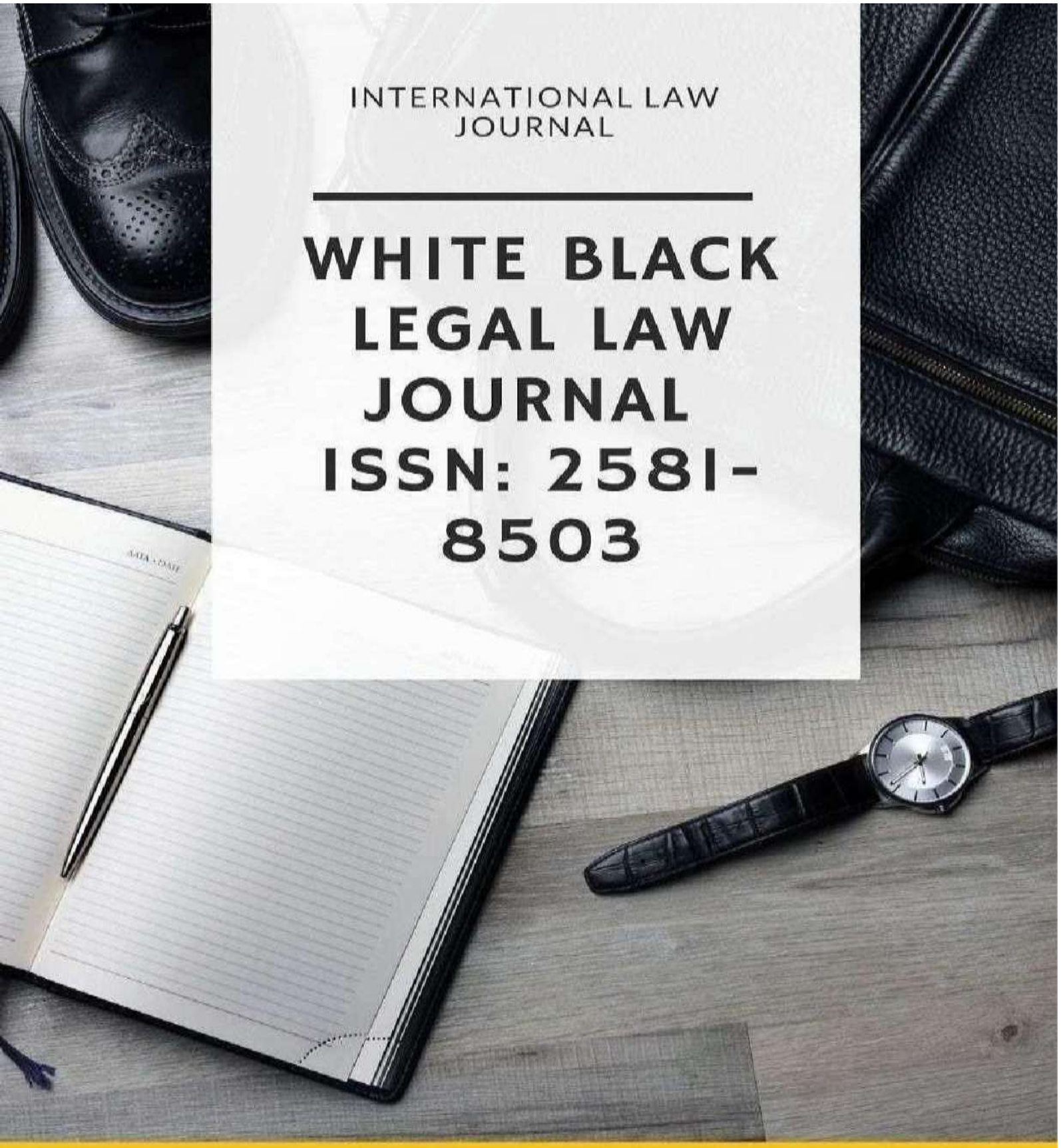

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Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

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With this thought, we hereby present to you

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REGULATORY CHALLENGES IN CURBING KILLER ACQUISITIONS: A COMPETITION LAW PERSPECTIVE ON INDIA'S PHARMA AND STARTUP INDUSTRIES

