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Evolving Character of the Indian Merger Control Regime

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Abstract

This article examines the evolving character of the Competition Commission of India (CCI) as regards merger review and discusses how CCI has fared in meeting legislative expectations and what is to come—best studied through analysing CCI's substantive and procedural approaches, its stance in complex merger cases, initiatives for efficient case disposal, and the quirkier aspects of India's merger control regime. The analysis shows that, through constant reforms, CCI has evolved into one of the most dynamic regulators amongst major merger control jurisdictions globally, displaying a willingness to adopt a business-friendly approach while dealing with complex transactions. CCI appears to be sufficiently adaptable to meet new economy challenges.

Keywords: competition law, CCI, competition amendment, merger control, digital, innovation, minority acquisition, private equity, killer acquisition

1. Introduction

The merger control provisions of the Competition Act, 2002 ('Act') were enforced on 1 June 2011. Since then, the Competition Commission of India (CCI/'Commission') has processed close to 990 merger notifications and developed a broadly consistent jurisprudence. CCI has not blocked any transactions so far and found no competition concerns in most of the transactions notified to it. In around 23 cases where competition concerns were found, it cleared the transactions, subject to certain remedies that would mitigate its concerns.

This article examines the evolving character of CCI with regard to its merger review powers. In the decade since merger regulation in India

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became effective, much has changed: India's economy has been through significant ups and downs, and India is no longer a single homogenous market. Businesses operating in India are coping with a regulatory shift towards increased compliance. E-commerce and digitisation have leaped from their initial stages of development to becoming behemoths, with some interesting market entrants dominating the limelight in recent years. The business environment and competitive conditions as well as the regulatory outlook have also evolved significantly in the last few years, and the COVID-19 pandemic only accelerated these changes.

2. Brief Overview of the Indian Merger Control Regime

Under the Indian merger control regime,[1] an acquisition of shares, voting rights, or assets, or any enterprise or acquisition of control over an enterprise, or a merger/amalgamation triggers the requirement of making a merger filing with CCI if the parties to the transaction meet certain prescribed asset- and/or turnover-based merger filing thresholds (commonly referred to as *jurisdictional thresholds*, as provided under Section 5 of the Act) and the transaction does not avail of any of the exemptions specified under the regulations or under the notifications issued by the government from time to time.

The Indian merger control regime is mandatory and suspensory, which means that notifiable transactions (including interconnected steps/ transactions) cannot be consummated (entirely or in part) before CCI's approval. In case parties to a notifiable transaction do not notify it to CCI or consummate it entirely or in part without CCI's approval (usually referred to as *gun jumping*), CCI has the power to impose a monetary penalty.[2] The information/disclosures made in a merger filing should be correct in all respects, and no material information should be omitted; failure to ensure this may result in a monetary penalty as well as other repercussions (such as cancellation of the approval itself).[3]

3. Evolution of a World Class Merger Control Regime

3.1. Regular Reform

Regular review and reforms by CCI and the government (through the Ministry of Corporate Affairs (MCA)) towards a more evolved and business-friendly regime is well documented. Over the years, the

government and CCI have worked in tandem to streamline various structural and procedural aspects of the merger control regulations based on constant engagements with peers in other mature competition jurisdictions as well as stakeholders.

For example, at the outset, the Act had a 30-calendar-day deadline for submitting filings, but eventually, CCI and MCA realised that putting transacting parties on the clock did not make much sense in a mandatory and suspensory regime; as long as they did not complete the transaction without obtaining approval, they should have the flexibility to plan the timing of the merger filing. Accordingly, in 2017, the 30-day deadline was suspended after numerous penalty proceedings for delayed filings,[4] and this suspension was further extended for another 5 years on 16 March 2022.[5]

In another important reform, based on constant objections from notifying parties, the government at long last fixed a major anomaly by clarifying that, in cases where only a portion of business/assets is being acquired, it would only take into account the value of the assets and turnover attributable to the actual target assets or business being acquired and not the assets and turnover of the entire selling entity for the purpose of examining the merger filing or exemption thresholds.[6]

