fifty) days⁷, which is a significant alteration to the timeline according to the Amendment Act.

(d) There has been a modification to the "settlement and commitment" clause. According to Section 48-A⁸ of the Competition (Amendment) Bill, 2023, the CCI may stop the proceedings against a party as indicated by this Bill if the party proposes settlement (which includes monetary compensation) or commitment (which includes both behavioural and structural conduct). Furthermore, CCI has the option to propose a rule that explains how this framework will be implemented.

(e) The Bill of 2023 proposes to recognize "hub and spoke" arrangements in Section 3(3) of the Competition Act, 2002. This means that parties who act as a "hub" and facilitate or coordinate the cartelization among competitors, even if they are not actively involved in the formation of the cartel but merely intend to participate in its furtherance, may be penalized for such formation.

(f) By adding the production of products or services that providers can substitute for one another, the Bill broadens the scope of the "relevant market" as it is defined in Section 19 of the main Act.

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⁶ Section 6(b) of the Act, as amended through the Amendment Act.

⁷ Section 29(1B) of the Act, as amended through the Amendment Act.

⁸ Competition (Amendment) Bill, 2023, S. 48-A.

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(g) In addition, the Bill changed the penalties for a few offenses, such as breaking CCI instructions to avoid engaging in anti-competitive agreements and exploiting a dominating position, from fines to penalties.

Factors Driving M&A Activity in India:

Several factors contribute to the continued growth of M&A activities in India:

1. **Globalization:** As Indian companies expand their footprint abroad, they seek acquisitions to access new markets, technologies, and customer bases.
2. **Industry-specific Drivers:** Different sectors have unique drivers, such as the need for scale, technological advancements, or regulatory compliance, which fuel M&A activity in those sectors.
3. **Access to Capital:** Acquiring companies often gain access to new sources of capital and financing, which can fuel further growth.
4. **Competitive Pressures:** M&A can be a strategic response to competitive pressures, allowing companies to stay ahead or consolidate their positions in the market.
5. **Economic Reforms:** Policy changes and economic reforms have made it easier for businesses to engage in M&A activities, and government initiatives often encourage such activities.

Opportunities and Conclusion:

Mergers and acquisitions in India offer significant opportunities for companies seeking growth, diversification, and access to a vast and dynamic market. The country's regulatory environment is evolving to be more business-friendly, and the government is actively promoting investment and economic reforms. India's strategic location, skilled workforce, and diverse consumer base make it an attractive destination for M&A.

As India's economy continues to grow and transform, the M&A landscape is expected to remain vibrant and dynamic. Companies that can navigate the challenges, seize the

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opportunities, and align their strategies with India's evolving economic landscape are wellpositioned to thrive in this dynamic market.



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