

MERGER THRESHOLDS AND MERGER THRESHOLDS IN THE DIGITAL ECONOMY

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In India, much like the rest of the world, the thresholds for merger notification to the competition authority is based on the turnover of the parties involved in the deal. In 2014, when Facebook acquired WhatsApp for \$19 Billion, the question of whether antitrust law was doing enough to prevent acquisition of ‘nascent competition’ and ‘killer acquisitions’ came to focus, and particularly whether a transaction value threshold ought to be introduced. Since then, various reports have studied digital markets, including the question of sufficiency of merger thresholds. In fact, the CCI in 2020 released its market study of e-commerce in India, and noted that these markets are concentrated with a few large players. A more recent example that questions the appropriateness of the current antitrust law in detecting such deals is Zomato’s acquisition of Uber Eats for \$250 Million. This paper questions appropriateness of the current threshold in India. It explores and analyzes various changes that have the potential to ameliorate the current law. These include lowering current thresholds, introducing a transaction-value threshold, increasing the number of staff of the Combinations Division of the CCI, and providing more residuary power to the CCI.

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I. INTRODUCTION

Ever since Facebook acquired WhatsApp in 2014 for 19 billion dollars, the question of whether antitrust law was doing enough to prevent acquisition of ‘nascent competition’ and ‘killer

acquisitions’,¹ really came to the forefront. Reportedly, the big five, i.e. Facebook, Amazon, Microsoft, Google, and Apple, also known as ‘FAMGA’, acquired over 750 companies over the last 30 years², with 476 of these coming in the last 10 years.³ The Report of the UK Government-appointed Digital Competition Expert Panel, headed by Prof. Furman, notes that 400 acquisitions were made by the top five over the last 10 years,⁴ while the UK Competition and Markets Authority’s commissioned report puts the figure at 299 for Google, Facebook, and Amazon in the period 2008 – 2018.⁵ According to the recently published Report of the Judiciary Antitrust Subcommittee of the US House of Representatives, GAFAs has acquired 568 companies over the last 20 years.⁶

As the rancour grew against ‘big tech’, several significant studies were conducted and reports were published.⁷ In June 2020, the OECD held a two-day meeting of the Competition

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¹ The term ‘killer acquisition’ applies more aptly to acquisitions in the pharmaceutical industry, where the acquisition is made for the primary purpose of discontinuing the acquired product. See OECD Background Note on ‘Start-ups, Killer Acquisitions and Merger Control’ 12 May 2020, <<http://www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control.htm>> accessed 15 October 2020.

² ‘Visualizing Tech Giants’ Billion Dollar Acquisitions’ 5 May 2020, at<<https://www.cbinsights.com/research/tech-giants-billion-dollar-acquisitions-infographic/>> accessed 15 October 2020.

³ Elaine Burke ‘10 years of acquisitions show how Big Tech came to be’ 5 July 2019 <<https://www.siliconrepublic.com/companies/big-tech-acquisitions-2009-2018>> accessed 15 October 2020.

⁴ Jason Furman, ‘Unlocking Digital Competition’ (2019) <<https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel>> p. 12 accessed 15 October 2020.

⁵ Lear, ‘Ex-post Assessment of Merger Control Decisions in Digital Markets’ (2019) <<https://www.gov.uk/government/publications/assessment-of-merger-control-decisions-in-digital-markets#:~:text=As%20part%20of%20its%20continual,of%20harm%20in%20digital%20mergers>> p. 10. accessed 15 October 2020.

⁶ Majority Staff Report and Recommendations of the Subcommittee on Antitrust, Commercial and Administrative Law, of the Committee on the Judiciary of the US House of Representatives, *Investigation of Competition in Digital Markets* (6 October 2020) <https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf> accessed 15 October 2020.

⁷ See Furman(n 4); Lear (n 5); Stigler Center for the Study of the Economy and the State, ‘Stigler Committee on Digital Platforms’ (2019) <<https://research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf>> accessed 15 October 2020; Crémer, de Montjoye and Schweitzer, ‘Competition Policy for the Digital Era’ (April 2019) <<https://op.europa.eu/en/publication-detail/-/publication/21dc175c-7b76-11e9-9f05-01aa75ed71a1>> accessed 15 October 2020; ‘FTC Hearings on Competition and Consumer Protection in the 21st Century’ (Oct 15-172018) <<https://www.ftc.gov/news-events/events-calendar/2018/10/ftc-hearing-3-competition-consumer-protection-21st-century>> accessed 15 October 2020; ‘Digital Platforms Inquiry’, (June 2019), <<https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>> accessed 15 October 2020; JFTC Research Centre, ‘Report of Study Group on Data and Competition Policy’ (2017) <https://www.jftc.go.jp/en/pressreleases/yearly-2017/June/170606_files/170606-4.pdf> accessed on 15 October 2020; JFTC Research Centre, ‘Report Regarding Trade Practices on Digital Platforms’ (October2019) <<https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191031Report.pdf>> accessed 15 October 2020; Canada Competition Bureau’s Data Forum, ‘Discussing competition policy in the digital era’

Committee, focusing on ‘Start-ups, killer acquisitions, and merger control’.⁸ Two primary areas of concern were whether antitrust laws’ merger thresholds were adequately capturing such transactions, and how were antitrust authorities to assess such acquisitions. This paper concentrates on the former.⁹

Most jurisdictions work on a combination of worldwide and national thresholds based on turnover or revenue.¹⁰ Transactions related to new age technology, created by start-ups, typically fall below these thresholds when they are acquired by incumbents. Some antitrust authorities even acknowledged that there may be an enforcement gap in bringing such transactions within the review mechanism.¹¹ In 2015 Germany and Austria proposed to introduce transaction-based thresholds, and eventually did in 2017. The European Commission floated a consultation paper in 2016, but appears to have concluded that referrals from national competition authorities would work efficiently enough,¹² coupled with the ‘new tool’.¹³

(August 2019) <<https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04492.html#sec04-1>> accessed 15 October 2020; CMA, ‘Online Platform and Digital Advertising’ (July 2020) <https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf> (accessed 15 October 2020); Autorité de la concurrence, ‘Competition & e-commerce’ (May 2020) <<https://www.autoritedelaconcurrence.fr/sites/default/files/concurrence-commerce-en-ligne-en.pdf>> accessed 15 October 2020.