The government and CCI have constantly streamlined and clarified available exemptions (including exemptions available to small targets, financial investments, and intra-group transactions), besides introducing various sectoral exemptions from time to time.[7]

CCI has also been nimble on the procedural front and has tried to address issues raised by notifying parties and their advisors by amending the filing forms,[8] issuing detailed guidance notes to draft the filing,[9] as well as consulting them informally on procedural as well as substantive aspects.[10] With increased clarity on substantive issues, the Commission has encouraged parties in the last few years to use the pre-filing consultation facility as a norm so as to minimise surprises during the review stage.

Thus, CCI is one of the most dynamic regulators amongst major merger control jurisdictions in the world.

3.2. Broadly Consistent Jurisprudence

The Indian merger control regime has evolved a broadly consistent jurisprudence, largely in accordance with globally accepted practices. However, there are certain aspects on which CCI's position is yet to evolve, and in such cases, CCI prefers taking considered decisions basis the facts and circumstances of each case, for example, minority acquisitions, financial investments, and on-market purchases.

There have not been many merger review orders that were appealed before appellate bodies; notable ones have been the Supreme Court orders in two separate cases (involving gun-jumping findings in the SCM Soilfert (2018) and Thomas Cook (2018) cases). CCI's interpretation in respect of interconnected transactions and the scope of the financial investor exemption (strategic v. passive acquisition) was confirmed by the Supreme Court of India. Interestingly, in the Eli Lily (2020) case, the appellate tribunal disagreed with CCI's gun-jumping penalty and clarified that the small target exemption should be applied on the true target (target assets/ business) and not on the vendor/seller entity.

4. CCI's Stance on Complex Mergers

4.1. How the Data Stacks Up

Out of approximately 990 approved cases, the Commission required remedies/modifications in only 23 cases in the prima facie stage (Phase I) or after detailed investigation (Phase II). These remedies included either divestments or behavioural commitments, or a combination of both. CCI conducted in-depth Phase II investigations involving public consultation in only 8 out of the 23 cases; in the remaining 15 cases, the transacting parties offered voluntary divestments/commitments in Phase I. In these 15 cases, CCI granted its approval based on behavioural commitments that addressed concerns such as spillover effects, access to market and infrastructure, platform discrimination, information exchange, conflict of interest, and consumer protection.

In addition to the above 23 cases that were approved subject to some remedies or commitments, CCI ordered modifications or remedies in around 16 cases to mitigate the potential competition issues arising from non-compete obligations agreed between the parties. However, in 2021,

CCI decided to stay away from reviewing and passing an opinion on non-compete clauses as part of its merger control review. Parties are no longer required to engage in a detailed justification of these covenants.

4.2. Remedies Preferred by CCI

Even though the antitrust authorities of the US, UK, and, to some extent, the EU, have shown a preference for structural remedies, CCI has displayed a willingness to utilise structural, behavioural, as well as hybrid remedies/commitments to clear mergers, even in transactions with significant competition concerns.

In the beginning, CCI preferred clean-cut divestments or structural remedies. In the PVR/DT case (2015, cinema exhibition),[11] CCI clearly stated that:

> Behavioural remedies such as … would not adequately replicate the outcomes of a competitive market. The purpose of remedies is to preserve to the extent possible the pre-combination level of competition by recreating as far as possible the competitive status quo in the affected markets... behavioural commitments…would be difficult to formulate, implement and monitor and run the risk of creating market distortions…

However, over time, the Commission, has been less emphatic about this preference for structural remedies, accounting for the peculiarities of each case and being increasingly convinced that behavioural remedies would adequately address competition concerns.

