AU COURANT

RGNUL FINANCIAL AND MERCANTILE LAW REVIEW

DECEMBER 2023

PREFACE

It gives us immense joy to share with our readers the December edition of our monthly newsletter, "Au Courant". In this edition, the current on-goings in various fields of law have been analysed succinctly in the 'Highlights' section to provide readers with some food for thought.

This includes a brief comment on the details sought by CCI from Religare Enterprises on Burmans' role, the rejection order of the Delhi High Court for PepsiCo's Renewal of Patent Registration, and the Draft Framework proposed by RBI for FinTech Self-Regulatory Organizations.

Major happenings in various fields of law such as alternative dispute resolution, banking and finance, insolvency and bankruptcy, intellectual property rights law, and securities law have been recorded in the 'News Updates' segment to keep the readers abreast of latest legal developments.

This edition also features an interview with Mr. Aman Singh Sethi and Aparna Mehra, Partners at Shardul Amarchand Mangaldas & Co. on the topic "Unraveling the Deal Value Threshold (DVT) in Competition Law and Exploring New Frontiers."

We hope that this Edition of the Au Courant finds you well and is once again an enjoyable and illuminating read for you!

HIGHLIGHTS OF THE MONTH

HIGHLIGHTS

CCI seeks details from Religare Enterprises on Burmans' role, merger plans

Recently, Competition Commission of India (CCI)has sought the details on Burman's role, merger plans from Religare Enterprises. CCI has also sought all the communication documents exchanged between the Burmans and Religare from October 13, 2017 to September 25, 2023, during which the promoters' acquired shares in Religare Enterprises.
According to CCI, India's competition watchdog, the Burmans did not inform it about their initial acquisition of the Religare shares but have now sought approval for their proposed purchase of 5 per cent stake through secondary market transactions and the planned open offer to buy 26 per cent from the company's public shareholders. Religare stated that there has been no communication with the Burmans over a merger or management of the company's affairs but their actions show intention to gain control of the financial services unit.

In their first investment in 2018, the Burmans picked a 10 per cent stake in the company by subscribing to share warrants and subsequently converting it to equity, following which they increased their stake to 14 per cent and later to 22 per cent. After that they announced a proposal to acquire 5 per cent of Religare shares from the secondary market and an open offer for additional 26 per cent stake.
Religare Enterprises independent directors had levelled allegations of fraud and other breaches against the Burmans with regulators SEBI, Insurance Regulatory and Development Authority of India (IRDAI) and Reserve Bank of India (RBI). Subsequently, SEBI asked REL to provide evidence and documents to back the allegations. Burman family wrote to SEBI and the stock exchanges seeking a probe against Religare Enterprises Chairperson Rashmi Saluja's trade in the shares of the firm. Read more

HIGHLIGHTS

Delhi High Court Dismisses UltraTech's Challenge to CCI Decision Allowing Builders Association of India's Impleadment in Cement Cartelisation Case

The Delhi High Court on December 18 dismissed a plea by cement manufacturer UltraTech Cements Limited challenging the order of the Competition Commission of India (CCI) to allow the Builders Association of India (BAI) to be made a party in the ongoing cement cartelisation case.

Brief background:

