Journal of Emerging Trends and Novel Research
JETNR.ORG | ISSN : 2984-9276
An International Open Access, Peer-reviewed, Refereed Journal

A deep dive into the employment of Game Theory Tactics in IP heavy M&A Transactions : How deals may focus on Annihilation as opposed to Expansion.

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Abstract:

Killer Acquisitions, as profit and monopoly maximising strategies pose a variety of policy driven risks against antitrust regulations in the country. Modern day combinations are conducted in a way that maximises corporate profits and monopoly expansion, in various cases companies have been found guilty of acquiring startups, only to dump the latter's operations to safeguard their own interests. The issue arises not out of transactions that we manage to witness, but the sheer amount of transactions that manage to completely fly off of antitrust radars, the foremost reason for occurrences like these monopolized transactions is the sheer dependency of authoritarian policies on quants and tangibles alone. This research article focuses on exemplifying and identifying lapses in pre-existing antitrust regulations for combinations and truly understanding what these lapses might entail.

ABBREVIATIONS USED

§	Section
M&A	Mergers and Acquisition
S.B.O	Substantial Business Operations
CCI	Competition Commission of India
DVT	Deal Value Threshold
GMV	Gross Merchandise Value
NRAI	National Restaurant Association of India
Ors.	Others.
ACTH	Adrenocorticotropic Hormone
FTC	Federal Trade Commission

I. INTRODUCTION

The exponential growth in the number of nationwide M&A transactions, particularly aiming nascent/startup firms has left many technical enigmas behind in its wake, pre-existing acts, regulations, even the newer ones, are riddled with loopholes for anyone with a legal and technical know-how of such transactions. "*Start-up or nascent firms play a vital role in competitive markets. They are a key source of new ideas and products, disruptive innovation and maverick business models. They can help break up concentrated markets, force less efficient incumbents to improve or exit, and thus help ensure that markets reduce inequality"*[1]

Coined by C M Cunningham[2] in 2021, the term '*Killer Acquisition*'[3] refers to a transaction where a bigger firm (regarded as the acquirer), takes control of a smaller (nascent/startup firm - Acquiree) and proceeds to either shut down the acquiree completely or shuts down part of the acquiree's operations that the acquirer may perceive as a threat against their own offerings.

"*In the digital and tech startup context in India, killer acquisitions have taken a nuanced form. Tech giants frequently purchase emerging startups with promising innovations not necessarily to integrate or scale them, but to prevent them from developing into full-fledged competitors. Given the rapid pace of innovation and low initial revenues of digital startups, many of these deals do not meet conventional merger review thresholds.*"[4]

II. RECOGNIZING KILLER ACQUISITIONS

The standard issue with sighting out instances of killer acquisitions, especially in a growing economy like India is the sheer unpredictability of M&A transactions en masse, where such transactions can be hard to gauge due to the rigid and conventional principles of policy making in this sector.

Most M&A transactions simply fail to get recognized by the competition commission's radar owing to their principal act's strict conformity to quantitative and tangible aspects in any such transaction.

III. STATUTORY AND TECHNICAL LAPSES

"*The problem as we see it is that agencies are using static tools to analyze dynamic processes*"[5], even with the newest amendment to the Indian Competition Act[6], the issue of static, quantified assessment of dynamic mergers still persists, the amendment, along with ancillary regulations[7] Aim to introduce yet another quantifiable benchmark for assessing the fiscal gravity of a combination and the subsequent need for its registration with the CCI, this benchmark has been categorized as a - 'Deal Value Threshold' ('DVT', for brevity), the issue as discussed, still remains alive, since, according to this DVT, combinations would only be reportable to the CCI, if and when:-

a. The Deal value exceeds INR 2000 crores (Approx USD 238 Million)
   [All present and future credit transactions in the deal, including but not limited to royalties over IP, Deferred/Contingent payments made, securities, any and all payment for any intangibles - Barred at 2 years for notification (*vide* Combination Regulations 2024)]
b. The target has substantial business operations ('S.B.O', for brevity) in India.
   [10% of global users in India or 10% profits generated in India - for Digital companies, along with stipulation of existence of >10% of Gross merchandise Value ('GMV', for brevity) exceeding INR 500 Crores in the previous year - for Non Digital companies (*vide* Combination regulations 2024)]

In essence both of the above mentioned criterias must be duly fulfilled for a combination to be reportable to the CCI, any deviations from the track would mean the combination would go unchecked and unreported.

Prima Facie[8], the regulations appear to be holistic and inclusive. Practicality and pattern recognition however, point to something clearly different. As referenced before, static quantitative thresholds will never be able to regulate the dynamic requirements of M&A transactions, even with the onset of the newly imposed regulations, willing parties can simply exploit the 2 year time bar, or just strategize to have outlying financial models to cover financial transactions to take benefit of the de minimis exception.