In Schneider/L&T (2018, switchgears),[12] involving an in-depth Phase II investigation, CCI accepted white-labelling of certain products. In Hyundai and Kia/Ola (2019, auto and ride-hailing app),[13] CCI accepted a commitment that the collaboration between Hyundai and Ola would not be on an exclusive basis and that Ola's algorithm/program would not discriminate for/against drivers based on the brand of vehicles. In Tata/GMR (2019, airport),[14] CCI was concerned with downstream foreclosure in vertically linked markets—(a) upstream market for provision of access to airport facilities/premises at each of the airports operated by GMR; and (b) downstream market for provision of air transport activities and other specific services at each of the airports operated by GMR—and accepted

voluntary commitments from parties, including restrictions on the appointment of key managerial personnel and the conduct of directors.

In horizontal mergers involving Nippon Kabushiki, Mitsui O.S.K. Lines, and Kawasaki (2017, shipping)[15] and Northern T.K. Venture/ Fortis Healthcare (2018, hospitals),[16] the Commission accepted parties' commitment to introduce information control with the aim of addressing concerns around potentially collusive information exchange. In the Jio/Den (2018, DTH and broadband)[17] and Jio/Hathway (2018, DTH and broadband)[18] mergers, Jio undertook to bear the costs of technical realignment of customers' equipment to alleviate CCI's concerns around the merged entities' bundled services.

4.3. Discourse on the Innovation Theory of Harm

CCI's approach to market definitions, application of assessment tools, and theories of harm has gradually matured over the years, in line with global best practices and precedents. Even though, in a majority of cases, CCI has focused on the unilateral effects of mergers, such as combined market shares and the presence of strong competitors post-transaction, as well as other pricing factors, wherever required, it has displayed a willingness to look at new theories of harm and non-pricing factors, such as innovation.

Whether it was pharmaceutical mergers (such as Sun Pharma/ Ranbaxy, 2014)[19] or agrochemicals mergers (such as Dow/DuPont[20] and Bayer/Monsanto[21] in 2017 and 2018, respectively), the Commission engages in close scrutiny of pipeline products and innovation in defining relevant markets as well as in its assessment. In the Bayer/Monsanto merger, in relation to a number of markets (market for the licensing of herbicide-tolerant traits technology, R&D activities in seeds and traits, digital farming), CCI viewed Bayer to be a significant global competitor to Monsanto; as Bayer's innovation activities would no longer be a threat to Monsanto, Monsanto would have less incentive for innovation. Accordingly, CCI sought remedies.[22] In the Dow/DuPont merger, like the EU, CCI considered the innovation harm emanating from the merger in the Indian crop protection market and extracted necessary remedies from the parties. More recently, in the ZF/WABCO merger (2019, braking systems),[23] the Commission saw potential foreclosure in future markets

for electronic slip control technology and the oncoming shift in the Indian market from pneumatic drum to air disc braking systems. ZF voluntarily divested its share in its joint venture in India, Brakes India Limited.

CCI has especially shown maturity in sectors that are high on the radar of antitrust authorities globally, such as pharmaceuticals and high-tech/ digital markets.

4.3.1. Consideration of Portfolio Effects

In Bayer/Monsanto (agrochemicals), CCI conducted an in-depth study into the portfolio effects owing to Bayer's focus on agrochemicals and vegetable seeds and Monsanto's focus on non-selective herbicides, traits, and agricultural seeds. CCI accepted behavioural remedies to address a variety of concerns about horizontal overlaps, vertical foreclosure, innovation, and portfolio effects. Concerns about bundling resulted in Bayer undertaking that the combined entity would not offer its clients, farmers, distribution channels, and commercial partners bundled products that could exclude competitors.

In the ZF/WABCO merger, the Commission examined ZF's control over Brakes India Limited and its proposed acquisition of WABCO, given the complementary supply by the two companies of clutch system components.

In summary, so far, the Commission has had a business-friendly approach regarding remedies, i.e., no transaction has been blocked yet, possibly because CCI is yet to be confronted with a situation that requires a transaction to be blocked. However, it does not take away from the fact that CCI has shown a willingness to work with merging parties to structure a remedy package rather than being inclined to block transactions.

