A decade of India's merger control regime: The evolving personality of the Competition Commission of India

On June 1, 2021, the Indian merger control regime completed a decade since the merger control provisions of the Competition Act, 2002, (the Competition Act) were enforced. A decade may not be sufficient to judge the performance of a regulatory regime, but it is a good time to gauge whether its implementation has fulfilled the legislative expectations i.e., to prevent practices having adverse effects on competition, to promote and sustain competition in markets, to protect the interests of consumers and ensure freedom of trade for participants in markets. The Competition Commission of India (the ***CCI / Commission***) has set strong foundations for the Indian merger control regime.

In the last 10 years, the CCI processed close to 840 merger notifications and developed a broadly consistent jurisprudence. No transaction has been blocked by the CCI so far. The CCI found no competition concerns in most of the transactions notified to it. In the 40 odd cases where competition concerns were found, it showed willingness to clear the transaction subject to certain remedies that would mitigate such concerns. The CCI has also been very efficient in its timelines for approvals. Even though the CCI has 30 working days to grant its *prima facie* (Phase I) approval, the average time taken for approvals is around 22 days.

The regular review and reforms by the CCI and the Government (through the Ministry of Corporate Affairs) towards a more evolved and business-friendly regime is well documented. Most would agree that the CCI did not disappoint on timelines (in fact, its methodical and efficient delivery of orders has left many pleasantly surprised). The introduction of the Green Channel (a simple form for notification that leaves the notifying parties with an acknowledgement of the notification and an immediate approval) was a breakthrough for many of the no-issues application that acquirers have had to seek approvals for under the Indian regime.

A regulator such as the CCI has pervasive authority, with interest across sectors. Its actions may directly impact consumer welfare, one of the key legislative objectives of the Commission. Few competition regulators can remain separated from the reality around them.

In the decade since merger regulation in India became effective, much has changed: India's economy has been through significant ups and downs, there is an increasing recognition of the idea of the federal structure of India's political landscape and the fact that India is not a single homogenous market. Businesses operating in India are coping with a regulatory shift towards increased compliance. E-commerce and digitization have leaped from their initial stages of development to becoming behemoths, with some interesting market entrants dominating the limelight in recent months. There is also a focus on nationalism (even in business), start-ups in India are spoilt for choice in access to funds, OTT and content platforms rule the media and entertainment industry (many consumers gave up visiting cinema theatres even before the pandemic), and, lesser-known artists such as Ayushman Khurana and Rajkumar Rao now co-exist with mega-stars, like Salman Khan, despite spending less time in the gym (and perhaps, more time engrossed in learned thought).

This piece examines the evolving personality of the CCI and the shape of things to come - best studied through the CCI's stance on remedies in complex merger cases, and the quirkier aspects of India's merger control regime.

Commission's stance on Remedies

What type of remedies would the CCI impose in complex mergers with anticompetitive consequences?

In the beginning, the CCI preferred the clean-cut divestment or structural remedy. In the PVR/DT (2015, cinema exhibition), the CCI clearly stated that: *behavioral remedies such as... would not adequality 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... behavioral 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 increasingly being convinced that behavioral remedies may adequately address competition concerns.

In Schneider/LT (2018, switchgears) the CCI accepted white labeling of certain products as an adequate resolution, in Hyundai and Kia/Ola (2019, auto and ride-hailing app) the CCI accepted a commitment that the collaboration between Hyundai and Ola would not be on an exclusive basis and the algorithm / program of Ola would not discriminate for / against drivers based on the brand of passenger vehicles. In Tata/GMR (2019, airport) the CCI was concerned with downstream foreclosure in vertically linked markets (i) upstream market for provision of access to airport facilities / premises at each of the airports operated by GMR; and (ii) 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 appointment of key managerial personnel and the conduct of directors.