⁸ OECD (n 1).

⁹ As the German submission to the OECD put it: “*This article does not intend to contribute to the different theories of harm this topic entails; it is the logical precondition for any meaningful competitive assessment of a merger’s actual effects on the market structure that potentially harmful acquisitions do not escape the prism of merger control in the first place.*”

¹⁰ ICN Merger Working Group, ‘Setting Notification Thresholds for Merger Review’ (April 2008) p. 8 <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_SettingMergerNotificationThresholds.pdf> accessed 15 October 2020.

¹¹ For example, see the speech by Margaret Vestager in March 2016, “*A merger that involves this sort of company (WhatsApp) could clearly affect competition, even though the company’s turnover might not be high enough to meet our thresholds. by looking only at turnover, we might be missing some important deals that we ought to review.*”, <https://wayback.archive-it.org/12090/20191129204644/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/refining-eu-merger-control-system_en> accessed 15 October 2020; The CCI’s Chairperson also referred to this “potential enforcement gap” or “blind spot” in the panel session on Digital Merger on 15 September 2020 of the ICN Conference 2020, attended at <<https://icn-2020.videoshowcase.net/icn-2020-day-2-sept-15?category=64043>> accessed 15 October 2020.

¹² See EU Submission to the OECD 25 May 2020, Crémer and Schweitzer (n 7) 4-5; In a 11th September 2020 address at the IBA’s 24th Annual Competition Conference, Ms. Vestager indicated that the EC “*plans to start accepting referrals from national competition authorities of mergers that are worth reviewing at the EU level – whether or not those authorities had the power to review the case themselves*”, <https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en> accessed 15 October 2020.

¹³ See the EC’s Press Release 2 June 2020 <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_977> accessed 15 October 2020 Also Speech by the EC Competition Commissioner, Margaret Vestager at the ASCOLA Annual Conference, 26 June 2020, <https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-digital-age-changing-enforcement-changing-times_en> accessed 15 October 2020.

Similar to most jurisdictions, India's thresholds are based on the turnover and assets of the parties in question, which determine whether a transaction will be notifiable to the Competition Commission of India ('CCI'). Thus, it is open to the same 'enforcement gap'. The August 2019 Report of Competition Law Review Committee that had been set up by the Central Government, had a chapter devoted to '*Technology and New Age Markets*'.¹⁴ Among other things, the Committee concludes that a 'size of transaction' or 'deal value' threshold '*may be introduced in due course*'.¹⁵

The challenges of digital economy have not escaped the CCI's notice. In 2019, it launched a market study on e-commerce in India, and on 8th January 2020, the CCI released its report.¹⁶ The report focuses on platform/intermediation services in three areas – consumer goods, accommodation services, and the food services – and notes that these markets are concentrated with a few large players in each of the three categories,¹⁷ making an obvious reference to Flipkart and Amazon in consumer goods, MakeMyTrip in accommodation, and Swiggy and Zomato in food services.

On 22 January 2020, Zomato announced its acquisition of Uber Eats for approximately 350 million USD (or 2500 crores INR). The transaction was not reported to the CCI as it did not breach the current thresholds, and is perhaps exactly the kind of transaction the Committee was hoping to catch with the introduction of the transaction value threshold.¹⁸

Home confinement due to the outbreak of COVID-19 gave us a pause to think about this in greater depth. Our research threw up some interesting facts and figures, and called into question not only appropriate thresholds for the digital economy, but also the appropriate thresholds for merger regulation as a whole. This paper first looks at the current thresholds in India, and questions whether they are set at an appropriate level. The paper then also looks at the nature of transactions in a digital economy and whether a transaction value-based threshold could address the concern.

¹⁴ Report of the Competition Law Review Committee (July 2019) <http://www.mca.gov.in/Ministry/pdf/ReportCLRC_14082019.pdf> accessed 17 October 2020.

¹⁵ Report of the Competition Law Review Committee (n 14) 159.

¹⁶ Competition Commission of India 'Market Study on E-Commerce in India' (CCI 8 January 2020) <https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf> accessed 17 October 2020.

¹⁷ Ibid.

¹⁸ Indeed, the CCI has reportedly sent a notice to Zomato to confirm this. See <<https://www.moneycontrol.com/news/business/exclusive-i-competition-regulator-launches-probe-into-zomato-uber-eats-deal-5302501.html>> and <<https://www.news18.com/news/tech/trouble-for-zomato-cci-probes-possibly-anti-competitive-uber-eats-acquisition-2632713.html>> accessed 15 October 2020.

