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DIGITAL MERGER AND ITS CHALLENGES TO THE COMPETITION LAW: INDIAN LAWS

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I. ABSTRACT

The rapid rise of digital platforms has fundamentally transformed the Indian economy, ushering in unprecedented levels of connectivity, convenience, and innovation. However, this digital revolution has also brought forth unique challenges for competition law, particularly in the realm of mergers and acquisitions. In this paper, we delve into the intricacies of digital mergers within the framework of Indian competition law. We explore how the traditional geographic boundaries that once defined market competition become increasingly irrelevant in the context of online platforms, where users can interact and transact across borders effortlessly. Additionally, we examine the concept of multi-sided markets, where platforms cater to multiple user groups whose interactions generate network effects and drive value creation. These network effects pose significant challenges for competition authorities, as dominance in one market segment can spill over into adjacent markets, further entrenching the position of dominant platforms. Against this backdrop, we analyze the relevant provisions of the Competition Act, 2002, and the evolving approach of the Competition Commission of India (CCI) in assessing digital mergers. Notably, we highlight the introduction of a deal value threshold and the CCI's heightened focus on factors such as substitute platforms and the potential for new entrants to mitigate competitive concerns. By navigating these complexities and adapting to the digital landscape, Indian competition law aims to foster innovation, protect consumer welfare, and ensure a level playing field in the dynamic and rapidly evolving digital economy.

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II. KEYWORDS

Digital Mergers, Competition Law, Indian Laws, Competition Commission of India, Multi-Sided Markets, Network Effects

III. INTRODUCTION

The advent of the digital revolution has ushered in a paradigm shift in the way businesses operate and how consumers engage with goods and services. In this digital age, there has been a notable uptick in mergers and acquisitions (M&As) involving online platforms, signaling a significant trend in corporate consolidation within digital industries. However, this surge in M&As has also sparked concerns regarding potential anti-competitive effects within the digital landscape. Traditional competition law frameworks, initially formulated with brick-and-mortar businesses in mind, now find themselves grappling with the intricacies and nuances of digital markets[2]. Unlike traditional markets, digital platforms often operate on a global scale, transcending geographical boundaries and presenting unique challenges for competition regulators.[3] These platforms leverage digital technologies to reach consumers worldwide, creating complex ecosystems where competition dynamics differ substantially from those in traditional industries.[4]

One of the primary challenges faced by traditional competition law frameworks in addressing digital markets is the difficulty in defining relevant markets. Unlike brick-and-mortar businesses, where geographic location often determines market boundaries, digital platforms operate in a borderless environment, making it challenging to delineate market segments. Additionally, digital platforms often serve multiple user groups simultaneously, blurring the lines between suppliers and consumers and complicating traditional market definition methodologies.

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[2] Monopolies Commission, Special Report Pursuant to Section 44(1)(4) of the Act Against Restraints on Competition*: Competition Policy: The Challenge of Digital Markets*. https://www.monopolkommission.de/images/PDF/SG/SG68/S68_summary.pdf

[3] Tyagi, K., Kamperman Sanders, A., & Cauffman, C. (Eds.). (2024). *Digital Platforms, Competition Law, and Regulation. London: Bloomsbury Academic.*

[4] Jason Furman et al., *Unlocking Digital Competition–Report of the Digital Competition Expert Panel (2019),* p. 31

Moreover, the rise of digital platforms has introduced novel competition dynamics, such as network effects and economies of scale, which further complicate competition analysis[5]. Network effects, for example, occur when the value of a platform increases as more users join, creating a reinforcing cycle of growth and potentially leading to the emergence of dominant players. These network effects can result in barriers to entry for new competitors and raise concerns about the potential abuse of dominant positions by incumbent firms.

In light of these challenges, competition authorities around the world are grappling with how best to adapt traditional competition law frameworks to the realities of the digital age. Efforts are underway to develop new analytical tools and methodologies tailored to digital markets, with a focus on promoting competition, fostering innovation, and protecting consumer welfare in an increasingly digitized economy.'

IV. CHALLENGES OF DIGITAL MERGERS: MARKET DEFINITION

A. Failure of Traditional Market Definition

The emergence of digital platforms has fundamentally altered the landscape of business operations, allowing companies to transcend traditional physical boundaries and operate on a global scale. Unlike traditional brick-and-mortar businesses, which are constrained by their physical locations, digital platforms leverage technology to connect with users across diverse regions and jurisdictions simultaneously, which also includes two-sided[6] and multi-sided markets. This global reach renders the traditional approach of defining relevant markets solely based on geographical location inadequate for online platforms.

One prominent example is e-commerce giant Amazon. Amazon operates an expansive online marketplace that enables buyers and sellers from around the world to engage in transactions. Sellers can list their products on Amazon's platform,

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[5] Jason Furman et al., *Unlocking Digital Competition–Report of the Digital Competition Expert Panel (2019),* p. 118.