In the horizontal mergers involving Nippon Kabushiki, Mitsui O.S.K. Lines, and Kawasaki (2017, shipping) and Northern T.K. Venture/Fortis Healthcare (2018, hospitals), the Commission accepted the parties' commitment to introduce a rule of information control towards addressing concerns around potentially collusive information exchange.

In the Jio/Den (2018, DTH and broadband) and Jio/Hathway (2018, DTH and broadband) mergers, Jio (acquirer) undertook to bear the cost of any technical realignment of the customers' equipment to alleviate the CCI's concerns around bundled services that the merged entities would offer.

Out of approximately 840 approved cases, the Commission required remedies only in about 40 cases

(less than 5%), in the *prima facie* stage (Phase I) or, after a detailed investigation (Phase II). Out of these, 13 cases (less than 2%) involved either divestments or behavioral commitments or a combination of both, though in only 8 (less than 1%) of these cases the CCI conducted in-depth Phase II investigation involving public consultation. In the remaining 5 (less than 1%) problematic cases, the transacting parties offered voluntary divestments / commitments during the Phase I review.

In the Phase I cases where the CCI found competition concerns, it granted its approval based on behavioral commitments that addressed concerns such as spillover effects, access to market and infrastructure, platform discrimination, information exchange, conflict of interest and consumer protection.

In around 16 cases, the modifications or remedies ordered by the CCI were to mitigate the potential competition issues arising from non-compete obligations agreed between the parties. However, very recently, the CCI has 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 needed to engage in a detailed justification of these covenants.

If there were one word to describe the Commission, it would be -- 'adaptable.' In the future, one can continue to expect the Commission's open-mindedness in discussing possible remedies in complex cases.

Has the Commission examined mergers under the lens of portfolio effects?

Yes. In the ZF/WABCO merger, the Commission examined ZF's control over Brakes India Limited and its proposed acquisition of WABCO with concern given the complementary supply by the two companies of clutch system components. Bayer/Monsanto (2018, agrochemicals) also involved an in-depth study into portfolio effects owing to Bayer's focus on agrochemicals

and vegetable seeds, and Monsanto's focus in non-selective herbicide, traits and agricultural seeds. In fact, information requests received in multiple auto and auto-comp mergers (such as ZF/TRW) clearly suggest the Commission's consideration of portfolio effects.

However, the Indian regulator does not market-test its remedies

From time to time, the Commission has reached out to specific third parties for collating data and comments but this has been limited to instances where parties were for some reason, unable to supply verifiable data or information and in one case, (Aditya Birla/ Grasim Chemicals, 2015), the Commission confirmed the affirmations made by parties about being a single economic entity by contacting their vendors and suppliers.

It is unlikely that the Commission will market-test remedies in the foreseeable future unless it develops a high level of comfort with external agencies carrying out such tests on its behalf. Our guess is that such an exercise is most likely in the consumer facing digital market space, as and when there comes a transaction that requires such action by the CCI.

So far, the Commission's approach has been 'business friendly' i.e., no transaction has been blocked yet. This is possibly because the CCI has so far not been confronted with a fact situation that required blocking a transaction and remedies proposed by the Commission or, by the parties themselves, allowed competitiveness to prevail.

An Indian merger control quirk that doesn't go away

The single most dominant quirk at the Commission is the requirement to notify minority acquisitions

This has left the private equity, financial and fund investors with at least a 30- working day hurdle to closure, while the CCI reviews the applications. An interesting development was the recent voluntary remedies offered by Chryscapital (a private equity investor) in relation to its investment in Intas Pharmaceuticals. The remedies include: (a) resignation of its 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 Intas' Board should not have been associated with Mankind Pharma in the previous 1 year; (d) Chryscapital undertaking not to exercise its affirmative right in Mankind Pharma with respect to changes to capital structure, M&A, amendment to charter documents; and (e) non-public information received by Chryscapital from its portfolio companies competing with Intas will be strictly used for the purpose of evaluating the respective investment in such portfolio company.

