

| LAW AUDIENCE JOURNAL |
| VOLUME 2 | ISSUE 1 | ISSN (O): 2581-6705 |
| INDEXED JOURNAL | IPI VALUE (2019): 2.32 |
| IMPACT FACTOR (2018): 2.527 |

| LAW AUDIENCE JOURNAL® |

| VOLUME 2 & ISSUE 1 |

| ISSN (O): 2581-6705 |

EDITED BY:

LAW AUDIENCE JOURNAL'S

EDITORIAL BOARD

| LAW AUDIENCE JOURNAL |
| VOLUME 2 | ISSUE 1 | ISSN (O): 2581-6705 |
| INDEXED JOURNAL | IPI VALUE (2019): 2.32 |
| IMPACT FACTOR (2018): 2.527 |

| COPYRIGHT © 2020 BY LAW AUDIENCE JOURNAL |

(ISSN (O): 2581-6705)

*All Copyrights are reserved with the Authors. But, however, the Authors have granted to the Journal (**Law Audience Journal**), an irrevocable, non-exclusive, royalty-free and transferable license to publish, reproduce, store, transmit, display and distribute it in the Journal or books or in any form and all other media, retrieval systems and other formats now or hereafter known.*

No part of this publication may be reproduced, distributed, or transmitted in any form or by any means, including photocopying, recording, or other electronic or mechanical methods, without the prior written permission of the publisher, except in the case of brief quotations embodied in critical reviews and certain other non-commercial uses permitted by copyright law.

*For permission requests, write to the publisher, subject of the email must be "**Permission Required**" at the email addresses given below.*

Email: lawjournal@lawaudience.com, info@lawaudience.com,

Phone: +91-8351033361,

Website: www.lawaudience.com.

Facebook: www.facebook.com/lawaudience

Instagram: www.instagram.com/lawaudienceofficial

Contact Timings: 5:00 PM to 9:00 PM.

DISCLAIMER:

*This article is published free of cost as a part of **Law Audience's 4th National Online Essay Writing Competition 2020**. No separate Article Processing Fee is charged. Law Audience Journal (ISSN (O): 2581-6705) and Its Editorial Board Members do not guarantee that the material published in it is 100 percent reliable. You can rely upon it at your own risk. But, however, the Journal and Its Editorial Board Members have taken the proper steps to provide the readers with relevant material. Proper footnotes & references have been given to avoid any copyright or plagiarism issue. Articles published in **Volume 2 & Issue 1** are the original work of the authors.*

*Views or Opinions or Suggestions (**if any**), expressed or published in the Journal are the personal point of views of the Author(s) or Contributor(s) and the Journal & Its Editorial Board Members are not liable for the same.*

While every effort has been made to avoid any mistake or omission, this publication is published online on the condition and understanding that the publisher shall not be liable in any manner to any person by reason of any mistake or omission in this publication or for any action taken or omitted to be taken or advice rendered or accepted on the basis of this work.

All disputes subject to the exclusive jurisdiction of Courts, Tribunals and Forums at Himachal Pradesh only.

| LAW AUDIENCE JOURNAL |
| VOLUME 2 | ISSUE 1 | ISSN (O): 2581-6705 |
| INDEXED JOURNAL | IPI VALUE (2019): 2.32 |
| IMPACT FACTOR (2018): 2.527 |

**“INTERPLAY BETWEEN MERGERS AND ACQUISITIONS (‘M&AS’)
AND DIGITAL MARKETS: CHALLENGES AND WAY FORWARD.”**

**AUTHORED BY: MS. PRIYANSHI CHOKSHI (LL.B), GOVERNMENT LAW
COLLEGE, MUMBAI,**

**CO-AUTHORED BY: MR. PRANAV BAFNA (B.A.LL.B), ILS LAW COLLEGE,
PUNE,**

**EMAIL IDS: PRIYANSHICHOKSHI@GMAIL.COM,
PRANAV333BAFNA@GMAIL.COM.**

I. ABSTRACT:

“The global economy is coalescing around a few digital superpowers. A winner-takes-all approach is emerging, whereby companies are capturing a disproportionate market share by indulging in transactional activity. M&As in the digital age are scrutinized under Competition Law as they result in modification of the existent market structure by giving rise to single firm dominance or coordinated practices. The technologies that once promised to democratize businesses now threaten to make it more monopolistic.