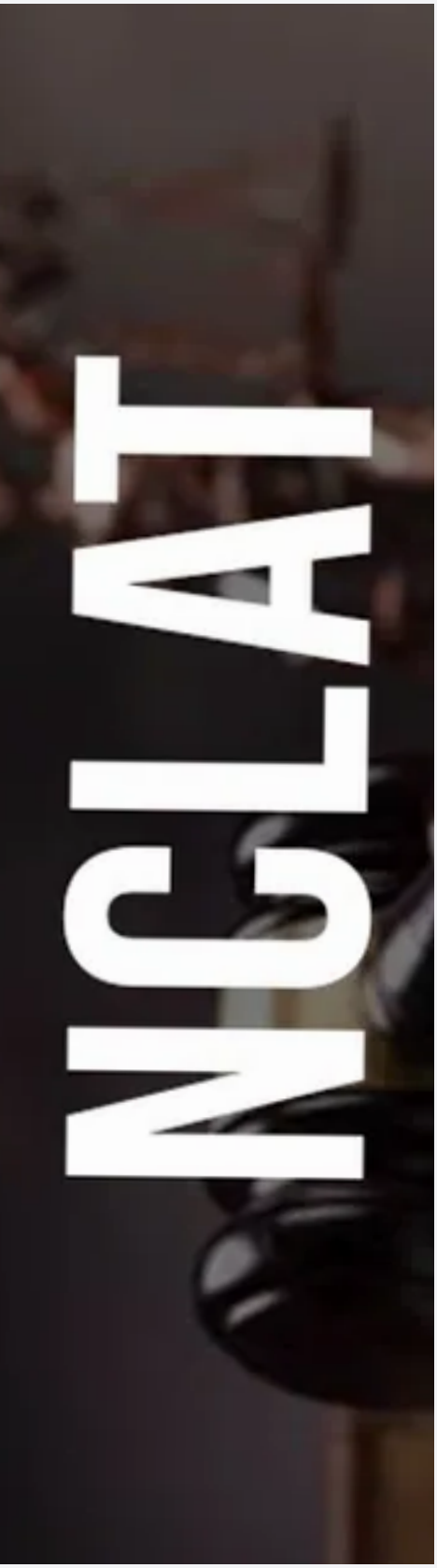
In July 2019, the CCI initiated suo motu investigation against several cement companies for alleged cartelisation. In December 2021, BAI filed an application before the CCI seeking to be impleaded as a complainant in the investigation, which was rejected by the CCI. BAI filed a writ petition challenging the Rejection Order before the Delhi High Court. The DHC granted liberty to BAI to approach CCI to seek a copy of the investigation report and thereafter, the CCI impleaded BAI as an interested party. Then, a writ petition was filed by Ultratech to challenge the Impleadment Order before DHC.

Delhi High Court Judgment:

The DHC dismissed the writ petition and inter alia held that the CCI has provided adequate reasoning in the Impleadment Order and noted that any cartel by cement companies will have direct impact on BAI as its members are the largest consumers of cement companies. It also stated that the CCI has the power to implead any party to a competition proceeding at any stage provided it satisfies the two-fold test of 'substantial interest' and 'public interest' under Regulation 25 of the Competition Commission of India (General) Regulations, 2009.

This is one of the first decisions where the CCI allowed the impleadment of a party after the DG had concluded its investigation in the matter. The decision also provides much needed clarity regarding the test for impleadment to matters pending before the CCI for third parties who are interested in the outcome of the proceeding.

HIGHLIGHTS



Inter-Corporate Deposits held in a Joint Venture cannot be Adjudged as a 'Financial Debt' Under IBC: NCLAT New Delhi

The New Delhi Bench of the National Company Law Appellate Tribunal ("NCLAT") recently held that inter-corporate deposits ("ICD") between body corporates in a Joint Venture Agreement ("JVA") cannot be held as 'financial debt' as u/s 5 (8) of the Insolvency and Bankruptcy Code ("IBC").

In the case of Ansal Housing Ltd. ("Appellant") v. Samyak Projects Pvt. Ltd. ("Corporate Debtor"), an inter-corporate loan was disbursed to the Corporate Debtor by the Appellant, of Rs. 25 Crores for a JVA regarding a Real Estate Project involving the purchase and development of land.

The Appellant filed a CIRP at the CD's default of the loan, which NCLT Delhi dismissed outright. Subsequently, the Appellant preferred an appeal to the NCLAT.

With reference to the ratio held in Anuj Jain, IRP for Jaypee Infratech Ltd. v. Axis Bank Ltd. & Ors. and in Pioneer Urban Land and Infrstructure Ltd. v. Union of India, wherein it was held that a 'financial debt' is considered to be a disbursement against the consideration of the time value of money, the NCLAT could not find merit in the Appellant's case. The Appellant Tribunal held that the loan produced was used acquiring land for the real estate project, and thereby, the Appellant was financing the JVA's operation, and can be designated as an investment for profit which cannot be held as a 'financial debt'.
Thus, the NCLAT dismissed the appeal by Ansal Housing Ltd. Read More

HIGHLIGHTS

Delhi High Court Dismisses the Petition under Section 27 Of the A&C : Holds that its Powers Under Section 27 are not Adjudicatory in Nature and the Arbitral Tribunal Must Adjudicate the Relevancy and Materiality of the Evidence

In the matter of Steel Authority of India Vs. Uniper Global Commodities, the Delhi High Court dismissed the Petition under Section 27 of the A&C Act on the ground that the order passed by the Arbitral Tribunal, granting permission to the Petitioner to apply to the Court for seeking its assistance in taking evidence, is a non-speaking order, based on a misconception of law that the Arbitral Tribunal is not required to examine, even prima-facie, the relevancy or materiality of the evidence sought to be produced, before allowing the application under Section 27 of A&C Act.

