CPI Columns

South Asia

November 2024

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On September 10 2024, the amendments to the Indian Competition Act, 2002 (Competition Act) regarding merger control came into force. A significant amendment was the introduction of the "Deal Value Threshold" (DVT), an additional metric for assessing the requirement of seeking prior approval for an M&A transaction. With the newly introduced DVT, transactions will require prior clearance from the Competition Commission of India (CCI) if the following criteria are met:

(i) the global value of the transaction exceeds INR 20 billion (approximately USD 239 million), and

(ii) the target has "significant business operations in India" (SBOI).

The concept of SBOI is similar to the 'substantial domestic operations' / 'local nexus' test used in Germany and Austria – the two jurisdictions which implemented DVT as early as 2017.

The CCI has also laid down criteria for determining SBOI in Regulation 4 of the Competition Commission of India (Combination) Regulations, 2023 (Combination Regulations). As per the regulation, an entity engaged in "digital services" will be said to have SBOI if 10 percent of its global users, turnover, or gross merchandise value (GMV) is in/derived from India.

While at first blush the criteria for SBOI appears robust, a closer examination reveals that the criteria for SBOI can allow market-altering transactions to evade scrutiny while bringing non-problematic deals into its regulatory fold. Before exploring this issue in detail, it is important to first understand the objectives that the Indian Parliament had in mind when introducing the DVT.

Competition Law Review Committee's Recommendations – The Prelude to DVT

The introduction of the DVT to India's merger control regime traces back to recommendations made by the Competition Law Review Committee (CLRC) in 2019. Established in 2018, the CLRC aimed to strengthen India's competition law framework by identifying enforcement gaps, particularly in digital markets. One highlighted issue was the CCI's limited ability to review significant transactions involving companies with low assets or turnover, but high value derived from data or innovation—such as Snapdeal's acquisition of Freecharge, and Facebook's acquisition of WhatsApp. While the CLRC suggested DVT to tackle "killer acquisitions," it also warned against a potential for regulatory overreach, emphasizing the need for a local nexus test to align with international standards.

Target as the "Focal Point" for SBOI assessment – The Fallacy Within the Framework

Considering that the central objective of the DVT was to curb "killer acquisitions," the SBOI test stipulated in Regulation 4 has ostensibly been designed with the target entity in mind. However, the fine prints remains vague, which could potentially allow significant transactions to escape regulatory scrutiny. This can be illustrated by considering the hypothetical situations below:

1. There are two separate global acquisitions, each having a transaction value over INR 20 billion (~ USD 240 million):
    a. **Scenario 1:** The target entity has 200 million users globally with 10 million users in India. The percentage of users in India is 5 percent.
    b. **Scenario 2:** The target entity has 50 million users globally with 7.5 million

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users in India. The percentage of users in India is 15 percent.

Although the target entity in Scenario 1 has more users in India and thus a potentially greater competitive impact when compared to the target entity in Scenario 2, only Scenario 2 would fall under the DVT's regulatory scope, while Scenario 1 would escape CCI review given that the target entity would not be considered to have SBOI.

2. A global MNC (TopCo) runs an online platform with operations in more than 70 countries. It has various subsidiaries, one in each country, including India, to carry out various operations in relation to the platform (such as collection of subscription fees, compliance with local laws, etc.) in that country. While the proportion of users in India is substantially lower than 10 percent of the total users globally, the Indian subsidiary caters exclusively to users in India. Now, consider the following two scenarios:
    a. **Scenario A**: The TopCo divests its India business for a deal value which is slightly over INR 20 billion.
    b. **Scenario B:** The owners of the TopCo sell the TopCo (including all its subsidiaries) in a global deal for a transaction value which is significantly over INR 20 billion (and much higher than the deal value for divestment of the India business as contemplated in Scenario A).

Despite identical competition implications in India, only Scenario A will require CCI approval, as the target is the Indian subsidiary which meets the SBOI criteria with 100 percent of its users being in India. In Scenario B, while the Indian subsidiary is part of the deal, the global parent is the direct target. Consequently, the 10 percent user threshold in India isn't met, the transaction would evade regulatory scrutiny.

This deficiency in the SBOI framework may not only allow potentially harmful M&A activities to bypass scrutiny, but also subject low-impact deals to unnecessary review. If the SBOI test is applied literally, it is possible that several innocuous transactions where (i) the target has an insignificant digital presence in India (for example, a website with only domestic users), and (ii) the high valuation of the deal is on account of the activities / assets of the target outside India (with no bearing / impact on the Indian markets), will also breach the SBOI threshold.

Accordingly, the present SBOI test, while conceived with the right intentions, may not do the trick of *only* attracting scrutiny for transactions that have real impact on the Indian market. It may therefore be prudent to re-examine and recalibrate the SBOI test.

Brightline Number as Criteria for SBOI – Possible Solution

A potential solution could be to base the SBOI criteria for digital entities on a brightline – i.e. a specified number of users in India – as opposed to a percentage of the global users of the target entity which are present in India. Pertinently, a leaf could be taken from the draft Digital Competition Bill, 2024 (DCB), a proposed legislation for *ex-ante* regulation of large tech companies. Presently, the draft DCB proposes quantitative thresholds (10 million end-users or ten thousand businesses associated with the platform in India) for a digital entity to be classified as a "systematically significant digital enterprise," i.e. the entities to which the DCB, if enforced, will apply. Similarly, the CCI could also consider providing a straight-forward quantitative threshold (in terms of an absolute number of business users/end users in India) for meeting the SBOI test for digital entities. The CCI may rely on the prevailing economic conditions / market realities to arrive at this quantitative threshold.

Such an approach to SBOI will not only result in predictable outcomes but will help achieve the intended objective of reviewing problematic transactions in the technology sector which have market impact in India. This approach will also ensure that deals that have an identical market impact are not escaping review purely based on the structure of the transaction. Further, should the Draft DCB translate into reality, the underlying principles and standards for user base test would also be uniform across both legislations.