The fast-paced development of the digital economy has challenged the existing regulatory frameworks and impacted competition in India. M&As have given rise to concerns over dilution of a healthy competitive environment and therefore, require a set of relevant, rather than stringent regulations.

The need to swiftly permit mergers, which are beneficial to the digital economy and prohibit anti-competitive ones, has led to the need for a revamp of the Indian merger control regime. The analysis presented herein throws light on the existing competition law policy with respect to M&As, challenges brought forth by the digital economy, loopholes in the incumbent

framework and the way forward. While changing the rules of competitiveness, and shaping digital markets, M&As need to ensure the maintenance of a level playing field. This paper argues that it is an opportune moment to bolster the Competition Commission of India's ('CCI') strengths and uplift its weaknesses. Further, the CCI needs to be cautious in its approach on advocacy exercise vis-à-vis M&As. It should endeavour to encourage pro-competitive business strategies and take effective action on substantive concerns. Thereby, ensuring a balance between prohibition and permission."

II. INTRODUCTION:

The Competition Act 2002 was enacted with the view of ensuring economic development in India. The law has been thrust on three basic foundations – Equitable opportunity to market participants, Sustainability of market operations and Freedom to practice trade and commerce within a market. The digital economy has disrupted business dynamics in an unprecedented fashion with a concentration of resources and competitive success in the hands of a few.

Consequently, it has become imperative for competition authorities to consider the challenges posed by digital markets for future policymaking. One of the most effective tools for enabling monopolization of markets – through market dominance – is M&As. An organization achieves a monopolistic standing through buying up or bullying the present and potential competitors out of the market. Adam Smith also spoke of 'the wretched spirit of monopoly' in which 'oppression of the poor establishes the monopoly of the rich'¹.

According to Goldberg², mergers impact upon the concentration and use of market power. They lead to a reduction in the number of business entities operating in a market and increase the market share under the control of a merged entity. Consequently, with the advent of new-age markets, it is imperative to revisit existing merger regulations and ensure competition both "for the market" and "in the market".

¹ Ph. D. Thesis Arneet Kaur, *Chapter-IV: Competition Act And Its Impact On Mergers And Acquisitions*, https://shodhganga.inflibnet.ac.in/bitstream/10603/103368/12/12_chapter-iv.pdf.

² Alan H. Goldberg, *Competition Law Today (Concepts, Issues And The Law In Practice)*, Oxford University Press 2007.

III. UNIQUE NATURE OF THE CHALLENGE POSED BY DIGITAL MARKETS:

The evolution of new-age markets has been backed by an unparalleled level of financial support from across the globe. Flush with funds, dominant companies operating in the digital technology sector have ventured into an unparalleled spree of transactional activity. It can be inferred that the primary objective for this newfound aggression is the pressure to acquire and retain market dominance and secure positions that appear increasingly unassailable.

It is highlighted that *Amazon, Apple, Facebook, Google, and Microsoft* combined have made over 400 acquisitions globally³. However, only a handful of these mergers have been scrutinized by Competition Authorities across the globe and none have been blocked. Statistics of this nature ought to raise a question i.e., whether the *Trustbusters* allow potentially unsettling transactional activity, to go unnoticed and unquestioned.

It is palpable that digitisation has changed the way the consumers behave (*such as exponentially rising use of digital platforms*), how business activities and strategies are organized, and ultimately how enforcement authorities need to operate. The purpose of merger control is to vet in advance whether mergers will have a detrimental impact on competition. The process of merger review has been greatly challenged by market dynamics, where enforcement fundamentally depends on an effects-based analysis of the merger. The Competition policy should evolve so as to prioritize pro-consumer innovation in the digital age; create space for businesses to start, compete and grow alongside big platforms and refine itself to face the challenges posed by digitization.

In spite of keeping itself in sync with international practices, the Indian anti-trust machinery falls short. The shortcomings in the framework have been elucidated hereinafter.

³ Andrea Coscelli, *Competition in the digital age: reflecting on digital merger investigations*, OECD/G7 conference (June 3, 2019), <https://www.gov.uk/government/speeches/competition-in-the-digital-age-reflecting-on-digital-merger-investigations>.