[6] Lapo Filistrucchi et al., Market Definition in Two-sided Markets: Theory and Practice, 10 J. Competition L. & Econ. 293 (2014).

reaching customers not only within their local region but also across different countries and continents. Likewise, customers can browse and purchase products from sellers located anywhere in the world, breaking down geographical barriers and expanding market access. Another example is social media platforms like Facebook, Twitter, and Instagram. These platforms serve as virtual communities where users can connect, communicate, and share content with individuals from diverse cultural backgrounds and geographic locations. Users can interact with friends, family, and acquaintances across continents, forming global networks that transcend physical boundaries. For businesses, social media platforms offer opportunities to reach and engage with a global audience, regardless of their physical location.

In conclusion, digital platforms have revolutionized the way businesses operate and consumers interact, enabling global connectivity and market access. The examples of Amazon, social media platforms, and digital content streaming services highlight how digital platforms transcend traditional geographical limitations, necessitating a reevaluation of market definition and competition analysis in the digital age.

B. Multi-Sided Market

Multi-sided markets, characteristic of many digital platforms, involve intermediating between distinct user groups, each deriving value from interactions with the platform[7]. One such example is food delivery apps, which connect restaurants seeking customers with consumers seeking meals. In this scenario, the platform serves as an intermediary, facilitating transactions between restaurants and consumers.

On one side of the market are restaurants, which benefit from increased visibility and access to a broader customer base facilitated by the platform. These restaurants may include local eateries, small businesses, and large chains, all seeking to attract

[7] Evans, D. S., & Schmalensee, R. (2016). *The Matchmakers: The New Economics of Multisided Platforms. Harvard Business School Publishing.*

customers and generate sales. On the other side of the market are consumers, who benefit from convenience, choice, and access to a variety of dining options available through the platform. Consumers can browse menus, place orders, and track deliveries with ease, enhancing their overall dining experience. The platform itself acts as a facilitator, matching restaurants with consumers and deriving revenue from various sources, such as delivery fees, service charges, and commissions on orders.

The presence of multiple user groups in a multi-sided market introduces unique dynamics that can have implications for competition law. Firstly, competition authorities must consider the impact of platform dominance on both sides of the market. If a platform achieves dominance, it may have the power to dictate terms to restaurants and consumers, potentially engaging in anti-competitive practices such as price-fixing or exclusivity agreements.[8]

Secondly, competition authorities must assess whether the platform's actions benefit one user group at the expense of another[9]. For example, if a platform imposes high fees on restaurants or engages in preferential treatment, it may harm competition among restaurants and limit consumer choice. Conversely, if a platform engages in predatory pricing or exclusivity agreements to attract consumers, it may harm competition among platforms and restrict restaurant access to customers[10].

Overall, the presence of multi-sided markets in digital platforms introduces complexities for competition law enforcement. Competition authorities must carefully analyze market dynamics, assess the balance of power between platform

[8] David Evans & Richard Schmalensee, *The Antitrust Analysis of Multi-sided Platform Businesses*, NBER Working Paper No. 18783, 20–21 (2013), www.nber.org/papers/w18783

[9] See B Caillaud & BM Jullien, "Chicken and Egg: Competition Among Intermediation Service Providers" (2003) 34:2 Rand J Econ 309; JeanCharles Rochet & Jean Tirole, "Two-Sided Markets: A Progress Report" (2006) 35 Rand J Econ 645

[10] Parker, G. G., Van Alstyne, M. W., & Choudary, S. P. (2016). Platform Revolution: How Networked Markets Are Transforming the Economy and How to Make Them Work for You. W. W. Norton & Company.

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operators and user groups, and intervene when necessary to promote competition, protect consumer welfare, and ensure a level playing field for all market participants.

C. Network Effects

Network effects, a phenomenon prevalent in many digital platforms, occur when the value of a product or service increases as more users join or participate in the network[11]. This increase in value can lead to a positive feedback loop, where more users attract even more users, creating a virtuous cycle that enhances the platform's dominance. This dynamic makes it challenging for new entrants to compete effectively and may stifle innovation in the market.

One example of network effects can be observed in social media platforms like Facebook. As more individuals join Facebook's network, the platform becomes increasingly valuable to users, as they can connect with a larger audience, share content, and communicate with friends and family. This increased user base attracts advertisers seeking to reach a broad audience, further enhancing the platform's value. Consequently, Facebook has emerged as a dominant player in the social media landscape, with billions of users worldwide, making it difficult for new entrants to compete.[12]

Another example is online marketplace platforms like eBay. As more buyers and sellers join eBay's network, the platform becomes more attractive to users seeking to buy or sell goods. The larger user base increases the variety of products available for sale and enhances the likelihood of finding buyers or sellers for specific items. This network effect reinforces eBay's dominance in the online marketplace space, making it challenging for new competitors to establish a foothold.