AUTHORED BY - TANISHTHA ANAND

Abstract

Killer acquisitions, where dominant firms acquire emerging competitors to eliminate future competition, pose significant challenges in the Indian pharmaceutical and startup ecosystem. These acquisitions, often disguised as strategic business moves, can lead to reduced innovation, increased market concentration, and higher prices for consumers. While global antitrust regulators, such as the US Federal Trade Commission (FTC) and the European Commission, have introduced stringent measures to curb such acquisitions, India's competition law still faces gaps in effectively identifying and preventing these transactions. This dissertation examines the role of the Competition Commission of India (CCI) in regulating such acquisitions under the Competition Act, 2002, highlighting challenges such as the de minimis exemption, lack of transaction-value thresholds, and limited forward-looking analysis. Through a comparative analysis of global antitrust practices, this study identifies key regulatory loopholes and suggests policy reforms to strengthen oversight in India. The research also includes detailed case studies from the pharmaceutical and startup sectors, such as the Sun Pharma-Ranbaxy merger and Abbott-Piramal deal, to illustrate enforcement challenges and the need for a more robust legal framework. The findings emphasize the necessity of revising India's competition policies to align with global best practices and ensure a more competitive market environment that fosters innovation and consumer welfare.

Chapter 1: Introduction

1.1 Background

Killer acquisitions occur when established firms acquire smaller competitors not to enhance innovation but to suppress competition. This is particularly concerning in high-growth sectors like pharmaceuticals and startups, where innovation and new entrants drive market dynamism. The lack of proper regulatory oversight allows such acquisitions to go unnoticed, weakening market competition and harming consumer welfare.

In India, the Competition Act, 2002[1], serves as the primary legislative framework to regulate mergers and acquisitions. However, its provisions are largely focused on high-revenue transactions, allowing many smaller but strategically significant acquisitions to escape scrutiny. This dissertation explores how Indian competition law addresses killer acquisitions, with an emphasis on the pharmaceutical and startup ecosystem.

1.2 Research Objectives

This study aims to:

- Examine how Indian competition law addresses killer acquisitions.
- Analyze the role of the CCI in regulating such acquisitions.
- Compare Indian regulations with global antitrust frameworks (EU and US).
- Propose reforms to strengthen India's competition law framework.

1.3 Research Questions

- What are killer acquisitions, and why are they harmful?
- How does Indian competition law currently regulate these acquisitions?
- What lessons can India learn from global antitrust frameworks?
- What policy recommendations can be made to address existing gaps?

1.4 Methodology

This dissertation employs a doctrinal legal research approach, analyzing statutes, case laws, regulatory reports, and academic literature. A comparative analysis with the US and EU competition regimes is conducted to identify best practices and potential regulatory reforms.

Chapter 2: Literature Review

2.1 Concept of Killer Acquisitions

The term "killer acquisitions" was coined by Cunningham, Ederer, and Ma (2021[2]) to describe cases where large firms acquire smaller firms to eliminate potential competition. Research highlights that such acquisitions often occur in industries requiring high R&D investment, such as pharmaceuticals and technology startups.

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[1] Competition Commission of India. (n.d.). *The Competition Act, 2002*. https://www.cci.gov.in

[2] Cunningham, C., Ederer, F., & Ma, S. (2021). *Killer acquisitions*. *Journal of Political Economy*, 129(3), 649–702. https://doi.org/10.1086/712506

A study by the OECD (2020)[3] emphasized that killer acquisitions are particularly prevalent in sectors with high innovation dependency, where dominant firms seek to acquire early-stage competitors before they pose a substantial threat. These acquisitions allow large firms to maintain their market dominance by preventing disruptive innovation from smaller players.

2.2 Global Studies on Competition Law and Killer Acquisitions

The European Commission and US Federal Trade Commission (FTC) have actively worked to strengthen their regulatory frameworks to tackle killer acquisitions. Several studies argue that India's current merger control framework, particularly the de minimis exemption, allows many killer acquisitions to go unchecked.

- **United States:** The FTC has initiated several retrospective investigations into past acquisitions by tech giants such as Facebook, Google, and Amazon. In the pharmaceutical sector, the US Department of Justice (DOJ) has scrutinized large-scale mergers to prevent anti-competitive consolidation.
- **European Union:** The European Commission has introduced new guidelines to scrutinize transactions where dominant firms acquire innovative startups, even if they don't meet traditional turnover thresholds. The EC's 2021[4] Guidance on the application of Article 22 of the EU Merger Regulation allows member states to refer problematic acquisitions even if they do not meet traditional revenue-based criteria.