5. Minority Acquisitions—A Work in Progress Jurisprudence

The single most dominant debate in the Indian merger control regime is the requirement to notify minority acquisitions. This has left private equity, financial, and fund investors with at least 30 working days to closure while CCI reviews the applications.

The issue emanates from CCI's expansive and subjective interpretation of the definition of *control*, on which the assessment of most available

exemptions (including minority financial investments) is pivoted. After following the test of decisive influence (as applied in the EU) in many cases, in its order in the Ultratech/Jaiprakash case (2018),[24] CCI lowered the threshold to the UK's test of material influence (CMA, 2022) over the management and affairs and/or strategic business decisions of the target entity. This made things quite subjective and uncertain for financial/ institutional/private equity investors, especially when CCI's approach in respect of minority protection rights (which are very important for such investors) remains expansive and uncertain.[25]

This has resulted in a number of unnecessary and cautionary filings. There are increasing instances of the Commission's media-scanning exercise resulting in notices to various financial investors about failure to notify past acquisitions. There is always a doubt as to whether a non-controlling minority acquisition by a financial/institutional investor, which is indeed made "solely as an investment" or "in the ordinary course of business" (i.e., a passive investment as against an active or strategic investment), would be eligible to avail of the financial investor exemption if the investor gets some customary minority protection rights or an observer seat on the target's board in order to protect the value of its investment. The Commission's position (at least the portion of it that is clear) is that special rights amount to the acquisition of material influence over the target and is notifiable even if the investor acquires less than 25% shares in a company. The confusing additional exemption threshold provided for the acquisition of less than 10% shares being deemed to be made solely as an investment has complicated the availability of the exemption to financial investors, as it is also subject to the stricter standard that any special rights in favour of the acquirer would take the exemption away.

This becomes even more uncertain because of CCI's stand that if a financial investor has existing investments in an entity engaged in a competing, vertically related, or complementary business to that of the target, even if the fresh investment is below 10% and without any board seat and/or special rights (being the conditions prescribed for treating a non-controlling investment to have been made solely as an investment), it is likely to be treated as a strategic investment, and the applicability of the financial investor exemption becomes doubtful. Even though our

recent experience shows that CCI may be willing to consider the profile of the investor while analysing their competing/vertically related or complementary investments, minority financial investors expect some objectivity and certainty on this issue from CCI.

An interesting example was the recent voluntary remedies offered by ChrysCapital (a private equity investor) in relation to its investment in Intas Pharmaceuticals,[26] resulting in only around 6% shareholding in Intas. However, considering that ChrysCapital had minority investments in certain competing entities, CCI treated its investment to be strategic in nature and denied it the exemption available to pure financial investors. In fact, the approval was granted based on certain remedies, including: (a) resignation of ChrysCapital's nominee director in Mankind Pharma (a portfolio company of ChrysCapital); (b) undertaking not to nominate a director in Mankind Pharma so long as ChrysCapital has a nominee director on Intas; (c) the nominee director on the board of Intas should not have been associated with Mankind Pharma in the previous year; (d) ChrysCapital undertaking not to exercise its affirmative right in Mankind Pharma with respect to changes to capital structure, mergers and acquisitions (M&As), amendment to charter documents; and (e) ChrysCapital undertaking to use non-public information received from its portfolio companies competing with Intas, strictly for the purpose of evaluating the respective investment in such portfolio companies.

5.1. Concerns Around Common Ownership Through Minority Investments

The issue of potential lessening of competition as a result of common minority investments by private equity (PE)/institutional investors in a sector, which are otherwise considered passive investments on a standalone basis, has been in the antitrust spotlight. CCI also recently embarked on a market study to determine causal links, if any, between common ownership and lessening of competition between commonly owned portfolio companies, with a focus on PE and other financial investors.