[11] Germany, Monopolkommission, Twenty-First Biennial Report by the Monopolies Commission (Chapter V), online: http://www.monopolkommission.de/images/HG21/HGXXI_Chapter_V.pdf [Monopolkommission]

[12] Justus Haucap and Ulrich Heimeshoff, 'Google, Facebook, Amazon, eBay: Is the Internet Driving Competition or Market Monopolization?' (2014) 11 International Economics and Economic Policy 49; Hal Varian, 'Use and Abuse of Network Effects' (2017)

The presence of network effects can also be observed in ride-hailing platforms like Uber and Lyft. As more drivers and passengers join these platforms, the availability of rides increases, reducing wait times for passengers and increasing potential earnings for drivers. This positive feedback loop reinforces the dominance of established players like Uber, making it difficult for new entrants to attract drivers and passengers and compete effectively. In summary, network effects can lead to the emergence of dominant players in digital markets, making it challenging for new entrants to compete and potentially hindering innovation. Examples such as Facebook, eBay, and ride-hailing platforms demonstrate how network effects contribute to the consolidation of market power in the hands of a few key players. This underscores the importance of competition authorities' vigilance in addressing anti-competitive behavior and promoting a level playing field in digital markets.

V. INDIAN COMPETITION LAW AND DIGITAL MARKET

A. Problem with "Market" Definition

The traditional definitions outlined in India's Competition Act, 2002, for relevant product[13] and relevant geographic markets[14] encounter significant challenges when applied to digital platforms. These challenges stem from the unique characteristics of digital platforms, which operate beyond traditional boundaries and compete on a global scale.

Firstly, digital platforms exhibit a borderless reach, transcending geographical limitations. Local Indian e-commerce platforms, for instance, may find themselves competing directly with global giants like Amazon for the same user base, blurring the distinction between domestic and international competition.

[13] Sec 2(t) of Competition Act, 2002 - "relevant product market" means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use;

[14] Sec 2(s) of Competition Act, 2002 - "relevant geographic market" means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas;

Secondly, the rise of digital platforms has ushered in global competition, rendering the focus on specific Indian regions irrelevant. The Competition Commission of India (CCI) must now consider the impact of international players on Indian markets, necessitating a broader perspective in assessing competition dynamics.

Moreover, traditional definitions based on products or services struggle to capture the essence of competition in the digital realm, where the user base itself becomes a key market consideration[15]. Platforms offering seemingly different services, such as social media and messaging, often compete for the same user base and advertising revenue, challenging conventional market categorizations.

These unique characteristics pose several challenges for Indian competition law:

1. Defining the Relevant Market: The CCI faces difficulty in defining the relevant market for digital platforms. Determining whether it should be based on specific services, broader categories, or the user base itself presents a significant challenge.
2. Addressing Anti-Competitive Practices: Traditional laws may not adequately address anti-competitive practices by dominant digital platforms and this has been discussed in several countries' legal framework[16]. For example, platforms may engage in self-preferencing, favoring their own products or services within their ecosystem, thereby disadvantaging smaller competitors.

[15] Parker, G. G., Van Alstyne, M. W., & Choudary, S. R. (2016). Platform revolution: How ecosystems drive innovation and create value in the digital age. **Business Horizons**, 59(5), 461-472.

[16] ECJ 13 February 1979, C-85/76, Hoffmann-La Roche v Commission, EU:C:1979:36, para. 21 ("In order to determine whether Roche has the dominant position as alleged, it is necessary to delimit the relevant markets both from the geographical standpoint and from the standpoint of the product"); Court of First Instance 6 July 2000, T-62/98, Volkswagen v Commission, para. 230 ("For the purposes of Article 86, the proper definition of the relevant market is a necessary precondition for any judgment as to allegedly anti-competitive behaviour, since, before an abuse of a dominant position is ascertained, it is necessary to establish the existence of a dominant position in a given market, which presupposes that such a market has already been defined"); Court of First Instance 11 December 2003, T-61/99, Adriatica di Navigazione v Commission, EU: T:2003:335, para. 27; European Commission, December 2005, DG Competition discussion paper on the application of Article 82 [now Article 102] of the Treaty to exclusionary practices, para. 11 ("The concept of dominance contained in Article 82 of the Treaty relates to a position of economic strength on a market. In the application of Article 82 it is therefore necessary to define a relevant market").

3. Data and Network Effects: Digital platforms often benefit from data and network effects, where the value of the platform increases with the number of users. This creates barriers to entry for new competitors and exacerbates market concentration. The existing legal framework may lack sufficient tools to effectively address these issues, leaving room for anti-competitive behavior to persist unchecked.