II. CURRENT THRESHOLDS

India's current merger notification thresholds work on a turnover and asset test., If the combined turnover or assets of the acquirer and the target (or of their groups) in India is over the prescribed figures, the transaction would have to be notified to the CCI for prior approval. When the statute was first enacted in 2002, the prescribed turnover figure of the acquirer and target in aggregate was 3000 crores INR in India and the asset figure was 1000 crores INR in India. In 2011, this was increased to INR 4500 crores and INR 1500 crores *via* a Central Government Notification,¹⁹ and in 2016 it was increased to INR 6000 crores and 2000 crores.²⁰ In 2011, the Central Government also introduced the '*target de minimis threshold*' – i.e. if the target has a turnover of less than 750 crores or assets of less than 250 crores in India, the transaction would be exempt from the notification regardless of whether the combined value of acquirer and target crossed the main thresholds.²¹ These *de minimis* figures were increased to 1000 crores and 350 crores in 2016.²²

But how did Parliament arrive at 3000 crores in 2002? And how did the Central Government arrive at 750 crores as the target *de minimis* figure? Very little is available publicly on these aspects, and repeated RTI applications did not yield any fruitful results. What little material was shared suggests that the increase from 3000 to 4500 crores in 2011, and then to 6000 crores in 2016, was a simple result of enhancing the value on the basis of the increase in the Wholesale Price Index, taking FY 2003 as the base year.²³

The International Competition Network suggests that the size of the economy and a comparison with other jurisdictions are useful metrics to analyze when determining one's thresholds.²⁴ Other considerations may include whether the agency has residuary power to look at transactions that fall below the thresholds, and also the resources of the agency.²⁵

¹⁹ Ministry of Corporate Affairs Notification S.O. 480(E) (4 March 2011) <<https://www.cci.gov.in/sites/default/files/notification/SO479%28E%29%2C480%28E%29%2C481%28E%29%2C482%28E%29240611.pdf>> accessed 15 October 2020.

²⁰ Ministry of Corporate Affairs Notification S.O. 675(E) (4 March 2016) <https://www.cci.gov.in/sites/default/files/notification/SO%20673%28E%29-674%28E%29-675%28E%29.pdf> accessed 15 October 2020.

²¹ EU Submission to the OECD (n 12).

²² EC's Press Release (n 13).

²³ Minutes of the Meeting of the Committee of Secretaries 6 October 2010 (resulting in the 2011 increase) and Notes of the Ministry of Corporate Affairs 10, 14, 17 and 18 December 2015 (resulting in the 2011 increase).

²⁴ ICN Merger Working Group (n 10) 10-11.

²⁵ Ibid.

III. A COMPARISON

We decided to compare the top 10 jurisdictions by GDP, as well as Russia and South Africa (to round off BRICS nations), with our own, on these metrics. This is not altogether an easy task as the thresholds systems vary significantly. While a market share based threshold may have a clear benefit in bringing the most problematic transactions to the authorities for review, it is also replete with uncertainties over the appropriate market definition and availability and presentation of the data. The most objective and reliable criteria appear to be revenue, which is why most jurisdictions work on a combination of worldwide and national thresholds based on turnover.²⁶ Others combine transaction value thresholds to the turnover thresholds, and have separate acquirer and target figures.²⁷ A relative minority also base thresholds on market shares in addition to turnover.²⁸

All in all, however, turnover was the most consistently used criteria across jurisdictions, and in most cases satisfying a national turnover test was mandatory. Thus, this was the chosen metric. The numbers were primarily sourced from the official websites and annual reports published by each authority wherever available, details of which may be found in the Appendix.

The following table contain the results of the comparison:

²⁶ For example, USA, Germany and Brazil.

²⁷ For example, USA, Canada and Germany.

²⁸ For example, UK, Spain, and Portugal.

Country	US	EU	China	Japan	Germany	UK	France	India	Italy	Brazil	Russia	Canada	SA
GDP (USD)	20.5 trillion	18.8 trillion	13.6 trillion	4.97 trillion	3.95 trillion	2.85 trillion	2.78 trillion	2.72 trillion	2.08 trillion	1.86 trillion	1.65 trillion	1.71 trillion	368 billion
Annual Net sales/turnover (USD) relatable to that country except in the case of United States & Russia, which is worldwide ²⁹	188 million for one party and & 18.8 million for another	275 million ³⁰ turnover of at least two of the entities	285 million combined turnover of all parties	186 million for one party and & 46 million for another	28 million ⁶ for one party and & 5 million for another	86 million turnover of the target	56 million turnover of each of at least two of the parties	800 million combined turnover of the acquirer and target	570 million aggregate turnover of all parties	140 million for one party and & 14 million for another	141 million combined turnover of the acquirer and target	294 million ³¹ combined revenues of the parties	393 million combined annual turnover
Target turnover thresholds (USD)	18.8 million 94 million for assets situated abroad	275 million of at least two of the entities	57 million of at least two of the parties	28 million	5 million	86 million	56 million	133 million	35 million of at least two of the parties	14 million	5 million	No minimum target turnover	11 million
Staff	1176	848	805	832	315	586	500	197	285	392	3504	391	220
Number of filings in a 12-month period CY/FY 2018/2019	2089	382	448	321	1400	62	252	94	73	404	1086	231	348
	2009 – 2019 average ³²												
Number of filings in a 12-month period	1692	332	282	283	1183	72	215	80	230	495	2700	233	328

²⁹ US and Russia also require that the transaction satisfy a local nexus requirement. For foreign based transaction, the US requires that acquired assets situated abroad should have generated sales in excess of USD 94 million and aggregate sales of the acquirer and target in the United States are more than USD 207 million. Russia requires that the target be a Russian company, the assets be situated in Russia, or the target has sales of over USD 15 million in Russia.

³⁰ Works in conjunction with a worldwide turnover threshold.

³¹ Works in conjunction with a size of transaction threshold.

³² Based on available data, the average for US, UK, Germany and EC is for a 10-year period, India for 8, and France for 7.

Notes on currency conversion:

- The rate of conversion of INR into USD is the average spot rate for the last six months quoted by the Financial Benchmarks India Private Ltd (FBIL): 1USD = INR 74.99 (as on 12 July 2020).
- Average of last 6 months for GBP into USD as quoted by FBIL, as on 12 July 2020: 1GBP=1.24USD
- Average of last 6 months for EUR into USD as quoted by FBIL, as on 12 July 2020: 1EUR=1.10USD
- All other figures are approximations based on current conversion rates, as per <https://www.xe.com/currencyconverter> (as on 13 July 2020).