The Arbitral Tribunal, without considering the relevancy and materiality of the evidence sought to be produced, allowed the Petitioner's Application on the ground that the parties in an arbitration proceeding should be given full opportunity to present their case and that at this stage, the Arbitral Tribunal is not required to go into the relevancy or materiality of the evidence sought to be produced.

The High Court's decision is noteworthy and will set a precedent for similar cases because, in most cases, an order issued by the Arbitral Tribunal allowing the applicant to petition the Court for help in gathering evidence cannot be overturned because this Court, acting under Section 27 of the A&C Act, is not hearing an appeal of the Arbitral Tribunal's ruling. Read More

HIGHLIGHTS

Delhi High Court Sets Aside Rejection Order for PepsiCo's Renewal of Patent Registration

Protection of Plant Varieties and Farmers Rights Authority's order of revoking PepsiCo's registration for patent for a potato variety used in Lay's chips production has been overturned by the Delhi High Court. The order of revocation had annulled the registration for the potato variety used.

The division bench of the High Court did not uphold the previous order due to incorrect information related to the date of the first commercial sale being furnished and failure to furnish required documents for registration. The Hon'ble Court referred to section 34 of the Stamp Act, 1899, which is a special provision as to unstamped receipts as registration may be revoked, based on the application in the prescription of any person interested.

The initial observation that the certificate of registration was not in public interest was not followed by the bench that overturned the decision. The Court affirmed the previous decision that the misclassification of the variety as 'new' was remediable and not detrimental to the case.

It noted that plant variety protection offers legal safeguarding to plant breeders as it provides exclusive rights on the registered variety. Thus, the Court overturned the earlier decision and set aside the rejection for patent renewal. Read More

NEWS BITS

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RBI Proposes Draft Framework for FinTech Self-Regulatory Organizations

The Reserve Bank of India ("RBI") has devised a draft plan for self-regulatory organisations ("SROs") for fintech companies. RBI aims to set normative standards for the industry, for uniform oversight, enforcement, grievance redressal and dispute resolution. The draft mentions the prerequisites for a SRO to apply for the scheme. An SRO should be set up as a not-for-profit, have sufficient net worth and demonstrate its capability to fulfil the responsibilities of an SRO. The RBI would be inviting applications for the entire FinTech Sector or a sub-sector as and when the need arises. Read more

India's New Telegraph Law: Telecommunications Act, 2023 receives President's Assent

The Telecommunications Act, 2023 has received presidential assent on 24th December, 2023 and has been notified for information. It replaced existing legislation governing telecommunications in India, namely the Indian Telegraph Act, 1885, the Wireless Telegraphy Act, 1933, and the Telegraph Wires (Unlawful Possession) Act, 1950. While it excludes from its ambit broadcasting, and over-the-top services such as WhatsApp and Telegram, it cements rules for spectrum allocation and provides for a non-auction route for assigning airwaves for satellite-based communication services. Read more

BSE and NSE notify of a Special Live Trading Session on the 20th of January

In efforts to switch over to the Disaster Recovery ("DR") site to ensure business continuity for the players of the market, grouped under Market Infrastructure Intermediaries ("MII"), the Bombay Stock Exchange ("BSE") and the National Stock Exchange ("NSE") determine 20th January to have an intra-day shift to the DR site with Software as a Service ("SaaS") model working simultaneously to combat against any unforeseen event capable of threatening the market. This action plan strives to ensure a swift recovery of operations from the DR site. Read More

NEWS BITS

CIRP not Non-Maintainable due to Non-Stamping of Agreement

Following the Supreme Court's decision which points out Agreements that are not stamped are not rendered void or unenforceable, NCLAT New Delhi has held that non-stamping of an agreement does not render the Corporate Insolvency Resolution Process ("CIRP") non-maintainable when there are other materials to support default of payment of debt.