B. Anti-Competitive Agreement threat from Digital Mergers

The Competition Act, 2002, prohibits anti-competitive agreements that have an appreciable adverse effect on competition (AAEC) in India and this has been provided in the Section 3 of the Competition Act, 2002. These agreements, categorized as horizontal or vertical, pose challenges in the digital context due to the unique characteristics of digital platforms.

i. Horizontal Agreements: Horizontal agreements involve collusion between competitors operating at the same level of the supply chain, aiming to eliminate or restrict competition. Examples include price fixing, where competitors agree to set prices at a certain level to avoid price competition, market allocation, where competitors divide markets amongst themselves to avoid competing in each other's territories, and bid rigging, where competitors collude to manipulate the bidding process to their advantage. In the context of digital mergers, horizontal agreements could manifest in the form of tacit collusion between competing digital platforms. For example, if two competing social media platforms were to merge, there could be concerns about the elimination of competition in the social media market, leading to potential collusion on user data sharing practices or advertising rates. This could result in reduced choice and higher prices for consumers.

ii. Vertical Agreements: vertical agreements occur between enterprises at different levels of the supply chain, typically between a manufacturer and a distributor or retailer. These agreements may include exclusive dealing arrangements, where a manufacturer agrees to sell its products exclusively through a particular distributor or retailer, or tie-in agreements, where a buyer is required to purchase one product in order to obtain another. Vertical agreements in the digital space could arise in the context of mergers between online platforms and content creators or suppliers. For instance, if a digital platform were to acquire a content production company, there could be concerns about the platform using its dominant position to favor its own content over that of competitors, thereby limiting market access for other content creators.

In the digital realm, algorithmic collusion emerges as a significant concern. Digital platforms can utilize algorithms to tacitly coordinate prices or limit consumer choices, leading to implicit agreements among competitors. Unlike traditional forms of collusion, algorithmic collusion operates surreptitiously, making it challenging for competition authorities to detect and address. Additionally, data sharing agreements among competitors in the digital space present challenges to competition. While data sharing can enhance transparency and facilitate coordination, it may also lead to reduced competition by allowing firms to align their strategies based on shared information. This can result in market distortions and hinder entry by new competitors.

In analyzing anti-competitive agreements in the digital context, the Competition Commission of India (CCI) faces several challenges. It needs to develop guidelines tailored to digital markets, considering factors such as network effects and algorithmic behavior. These guidelines should provide clarity on assessing AAEC in digital markets and offer frameworks for evaluating the impact of algorithmic collusion and data sharing agreements. Furthermore, the existing legal framework may require strengthening to effectively address the specific challenges posed by algorithmic collusion and data sharing agreements. This could involve amendments

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to the Competition Act or the introduction of supplementary regulations aimed at regulating algorithmic behavior and promoting competition in digital markets.

This has also been discussed in the case of *Federation of Hotel & Restaurant Associations of India (FHRAI) and Anr. v. MakeMyTrip India Pvt. Ltd. and Ors*[17] wherein the case involves allegations of anti-competitive agreements between MMT-Go and OYO and concerns were raised about preferential treatment given to OYO, potentially leading to exclusion of competitors like Treebo and Fab Hotel and room and price parity restrictions imposed by MMT-Go on hotels are seen as anti-competitive.

C. Abuse of Dominant Position through Digital Merger

Section 4 of the Competition Act, 2002, outlines provisions regarding the abuse of dominant position by enterprises in India. This section prohibits any enterprise from abusing its dominant position in a manner that causes or is likely to cause an AAEC within India. Here's a breakdown of the types of abuse, along with specific examples, challenges, and potential solutions:

- ***Exploitative Abuse:***

Exploitative abuse occurs when dominant firms impose unfair or discriminatory conditions on customers, leading to consumer harm. Examples include:

a) **Excessive Pricing:** This occurs when a dominant firm charges unreasonably high prices for goods or services due to a lack of competition. For instance, during a pandemic, a dominant online retailer may exploit its position by charging exorbitant prices for essential goods, thereby harming consumers.

b) **Refusal to Deal:** When a dominant firm refuses to supply goods or services to certain customers without justification, it can harm competition. For example, a dominant e-commerce platform may refuse

[17] *Federation of Hotel & Restaurant Associations of India (FHRAI) vs. MakeMyTrip India Pvt. Ltd. (MMT) & Others COMPETITION COMMISSION OF INDIA Case No. 14 of 2019*

to list products from certain competitors, limiting consumer choice and harming competition.

- ***Exclusionary Abuse:***

Exclusionary abuse involves dominant firms foreclosing competitors from the market, thereby reducing competition. Examples include:

a) Predatory Pricing[18]: This occurs when a dominant firm sells goods or services below cost to drive competitors out of the market, intending to raise prices once competitors exit. Predatory pricing harms competition and consumer welfare in the long term.

b) Self-Preferencing: When a dominant platform prioritizes its own products or services over competitors within its ecosystem, it can disadvantage competitors and harm competition. For instance, a dominant search engine may prioritize its own shopping results over competitors' listings, leading to an unfair advantage.