In addition to all the requirements, the regulations simply state that in a case where the true valuation of a combination cannot be assessed through conventional means, the parties involved should simply let go of the de minimis rule and treat the combination to be reportable to the commission, the regulations however do not employ or state authorities which would undertake these valuations, simply put, the assessment of all valuations in regards to the combination have been left to the sole discretion of the parties themselves, paving way for questionable metrics for valuation and even more suspicious practices.

IV. KILLER ACQUISITION EXTREMITIES

Diving into examples with real world consequences, the most notable case of a killer acquisition in the Indian economic territory is the case of Ubereats[9] Indian wing acquisition by Zomato[10], where the Indian company (Zomato,now-Eternal Ltd.) acquired

all business operations of the US based conglomerate inside the territory of India, effectively eradicating the company's entire existence in return for a 9.99% stake in Zomato's equity[11].“*It escaped the combination assessment by availing of the target exemption or de minimis threshold exemption under the Act. This case prompted a critical revision of the current existing legislative framework on combination assessment, as the CCI has initiated a probe in this non-notifiable deal despite the de minimis exemption*”[12].

The case received much needed publicity when it was cited by the National Restaurant Association of India[13] (‘NRAI’ for brevity) in the case of National Restaurant Association of India v.s Zomato Limited (‘Zomato’) and Ors.[14], alleging AAEC[15] by Zomato after it acquired UberEats.

Referencing the Morgan Stanley Draft Red Herring prospectus for the company[16] The association argued that Zomato's acquisition of the US based company has granted the Indian counterpart a major boost in market share and expansion scope, leading to a volatile and tangible appreciable adverse effect on competition in the restaurant and food delivery industry. Descriptive analysis of the Association's arguments and other supporting documents clearly highlight that zomato did not acquire the US based company to nurture or to expand the latter's operations, rather it acquired the Indian wing of US based delivery conglomerate to strengthen its own monopoly in the Indian Quick Commerce Industry by effectively shutting down what could have been their biggest competitor.

To understand what killer acquisitions really entail, it is crucial to mention the notable example of a global killer acquisition through the acquisition of Novartis's[17] Synacthen[18] drug by Mallinckrodt[19] (Keenova therapeutics) in 2013, the acquisition made headlines since mallinckrodt, the acquirer, completely ended research operations of the drug, in order to maintain its monopoly in the US market for ACTH, cortisol producing drugs via its pre existing Acthar gel[20] (repository corticotropin).

The FTC[21], taking cognizance of the acquisition, reprimanded Mallinckrodt for trying to establish a monopoly in an entire industry, resulting in fines accumulating over USD 100 Million against the acquirer[22].

V. CONCLUSION

Transactions like the ones discussed in this essay are not just one off events limited to certain industries, they are widespread corporate decisions aimed to maximize the corporation's profits and monopolies, as consumers and as stakeholders of public policy morality it is innately crucial to us to identify the survivorship biases[23] in the current global corporate environment and understand that there are many more similar transactions which never made the headlines but have transformed and are still in the process of transforming new gen consumerism as we know it.

It is almost impossible for Indian antitrust authorities such as the CCI to scope out and to regulate all combination transactions that might happen in the wild today, owing to the sheer quantity of such transactions, coupled with their overtly rudimentary methods of examination. Combinations/transactions like the ones discussed here affect consumerism in a plethora of negative ways, effectively rupturing the whole essence behind antitrust laws by blind siding antitrust authorities.

In order to truly regulate antitrust mechanisms in this day and age it is imperative for any antitrust authority to understand the true value of intangible assets. Companies no longer bet on capital, in this late dystopian stage of capitalism, financial resources have become readily available to any all seekers, the real crown jewels of the 21st century corporate world reside in cloud platforms and hide behind veils of patented inventions.

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14.National Restaurant Association of India v.s Zomato Limited ('Zomato') and Ors., (2021), Competition Commission of India, Case No. 16 of 2021

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18. Medsafe - What is Synacthen? (Synacthen)

19. US Based Pharma company, merged with Endo health to create keenova therapeutics (Mallinckrodt Merger)

20. National Library of Medicine - Acthar gel (What is Acthar Gel?)

21. Federal Trade Commission of the United States of America (About - FTC)
22. Mallinckrodt Ard. Inc. (Questcor Pharmaceuticals) report, Federal Trade Commission, (14th July 2017), (Mallinckrodt - FTC)

23. Cognitive bias which gives attention only to existing data points and fails to recognise data points which might have been forgotten/lost, (What is Survivorship Bias?)