2.3 Gaps in Indian Literature

Indian competition law research primarily focuses on anti-competitive agreements and abuse of dominance but lacks extensive literature on killer acquisitions. Unlike the EU and US, India does not have a history of tracking post-merger competition effects, making it challenging to evaluate whether an acquisition qualifies as a killer acquisition.[5] This study aims to fill that gap by providing a structured analysis of how competition law can be improved to address such acquisitions.

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[3] OECD. (2020). *Start-ups, killer acquisitions and merger control: Background note by the Secretariat*. Organisation for Economic Co-operation and Development. https://www.oecd.org/competition/start-ups-killer-acquisitions-and-merger-control.html

[4] European Commission. (2021). *Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases*. https://ec.europa.eu/competition/mergers/legislation/guidance_article_22_referrals.html

[5] Nishith Desai Associates. (2021). *Killer acquisitions in Indian pharma*. https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Killer_Acquisitions_in_Indian_Pharma.pdf

Chapter 3: Legal Framework and Regulatory Landscape

3.1 The Competition Act, 2002

India's Competition Act, 2002, governs mergers and acquisitions through Sections 5 and 6. However, these provisions rely on asset and turnover thresholds to determine whether a merger requires CCI approval. Since startups and many pharmaceutical firms operate at relatively low revenue levels, such acquisitions often escape regulatory scrutiny.

3.2 Role of the Competition Commission of India (CCI)

The CCI has been active in reviewing high-value mergers but has faced challenges in identifying killer acquisitions due to existing legal loopholes. The lack of transaction-value thresholds similar to the EU and US further limits its ability to capture anti-competitive deals.

Key Provisions under the Competition Act, 2002

1. **Section 3:** Prohibits anti-competitive agreements, including both horizontal and vertical arrangements that may have an appreciable adverse effect on competition (AAEC).
2. **Section 4:** Prohibits abuse of dominant position, including actions by dominant firms that eliminate or restrict market competition.
3. **Section 5 & 6:** Regulate combinations (mergers, acquisitions, and amalgamations) that cross certain financial thresholds, requiring prior notification to the CCI.
4. **Section 32:** Grants extraterritorial jurisdiction, allowing the CCI to examine foreign mergers if they have an impact on the Indian market.

Despite these provisions, the CCI has yet to prosecute any pharmaceutical company in India for a killer acquisition. However, regulatory scrutiny has increased post-pandemic, making it likely that such acquisitions will be closely monitored.

3.3 Global Comparisons

- **United States:** The Hart-Scott-Rodino Act mandates pre-merger[6] notifications above a certain transaction value.
- **European Union:** The European Commission has introduced new guidelines to scrutinize transactions where dominant firms acquire innovative startups.
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[6]U.S. Federal Trade Commission. (n.d.). *Merger review process*. https://www.ftc.gov

Chapter 4: Case Studies

4.1 Pharmaceutical Sector

Example: Sun Pharma-Ranbaxy Merger

The Sun Pharma-Ranbaxy merger in 2014, valued at $4 billion, marked one of the most significant consolidations in India's pharmaceutical industry. The merger created the fifth-largest specialty generics company in the world, leading to concerns about excessive market concentration in key therapeutic segments. The Competition Commission of India (CCI) approved the transaction but mandated the divestiture of seven brands to allay concerns of reduced market competition. The case underscored the need for stringent regulatory oversight to ensure that mergers do not stifle competition or reduce innovation. Despite the CCI's intervention, industry analysts argue that post-merger market dynamics led to reduced price competitiveness in certain drug categories, raising questions about the effectiveness of merger remedies in the long term. This case highlights the necessity for continuous post-merger monitoring and stronger forward-looking analysis in competition law enforcement.

Example: Abbott-Piramal Deal

Abbott's acquisition of Piramal Healthcare's domestic business in 2010, valued at $3.72 billion, significantly reduced competition in India's generic pharmaceutical market. This acquisition positioned Abbott as the largest player in India's pharmaceutical sector, capturing nearly 7% of the market. Concerns were raised regarding the monopolization of essential drug categories and the potential for price increases, especially in life-saving generic drugs.