The Commission has been under heat with multiple investors complaining about the need for scrutiny of the acquisition of non-controlling minority shares. It hasn't helped that such investments form a key portion of the merger enforcement activity at the Commission. We see increasing instances of the Commission's media scanning exercise resulting in notices to various financial investors about past acquisitions and their failure to notify these. The Commission's position (at least the portion of it that is clear) is that special rights (such as those impacting business and operations of the target, or the appointment of nominee director/s) amount to the acquisition of material influence over the target and this is a notifiable event even if the investor acquires less than 25% shares in a company. The confusing additional exemption threshold for shares less than 10% being solely as an investment is subject to the stricter standard that any special rights in favour of the acquirer would take the exemption away.

For a company actively engaged in business that is horizontally linked or vertically connected with that of the target, the Commission's requirement is that such an acquisition is notifiable whether the acquirer takes special or negative veto rights, or not. The investing arms of companies do not, therefore, enjoy the 'special rights' standard and it is likely that they would have to seek the Commission's approval for their acquisitions.

Commission's Green Channel for merger filings

Of course, many transactions enjoy the benefit of the *Commission's Green Channel for making merger filings* introduced in 2019. The "Green Channel" is a coinage borrowed from customs clearance for international travelers at Indian airports – the queue for persons with nothing to declare whose baggage is nonetheless summarily scanned by Indian Customs Officials. The Green Channel under Indian merger control applies to acquisitions (arguably even acquisitions upto 100%) of a target with no vertical nor horizontal nor complementary linkage with the business of the acquirer. The CCI allows an on-spot or immediate approval for such a notification. On ground, parties are expected to discuss the proposed green channel notification with the Commission under the informal guidance mechanism and the process could take between 5 to 10 days. It is unlikely that the Commission will expand the scope of the green channel notification in the foreseeable future.

This brings us back to the question of *that thorn in the side of investors – the requirement to seek the CCI's approval*

for minority investments. The CCI has recently embarked on a market study of common ownership with a focus on PE and other financial investors. The results of their findings, in our opinion, could mean one of two things – removing the requirement to notify minority acquisitions altogether or, maintaining status quo. The latter appears more likely. However, the detailed scrutiny that such acquisitions are subject to by the case teams treating them at par with actual acquisitions of businesses or majority stakes could be reconsidered by the Commission. Perhaps, an internal guidance to distinguish the issues / transactions from the no-issues ones would go a long way in achieving balance.

Increasing merger enforcement but decreasing gun-jumping penalties

Merger enforcement has gained strong momentum with the Commission pursuing gun jumping inquiries into multiple transactions (many of them being minority acquisitions), however, the penalties for a failure to notify have seen a decreasing trend. The Commission has dealt with close to 40 gun jumping cases so far. While the penalty for gun jumping could go up to 1% of the higher of the total turnover or the value of the total assets of the combination, in practice, the CCI has imposed nominal penalties ranging from INR 0.1 million to INR 50 million. The violations that have attracted these penalties included the following acts and omissions pending CCI approval: (a) extending corporate guarantee to a bank in connection with its loan to the target; (b) requiring transfer of IP rights in favour of the proposed acquirer; (c) advance payment of the whole or part of the consideration; (d) holding acquired shares in an escrow account; (e) advancement of loan to the target company; and (f) contractual overreach of standstill obligations. The Commission has so far ignored submissions for reasonable rules of derogation that would allow some acts such as the payment of advance consideration to distressed targets, or the acquisition of shares in public companies pending CCI approval (with the condition that voting rights are not exercisable till such time as the final approval is received).

With the 30-calendar day timeline for submitting the merger filing being suspended, the CCI's recent enforcement focus has also included incomplete and / or incorrect information provided in merger filings. Recently, the CCI penalized a large 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. The penalty imposed for incomplete / incorrect information was around USD 67,500 (INR 50 lakhs), which is higher than recent penalties imposed for a failure to notify transactions.