What immediately stands out is that India's turnover threshold is the highest by far. Prior to 2016, when the thresholds were increased, India would have still been the highest on the list, while it would stand second based on its original 2002 figures (behind where Italy is currently).³³ While the GDP of the US, EU, and China outstrip that of India's by some distance, the turnover thresholds are significantly lower. India is sandwiched squarely between Germany, UK, and France, which have a slightly higher GDP, and Italy, Brazil, and Russia, which are slightly lower. The turnover thresholds of the former three are over ten times lower than India's. Italy is the closest to India in terms of the threshold, and still about 250 million dollars lower.

The result is of course that India and Italy receive the least number of notifications amongst the 13, and again by quite a margin. While the US and Germany receive over 1000 notifications a year, the EU, China and Brazil are around the 400 mark, and India and Italy received less than a 100. The only exception to the rule appears to be the UK, which received fewer, although it is a voluntary notification regime.

A ten-year average of the number of notifications received by each agency between 2009 – 2019 yields the same results, except Italy, which averages 230 notifications in that period. This was primarily for the reason that up to 2012,³⁴ Italy did not have a mandatory local nexus requirement, and therefore, captured a number of transactions with little to no impact in Italy.

The ICN also suggests that thresholds may be set on the higher side for agencies with residuary powers to look into transactions falling below the thresholds.³⁵ Of the 13, the antitrust authorities of the US, Canada, Brazil, China, Japan, and the UK have such a power. Yet, their thresholds are not on the higher end of the scale and all are significantly lower than India's, where the CCI does not possess such a residuary power.

Finally, the ICN asks us to consider the agency's resources.³⁶ However, if a country wants a serious pre-merger notification system in place to screen potentially problematic transactions, the

³³ Approximations given that the currency conversion rate has changed over the period 2009 – 2019. However, the thresholds of the comparison jurisdictions were also lower and have increased over time.

³⁴ Organisation for Economic Cooperation and Development, 'Annual Report on Competition Developments in Italy' (OECD 2012) p. 4
<[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/AR\(2013\)45&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/AR(2013)45&docLanguage=En)>.

³⁵ ICN Merger Working Group (n 10) 6.

³⁶ ICN Merger Working Group (n 10) 10.

answer appears to be in increasing the staff numbers rather than increasing the thresholds so fewer notifications are made. India stands in last position amongst the countries examined in terms of staff numbers. According to CCI's 2018-19 Annual Report, the Commission has a total sanctioned staff of 197 split between the CCI (156) and the office of the Director General of Investigation (41). Although the CCI could technically refer a 'phase 2' investigation to the DG's office, it has never done so. The Combinations Division (one of the six divisions at the CCI) handles merger regulation in its entirety. Between October and November 2019, the CCI increased its filing fees for both merger regulation and prevention of anti-competitive practices. This can be suitably adjusted to cover additional staff requirements.³⁷

A quick review of the ET-500 Companies list of 2019,³⁸ reveals that about half, i.e., 250 out of approximately 1800000 companies registered in India³⁹ have turnover in excess of 6000 crores INR, the current turnover threshold. 250 A similar cursory review reveals that several sectors are quite concentrated where a single player has more than 50% market share – for example automotive glass, adhesives, lead batteries, oral care, mopeds, and glass lined equipment to name a few.⁴⁰ The CCI itself has had an occasion to note the concentration in several markets during its enquiries into abuse of dominance – in markets such as viscose staple fibre,⁴¹ standing/tilting MRI machines,⁴² licensing of Bollywood music to FM stations,⁴³ borosilicate glass tubes,⁴⁴ and backhoe loaders.⁴⁵

³⁷ Back of the envelope calculations suggest the Commission received approximately INR 21.1 crores from filing fees in FY 2018-19 with 74 Form I, and 20 Form II filings. A quick comparison of budgets would suggest that the CCI's budget (of INR 162 crores, i.e. approximately USD 22 million) compares to that of France (USD 27.5 million) and South Africa (USD 24.7 million), whereas it is twice that of Brazil's (USD 11 million). All three countries review a significantly higher number of transactions as compared to India.

³⁸ See <<https://economictimes.indiatimes.com/marketstats/marketcap-,pageno-10,pid-60,sortby-CurrentYearRank,sortorder-asc,year-2019.cms>> accessed 15 October 2020.

³⁹ That is not to say that only transactions involving companies covered in top 250 listed companies in India are ever notified. In fact, there are several transactions every year that involve companies that do not find a mention in the ET-500 since once the target level turnover threshold of INR 1000 crores is crossed, the turnover threshold of INR 6000 crores is the aggregate of both (or all) parties involved. It is also possible that the threshold of INR 2000 crores is crossed on aggregate even through the turnover threshold is not.

⁴⁰ See for example '20 most profitable firms in India generate 70% of the country's profits' *Livemint* (18 May 2020) <<https://www.livemint.com/companies/news/20-most-profitable-firms-in-india-generate-70-of-country-s-profits-11589766746084.html>> accessed 16 October 2020; Ajai Sreevatsan, 'How Big Tech reset will impact India' *Livemint* (16 October 2020), "found that one-sixth of the country's business sectors has a dominant firm that controls over 70% of all sales", <<https://www.livemint.com/technology/tech-news/how-big-tech-reset-will-impact-india-11602773100875.html>> accessed 16 October 2020; Nandini Sen Gupta, 'Moped sales pick up speed on rural demand' *Times of India* (15 December 2020), <<https://timesofindia.indiatimes.com/business/india-business/moped-sales-pick-up-speed-on-rural-demand/articleshow/79727821.cms>> accessed 16 December 2020.

⁴¹ *XYZ v. Association of Man-Made Fibre Industry of India & Ors.* Case No. 62 of 2016.