Non-stamping is a rectifiable defect and the unstamped "confirmation and undertaking" does not render the entire process illegal if the document is not relied upon as evidence. The respondents filed a CIRP petition under section 7 of the Insolvency and Bankruptcy Code, 2016 as the debtor had undertaken to pay Rs. 7 crores after a period of 90 days and had payment of interest on the same. The Appellant contended that it the documents are mandatorily required to be stamped.The same plea could not be admitted as an unstamped instrument cannot render CIRP non-maintainable.

INTERVIEW

INTERVIEW

Aparna Mehra, Partner at Shardul Amarchand Mangaldas & Co.

She has received BW Legal World "Top 40 Under 40 Lawyers and Legal Influencers Awards 2021 and has been involved in a large number of high profile merger control matters.

UNRAVELING THE DEAL VALUE THRESHOLD (DVT) IN COMPETITION LAW AND EXPLORING NEW FRONTIERS.

1. To begin with, please share your experience as a competition law lawyer in the early years and your motivations. A decade back, competition law was a relatively smaller field in law. So, how did competition law become a passion for you?

I was a corporate lawyer who switched practice areas during the advent of the modern Indian competition law, and became a competition specialist. Back in 2009, when I was a senior associate with the corporate team at AZB & Partners, there were a series of competition law related conferences that were taking place in India before the introduction of the (then new) competition law. Enamoured by this new law, I actively attended and participated in these conferences. These conferences sparked my interest in competition law, and were my first steps towards this new, dynamic field. However, I was still part of AZB's corporate team and a heavy workload kept me busy during the time the enforcement provisions of the Competition Act, 2002 (Competition Act) got notified in 2009. In the backdrop, there was impetus towards notification of the merger control provisions of the Competition Act as well.

Then one sudden day in 2010, Mrs. Zia Mody (co-founder, AZB & Partners) asked me to accompany her to the Ministry of Corporate Affairs' office to work on the merger regulations. You could say that this was the formal start to my 14-year journey of being a competition lawyer. For next 10 days (and nights), I along with Mrs. Pallavi Shroff, Mrs. Shweta Shroff Chopra and Mr. Naval Satarawala Chopra, drafted and finalised the regulations governing the Indian merger control regime, working closely with the Government of India and the regulator, the Competition Commission of India (CCI). We played a particularly important role in the drafting of the various exemptions under these regulations, which we today call the 'Combination Regulations'. That's how my journey in this ever-evolving and dynamic practice area started and I'm happy to say that the last 14 years have been super-challenging yet exciting.

INTERVIEW

Aman Singh Sethi, Partner at Shardul Amarchand Mangaldas & Co under Competition and Antitrust Team and has an experience of 10+ years.

UNRAVELING THE DEAL VALUE THRESHOLD (DVT) IN COMPETITION LAW AND EXPLORING NEW FRONTIERS

Competition Law was not a subject taught at Symbiosis Law School while I was there. During internships in 2008-09, there was a lot of buzz of a new practice area and this first drew my attention to Competition Law. Over time, my interest in the subject grew and I was fortunate enough to intern with Mr. Samir Gandhi and Mr. Rahul Rai (then at Economic Law Practice), who at the time were involved in drafting the competition law for Afghanistan. This gave me a crash course on competition law, and there has been no looking back since. An LLM in the subject guided by stalwarts such as Professors Richard Whish, Allison Jones and David Bailey cemented my desire to be a Competition Lawyer.

The thrill of contributing in small ways to the evolution of a new law has been exhilarating. Over the 10 years that I have practiced competition law, the fraternity of exclusive competition practitioners in India have grown from a handful to nearly 100. At the same time, the quality of analysis and decisions passed by the competition regulator, the CCI, has also matured tremendously. Case in point is the evolution of the CCI's approach to promotional pricing in new markets. In 2011, with the NSE case, that I have been fortunate to work on, the CCI found zero pricing to contravene the Competition Act, 2002 (Competition Act) in contrast, since 2015, the CCI has demonstrated a mature understanding of platform markets and the need to price below costs in order achieve economies of scale 'in its decisions involving radio taxis / e-commerce platforms.