- ***Challenges in the Digital Context:***

a) Defining Dominance: Traditional market share metrics might not accurately reflect dominance in digital markets. Factors like user base, network effects (where a platform becomes more valuable as more users join), and data access can be crucial.

b) New Forms of Abuse: Digital platforms can engage in novel forms of abuse that are difficult to address with existing regulations. Examples include:

c) Data Advantage: A dominant platform leveraging its vast user data to harm competition by offering superior targeted advertising or services.

[18] Behringer, Stefan and Lapo Filistrucchi (2011), Predatory Pricing in Two-Sided Markets: Lessons from the UK Quality Newspapers in the '90s, Working Paper (Unversitat Bonn and Tilburg University).

d) Self-Preferencing[19] within Ecosystems: A dominant platform with multiple products or services may favor its own offerings within its ecosystem, stifling competition in specific segments. (e.g., A dominant messaging platform prioritizing its own payment service over competitors within its messaging app)

- ***Provisional Analysis and Solutions:***

The Competition Commission of India (CCI) needs a more nuanced approach to assess dominance in digital markets. This might involve considering user data, network effects, and platform reach alongside traditional market share metrics. Some argue for a "market definition" specific to the digital platform's ecosystem.

New regulations might be needed to address specific forms of abuse prevalent in the digital space. This could involve:

a) Rules on self-preferencing: Regulations could mandate that dominant platforms treat all businesses fairly within their ecosystems.

b) Data portability and access: Regulations could allow users to transfer their data between platforms, promoting competition and innovation.

c) Focus on algorithmic fairness: Regulations could ensure that algorithms used by platforms don't create discriminatory outcomes or self-preferencing.

Some cases about abuse of dominant position:

***CCI vs. Google*[20]:** The CCI is investigating Google's alleged abuse of dominance in the online search and mobile operating system markets. The investigation focuses on self-

[19] One could argue that the "discrimination" terminology presupposes that the services treated differently are equivalent, which appears to be the case in *Spotify v Apple*. Using both the "discrimination" and "self-preferencing" terminology, see Autorita' Garante della Concorrenza e del Mercato, 'Amazon: investigation launched on possible abuse of a dominant position in online marketplaces and logistic services'

[20] *CCI vs. Google COMPETITION COMMISSION OF INDIA Case No. 07 of 2020*

preferencing and alleged restrictions on device manufacturers. The investigation is ongoing. The CCI is likely evaluating evidence related to Google's market share, user data advantage, and the alleged practices. The outcome could set a precedent for how the CCI handles dominance and self-preferencing issues in the digital space.

VI. REGULATORY FRAMEWORK TO MONITOR MERGER

Establishing jurisdiction over digital mergers is a complex issue due to the borderless nature of the internet. Traditional merger control regimes based on factors like company turnover or market share may not always capture the true impact of a merger in the digital world. Here's a breakdown of the challenges and potential solutions.

a) Geographic Reach: Many digital platforms operate globally, making it difficult to determine which jurisdictions have the authority to review a merger.

b) Focus on Turnover: Traditional merger control thresholds often rely on a company's turnover. This might not be relevant for young, innovative digital startups that may have low revenue but a significant user base or data advantage.

c) Defining the Relevant Market: In digital markets, competition can be multifaceted and not always limited to geographical boundaries. User base, network effects, and access to data can be crucial factors.

A. Provisions of the Competition Act, 2002

The provisions and regulations play a crucial role in regulating mergers and acquisitions in India's competitive landscape. Section 5 ensures that mergers and acquisitions of significant size and scale are subject to scrutiny by the CCI to prevent anti-competitive practices. The thresholds set under Section 5 help determine which mergers and acquisitions require mandatory notification to the CCI, thereby ensuring that only transactions with a potential impact on competition are subject to regulatory review.

Competition Act, 2002 mandates notification to the Competition Commission of India (CCI) for certain mergers and acquisitions that exceed specific financial thresholds. As of March 2024, the thresholds are:

- Combined assets in India exceed INR 2,000 crore (approximately EUR 220 million).
- Combined turnover in India exceeds INR 6,000 crore (approximately EUR 660 million).

Section 6 of the Competition Act, 2002 complements Section 5 by prohibiting mergers that are likely to have an appreciable adverse effect on competition in the relevant market in India. This provision empowers the CCI to assess the potential competitive implications of mergers and take appropriate measures to safeguard competition and consumer welfare.

The Combination Regulations, 2011, provide a framework for notifying the CCI about mergers and acquisitions, outlining the procedural requirements and timelines for submission of merger notifications. These regulations ensure transparency and efficiency in the merger review process, enabling timely assessment of transactions by the CCI. Furthermore, the CCI's Guidance Notes on Mergers offer valuable insights into how the CCI evaluates mergers, including factors specific to digital markets such as network effects and data. These guidance notes help businesses understand the CCI's approach to merger assessment and facilitate compliance with competition law requirements.