How likely is the Commission to consider issues outside the domain of the consumer welfare standard when it receives a notification seeking approval for mergers and acquisitions?

For instance, is it likely to consider broader socio-economic impact on labor or unemployment? What about deals combining large databases, data usage and extracting commitments after a scrutiny of arrangements between parties? Let us first cover tech and the so called, "'killer acquisitions' of likely competitors by big tech. In this respect, India is likely missing the bus while it busies itself with disentangling its limbs from the grasps of multiple regulators jumping in on domains such as e-commerce, digitech and data privacy. The small target exemption that allows acquisitions of companies with either a limited revenue or asset value in India and the generally high merger thresholds under Indian law ensure that none of these acquisitions are reported to the Commission. A brief proposal for a deal value threshold was lost in the quagmire of legislative reforms that are yet to see the light of day. Evidently, the serial innovator community in India would not complain, for they enjoy financially healthy exits from these businesses.

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.

The Bayer/Monsanto remedies Order of the Commission included one on 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 (seven) years to Indian agro-climatic data, for the creation of a public good in India, which was perhaps, early, borderline 'hipster' antitrust at play.

Our thought is 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 indeed 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), into Jio Platforms (Jio Platforms Limited), the Commission investigated data sharing between the two. Its 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.

Will the Commission in India be swept by the rising wave of protectionism across the world and that of nationalism?

So far, the Commission has maintained a broadminded stance with respect to the idea of Indian 'champions.' We do not believe that the 'national' card has been played successfully before the Commission in all these years. It has not been the Commission's concern where the investment is coming from into India or which country the acquirer is based in because India has a robust foreign investment law addressing these issues. For instance, the Fosun's (Shanghai Fosun Pharmaceutical (Group) Co, a Chinese pharmaceutical company) acquisition of Gland Pharma (Gland Pharma Limited) received CCI approval but the then Foreign Investment Promotion Board did not allow an acquisition of 100% of the target by Fosun (who settled with acquiring only 74% of Gland under the automatic route). Would the Commission continue to maintain an agnostic stance in the face of growing protectionism internationally? Or, would it set a precedence for informal reciprocity for companies from jurisdictions that remain invested in India, or in sync with the Indian polity of the time?

It is ambitious to deny possibilities. It will become increasingly difficult for the Commission to ignore the waves of sentiment that respond to and anticipate economic activity at present, especially given the limited number of members at the CCI (for the past three years, only four persons have been appointed as members including the Chairperson at the CCI whereas the statute provides for the appointment of seven members including the Chairperson). Perhaps, a sign of firm commitment to fair markets would mean a robust membership at the Commission.

Market studies

The Commission has recently undertaken insightful market studies into e-commerce, telecom, pharmaceutical and common ownership issues with a focus on private equity. Some of these studies may even set the basis for a more informed merger review and various investigations into companies operating in these sectors.

The To-Do List

Here is the ask: a less strenuous approach in assessing financial investor driven / minority acquisitions of non-controlling stake; a reasonable law of derogation from the strict suspensory regime for mergers; clearer FAQs on the Commission's website; clarificatory notes to Form II (possibly, a revised, more up-to-date Form II); and, a more formal, informal guidance system where the facts and the guidance are published (similar to the Securities and Exchange Board of India's informal guidance).

It will be interesting for the CCI to study the effects of its interventions in markets for merger cases where parties accepted or offered remedies or modifications to the proposed transaction. From a public policy standpoint, the relevance of merger control will show over time. The CCI has exercised restraint in most cases and facilitated businesses, except where it was necessary to intervene. The CCI represents the smaller voices, market entrants, and consumers, as much as it facilitates the ambitions of big corporations.

An abridged version of this article was published first on Bloomberg Quint on 18 July 2021.
Article link: https://www.bloombergquint.com/business/cci-and-a-decade-of-merger-control

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