It is heartening to 'see competition law becoming more of a mainstream subject in law schools as well as to meet passionate students who are eager to enter this field.

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2. Is the Competition Act currently equipped with adequate provisions to effectively regulate instances of algorithmic tacit collusion, or does it require additional measures to comprehensively address emerging challenges in the market?

Algorithmic tacit collusion, i.e., collusion which takes place solely through the operation of algorithms that function on machine learning and without any human intervention, has been predicted in theory but is yet to be seen in practice. There has not been a single finding of algorithmic collusion by a competition authority anywhere in the world. Therefore, we should be measured in expressing concerns around it.

In any case, assuming such a situation were in fact possible, the Competition Act is well-equipped to deal with such tacit collusion. Additionally, the CCI has set up a Digital Markets Unit within the Commission which will have the technical manpower, tools and expertise to examine such issues within the existing legal and organizational framework.

3. In light of the increasing influence of artificial intelligence, how do you anticipate the market will navigate and address the challenges posed to hub-and-spoke arrangements?

Traditionally, companies would compete vigorously with each other on price as well as non-price (for instance, through innovation and better quality) to the benefit of the consumer. Artificial Intelligence certainly adds a degree of complexity as far as competition law is concerned.

It has been argued that different companies (let us call them spokes) centralize their pricing decisions through a common artificial intelligence based algorithmic offering (let us call this the hub).

The concern is that the common/ centralized hub could 'manage' signals to prevent this competition and allow these companies to achieve a 'collusive balance', maximizing profits at the expense of the consumer.' However, in this scenario, in order to be treated as a hub-and-spoke arrangement, every company must knowingly and actively choose to delegate its pricing decision to the hub with full knowledge that its competitors have done the same. Therefore, even if the companies did not themselves arrive at an anti-competitive agreement, it is evident that they acted in a manner that would help establish and facilitate a hub-and-spoke arrangement. Such implicit arrangements are caught within the wide definition of 'agreement' under the Competition Act.

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Businesses using artificial intelligence based algorithms for pricing should take active steps to ensure that the algorithm operates independently, with adequate firewalls, and does not rely on the prices (or other commercially sensitive information) of its competitors.

4. Do you think that the introduction of the Deal Value Threshold will effectively counter killer acquisitions in the Indian scenario? Is there a need to introduce ex-post assessment of acquisitions to effectively tackle killer acquisitions?

Let us take a step back and track this legislative development.

Last year, the Government of India passed the Competition (Amendment) Act, 2023 (Amendment Act) which introduces wide-ranging changes to the Competition Act. The Amendment Act has substantially revised both the existing merger control and the enforcement provisions of the Competition Act and is the most significant overhaul of the competition law regime in India since its inception.

On the merger control front, some key changes include: (a) the introduction of a deal value threshold (DVT), as an additional screen to the existing asset and turnover based thresholds; (b) derogation of standstill obligations for certain on-market purchases; (c) codifying the definition of control to the "material influence" standard; and (d) the introduction of expedited merger review timelines.

Background to the DVT:

Previously, the Competition Act only prescribed asset and turnover based thresholds. The CCI expressed concerns that relying solely on these thresholds a number of important transactions (especially in the digital and infrastructure space) would fall outside the CCI's jurisdictional net. The assets and / or turnover values were below the jurisdictional thresholds or, more importantly, the transactions benefited from the de minimis target based exemption (which is also based on the asset and turnover values of the target).

The Amendment Act has introduced an additional threshold, requiring notification of transactions where: (a) the deal value is in excess of INR 2,000 crores (approx. USD 252 million); and (b) where the target has "substantial business operations in India". Critically, the de minimis target exemption shall not be applicable to transactions caught under this threshold.

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Now, to address your query, at the outset, it is important to treat DVT as merely an additional screen to notify transactions to the CCI. The CCI's assessment of transactions notified to it on satisfying the DVT will be no different to the assessment of transactions that would otherwise be notifiable to the CCI. The CCI has never blocked a transaction or directed the unwinding of a transaction notified to it.