In the digital sphere, however, the target regularly is a small start-up that may be very innovative and seen as credible competition by Big Tech, but may not yet generate noteworthy turnover. A transaction whereby a Big Tec company buys such a promising start-up may therefore not be review-able by a competition authority that can only establish jurisdiction based on such a turnover threshold. Some jurisdictions have reacted to the shortcomings of the thresholds by introducing transaction value thresholds in addition to their national turnover thresholds. Where an acquirer pays a considerable amount of money for a target, this acquisition is seen as relevant for competition and needs to be notified to the competent competition authority. Both Austria and Germany introduced such transaction value thresholds in 2017, with the transaction value triggering a notification obligation set at €200m in Austria[21] and at €400m in Germany[22]. The Austrian and German competition authorities also issued joint guidance on their transaction value thresholds, most recently updated in January 2022[23].

B. Threat of Killer Acquisition

Many digital markets exhibit characteristics that favor market concentration, such as "winner takes all" competition, direct and indirect network effects, market tipping, and the lock-in of users[24]. In addition to this "natural" market concentration, however, Big Tech companies have made nearly 900 acquisitions over the past two decades. While some have referred to this M&A activity as "killer acquisitions,"[25] these acquisitions often do not lead to the killing-off of innovation but rather to the incorporation of said innovation into the acquiring company – possibly as part of the platform's existing service offerings.

These types of "conglomerate" Big Tech acquisitions have been a factor in the emergence of entire digital ecosystems[26]. Several big digital platforms have morphed into digital ecosystems that offer a multitude of interoperable digital goods and services, lead to platform envelopment, and shield the ecosystem from interoperability with third-party services as far as possible[27]. This leads to a number of competition concerns.

[21] § 9 para 4 Cartel Act, Austrian Federal Law Gazette I 61/2005 as amended. In addition to the transaction value, some further criteria also need to be fulfilled.
[22] § 35 para 1a Act against Restraints of Competition, German Federal Law Gazette I 2013/1750 as amended. In addition to the transaction value, some further criteria also need to be fulfilled.
[23] Bundeswettbewerbsbehörde and Bundeskartellamt, Leitfaden Transaktionswert-Schwellen für die Anmeldepflicht von Zusammenschlussvorhaben (§ 35 Abs. 1a GWB und § 9 Abs. 4 KartG) (January 2022)
[24] Jason Furman et al., *Unlocking Digital Competition–Report of the Digital Competition Expert Panel (2019)*
[25] This term was coined in relation to acquisitions in pharmaceuticals by Colleen Cunningham, Florian Ederer and Song Ma, 'Killer Acquisitions' (2021) 129 *Journal of Political Economy* 649. It has since been widely used in the antitrust discussion of digital markets.
[26] Marc Bourreau & Alexandre de Streel, *Digital Conglomerates and EU Competition Policy (CERRE Report, March 2019).*
[27] On platform envelopment, see Thomas Eisenmann, Geoffrey Parker and Marshall Van Alstyne, 'Platform Envelopment' (2011) 32 *Strategic Management Journal* 1270.

For instance, digital ecosystems may erect barriers to competition that cannot be overcome by competitors that only offer a smaller range of digital goods and services. Furthermore, the data that big digital platforms can collect represents an unmatched competitive advantage where competitors are not able to replicate the data sets, an issue that becomes particularly pressing because of the versatile nature of data that the incumbent platform can use in many different ways and markets.

There are three factors which highlight the impact of killer acquisition on competition in digital market:

- **Reduced Innovation[28]:**
  a) Stifling New Ideas: When a large company acquires a promising startup, the startup's innovative spirit can be stifled. Established companies often have established processes and bureaucracies that can hinder creativity and slow down the development of new ideas.
  b) Focus on Short-Term Gains: Large companies may prioritize short-term profits over long-term innovation. Acquiring a competitor allows them to maintain their market share without investing in risky research and development (R&D). This can lead to a lack of groundbreaking advancements in the digital landscape.
  c) Loss of Talent: Acquisitions can lead to the dispersal of the acquired company's talent pool. Key engineers and developers might leave due to a lack of autonomy or cultural fit within the larger company. This loss of talent can further hinder innovation.
- **Increased Concentration:**
  a) Limited Choices: When a few large companies control the market, consumers have fewer options to choose from. This can lead to a

[28] Amy Madl, 'Killing Innovation? Antitrust Implications of Killer Acquisitions' (2021) 38 Yale Journal on Regulation Bulletin 28

homogenization of products and services, reducing overall diversity and customization.

b) Reduced Incentives to Improve: With less competition, established companies may have less incentive to improve their products or services. They may become complacent, knowing consumers have limited alternative options.

c) Entry Barriers: Killer acquisitions can create high barriers to entry for new startups trying to compete in the market. The large companies may have more resources, brand recognition, and user data, making it difficult for new players to gain a foothold.