⁴² *House of Diagnostics LLP v. Esaote S.p.A & others.* Case No. 09 of 2016.

⁴³ *In Re. HT Media Limited v. Super Cassettes Industries Limited* Case No. 40 of 2011.

⁴⁴ *Kapoor Glass Private Limited v. Schott Glass India Private Limited* Case No. 22 of 2010.

⁴⁵ *Bull Machines Pvt. Ltd. v. JCB India Ltd. & Anr.* Case No. 105 of 2013.

This brief study shows that perhaps the current thresholds may need to be re-calibrated, and at the very least merits re-visiting to understand if it at the desired level.

IV. KILLER ACQUISITIONS & TRANSACTION VALUE THRESHOLDS

In addition, we are also currently in the midst of a global overhaul of regulations that aim to address the peculiarities of the new age digital markets. One of the main concerns, in this regard, is ensuring that transactions of a certain nature are brought within the purview of the regulator's screening process. Acquisitions in the digital space tend to be characterized by the target slipping under the thresholds due to its minimal turnover in the growth years. One answer appears to lie in introducing a transaction value threshold. The thinking behind this is that start-ups tend to burn cash in their early years, with little to no revenue until they reach a critical mass. They, therefore, have minimal assets and revenue and thus, will inevitably fall below merger notification thresholds. However, the incumbent acquirer sees the potential (and possibly threat) which is reflected in the high acquisition price. For example, when Facebook acquired Instagram for 1 billion US dollars in 2012 (approximately 5000 crores INR at the time), it had 13 employees and *zero* revenue.⁴⁶

Detractors criticise the introduction of a new transaction-based threshold on primarily three grounds.⁴⁷ Firstly, the introduction of a new transaction-based threshold would lead to

⁴⁶ And WhatsApp had 55 employees and revenues of EUR 10 million when it was acquired two years later for 19 billion USD. See German submission to the OECD, dated 28 May 2020, p. 3.

⁴⁷ AZB Partners, 'Introduction of alternative merger enforcement thresholds – is it the way forward?' (30 November 2018) <<https://www.azbpartners.com/bank/introduction-of-alternative-merger-control-thresholds-is-it-the-way-forward/>> accessed 15 October 2020; Anisha Chand and Anmol Aswathi, 'Do new-age markets call for new merger thresholds? The India story' *Moneycontrol* (5 May 2020) <<https://www.moneycontrol.com/news/opinion/do-new-age-markets-call-for-new-merger-thresholds-the-india-story-5223171.html>> accessed 15 October 2020 For arguments against tech regulation and calls for a more interventionist approach in general, see Christine Wilson and Keith Klovers, 'The growing nostalgia for past regulatory misadventures and the risk of repeating these mistakes with Big Tech' *Oxford Journal of Antitrust Enforcement* (7 November 2019) <<https://academic.oup.com/antitrust/article/8/1/10/5614371>> (accessed 15 October 2020); Christine Wilson, 'Global Innovation, Local Regulation: Navigating Competition Rules in the Digital Economy' Remarks at UIC John Marshall Law School Center for Intellectual Property, Information and Privacy Law ChicagoIL (13 March 2020) <https://www.ftc.gov/system/files/documents/public_statements/1569053/wilson_-_global_innovation_local_regulation_ui_chicago_speech_3-13-20.pdf> accessed 15 October 2020; Geoffrey A. Manne, 'Correcting Common Misperceptions About the State of Antitrust Law and Enforcement' Invited Statement on the House Judiciary Investigation Into Competition in Digital Markets, (17 April 2020) <https://www.competitionpolicyinternational.com/wp-content/uploads/2020/07/Manne_statement_house_antitrust_20200417_FINAL3-POST.pdf> accessed 15 October 2020; Statement of Prof. John Yun, before the House Judiciary Antitrust Subcommittee (24 September 2019) <<https://www.judiciary.senate.gov/imo/media/doc/Yun%20Testimony.pdf>> accessed 15 October 2020; Henrique Schneider, 'EU Antitrust Policy in the Digital Era' (29 October 2020) Competitive Enterprise Institute <https://cei.org/issue_analysis/european-union-antitrust-policy-in-the-digital-era/> accessed 15 December 2020.

uncertainty and add to administrative burden. Secondly, and worse still, it would result in a chilling effect on investment and innovation. Finally, they point to the fact that a post-facto review under the abuse of dominance and vertical restraints provisions can always be undertaken by the CCI.

However, these arguments are not particularly convincing. The introduction of any new regulation normally adds some uncertainty and additional administrative burden. There were many clarifications required on the application of the turnover and asset tests as they currently function under the Competition Act, requiring the CCI to bring out a detailed set of FAQs on the subject after a few years. The Central Government also had to clarify its intention with respect to the *de minimis* threshold several years after it was first introduced.⁴⁸ Germany and Austria faced similar queries from industry and practitioners with regard to the transaction value threshold they introduced in 2017. A year later they issued a ‘Joint Guidance’ on the subject which clarified many of these aspects.⁴⁹ Nor did the new test appear to dramatically increase the number of filings in either Germany or Austria. 18 notifications were based on this threshold in Germany (of approximately 2686 in the same period)⁵⁰ and 15 filings in Austria of over 400 in total.⁵¹

Similarly, there is no evidence to suggest that India’s merger notification system, the CCI’s narrow interpretation of the *de minimis* exemption, or of the ‘investment only’ exemption, has led to a reduction in investments or innovation.⁵² The factors influencing investments appear to be more dependent on the expected return on investment, political stability, tax rates, enforcement of contract, and so on.⁵³

Finally, the argument that the CCI can always look at conduct under the abuse of dominance and vertical restraints provisions is true for merger regulation as a whole. The point is to address foreseeable issues prior in time rather than react to complaints subsequently.