CCI has been routinely asking PE/institutional investors to disclose their competing/vertically related portfolio investments and the rights (including the right to appoint a director/observer and/or any veto

rights) in such portfolio entities. The intention is to analyse whether, due to their common ownership and certain rights, PE/institutional investors are able to exercise material influence/control over the management/affairs or strategic business decisions of their portfolio companies and whether the market share of such portfolio entities should be aggregated for the purpose of assessing the investor's position in a particular market and the resulting impact on competition. In fact, in the *ChrysCapital/Intas* case, the potential aggregation of market power of ChrysCapital because of its common ownership and certain rights (especially a board seat) in other portfolio entities in the same sector was the focal point of CCI's competition assessment.

6. Efficient Review Timelines: CCI's Green Channel for Merger Filings

Most would agree that CCI has not disappointed when it comes to timelines (in fact, its methodical and efficient delivery of orders has left many pleasantly surprised). The introduction of the Green Channel—a simple form of notification that leaves notifying parties with an acknowledgement of the notification and an immediate approval—was a breakthrough for many of the no-issues applications that acquirers have had to seek approvals for under the Indian regime.

Even though CCI has 30 working days to grant its prima facie (Phase I) approval, the average time taken for approvals is around 22 days, and thus, overall, CCI has been very efficient in its timelines for approvals. On this front, a significant contribution of CCI to the government's ease-of-doing-business efforts was the introduction of a one-of-a-kind fast-track approval facility, i.e., Green Channel, for cases where there are no horizontal overlaps or vertical/complementary linkages between the transacting parties, their groups, and all entities where the parties directly or indirectly hold shares or exercise control.[27] The Green Channel under Indian merger control applies to acquisitions (arguably even acquisitions up to 100%) of a target with no vertical, horizontal, or complementary linkages with the business of the acquirer. CCI allows on-the-spot or immediate approval for such a notification. On ground, parties are expected to discuss the proposed Green Channel notification with the Commission through the informal guidance mechanism, which could take

5–10 days. The Green Channel has been well received by the corporate world as it cuts down deal timelines significantly (by almost 2 months), and within the last year and a half, more than 55 notices have been filed through the Green Channel route.

7. Evolving Approach in Merger Enforcement

Merger enforcement has gained momentum, with the Commission pursuing gun-jumping inquiries into multiple transactions, many of which are minority acquisitions. Despite this, there has been a decreasing trend in penalties for failure to notify. The Commission has dealt with nearly 50 gun-jumping cases, with penalties having the potential to go up to 1% of the higher of the total turnover or the value of the total assets of the combination. However, till 2021, CCI had imposed only nominal penalties, between INR 0.1 million and INR 50 million.

In December 2021, CCI's unprecedented gun-jumping order in the Amazon/Future Group case[28] brought the spotlight back to CCI's enormous power and how regulators like CCI can send deal-making and dispute-settlement strategies into disarray. Through its order dated 17 December 2021, CCI suspended the approval that it issued to Amazon for its acquisition of 49% share capital of a Future Group entity, Future Coupons Private Limited. CCI asked Amazon to obtain fresh approval and imposed the highest ever monetary penalty, INR 200 crores (approximately USD 27 million), for failing to notify the complete details/ rationale and all interconnected transactions/commercial arrangements (about its intention to indirectly achieve a strategic alignment with Future Group's retail entity, Future Retail Limited). CCI also imposed a penalty of INR 2 crores (approximately USD 0.3 million) on Amazon for knowingly making false statements, omitting to furnish material particulars and documents, and suppressing material information. In June 2022, CCI's order was upheld by the National Company Law Appellate Tribunal, the appellate tribunal for CCI's orders.

CCI's latest approach on gun jumping will have far-reaching implications on how deals are documented, negotiated, staffed, managed, and notified to CCI in the future.