- **Data Monopoly[29]:**

a) User Data as a Competitive Advantage: Data on user behavior and preferences is a valuable asset in the digital age. By acquiring smaller firms with unique user bases, established companies can gain access to a vast amount of data, strengthening their market position.

b) Targeted Advertising and Personalization: This data allows companies to offer highly targeted advertising and personalized services, making it difficult for competitors to compete.

c) Privacy Concerns: The concentration of user data in the hands of a few large companies raises concerns about consumer privacy and the potential for misuse of this data.

For instance, the Facebook acquiring Instagram (2012) and WhatsApp (2014):

a) Arguments against competition: Both Instagram and WhatsApp were seen as potential competitors to Facebook in the social media and messaging space. Critics argue that Facebook acquired these companies to eliminate

[29] Cunningham, C, F Ederer and S Ma (2021), "Killer Acquisitions", *Journal of Political Economy* 129(3): 649-702.

future competition and maintain its dominance in the social media landscape.[30]

b) Arguments for continued competition: Facebook has integrated features from both Instagram and WhatsApp into its main platform, arguably increasing functionality and user engagement. Additionally, both acquired platforms continue to operate as separate entities with their own user bases.

These dynamics underscore the complexity of competition in digital markets and raise important questions about the impact of Big Tech acquisitions on innovation, competition, and consumer welfare. While some acquisitions may lead to the integration of innovative technologies into existing platforms, others may result in the consolidation of market power and the creation of barriers to entry for potential competitors. Regulators and policymakers face the challenge of striking a balance between promoting innovation and competition while preventing anti-competitive behavior and protecting consumer interests in the rapidly evolving digital economy.

C. The Threshold Problem:

As earlier stated, the Indian Competition law relies solely on asset size and turnover as thresholds for notifying mergers under the Competition Act, 2002, overlooks the unique nature of digital startups. These companies might be young and have low revenue, but their innovative potential and user base can be significant. This allows them to be snapped up by larger players without triggering any regulatory scrutiny. Imagine a small company developing a revolutionary new social media platform being acquired by a dominant player simply to eliminate the threat. Under the current system, this acquisition might fly under the radar.

D. Defining the Digital Playing Field:

[30] Sarah Frier, Facebook Didn't Want Competition. So It Just Bought Instagram, Documents Show, Bloomberg (July 30, 2020), https://theprint.in/economy/facebook-didnt-want-competition-so-it-just-bought-instagram-documents-show/470914/

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Traditional market share metrics, which often play a central role in merger assessments, do not fully capture the competitive landscape in the digital world. Factors like user base and network effects[31], where a platform becomes more valuable as more users join, are crucial. Additionally, data access can be a significant competitive advantage. A seemingly small acquisition might grant the acquirer access to a vast amount of user data, giving them an unfair edge in the market. Standard market share analysis wouldn't necessarily reveal this hidden threat.

- **Potential Solutions for a Healthier Digital Ecosystem:**

To address these concerns, the Competition Commission of India (CCI) could consider several approaches:

a) **Lower Deal Value Thresholds:** Setting lower thresholds specifically for acquisitions involving digital companies, especially those with high innovation potential, could bring more mergers under the CCI's watchful eye.

b) **"Killer Acquisition" Guidelines:** Developing clear guidelines to identify and assess potential killer acquisitions would be a valuable tool. These guidelines could focus on factors like the target company's innovative technology, its potential to disrupt the market, and the acquirer's existing dominance.

c) **Ex-Post Review Mechanism:** Implementing a system for reviewing certain mergers after they've been completed would allow the CCI to assess the actual impact on competition. This could be a safety net to catch acquisitions that might have slipped through the cracks initially.

By adopting some or all of these solutions, the CCI can create a more robust framework for monitoring mergers in the digital age. This will help safeguard competition, foster

[31] International Economics and Economic Policy 49; Hal Varian, *'Use and Abuse of Network Effects' (2017)*

innovation, and ultimately benefit consumers by ensuring a healthy digital market in India.

VII. CASE STUDY:

A. Flipkart-Walmart Merger[32] (2018) and Competition Concerns in India

Background:

In 2018, Walmart, the American retail giant, acquired a majority stake (77%) in Flipkart, the leading Indian e-commerce platform, for a staggering $16 billion. This mega-merger sent shockwaves through the Indian digital market, raising concerns about potential breaches of the Competition Act, 2002.

Competition Act Considerations:

- **Section 5:** This section mandates notification to the CCI for mergers exceeding specific financial thresholds. The Flipkart-Walmart deal easily surpassed these thresholds, triggering mandatory notification and review by the CCI.
- **Section 6:** This section prohibits mergers that cause, or are likely to cause, an Appreciable Adverse Effect on Competition (AAEC) in the Indian market. The CCI's primary concern was whether the merger would create an excessively dominant player in the Indian e-commerce landscape, potentially harming consumers and stifling competition.