⁴⁸ Ministry of Corporate Affairs Notification dated 27 March 2017 read with Press Release dated 30 March 2017.MCA Notification
<<https://www.cci.gov.in/sites/default/files/notification/S.O.%20988%20%28E%29%20and%20S.O.%20989%28E%29.pdf>> accessed 15 October 2020.

⁴⁹ <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2>accessed 15 October 2020 and <https://www.bwb.gv.at/en/news/news_2018/detail/news/final_joint_guidance_on_new_transaction_value_threshold_in_the_merger_control_has_been_published/#:~:text=The%20Austrian%20Cartel%20Act%20and,400%20million%20Euros%20in%20Germany>accessed 15 October 2020.

⁵⁰ OECD Background Note on Start-ups, Killer Acquisitions and Merger Control, 12 May 2020, p. 40.

⁵¹ Martin Glasser, *Why the introduction of a new transaction value jurisdictional threshold for the EUMR has been postponed, at least for now*, (28 June 2019) <<https://oxcat.ouplaw.com/page/775#11>> accessed 15 October 2020.

⁵² As NYU Law Professor Scott Hemphill states, even preventing certain transactions will not affect funding for start-ups, “*but in fact most deals would be unaffected and for those that are, typically there are other buyers.*” <<https://leconcurrentialiste.com/scott-hemphill-uncertain-harms/>> accessed 15 October 2020.

⁵³ In fact, to the contrary the Furman report suggests that “*mergers in digital markets could be detrimental to consumer welfare through reducing future levels of innovation and competition*”. See Furman (n 7) 12.

So, would the introduction of a transaction value threshold solve the problem of ‘killer acquisitions’? After all the Facebook/WhatsApp transaction was mandatorily notifiable in the US, one of the few countries with a transaction value threshold. Yet, the US has come in for the most criticism when it comes to missing out on killer acquisitions. In February 2020 the FTC directed the FAMGA contingent to provide key information and documents on *‘the terms, scope, structure, and purpose of transactions that each company consummated between Jan. 1, 2010 and Dec. 31, 2019’*.⁵⁴ The purpose of this exercise – a better understanding of tech firm’s acquisition and *‘whether large tech companies are making potentially anticompetitive acquisitions of nascent or potential competitors that fall below HSR filing thresholds and therefore, do not need to be reported to the antitrust agencies’*.⁵⁵ This is despite the fact that the US agencies have the residuary power to look into mergers that do not cross the thresholds,⁵⁶ a power that the CCI lacks.⁵⁷ In October 2020, the Antitrust Subcommittee of the US House of Representatives concluded its 16 month long investigation into Big Tech and published a 450 page report, which amongst other things, recommended strengthening merger law and enforcement to protect nascent competitors.⁵⁸ And finally in December 2020, the FTC filed a suit against Facebook⁵⁹ for wilfully maintaining its monopoly power *“through its course of anticompetitive conduct, including though anticompetitive acquisitions and anticompetitive conditioning of access to interconnections”* and sought divestiture of WhatsApp and Instagram, and more pertinently, *“a prior notice and prior approval obligation for future mergers and acquisitions”*.⁶⁰

But how prevalent is this problem of ‘killer acquisitions’ in India? According to one study approximately 582 acquisitions were concluded in the Indian start-up ecosystem in the five- year period between FY 2015 to FY 2019.⁶¹ In its E-commerce Study, the CCI noted that platform/intermediation services is concentrated with a few large players in each of consumer goods (read

⁵⁴ See ‘FTC Press Release’ (11 February 2020) <<https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies>> accessed 15 October 2020.

⁵⁵ Ibid; At the ICN’s (virtual) 2020 Conference in September 2020, FTC Chairman Joseph Simon reportedly stated that *“the agency may issue a special order that would require several Big Tech firms to file premerger notifications for acquisitions that fall well below existing thresholds”*, as reported by PaRR on 14th September 2020 <https://app.parr-global.com/intelligence/view/intelcms-wcr76p?utm_source=Notifications&utm_medium=Email&utm_campaign=Alert&utm_term=5bad1b47d6c34b0025f1620c> accessed 15 October 2020.

⁵⁶ The FTC used this power 15 times over the last 5 years to challenge non-notifiable mergers, and the DOJ 18 times over the same period. See US Submission to the OECD, (4 June 2020) p. 13.

⁵⁷ Notably, the US, UK, Canada, Brazil, and Japan have this power. See OECD Background Note, (12 May 2020) p. 42.

⁵⁸ Majority Staff Report and Recommendations of the Subcommittee on Antitrust, Commercial and Administrative Law, of the Committee on the Judiciary of the US House of Representatives (n 6).

⁵⁹ ‘FTC Press Release’, (9 December 2020) <https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization?utm_source=govdelivery> accessed 15 December 2020.

⁶⁰ ‘FTC Complaint’, (9 December 2020) para 171 section X, <<https://www.ftc.gov/system/files/documents/cases/1910134fbcomplaint.pdf>> accessed 15 December 2020.

⁶¹ See <<https://inc42.com/features/2019-in-review-top-10-high-profile-startup-acquisitions-in-india/>> accessed 15 October 2020.

Flipkart and Amazon), accommodation services (read MakeMyTrip), and the food services markets (read Zomato and Swiggy). A preliminary web search suggests these five acquired (or invested in) approximately 40 companies in the last 10-odd years.⁶² How many of these were notified to the CCI? *Three*.⁶³

The CCI is, therefore, currently handicapped in its merger enforcement by (a) high thresholds, (b) the absence of a transaction value threshold, and (c) the lack of a residuary power to examine transactions that fall below the thresholds.

