ANTITRUST SCRUTINY OF DIGITAL MARKET M&A: FACEBOOK FIRST TO FACE THE HEAT?

1. INTRODUCTION

Technology has transmuted not only the way people across the globe conduct business but also the way they behave. As the covid-19 pandemic curtailed physical interactions, technology has been instrumental in maintaining and providing some semblance of normalcy to people in their personal and professional lives. In fact, different sites/apps such as Facebook, LinkedIn, Instagram, WhatsApp, Amazon, etc. have become an indispensable part of daily life for most people. The popularity of such sites/ apps can be mainly attributed to the fact that they offer free services to consumers by collecting and monetising their data.

Given that typically digital markets exhibit characteristics, such as, strong network effects, low switching costs, a self-enforcing advantage of data collected, and increased returns to scale which makes it a 'winner-takes-all' market, each sector of the digital market is now marked with the presence of (at least) one strong player, such as Amazon in e-commerce, Facebook in social networking, Apple and Google in application stores and Google in search engines. In order to maintain their market position, such companies often aggressively acquire their competitors/ potential competitors that not only sell similar products/ services but also complementary products/ services. Globally, Facebook, Amazon, Apple, Google, and Microsoft have undertaken more than 400 acquisitions (collectively) in the last decade. While such acquisitions may result in better and cheaper products/ services for customers owing to more robust technology, synergies generated and efficiencies gained, they may also have an anti-competitive effect such as hampering product development or innovation and loss of competitive threat to the incumbent players. Thus, it may also harm the consumer choice in the long run as the combined entity internalises the effects of its decisions on price, quality, and innovation.

2. ARE TRANSACTIONS IN DIGITAL MARKETS ESCAPING ANTITRUST SCRUTINY?

In order to analyse whether any merger/ acquisition will cause any adverse impact on the competitive landscape, various antitrust/competition law authorities ("**Competition Authorities**") usually undertake an *ex-ante* review of such transactions, popularly referred to as 'merger control review'. Currently, in most jurisdictions, a transaction is subject to merger control review only if the parties to the transaction meet certain asset value or turnover thresholds. In order to: (i) limit the expenditure of public and private resources; (ii) ensure that the merger control regime is not cumbersome; and (iii) ensure that the Competition Authorities are not unduly burdened with the responsibility of examining benign transactions, certain jurisdictions also exempt a transaction from requiring notification if the asset value or turnover of the target company are below certain financial thresholds ("**Target Exemption**").

In digital markets, typically companies (especially in their early stages) focus on creating a large user base by offering products/ services for free to customers. Given that they are yet to monetise their products/ services, such companies tend to have insignificant turnover. Hence, while the acquisition of such companies by incumbent companies in their sector may potentially have an anti-competitive effect, they escape the scrutiny of the Competition Authorities who tend to focus on turnover of the target company for undertaking merger control review. For instance, between 2013 to 2019, the Competition and Markets Authority ("**CMA**") (i.e., the Competition Authority of the United Kingdom ("**UK**")) had only investigated one acquisition by Amazon, Apple, Facebook, Google, and Microsoft. Further, out of the 72 acquisitions by Facebook till the year 2019, the Federal Trade Commission ("**FTC**") (i.e., the Competition Authority of the United States of America ("**US**")) only investigated two of its acquisitions, namely, of Instagram and of WhatsApp in the years 2012 and 2014, respectively.

The high number of acquisitions by the incumbent players in the digital market raises the suspicion that these players are undertaking at least some acquisitions in order to discontinue the product/ service of the target companies (that are existing or potential competitors), popularly referred to as 'killer acquisitions'. Hence, various Competition Authorities are now carefully examining not only proposed transactions in the digital market but also consummated transactions.

3. IS FACEBOOK'S M&A STRATEGY ANTI-COMPETITIVE?

The most noteworthy digital player under the radar of the various Competition Authorities is Facebook. When Facebook entered the market, the social networking space was marked by the presence of various other players such as Orkut, Myspace, Hi5, Google Friend Connect, Friendster, etc. Interestingly, although Facebook did not have the first-mover advantage, all its competitors lost their user base to Facebook and have since closed operations or have miniscule presence. The Competition Authorities are now examining various acquisitions of Facebook to determine whether Facebook has maintained its position as the un-crowned king of social networking sites by acquiring companies that it deemed were its competitive threats. The most significant investigations/ proceedings are discussed below:

3.1. United Kingdom

In January 2021, the CMA invoked its powers of ex-post review of consummated transactions and opened an investigation into Facebook's acquisition of GIPHY Inc. which was consummated in May 2020. GIPHY is the world's leading online database and search engine that allows users to search and share GIFs and GIF stickers (A GIF is a digital file that displays a short, looping, soundless video, while a GIF sticker displays an animated image comprised of a transparent (or semi-transparent) background over which images or text are placed).