7.1. Increasing Enforcement Towards Incomplete/Incorrect Disclosures and Material Omissions

Along with the suspension of the 30-calendar day timeline for submitting merger filings, CCI's recent enforcement focus includes incomplete and/ or incorrect information in merger filings. In the last few years, other than imposing a penalty of INR 2 crores on Amazon for knowingly making false statements, omitting to furnish material particulars and documents, and suppressing material information, as mentioned above, CCI penalised a cement company for omitting to provide correct and complete information in respect of its shareholders/status of control and a pension fund for failing to disclose material facts about a seemingly connected transaction. Interestingly, the penalty imposed for incomplete/incorrect information so far has been around INR 2 crores, which is higher than recent penalties imposed for failure to notify transactions.

7.2. Increasing Seriousness Towards Interim Covenants

As CCI continues to mature, it is likely to become more discerning in its assessment of certain well-known "grey" areas in merger control, such as violation of standstill obligations and clean team mechanisms. The recent decisional practice[29] suggests that CCI is looking at interim covenant and standstill clauses more closely than ever. CCI is rapidly moving towards not taking parties' submissions at face value, and one can expect deeper scrutiny of facts by the Commission. Transacting parties/deal teams often lose sight of the fact that interim covenants aimed at protecting and preserving the value of the investment/acquired business/assets during the period between signing and closing should not go beyond what is permissible under the principles of competition law in a suspensory jurisdiction such as India. The standard that will be enforced is that there is no partial implementation of the transaction by the acquisition of material influence or control over day-to-day business/affairs of the target before CCI's approval. Generally applied safe harbours, such as materiality thresholds, "ordinary course of business" and "consistent with past practice" qualifiers may not mitigate the gun-jumping risk in all circumstances.

8. CCI's Approach in New Markets

8.1. Looking Beyond the Consumer Welfare Standard

With the changing nature of economies, business dynamics, unprecedented digital transformation, and the new geopolitical landscape, antitrust enforcers such as the Commission are expected to look beyond traditional consumer welfare focused analysis. There are many open questions: Is the Commission likely to consider broader socio-economic impact on labour or unemployment? What about deals combining innovative startups with Big Tech, involving large databases and data usage, but not falling within merger filing thresholds?

The decisional practice suggests that if there were some cases where the Commission asked questions outside the scope of consumer welfare, it quickly retraced and chose to remain focused on competitive impact on relevant markets when it was reminded of the statutory imperative of legislative objectives from which the regulator derives its power and the very objectives that set its limits.

However, CCI's remedies order in Bayer/Monsanto included free access for the Government of India and its institutions to the combined entity's digital farming products or digital farming platform in India, granting access for a period of 7 years to Indian agro-climatic data for the creation of a public good in India, which was, perhaps, early borderline "hipster" antitrust at play in India.[30]

It appears that, where a broad interpretation of the consumer welfare standard is possible, the Commission may indeed appear to expand its scope of inquiry to fields that are broader than what one may expect from a competition regulator. A simple example would be the question of data usage or aggregation, since it does impact consumer welfare. In the recent investment by Facebook Inc. (through Jaadhu Holdings LLC) in Jio Platforms (Jio Platforms Limited), the Commission investigated data sharing between the two. The order, in this case, records the parties' clarifications that data sharing and ownership of each other's data was not the purpose of the transaction and that any information sharing would be limited to facilitating e-commerce transactions on JioMart.

8.2. Killer Acquisitions

There is also a need to discuss tech and the acquisition of a nascent competitor by a large enterprise in so-called *killer acquisitions*. Such transactions may be outside CCI's jurisdiction, because the small target exemption allows the acquisitions of companies with either a limited revenue or asset value in India. A proposal for a deal value threshold has been lost in the quagmire of legislative reforms that are still pending before the Parliament of India. While it is open to debate whether or not the deal value threshold is the most appropriate solution to catch and regulate killer acquisitions, it is probably a step towards a comprehensive regulatory architecture in India to address the challenges faced by new innovators from larger incumbents.

The Commission will need to recalibrate its approach, including developing new theories of harm which are able to capture the exact competition concerns in the new market in order to make appropriate and targeted remedial measures.