V. CONCLUSIONS & OPTIONS

Jurisdictions, such as the UK and Spain,⁶⁴ that work on a market share threshold along with a turnover test, also face the jurisdictional gap in capturing high value low turnover transactions, albeit to a lesser degree.⁶⁵ As the CMA recognized in its recently published Advice of its Digital Markets Taskforce, its ‘share of supply test’ still runs the risk that it “*fails to capture many transactions entered into by the most powerful digital firms, which often involve moving into adjacent markets...*”. UK is also blessed with powers to look at transaction below the thresholds.⁶⁶ Despite this, it was proposed in this report⁶⁷ that the government should establish a Digital Markets Unit housed within the CMA and should formulate new regulations that would empower it to label a firm as having ‘Strategic Market Status’ and require such firms to notify *all* transactions to the CMA for approval.⁶⁸

France launched public consultations in October 2017 on modernising merger control. It noted that three options were available to it in terms of (a) introducing a market share threshold, (b) a

⁶² Aggregated from multiple sources including, <<https://www.crunchbase.com/organization/swiggy#section-acquisitions>> accessed 15 October 2020; <<https://tech.economictimes.indiatimes.com/news/internet/zomatos-acquisitions-so-far-and-where-they-stand/75144770>> accessed 15 October 2020; <<https://officechai.com/startups/startups-acquired-by-flipkart/>> accessed 15 October 2020.

⁶³ Excluding Amazon’s investments in Shoppers Stop and Future Coupons, which were not digital start-ups.

⁶⁴ See Submission by Spain to OECD 14 May 2020 p. 2-3, <<http://www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control.htm>> accessed 15 October 2020.

⁶⁵ ‘Advice of the CMA’s Digital Markets Taskforce’ (8 December 2020) .57 <https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_-_Advice_--_pdf> accessed 15 December 2020.

⁶⁶ However, as the ICN notes, market shares are “*inherently subjective and fact-intensive may be appropriate for later stages of the merger control process (e.g., determining the scope of information requests or the ultimate legality of the transaction), but such tests are not appropriate for use in making the initial determination as to whether a transaction requires notification*”; See ICN Merger Working Group (n 10) 2.

⁶⁷ UK Government release dated 08 December 2020, available at https://www.gov.uk/cma-cases/digital-markets-taskforce?utm_source=a481f63d-447f-417f-9a3b-4a0b7bb19d7e&utm_medium=email&utm_campaign=govuk-notifications&utm_content=daily (last visited on 15 December 2020).

⁶⁸ (n 66).

transaction value threshold, and (c) specific ex-ante control and ex-post-merger control.⁶⁹ It preferred the third, and launched a second public consultation in June 2018 for this purpose. Specifically, it is looking at introducing a requirement to give prior information of transactions by “structuring platforms”.⁷⁰ On 19 February 2020, the French Competition Authority published its Contribution to the debate on competition policy and digital challenges, suggesting that such structuring platforms be required to inform the authority of *all* mergers entered into by such companies.⁷¹

Germany is set to adopt the 10th amendment to its Act against Restraints of Competition, also known as the Digitalisation Act, which if passed in current form would, amongst other things, empower the FCO to require that designated companies notify *all* future transactions, including those that fall below the thresholds.⁷²

In June 2020, the EC announced that it is considering a ‘new tool’ to combat markets that are prone to tipping, such as digital markets.⁷³ The new tool in essence would permit the EC to not only conduct broad market investigations (which it already has the power to do) but also address any structural problems it finds. It points to Greece, Iceland, Romania, UK, Mexico, and South Africa, as examples of authorities that can carry out market investigations and impose remedies to fix any competition problems they find.⁷⁴ Companies would not be fined but may be directed to modify practices and follow certain obligations.⁷⁵ In December, the Commission unveiled its much-anticipated twin legislative proposals – the Digital Services Act and the Digital Markets

⁶⁹ See Submission by France to OECD, p. 4, <<http://www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control.htm>> accessed 15 October 2020.

⁷⁰ Which it proposes to define as “a company that provides online intermediation services for exchanging, buying or selling goods, content or services, and who holds structuring market power because of its size, financial capacity, user community and/or the data that it holds, enabling it to control access to or significantly affect the functioning of the market(s) in which it operates, with regard to its competitors, users and/or third-party companies that depend on access to the services it offers for their own economic activity”. Submission by France to OECD, p. 7. Norway has a similar regime in place, while Italy and Netherlands are considering it. See OECD Background Note, 12 May 2020, p. 42. The Furman Report also recommends that “*Digital companies that have been designated with a strategic market status should be required to make the CMA aware of all intended acquisitions*”, Recommended action 8, at p. 12; The ACCC’s Digital Platforms Inquiry Report of June 2019 also recommends that “*Large digital platforms [should] provide advance notice to the ACCC of any proposed acquisitions potentially impacting competition in Australia*”, <<https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>>, 30 accessed 15 October 2020.

⁷¹ ‘FCA Contribution’ (24 February 2020) <<https://www.autoritedelaconurrence.fr/en/press-release/autorite-publishes-its-contribution-debate-competition-policy-and-challenges-raised>> accessed 15 October 2020.

⁷² See piece by Wilmer Hale, ‘New Antitrust Rules for the Digital Economy: German “Digitalization Act” Nears the Finish Line’ 14 December 2020 <<https://www.jdsupra.com/legalnews/new-antitrust-rules-for-the-digital-53319/>> accessed 15 December 2020.

⁷³ EC’s Press Release (n 13).

⁷⁴ EC’s Press Release (n 13).

⁷⁵ Ibid.