In August 2021, by way of its provisional decision, the CMA found that the transaction has resulted or would result in a substantial lessening of competition in the supply of: (i) display advertising in the UK due to horizontal unilateral effects arising from a loss of dynamic competition; and (ii) social media services worldwide (including in the UK) due to vertical effects resulting from input foreclosure. Further, the CMA also noted that several of Facebook's internal documents suggest that the acquisition of GIPHY was in part to prevent its acquisition by one of Facebook's rivals. Thus, Facebook was concerned about being itself being foreclosed. Hence, to adequately address the competition law issues

arising from the transaction, the CMA has identified that a structural remedy requiring the full divestiture of GIPHY would be necessary.

3.2. United States of America

Like its counterparts in the UK, the FTC and the Department of Justice ("**DoJ**") in the US, also have wide powers to look back and undertake an ex-post review of consummated transactions. In fact, in the US there is no limitation period to undertake such reviews.[1] In December 2020, the FTC filed a complaint before the District Court of Columbia ("**Court**") against Facebook for allegedly abusing its dominant position by: (i) 'acquiring firms that it believed were well-positioned to erode its monopoly (most notably, Instagram and WhatsApp)'; and (ii) 'adopting policies preventing interoperability between Facebook and certain other apps that it saw as threats, thereby impeding their growth into viable competitors' ("**Complaint**"). The FTC claimed a permanent injunction including forced divestiture or reconstruction of businesses as well as directions for cease and desist from indulging in similar conduct in the future. Hence, the FTC is attempting to re-examine Facebook's acquisitions of Instagram and WhatsApp (although they have been previously cleared by it in 2012 and 2014, respectively) mainly based on Facebook's internal e-mails (that have been made public in the US House Judiciary Committee report issued on 06 October 2020) which indicates that Facebook acquired them with a view to neutralise competitive threats to its business and protect as well as expand its dominance.

However, in June 2021, the Court held that the FTC failed to plead enough facts to plausibly establish that Facebook has a monopoly in the US's personal social networking services market and dismissed the Complaint without prejudice (and not the case). The Court granted the FTC, the leave to file an amended complaint and also provided further guidance to FTC for amending its complaint. With regard to past acquisitions of Instagram and WhatsApp, the Court indicated that the FTC might be able to seek injunctive relief. While such acquisitions took place years ago, the Court found that Facebook's continued ownership of Instagram and WhatsApp could be considered a continuing violation of antitrust laws. Thus, there seems to be a reasonable chance of the FTC succeeding in its claim against Facebook upon filing of an amended complaint in line with the Court's guidance.

3.3. European Union

In August 2021, based on referral request of Austria and other member countries, the European Commission ("**EU Commission**") exercised its powers of *ex-ante* review and initiated an investigation to assess the proposed acquisition of Kustomer by Facebook. Kustomer is a customer relationship management ("**CRM**") software provider offering businesses to manage communications with consumers across different channels (by phone, e-mail, SMS, WhatsApp, Messenger, or Instagram, etc.) in a single tool.

The EU Commission is concerned that the proposed transaction may: (i) reduce competition in the market for the supply of CRM software as Facebook may have the ability, as well as a potential economic incentive, to engage in foreclosure strategies vis-à-vis Kustomer's rivals; and (ii) further strengthen Facebook's already strong market position in the online display advertising market by

[1] Note: While the equitable doctrine of *laches* applies to the US, however, it is not applicable to the FTC and the DoJ.

increasing the already significant amount of data available to Facebook for personalisation of the ads it displays. It will be interesting to see whether pursuant to its investigation, the EU Commission approves, modifies, or rejects the proposed transaction.