9. Closing Remarks: Getting Future Ready

The Government of India recently introduced the Competition (Amendment) Bill, 2022 ('Amendment Bill'),[31] before the Indian parliament,[32] proposing significant changes to the Act. The Amendment Bill appears to have reasonably implemented solutions to various practical as well as other issues emerging from new business models during the past decade. For example, the Amendment Bill has proposed to introduce a deal value threshold that will apply across sectors (including digital and pharmaceuticals). In terms of the proposal, where the value of a transaction exceeds INR 2,000 crores (around USD 244 million), with the target having "substantial business operations" in India, a merger filing will be required even if the transaction is eligible for the de minimis target exemption.[33] The Amendment Bill also enables CCI to write regulations on derogation of standstill obligation in case of tender offers and on-market purchases on stock exchanges as long as a merger filing is made subsequently and the acquirer does not exercise any ownership or beneficial rights/interest in the acquired securities until CCI's approval.[34]

However, the change that probably merits another look is the shorter timelines for merger review proposed by the Amendment Bill.[35] While reducing the review timelines may be a good initiative towards ease of doing business in India, CCI's merger review timelines have been amongst the best in counterpart agencies, and the shorter timelines may prove burdensome to comply with, for CCI as well as the parties. The proposed reduction in timelines could adversely impact the current flexibility and integrity of the merger review process before CCI and may result in more "pull and refile" or "invalidation" scenarios.

CCI has been making constant efforts to improve its understanding as a regulator in view of the changing nature of the economy. It has recently undertaken insightful market studies into the e-commerce, telecom, pharmaceutical, and film exhibition sectors. The study in respect of common ownership issues with a focus on private equity investors is ongoing. With these market studies, the Commission is expected to adopt an even more informed and nuanced approach in these sectors going forward. One of the things that could be the most beneficial for CCI's future discourse is if CCI could study the effects of its interventions in markets for merger cases where parties accepted or offered remedies or modifications to the proposed transaction.

On the jurisprudence side, a more certain and less burdensome approach in assessing financial investor driven/minority acquisitions of non-controlling stake; a reasonable law of derogation from the strict suspensory regime for mergers (some of which has already been proposed); clarificatory notes to Form II; and a more formal pre-filing consultation facility where the facts and the guidance are published (similar to the Securities and Exchange Board of India's informal guidance) would go a long way in establishing a world-class merger control regime.

Although there are certain issues that remain unsettled, with most of the initial substantive as well as procedural issues being fixed, CCI is not far behind the other major antitrust regulators such as the EU, UK, US, and other BRICS countries in its review standards. It is particularly encouraging to see that CCI has not shied away from intervening in transactions involving the digital economy, pharmaceuticals, and companies with access to or impact on competitively valuable assets,

such as raw materials, intellectual property rights, data, or infrastructure, where innovation is an important parameter of competition.

With the Amendment Bill, a round of reforms is already under consideration and pending approval of the Parliament. It is important that the momentum of reforms continues. As the Indian economy grows, CCI needs to be ready to play an increasingly crucial role in keeping the M&A activity upbeat while protecting consumers and maintaining a level playing field for businesses.

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Endnotes

[1]Sections 5 and 6 of the Act are the substantive sections providing CCI with merger review powers.

[2]Competition Act, 2002, §43A.

[3]Competition Act, 2002, §44, §45.

[4]Ministry of Corporate Affairs, S.O. 2039(E) (Notified on June 29, 2017). https://www.mca.gov.in/bin/ebook/dms/getdocument?doc=NjgzNQ==&docCategory=Notifications&type=open

[5]Ministry of Corporate Affairs, S.O. 1193(E) (Notified on March 16, 2022). https://www.egazette.nic.in/WriteReadData/2022/234278.pdf

[6]Ministry of Corporate Affairs, S.O. 988(E) (Notified on March 27, 2017). https://www.mca.gov.in/bin/ebook/dms/getdocument?doc=NjgzNw==&docCategory=Notifications&type=open

[7]For example, the government has exempted combinations involving regional rural banks (https://www.cci.gov.in/combination/legal-framwork/notifications/details/11/0) and combinations involving Central Public Sector Enterprises (CPSEs) operating in the oil and gas sectors (https://www.cci.gov.in/combination/legal-framwork/notifications/details/13/0) from the merger filing requirement.