Act. The latter requires companies identified as “gatekeepers” to comply with a wide and inclusive set of ‘dos’ and ‘don’ts’.⁷⁶

For years, the CCI followed a largely non-interventionist policy with respect to technology related markets, and repeatedly dismissed complaints against Flipkart, Amazon, Uber, Ola, MakeMyTrip, OYO.⁷⁷ In 2019, the CCI changed gears and launched a study into the e-commerce sector. A formal investigation against MakeMyTrip followed in October 2019, and a second investigation into the practices of Flipkart and Amazon was ordered in January 2020. The next logical step would be to bring more transactions within the ambit of its purview, with a particular focus on the digital economy.

For a start, the Government and the Commission may consider:

1. Lowering the current turnover thresholds.
2. Lowering the target *de minimis* turnover threshold.
3. Introducing a transaction value threshold.
4. Increasing the number of staff of the Combinations Division of the CCI, and building the expertise of personnel in the area.

Save South Africa, Canada, and Russia, the remaining jurisdictions rely solely on a turnover threshold or a hybrid between turnover and transaction value, and not on an asset threshold. However, given that the turnover and asset thresholds work on an either/or basis in India, there may not be a need to consider modifying it. Lowering it appropriately may be considered, as could lowering the target asset *de minimis* threshold (or doing away with it entirely).

A more radical suggestion would be to confer the CCI with a residuary power to look into transactions falling below the thresholds. This could also be combined with permitting voluntary notifications for transactions that do not breach the thresholds.⁷⁸ No doubt, this would cause considerable anxiety to industry participants given the lack of certainty over whether a consummated deal would be scrutinized somewhere down the line, although the system has been in place in the US, UK, Brazil, Canada, and other major jurisdictions for several years.

With regard to transaction value thresholds, there is certainly merit in introducing them as they would bring within the CCI’s ambit a few additional transactions to evaluate. These will cut

⁷⁶ ‘EC Press Release’ (15 December 2020) <https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2347> accessed 15 December 2020.

⁷⁷ As the former Secretary of the CCI described it: “*the cases dealt with by the Commission in the digital space reveal its non-interventionists approach generally, unless some tangible harm...becomes apparent...keeping in mind the ever-evolving nature of the e-commerce industry...*”, Global Competition Review, ‘E-Commerce Competition Enforcement Guide’ 15 October 2019 <<https://globalcompetitionreview.com/guide/e-commerce-competition-enforcement-guide/second-edition>> accessed 15 October 2020.

⁷⁸ For example, Sweden has both a voluntary notification system as well as powers to call for a notification to be filed, for those transactions that fall below the thresholds. See OECD Background Note (12 May 2020) p. 15.

across sectors and not be limited to the digital economy. However, that may in fact be useful since experience from other jurisdictions suggests that the other sectors likely to be affected are pharmaceutical, healthcare, and chemical industries.⁷⁹ There would no doubt be teething troubles, which can be clarified by the CCI based on the questions that arise. It may also look at the Joint Guidance issued by Germany and Austria in order to anticipate the kind of issues likely to crop up and nip them in the bud.⁸⁰ The results of the US retrospective study, currently underway, would also be instructive. The CCI is currently conducting a similar study of acquisitions in the digital market,⁸¹ as is Brazil.⁸²

In addition, the CCI may, in parallel, consider tasking a suitable organization with a more broad-based and detailed study of the turnover and assets of Indian companies, as well as that of certain sectors, to arrive at suitable thresholds – both for the current turnover and asset tests, and also for a transaction value.

⁷⁹ OECD (n 80)42 and <<https://oxcat.ouplaw.com/page/775#11>> accessed 15 October 2020.

⁸⁰ The most common of these are (i) how to assess value in cases of consideration contingent on meeting certain targets, securities transactions, or consideration involving asset or securities swaps, and (ii) how to ensure the domestic nexus requirement is met, particularly in global transactions. Both these concerns are covered in detail in the Guidance, <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2> accessed 15 October 2020.

⁸¹ See statement by the CCI Chairperson in Report ‘Competition Commission initiates studies on telecom sector, M&A in digital market’ *Economic Times* (8 June 2020) <<https://economictimes.indiatimes.com/industry/telecom/telecom-news/competition-commission-initiates-studies-on-telecom-sector-ma-in-digital-market/articleshow/76264193.cms?from=mdr>> accessed 15 October 2020; Also remarks by the CCI’s Chairperson in the panel session on Digital Merger (15 September 2020) of the ICN Conference 2020, <<https://icn-2020.videoshowcase.net/icn-2020-day-2-sept-15?category=64043>> accessed 15 October 2020.

⁸² See PaRR, ‘CADE asks 18 digital companies for info about mergers, acquisitions’ (4 July 2020) <https://app.parr-global.com/intelligence/view/prime-3065831?utm_source=Notifications&utm_medium=Email&utm_campaign=Alert&utm_term=5bad1b47d6c34b0025f1620c> accessed 15 October 2020 - which reports that GAFAs, Twitter, Uber, and 12 others have been sent notices by CADE regarding mergers and acquisitions in which they were involved.

9.	Italy	https://en.agcm.it/en/scope-of-activity/competition/mergers-and-acquisitions/turnover-thresholds	http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/AR(2020)17&docLanguage=En
10.	Brazil	Questions on Mergers — CADE	http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/AR(2020)39&docLanguage=En
11.	Russia	https://en.fas.gov.ru/upload/other/Local%20Nexus%20and%20Jurisdictional%20Thresholds%20in%20Merger%20Control%20(Russian%20Contributions).pdf	https://en.fas.gov.ru/international-cooperation/oecd/oecd-annual/
12.	Canada	Pre-merger notification transaction-size threshold to remain at \$96M in 2020 - Canada.ca	https://www.competitionbureau.gc.ca/ei/c/site/cb-bc.nsf/vwapj/CB-AnnualReport-2019-2020-Eng.pdf/\$file/CB-AnnualReport-2019-2020-Eng.pdf
13.	South Africa	http://www.compcom.co.za/merger-thresholds/	http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/AR(2020)53&docLanguage=En