4. THE INDIAN EXPERIENCE

The Competition Commission of India ("**CCI**") (i.e., the Competition Authority of India) undertakes an ex-ante merger control review of transactions. As such, the Competition Act, 2002 ("**Competition Act**") provides for mandatory notification of a transaction to the CCI if the parties to the transaction meet certain asset value or turnover thresholds. In line with global best practices, in the year 2011, the Ministry of Corporate Affairs introduced a Target Exemption whereby a transaction is exempted from notification to the CCI, if the target company's asset value or turnover are below a certain financial threshold. Currently, such financial thresholds are asset value not exceeding INR 350 crores in India or turnover not exceeding INR 1,000 crores in India ("***De Minimis* Exemption**"). Further, the CCI has the power to inquire into any transaction that has not been notified but required prior notification, for a period up to 1 year from the date of completion of such transaction. Hence, if a transaction did not require mandatory notification to the CCI, the CCI is powerless to undertake ex-post scrutiny of such transactions.

Mirroring the trend globally, many transactions in the digital markets have escaped the CCI's scrutiny as they availed benefit of the *De Minimis* Exemption in India owing to the low turnover generated by the target company. Notable amongst them are: (i) Flipkart's acquisition of Myntra for USD 300 million (approximately INR 1,800 crore); (ii) Ola's acquisition of TaxiforSure for USD 200 million (approximately INR 1,200 crore); (iii) Snapdeal's acquisition of Freecharge for USD 400-450 million (approximately INR 2,800 crore); and (iv) Facebook's acquisition of WhatsApp for USD 19 billion (approximately INR 1.2 lakh crore).[2] In fact, the media reports regarding Facebook's acquisition of Instagram and WhatsApp enumerate their turnover data (at the relevant time) and interestingly, even if they were a single entity and were acquired at the same time, their combined turnover would have been so low that such acquisition may not have been notifiable to the CCI on account of the *De Minimis* Exemption.

Recognising the limitation of the current statutory framework and the need to examine transactions in digital markets, the Draft Competition (Amendment) Bill, 2020 ("**Draft Bill**") seeks to empower the central government to prescribe any other criteria (in consultation with the CCI) to trigger mandatory notification of a transaction to the CCI. It is widely speculated that such new criteria may be based on transaction size threshold or deal value threshold ("**DVT**"). The rationale behind DVT is that the purchase price in a transaction may be informative regarding its valuation by the acquirer (especially if the target company has low turnover) and its competitive effects in the market. The introduction of DVT will be a laudable step that may bring future transactions in the digital market under the CCI's *ex-ante* scrutiny and bridge the existing gap in its toolkit. However, given that the deal value of a transaction is determined holistically and not in regard to a particular geography/jurisdiction, the DVT would need to be coupled with a notification criterion to establish local nexus. It will be interesting to see what form the new criteria will take when the Draft Bill is formally passed by the Parliament.

[2]Note: IndusLaw advised on the Myntra and TaxiforSure transactions.

5. INDUSLAW VIEW

Given that digital and technology companies have replaced oil and gas companies as the most valued businesses across the globe, the Competition Authorities have realised that many transactions in the digital sector that could potentially have an adverse impact on competitive landscape have escaped their scrutiny. Such lacuna was partially due to ineffectiveness of conventional assets and turnover based thresholds in capturing such transactions, partially due to under-utilisation of ex-post merger control review but mainly because the Competition Authorities have been grappling with applying traditional tools and theories of harm to analyse digital markets. However, with an increased understanding amongst various Competition Authorities of the anti-competitive effect of transactions in digital market (such as potential distortion of competition resulting from the access to data), they are actively using all the regulatory tools at their disposal to take cognizance and block as well as unscramble anti-competitive transactions, where required.

The CCI has also kept abreast of such developments and kept pace with its global counterparts by undertaking a market study on mergers and acquisitions in the digital market intending to identify: (i) transactions that have the potential of inhibiting future competition in the digital space; and (ii) possible areas for refinement, improvement, and simplification of the merger control regime in India. Additionally, with the Draft Bill expected to be tabled and passed in the winter session of Parliament, the introduction of DVT will provide the CCI the necessary regulatory teeth required to increase its scrutiny of potentially problematic transactions in the digital market. Lastly, an amendment of the Competition Act is desirable to complete the CCI's toolkit by expanding its powers to 'look back' at transactions by bringing non-notifiable but potentially anti-competitive transactions within the scope of its review.

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Date: September 13, 2021