[8]The format of Form II (long form) was recently amended: https://www.cci.gov.in/legal-framwork/regulations/13/0

[9]Competition Commission of India. *Notes to Form 1.* https://www.cci.gov.in/images/content/en/notes-to-form-11652806167.pdf

[10]Competition Commission of India. *Pre-Filing Consultation*. https://www.cci.gov.in/images/combinationprefillingconsultation/en/pfc-guidence-note1651833852.pdf

[11]Competition Commission of India, C-2015/07/288 (Issued on May 4, 2016).

[12]Competition Commission of India, C-2018/07/586 (Issued on April 18, 2019).

[13]Competition Commission of India, C-2019/09/682 (Issued on October 30, 2019).

[14]Competition Commission of India, C-2019/07/676 (Issued on October 1, 2019).

[15]Competition Commission of India, C-2016/11/459 (Issued on June 29, 2017).

[16]Competition Commission of India, C-2018/09/601 (Issued on October 29, 2018).

[17]Competition Commission of India, C-2018/10/609 (Issued on January 21, 2019).

[18]Competition Commission of India, C-2018/10/610 (Issued on January 21, 2019).

[19]Competition Commission of India, C-2014/05/170 (Issued on March 17, 2015).

[20]Competition Commission of India, C-2016/05/400 (Issued on June 8, 2017).

[21]Competition Commission of India, C-2017/08/523 (Issued on June 14, 2018).

[22]To address these concerns, CCI required Bayer, 7 years after closing, to follow a policy of broad-based, non-exclusive licensing of traits currently commercialised in India, or to be introduced in the future, on a fair, reasonable, and non-discriminatory (FRAND) basis with willing and eligible licensees.

[23]Competition Commission of India, C-2019/11/703 (Issued on January 4, 2021).

[24]Competition Commission of India, C-2015/02/246 (Issued on March 12, 2018).

[25]The Government of India, in the recently introduced the Competition (Amendment) Bill, 2022, has proposed a new definition of *control*. The new definition proposes the "material influence" standard that has been elucidated by CCI in its merger control decisions.

[26]Competition Commission of India, C-2020/04/741 (Issued on April 30, 2020).

[27]Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2019. https://www.cci.gov.in/legal-framwork/regulations/21/0

[28]Competition Commission of India, C-2019/09/688 (Issued on December 17, 2021).

[29]Competition Commission of India, Adani Green Energy Limited / SB Energy order (Issued on March 9, 2022).

[30]As against the traditional antitrust standard, which focused on "consumer welfare", so-called "hipster" antitrust advocates for a broader focus on market structure and the power and influence large tech companies supposedly wield on competition as well as socio-economic factors such as labour abuses, and low wages.

[31]The Competition (Amendment) Bill, 2022, Bill No. 185 of 2022. https://prsindia.org/files/bills_acts/bills_parliament/2022/Competition%20(Amendment)%20Bill,%202022.pdf

[32]The Parliament is yet to pass the Amendment Bill. It has referred the Amendment Bill to the Parliamentary Standing Committee on Finance for further consideration.

[33]See Clause 6 of the Competition (Amendment) Bill, 2022, Bill No. 185 of 2022.

[34]See Clause 8 of the Competition (Amendment) Bill, 2022, Bill No. 185 of 2022.

[35]See Clause 7 of the Amendment Bill. The Amendment Bill proposes that CCI will form a prima facie view on transactions within 20 calendar days as opposed to the current 30 working days.