The DVT provisions are sector agnostic. That said, the CCI's stated concerns has been with not having sufficient transactions in the digital and infrastructure space notified to it. Interestingly, in Germany, where deal value thresholds have been in place longer, a number of transactions notified to the competition authority on the basis of deal value do not even pertain to these targeted sectors. Rather, a majority of these deals involved sectors such as pharmaceuticals and chemicals (see here and here).

The effectiveness of the DVT provisions will depend on the extent and number of transactions that are required to be notified to the CCI. If a large number of transactions are required to be notified, the DVT will become a cumbersome procedural requirement that hinders M&A activity without any commensurate public benefit. At the end of the day, the CCI will have to find balance and further tweaks to the DVT thresholds to manage the flood of anticipated notifications cannot be ruled out.

Separately, it will be important to highlight that the term 'killer acquisitions' may be misleading. There is no conclusive evidence, at least in the Indian context, to indicate that the acquisition of smaller players by larger players has an adverse effect on competition. In any event, the potential anti-competitive threat of 'killer acquisitions' does not warrant a reconsideration of the existing legal framework, or a departure from the current practice of the CCI.

5. In continuance of the previous question, should a referral system along with the DVT be introduced in India, wherein the CCI can review even those acquisitions that fall below the notifiable requirement as per the DVT?

A referral system, similar to Article 20 of the EU Merger Regulation, (which allows any member state of the European Union to request the European Commission (EC) to review a transaction, irrespective of whether it meets the EC's own jurisdictional thresholds) is not suitable in the Indian context.

Firstly, the jurisdictional thresholds in India coupled with DVT (as and when it becomes applicable) are sufficient to catch all transactions that are likely to have a material impact on competition in markets in India.

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Secondly, such a proposal is likely to lead to more stress on the CCI's manpower capacity to review transactions.

Thirdly, the incorporation of such a provision in Indian law would effectively render the jurisdictional thresholds redundant since the CCI would be empowered to review transactions that do not meet the jurisdictional thresholds. Under such an approach, it would be difficult for parties to assess whether the transaction would require notification to the CCI. Such regulatory uncertainty would adversely affect the time taken for M&A activity and would operate as an undue hurdle to the ease of doing business in India.

6. Should a gatekeeper-like approach, similar to that of the European Union (EU) be considered, in which all the acquisitions done by any entity that has been categorised as gatekeeper, would be reviewed by the CCI, irrespective of whether the DVT thresholds are met or not?

The Parliamentary Standing Committee on Finance, in its December 2022 Report on Anti-competitive practices by Big Tech Companies, has identified the acquisition of smaller players by large technological companies as a competition concern.

In February 2023, the Government of India constituted a Committee on Digital Competition Law (CDCL) to evaluate the need for a separate competition law for digital markets. The CDCL was tasked to review whether the existing Indian competition law regime was sufficient to deal with the challenges emerging from the digital economy.

Importantly, the CDCL was required to: (a) examine whether there was need for a separate legislation providing for ex-ante regulation in digital markets; (b) study the practices of leading players/ Systemically Important Digital Intermediaries (SIDIs) which limit or have the potential to cause harm in digital markets; and (c) to study the international best practices on regulation in the field of digital markets. The CDCL has received a number of extensions, however, the report of the CDCL has not yet been published. It will be interesting to see what they have to say on the subject. For now, it may be prudent to reserve comments for later.

INTERVIEW

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7. Do you think concerns about "killer acquisitions" are exaggerated, considering that large tech companies often acquire startups to innovate and stay competitive, ultimately benefiting markets and consumers? At the same time, these acquisitions are used to improve existing products or services, or to enter new markets altogether, thereby increasing the competition in those markets or allowing the platforms to develop better services.

As mentioned above, there is no evidence to indicate that large players have acquired smaller competitors with a view to entrenching their position.

The inorganic growth of companies through the acquisition of start-ups by larger players is an inherent part of the start-up ecosystem. We cannot have every start-up become a unicorn. Founders of start-ups focus on developing technological products or software typically with the aim to sell the company to larger and more established players. While some of these acquisitions may have anti-competitive effects, branding all acquisitions of small start-ups by larger players tech companies as "killer acquisitions" is overly alarmist and should be avoided.

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