The Competition Commission of India (CCI) reviewed the transaction but did not block it, as it did not breach the existing thresholds under the Competition Act, 2002[7]. However, post-acquisition reports suggested that Abbott's pricing strategies led to cost escalations for certain essential drugs, triggering debates on the necessity of revising India's merger control framework. Additionally, the deal drew comparisons with similar acquisitions in global markets, where regulators had imposed stricter conditions or even blocked transactions to prevent market dominance.

The Abbott-Piramal case underscored the limitations of India's competition law in addressing killer acquisitions, particularly in the pharmaceutical sector. Unlike jurisdictions such as the

[7] Competition Commission of India. (n.d.). *The Competition Act, 2002*. https://www.cci.gov.in

EU and the US, where authorities have implemented transaction-value thresholds to capture such deals, India's reliance on asset and turnover criteria allowed this acquisition to proceed without significant scrutiny. The case serves as a pivotal example of why regulatory frameworks must evolve to prevent anti-competitive consolidations that could harm consumer welfare and innovation. Abbott's acquisition of Piramal Healthcare's domestic business in 2010, valued at $3.72 billion, significantly reduced competition in India's generic pharmaceutical market. The deal led to concerns over price increases and reduced innovation incentives.

Chapter 5: Challenges and Gaps in the Current Regulatory Framework

One of the primary challenges in identifying killer acquisitions is that their anti-competitive intent may only become evident post-merger. This issue is particularly complex in the pharmaceutical industry, where drug development follows multiple trial phases and regulatory approvals. A drug in early development may fail to reach the market, making it difficult to prove that its acquisition was deliberately intended to suppress competition.

In contrast, the European Commission evaluates drugs in **Phase III clinical trials** as potential competitors to existing treatments, as seen in the **Novartis-GlaxoSmithKline merger case**. [8]When GlaxoSmithKline acquired Novartis AG's oncology division, Novartis had two promising skin cancer drugs in late-stage trials. To prevent market foreclosure, the European Commission approved the merger on the condition that Novartis divest one of the drugs.

India lacks similar pre-emptive regulatory measures. The **de minimis exemption** under the Competition Act exempts mergers involving entities with **assets below ₹3.5 billion or turnover below ₹10 billion** from mandatory CCI notification. This creates a regulatory gap, as killer acquisitions often involve smaller, emerging firms that fall below these thresholds.

Merger Control in India

Under the Competition Act, mergers exceeding specified financial thresholds require CCI approval. The CCI assesses whether the merger would lead to an **AAEC**[9] and can impose conditions such as divestitures to maintain competition.

[8] GlaxoSmithKline. (2014). *Novartis transaction: Oncology portfolio realignment*. https://www.gsk.com
[9] Indian Pharmaceutical Alliance. (2021). *Policy priorities and regulatory framework overview*. https://www.ipa-india.org

However, certain challenges persist:

1. **High Notification Thresholds:** Many acquisitions evade scrutiny due to the exemption for small enterprises, even if the merger has significant long-term implications.
2. **Lack of Sector-Specific Regulations:** The pharmaceutical industry plays a crucial role in public health, yet there are no dedicated thresholds tailored to this sector, unlike in jurisdictions such as the EU and the U.S.
3. **Limited Power to Block Foreign Acquisitions:** While the CCI can assess foreign mergers that impact India, enforcement is constrained if the acquiring company does not explicitly plan to launch the acquired drug in India.

Another challenges include:

- **De Minimis Exemption:** Many killer acquisitions evade scrutiny due to transaction value thresholds.
- **Lack of Forward-Looking Analysis:** The CCI relies on immediate market impact rather than long-term competitive harm.
- **Limited Provisions for Dynamic Markets:** Digital and pharmaceutical sectors require specialized competition rules.
- **Challenges in Defining Potential Competition:** The lack of clarity in Indian law regarding the assessment of potential competition allows many harmful acquisitions to bypass regulation.

