Kluwer Competition Law Blog

Indian Merger Control Thresholds: Effects of Recent Amendments on Digital Markets

Saksham Malik (The Dialogue) · Monday, January 10th, 2022

The Indian antitrust landscape has recently shifted its focus to the regulation of digital markets. To achieve this end, substantial changes to the country's merger control mechanisms were proposed in the Competition (Amendment) Bill, 2020 (the Amendment/the Bill). One of the central purposes of these amendments is to prospectively analyse mergers and acquisitions that may cause an appreciable adverse effect on competition due to the volume of and how parties to the transaction process data.

Big data, in simple terms, means large, diverse sets of information that is constantly growing. This data can be derived from multiple sources, including, most notably, a consumer's online activities. Businesses have realised the value data holds in expanding their commercial footprint. If a consumer searches for a new lightsaber, chances are that he will come across targeted ads for lightsabers on social media and email for the next few days.

Companies are increasingly entering into horizontal and vertical mergers to consolidate data. In as early as 2014, Tesco bought a big data technology firm, Sociomantic to make its marketing more personalised.[1] The deal is only a drop in the proverbial ocean that is big data mergers. According to an OECD report, big data-related mergers more than doubled between 2008 and 2012-15.[2] Currently, the primary reason these mergers are not being scrutinised by the Competition Commission of India (CCI/Commission) is inefficient merger thresholds. The Competition Act, 2002 (the Act) currently prescribes an asset and turnover based approach wherein only transactions consisting of parties with assets or turnover above a certain threshold are mandated to be notified to the CCI. While competition regulators in more mature jurisdictions like the United States have also had limited success in this aspect, they have fared significantly better than their Indian counterparts.

The Federal Trade Commission (FTC), the antitrust regulator in the United States, has scrutinised various big data transactions with anti-competitive concerns due to various reasons. *Firstly*, unlike the Indian scenario, the United States merger control landscape also employs a 'size of transaction test' wherein transactions that are valued above a threshold value are to be notified to the agency. The test has been comparatively more successful in bringing transactions in the digital economy within the scope of the merger control mechanism. Other jurisdictions, including Germany[3] and Austria,[4] have also recently adopted the size of transaction thresholds in their merger review mechanisms.

Secondly, the FTC, as well as the competition authorities in Brazil and Ireland, have been given the power to review transactions that do not cross jurisdictional thresholds and are, therefore, not notifiable. The power prevents competition authorities from being handicapped by outdated or inefficient merger control thresholds. Currently, the FTC is at the forefront of antitrust scrutiny of big data mergers, investigating past acquisitions by tech companies. Similar powers for the CCI are envisaged neither in the Act nor the recent amendment.

Instead of incorporating updated merger control criteria or providing the CCI increased power to review transactions, the recent amendment provides for vague reforms that effectively hand over the reins to the Central Government. The Bill provides that the central government may, in consultation with CCI, prescribe any criteria other than the assets and turnover based thresholds for notifying a transaction to the CCI. The Bill proposes that the prescription of the new criteria is to be made in 'public interest'. This amendment presents challenges for two reasons.

There have been calls in the United States, European Union and India to amend competition policies keeping social justice and public interest considerations in mind. However, the term' *public interest*' in the proposed amendment creates ambiguity and does little to actually protect the public's interests. The South African experience is often considered an example of an effective public interest centric merger control landscape. For instance, while assessing whether or not a merger is likely to prevent or lessen competition, the Commission has to determine whether the merger can or cannot be justified on public interest grounds, including the merger's effect on the ability of small and medium businesses controlled or owned by historically disadvantaged persons to effectively enter into, participate in or expand within the market.

A clear delineation of 'public interest considerations' within the merger control mechanism has practically allowed the country to protect its populace. For instance, In June 2021, the Commission blocked the proposed acquisition of Burger King South Africa by a private equity fund, ECP Africa, primarily on the basis that the merger would lead to a significant reduction in the shareholding of historically disadvantaged persons in the target firm, from more than 68% to 0%[5]. The Indian amendment has failed to define public interest or provide basic principles that the government may consider while determining its scope. The same is likely to result in thresholds prescribed based on subjective parameters and a digital market ecosystem uncertain how data their processing activities will be affected by updated criteria.

Further, the proposed amendment dilutes the powers of the CCI and provides the Central Government disproportionate authority to regulate the merger control thresholds. Other proposed amendments in the Bill have also provided the Central Government more power. For instance, the Bill proposes the formation of a governing board which will be constituted largely of, in addition to members of the CCI, members either from central ministries or appointed by the Central government. The board has been given wide-ranging powers, including powers of general superintendence, direction and management of the affairs of the CCI. The government and the CCI have also received criticism from multiple quarters for failing to investigate transactions in digital markets due to an ineffective merger control landscape. In the backdrop of consistent criticism and a Bill amplifying the government's involvement in CCI affairs, providing the Central Government with the power to prescribe criteria for notifying transactions is a worrying development. At the very least, it will lead to apprehensions among industry stakeholders about the legitimacy of additional criteria for thresholds that the Central Government may prescribe.

In order to ensure that big data mergers do not lead to anti-competitive effects and tech companies are not faced with inefficient and vague compliance requirements, substantial changes to the competitive landscape are required. Incorporating the 'size of transaction' test or empowering the CCI to review transactions that do not cross-jurisdictional thresholds may be considered. If the amendment is passed in its current form, the Central Government should, in consultation with the CCI, publish parameters based on which criteria of merger control thresholds will be prescribed.

---

[1] Sarah Vizard, 'Tesco buys into big data to make marketing more personalised' (2014), Marketing Week, available at https://www.marketingweek.com/tesco-buys-into-big-data-to-make-marketing-more-personalised/ (last accessed 15 March 2020)

[2] —, 'Report of workshop on Privacy, Consumers, Competition and Big Data' (2014) , EDPS, available at https://edps.europa.eu/sites/edp/files/publication/14-07-11_edps_report_workshop_big_data_en.pdf (last accessed 15 March 2020)

[3] Dr. Frank Rohling, 'Germany merger control update: New merger control threshold will take into account the size of the transaction' (2019), Freshfields, available at https://www.freshfields.com/en-us/our-thinking/campaigns/digital/media–internet/germany-merger-control-update/ (last accessed 21 March 2020).

[4] —, 'Joint guidance on new transaction value threshold in German and Austrian merger control – Publication of final version' (2018), Europa, available at https://webgate.ec.europa.eu/multisite/ecn-brief/en/content/joint-guidance-new-transaction-value-threshold-german-and-austrian-merger-control (last accessed 21 March 2020).

[5] Helena Wasserman, 'Sale of Burger King South Africa blocked over lack of black ownership', News24 (2021), available at https://www.news24.com/fin24/Companies/sale-of-burger-king-south-africa-blocked-over-lack-of-black-ownership-20210601

---

ready for the future?

Learn how **Kluwer Competition Law** can support you.

This entry was posted on Monday, January 10th, 2022 at 12:20 pm and is filed under Competition Commission of India, Digital economy, Digital markets, India, Merger control, Merger Thresholds
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.