Analysis of Potential AAEC:

- **Market Definition:** Defining the relevant market was crucial. The CCI could have considered the broader e-commerce market or focused on specific segments like online fashion retail. A broader market definition might suggest less risk of dominance, while a narrower definition could raise concerns.

[32] COMPETITION COMMISSION OF INDIA (Combination Registration No. C-2018/05/571) http://164.100.58.95/sites/default/files/Notice_order_document/Walmart%20PDF.pdf

- **Market Share:** Following the merger, the combined entity would hold a significant market share in the Indian e-commerce space. However, market share alone isn't enough.
- **Factors Considered by the CCI:** The CCI likely evaluated factors beyond market share, including:
  - **Vertical Integration:** Walmart's vast brick-and-mortar presence could give the merged entity an unfair advantage in logistics and supply chain management.
  - **Buyer Power:** The combined entity's increased bargaining power with suppliers could lead to lower prices for them but potentially higher prices for consumers.
  - **Data Advantage:** The merger could give the entity access to a massive amount of user data, potentially allowing them to personalize offers and target advertising more effectively, further squeezing out competition.

CCI's Decision:

After a thorough investigation, the CCI ultimately approved the Flipkart-Walmart deal with certain conditions. These conditions aimed to mitigate potential anti-competitive effects, including:

- **Ensuring Open Access to Marketplace:** Flipkart's online marketplace platform had to remain open to other sellers, preventing Walmart from giving preferential treatment to its own products.
- **Maintaining Neutrality in Logistics:** The merged entity couldn't discriminate against other sellers in terms of logistics and warehousing services.
- **Data Sharing Restrictions:** Data collected by Flipkart couldn't be shared with Walmart in a way that could disadvantage competitors.

B. Reliance – Disney Merger

Another example of digital merger is the deal between the media business of Reliance Industries and The Walt Disney Company's India entities. The Joint venture (JV) will be mainly of the Viacom18 and Disney and under the deal Reliance (RIL) will own 16.34%, Viacom18 will own 46.82% and Disney will own 36.84%,[33] subject to regulatory and other party's approval as per required by the applicable laws. The JV shall be chaired by Nita Ambani and the Vice-Chairman shall be Uday Shankar.

The merger could result in the smaller players in TV and streaming services might face challenges competing with the combined entity's vast resources and reach[34]. This could stifle innovation and lead to homogenization of content. The merger could give the entity greater leverage with advertisers, potentially impacting pricing and squeezing out smaller players. Therefore, the CCI shall have close scrutiny on the deal to check if there is any appreciable adverse effect on the competition in Indian digital market.

VIII. CONCLUSION AND SUGGESTION

In conclusion, the digital age presents unique challenges for competition law, particularly concerning mergers and acquisitions in the digital space. Traditional merger control frameworks based on factors like asset size and turnover may not adequately capture the potential anti-competitive effects of digital mergers. Early-stage startups with high innovation potential can be particularly vulnerable to "killer acquisitions" by larger players.

The Competition Commission of India (CCI) is actively developing its approach to digital mergers. While the current framework offers some tools for addressing concerns, there is room for improvement. To strengthen India's competition law framework in the digital age, several suggestions can be considered.

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[33] Business Today. "Reliance-Disney Merger: Here's How the Deal Can Fundamentally Transform India's Media and Entertainment Landscape." Business Today (March 8, 2024), https://www.businesstoday.in/magazine/the-buzz/story/reliance-disney-merger-heres-how-the-deal-can-fundamentally-transform-indias-media-and-entertainment-landscape-420683-2024-03-08#.

[34] Patrick Frater & Naman Ramachandran, "Disney-Reliance Merger: Post-Quake Route Forward for Indian Media Becomes a Fight for Value and New Allies", Variety (May 15, 2024), https://variety.com/2024/tv/news/disney-reliance-merger-aftermath-indian-media-1235927318/.

Firstly, the CCI could consider lowering the deal value thresholds for acquisitions involving digital companies, particularly those with high innovation potential. This would help ensure that mergers with significant competitive implications are subject to regulatory scrutiny. Secondly, the CCI could develop specific guidelines to identify and assess potential killer acquisitions. These guidelines could take into account factors like the target company's innovative technology, its disruptive potential, and the acquirer's existing market power. Additionally, implementing an ex-post review mechanism could allow the CCI to assess the actual impact on competition after the acquisition has been completed. This would enable the regulator to intervene if necessary to address any anti-competitive effects that may arise post-merger. Lastly, continued collaboration with global competition authorities can help the CCI develop best practices and to effectively address cross-border mergers. By collaborating with international counterparts, the CCI can stay abreast of global trends and ensure a coordinated approach to regulating digital mergers.

By implementing these suggestions, the CCI can create a more robust framework for monitoring digital mergers and promoting a healthy, competitive digital market in India. This will foster innovation, protect consumers from potential harm, and ensure a diverse and vibrant digital ecosystem.