CPI's South Asia Column Presents:

Reshaping the Contours of Combination Threshold through the 2020 Draft Competition Amendment Bill – Meeting the Need with Digital Merger Control in India?

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I. Background

The Competition Act, 2002 replaced the toothless Monopolies and Restrictive Trade Practices Act, 1969 ("MRTP") in 2002, as it was considered insufficient to deter anti-competitive conduct. However, considering the changing dynamics of competition law and creating a robust competition regime for changing market trends, the Ministry of Corporate Affairs ("MCA") felt the need to further analyze the Act in light of the current situation. It therefore constituted the Competition Law Review Committee ("CLRC") to study and research present market trends, and existing government policies and regulatory mechanisms to check if such policies and regulations are in line with market practices.

II. The Proposed Amendments – Merger Control

The Draft Competition Amendment bill, 2020 prepared by the CLRC, put forward certain recommendations for amendments[2] such as statutory recognition for so-called "green channel" approval, expanding the definitions of "control" and "group," a speedier process for reviewing and assessing combinations, changes in standstill obligations, statutory recognition of inquiry processes, and the central government's power to set new thresholds for merger control. This article, however, broadly discusses the proposed amendment to the combination threshold regime and its impact on digital mergers in areas such as e-commerce, fin-tech, start-ups, etc. It further makes recommendations both on a national and global level to increase coordination and cooperation in regulating digital mergers that may be harmful to competition.

Section 5 of the Competition Act, 2002[3] deals with "combinations" and lays down specific thresholds based on the monetary assets and turnover of the enterprise. The proposed amendment however introduces an "empowering" provision that would permit the central government in conjunction with the Competition Commission of India ("CCI") to set out other criteria to determine whether a given transaction is to be viewed as a "combination," in addition to the asset-size and turnover criteria.

III. Need for an Overhaul in Merger Control

Section 6 of the Draft Amendment Bill[4] empowers the central government in consultation with CCI to identify any other ground to classify a transaction as a combination. This is a laudable steps by the committee, as it will increase the jurisdiction of the CCI by bringing more transactions under its purview in a more standardized and progressive form. The objective behind the alteration was to bring transactions in the digital market into both administrative and judicial scrutiny, as previously they were often non- notifiable to the CCI due to their asset-light nature, despite having the potential to produce competitive harm.

The proposed modification expands the provision to include agreements entered in the digital market as it would include "control over data" or "specialized assets" under the list of conditions used in determining dominance. The shifting of the thresholds from asset-size turnover to deal-size would result in increased compliance costs for businesses. Such a shift in threshold is favourable to nascent enterprises or start-ups as it opens the door for their

growth and expansion, whereas previously they may have been likely to be acquired by dominant players in the market to eliminate any threat they may pose.

IV. Exemption of Certain Combinations – Doing More Harm Than Good

In 2016, the exempted certain combinations from the need for approval if the "target firm's" assets were below INR 350 crore and their turnover was below INR 1000 crore.[5] This arguably posed more threat to competition than justified by the "ease of doing business" in technology-driven markets.[6] The exemption from notifying such "nascent acquisitions" risks so "killer acquisitions" that would eliminate growth by new entrants that would have the potential to disrupt dominant players through its pool of fresh talents, innovative ideas and government subsidies. The proposed amendment is welcome, as it would make antitrust regulators more vigilant towards enterprises or firms who believe in practicing "one-player market rule." Hence, the new deal-size (transactional value), threshold for merger control will impact heavily on e-commerce and tech giants as any acquisitions by them would have to be notified to the CCI, to determine whether there would be an Appreciable Adverse Effect on Competition ("AAEC") in the market.

V. A Global Reset on Digital Mergers: Need for a Global Expert Review Committee?

There is also a need for the regulation of global M&A regulations especially, amongst the e-commerce and tech giants. Lately, the CEOs of the big tech giants (Google, Facebook, Amazon, and Apple) testified before the U.S. Congress.[7] The primary aim of the investigation was to check for unfair data practices and surveillance of other companies which big tech fears as a potential threat, and their abusive strategies to protect its power by "buying, copying, or by cutting off" potential competition.[8]

However, the only defence for adopting such strategies were "providing better and convenient services to their customers." The antitrust agencies noted that such defences cannot be provided at the cost of the economy and consumer welfare.

The UK government's Furman review focused on "Unlocking Digital Competition"[9] and critically analysed the problem of growing competition concerns (the tipping point) in the digital space globally, and suggested recommendations to grapple with the persistent dominance of big tech companies. The report also highlighted how the Competition and Markets Authority ("CMA") was responsible for not identifying and overlooking the long-term impacts of anti-competitive mergers in the digital space such as the *Facebook/Instagram* acquisition or the *Facebook/WhatsApp* acquisition.[10] On October 23, 2019, Facebook, before Congress, confessed that it feared the competitive threats of Instagram and Whatsapp.[11] *Google/DoubleClick*[12] was another master acquisition in the advertising technology business. *Paypal/iZettle*[13] was also a high profile UK CMA phase 2 case where Paypal acquired iZettle for $ 2.2 billion when it was initially valued at $ 1.1 billion.