Chapter 6: Findings and Recommendations

- **Introduce a Deal-Value Threshold:** To capture acquisitions of high-value startups and pharmaceutical firms.
- **Enhance Post-Merger Monitoring:** The CCI should track the competitive impact of acquisitions over time.
- **Increase Digital and Pharmaceutical Market Oversight:** Establishing sector-specific competition rules to prevent anti-competitive consolidation.
- **Strengthening Section 4 (Abuse of Dominance) Enforcement:** While Section 4 prohibits abuse of dominance, its application to mergers remains limited. The CCI could adopt a broader interpretation by investigating whether acquisitions are structured to suppress potential competitors.

- **Lowering the De Minimis Exemption for Pharma & Life Sciences:**[10] Given the essential nature of pharmaceutical products, introducing sector-specific thresholds would allow better oversight of mergers involving nascent drug development companies.
- **Aligning with Global Best Practices:** Regulators in the U.S. and Europe increasingly rely on **market structure analysis** to identify acquisitions with potential anti-competitive effects. India could benefit from adopting similar predictive models for merger assessment.
- **Mandatory Post-Merger Reviews:** Introducing a framework for **post-merger scrutiny** could help identify killer acquisitions after they have occurred, enabling corrective actions such as compulsory licensing or divestiture.
- **Expand CCI's Powers to Review Small Transactions:** Aligning with global best practices to scrutinize smaller deals that may have significant market impact.

Chapter 7: Conclusion

Killer acquisitions undermine competition and innovation by allowing dominant firms to eliminate potential rivals before they can pose a legitimate threat. This practice is particularly harmful in high-innovation sectors such as pharmaceuticals and technology startups, where competition drives advancements in R&D and product development.

The Competition Commission of India (CCI) plays a critical role in monitoring and regulating mergers and acquisitions under the Competition Act, 2002. However, existing legal provisions primarily focus on high-revenue transactions, allowing many strategically significant but lower-value acquisitions to evade regulatory scrutiny. The absence of a transaction-value threshold, as seen in jurisdictions like the US and the EU, limits CCI's ability to assess the long-term impact of these acquisitions.

A comparative analysis of international frameworks reveals key lessons for India. The United States Federal Trade Commission (FTC)[11] has taken proactive steps to investigate retrospective mergers, particularly in the technology and pharmaceutical sectors, where firms have

[10] Patnaik, I., & Roy, S. D. (2020). *Competition and regulation in India: Issues and perspectives*. *NIPFP Working Paper Series*. https://www.nipfp.org.in
[11] ICN Merger Working Group. (2020). *Recommended practices for merger notification and review procedures*. International Competition Network. https://www.internationalcompetitionnetwork.org

systematically acquired smaller competitors to stifle innovation. Similarly, the European Commission's revised merger guidelines emphasize the assessment of market dynamics and potential competition, ensuring that transactions which do not meet traditional revenue thresholds are still scrutinized for anti-competitive effects.

Several cases in India highlight the shortcomings of the current regulatory framework. The Sun Pharma-Ranbaxy merger in 2014, while approved with divestiture requirements, demonstrated the need for stronger merger analysis mechanisms. The Abbott-Piramal acquisition in 2010 raised concerns over market dominance and price hikes in India's generic pharmaceutical industry, underscoring the necessity of a forward-looking approach to merger control.

To strengthen competition law in India, key recommendations include:

- Introduction of a Deal-Value Threshold: Implementing a transaction-value-based review mechanism to capture high-value acquisitions that bypass revenue-based thresholds.
- Enhanced Post-Merger Monitoring: Establishing mechanisms to track the competitive impact of mergers over time and ensure compliance with imposed conditions.
- Sector-Specific Competition Rules: Formulating distinct guidelines for digital and pharmaceutical markets, acknowledging their unique competitive dynamics.
- Expanding CCI's Investigative Powers: Granting the CCI authority to review[12] small but strategically significant transactions that may have long-term anti-competitive effects.

Aligning India's regulatory framework with international best practices will ensure a more competitive market landscape that fosters innovation, consumer welfare, and economic growth. A robust competition policy is essential to counter the adverse effects of killer acquisitions and promote sustainable market competition in India's rapidly evolving economic environment.

[12] Department for Promotion of Industry and Internal Trade (DPIIT). (2020). *Startup India initiative: Regulatory framework and M&A landscape*. https://www.startupindia.gov.in