Over the last 10 years, these big tech firms have already made an unnerving 400 plus acquisitions globally and few have been blocked or subject to conditions for approval in the UK or elsewhere.[14] These acquisitions have done no justice to the e-commerce sector. The recent probe of Amazon's acquisition of a 16 percent stake in the food delivery company

Deliveroo caused serious concern in the incipient ultra-fast grocery delivery market.[15] Walmart's strategy of acquiring Jet.com, a smart and fast-growing online retailer, for $3 billion in 2016[16] then further acquiring Art.com, an online specialty retailer of wall art and other home-decor products in 2018[17] highlights the need for valuation analysis in merger control.

The major reason for acquisitions of such nascent/targeted companies in the digital market is because of their "small size and low turnover." Such targeted companies raises no issue as selling their companies to the potential acquirer would help them in generating funds for the formation of their own venture capital market. However, the ultimate harm in this process is always faced by the consumers as there remains no countervailing buying power due to limited competition existing in the market. The initial absence of any firm provision both in India and globally to deter, the growth of such anti-competitive conduct by the dominant tech and e-commerce entities have paved an impetus for them to walk on the roads of profiteering.

Therefore, the need for a thorough analysis by economic and market experts becomes necessary to identify the relevant counterfactuals in big mergers. However, there is also a requirement to enact broader policy reforms that might find more pro-active methods and a more targeted approach in dealing and assessing the intent of the acquiring firm.

VI. Conclusion

The loss of potential competition by acquiring a small or nascent firm is no more a novel theory of harm but in the buy versus build era, competition watchdogs should concern themselves with the contemporary and dynamic marketing strategies practiced by dominant players. The rapid increase of nascent acquisitions not only involved in the killing of a product or innovation but also are seriously to the detriment of consumer choice.

The CLRC recommendation concerning to the "shift to valuation analysis threshold" in merger control is undoubtedly a much-needed shot in the arm for dominant players in the digital space, but it however failed to make suggestions similar to those in the Furman review, such as assessing a merger using an "expected harm test" i.e. shifting the approach to merger control from a "balance of probabilities" to a "balance of harm." *Ex post* review would also help competition agencies to trace or check the extent to which the success of the target's product depended on the acquisition. The CLRC in its draft competition amended bill should also have come up with a recommendation concerning "retrospective evaluation" of selected cases, that escaped the scrutiny of regulators in India (such as *Facebook/Whatsapp* or *Facebook/Instagram*), as such mergers were not notified in India.

Closer co-operation and co-ordination among other national antitrust agencies is essential, as it would monitor potential anti-competitive conduct arising from new technologies in cross-border digital mergers. Apart from the new shift in merger thresholds, further economic policy tools and frameworks are required to better understand and assess online markets, and a strategic and periodic market study approach should be pursued at both national and international level to address the challenges of the digital economy.

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[3] §5 of the Competition Act, 2002 https://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf.

[4] *Supra* note 3.

[5] Notification No. S.O. 674(E) dated March 4, 2016. https://www.cci.gov.in/sites/default/files/quick_link_document/Revised%20thresholds.pdf.

[6] "CCI assessing regulations to help improve ease of doing business," THE ECONOMIC TIMES (Mar. 02, 2017, 09:00 PM), https://economictimes.indiatimes.com/news/economy/policy/cci-assessing-regulations-to-help-improve-ease-of-doing-business/articleshow/57434094.cms.

[7] Adi Robertson, "Everything you need to know from the tech antitrust hearing," THE VERGE (Jul. 29, 2020, 1:10 PM), https://www.theverge.com/2020/7/29/21335706/antitrust-hearing-highlights-facebook-google-amazon-apple-congress-testimony.

[8] *Ibid.* ¶ 4.

[9] Report of the Digital Competition Expert Panel, Unlocking Digital Competition (March, 2019). https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

[10] *Ibid.* pg. 11.

[11] Tony Romm, "Amazon, Apple, Facebook and Google grilled on Capitol Hill over their market power," THE WASHINGTON POST (Jul. 30, 2020, 4:25 AM). https://www.washingtonpost.com/technology/2020/07/29/apple-google-facebook-amazon-congress-hearing/.

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[13] Veronica Roberts & Ruth Allen, "Record £250,000 Fine Imposed by the CMA On Paypal for Integration Activities During Merger Review Process," HERBERT SMITH FREEHILLS (Sept. 29, 2019) https://www.herbertsmithfreehills.com/latest-thinking/record-%C2%A3250000-fine-imposed-by-the-cma-on-paypal-for-integration-activities-during.

[14] *Supra* note 8.

[15] Jasper Jolly, "Amazon's deal with Deliveroo faces in-depth inquiry," THE GAURDIAN (Dec. 27, 2019, 17:05 PM); https://www.theguardian.com/business/2019/dec/27/amazon-deliveroo-inquiry-regulator-london-food.

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[17] Lauren Thomas, "Walmart to acquire home décor site Art.com, further extending its e-commerce push," CNBC (Dec. 06, 2018, 7:00 PM) https://www.cnbc.com/2018/12/06/walmart-to-acquire-online-home-decor-retailer-artcom.html.