**III. I THE EXISTING TURNOVER AND ASSET BASED
THRESHOLDS ARE INSUFFICIENT TO INDICATE THE
TRANSACTIONS' SIGNIFICANCE:**

The Competition Act prescribes an asset and turnover based threshold for notification of transactions by the acquirer to the CCI⁴. The aforesaid threshold only evaluates the nominal 'book value' significance of the transaction. In digital markets, most acquisitions are driven by the desire for *Big Data* or Innovation. Big Data is characterized by the four Vs: *volume* of data, *variety* of data aggregated, the *velocity* at which data is collected, used and disseminated, and *value* of data.⁵

The reason behind the same being that data-driven businesses generate more efficiency than traditional brick and mortar businesses, for instance, by using predictive and behaviour analytics for improving decision making, and mainly for better segmenting and targeting consumers.

Further, digital platforms with a large user base are able to collect more data which in turn allows them to improve their services which further allows them to attract more users, known as the '*user feedback loop*'. Such platforms can explore data to improve targeted advertising and monetize its services, secure more funds to improve their services and attract more users, known as the '*monetization feedback loop*'.

These loops act as vicious circles creating high barriers to entry and making it difficult for new entrants to compete with incumbent players with large data.⁶ As the database grows, such platforms can possibly tilt the market towards a monopoly.⁷ This also explains the target entity paying a non-monetary price for the acquisition that is – data. A target company may

⁴ §5, The Competition Act, 2002.

⁵ Stucke, M.E. and A.P. Grunes, *Big Data and Competition Policy*, (2016).

⁶ Organization for Economic Cooperation and Development (OECD), *Big Data: Bringing Competition Policy To The Digital Era*, (2016).

⁷ Howard Shelanski, *Information, Innovation and Competition Policy for the Internet*, (2013), 161 University of Pennsylvania Law Review 1663.

not have an asset-heavy balance sheet or a significant turnover at the time of its takeover. Consequently, it fails to take action on the harmful impact a transaction could have on market participants. Therefore, the likelihood of a target company causing an Appreciable Adverse Effect on Competition ('AAEC') is enhanced manifold.

III.II INCONSISTENT APPLICATION OF THE TERMS 'CONTROL' AND 'MARKET POWER':

One key concept that remains open to interpretation, pending substantive guidance, is that of 'control'. While the definition is circular and inclusive, orders passed by the CCI offer clarity on limited aspects⁸. Though various provisions provide yardsticks to measure *de jure* control under Competition Law, in practice, material influence also amounts to 'control'. Such determination of material influence requires an analysis of the overall relationship between the acquirer and the target and in certain cases 'lifting the corporate veil'⁹.

Further, there has also been debate on when a digital platform is said to have extensive market power, for instance, Amazon, maybe ostensibly powerful and large and yet not have market power in the Competition Law sense. Though the Law enumerates certain acts involving the existence of market power and instances of its abuse¹⁰; other anti-competitive activities in the digital scenario like refusal to supply, and forced free-riding (viz. appropriation of innovation of a firm by a platform on which it depends), have been negated and must be considered.¹¹ An inconsistent evaluation of combination cases in light of the acquirer's ability to influence the behaviour of the target entity¹² and an incoherent assessment of market power by the authorities has caused significant confusion and

⁸ Cyril Shroff, *Moving forward on competition law*, THE HINDU BUSINESS LINE (July 04, 2012), <https://www.thehindubusinessline.com/opinion/moving-forward-on-competition-law/article22995796.ece>.

⁹ Divye Sharma, *India: Control Under The Competition Law Regime*, MONDAQ (Feb. 27, 2019), <http://www.mondaq.com/india/x/785104/Antitrust+Competition/Control+Under+The+Competition+Law+Regime>.

¹⁰ §4, The Competition Act, 2002.

¹¹ Organization for Economic Cooperation and Development (OECD), *Implications Of E-Commerce For Competition Policy*, (2019), DAF/COMP(2018)3.

¹² Ultratech-JAL (C-2015/02/246, Order dated March 12, 2018),

<http://www.mondaq.com/india/x/785104/Antitrust+Competition/Control+Under+The+Competition+Law+Regime>.

jeopardized the interests of all stakeholders. With respect to the digital space, since financial involvement of overseas investors, who prefer a litigation-free investment climate, is rampant; an extensive review of thresholds to formulate a precise definition of control and ease up doing business is highly critical.

III.III MERGER POLICY IN THE DIGITAL SECTOR HAS PLACED TOO MUCH SIGNIFICANCE ON THE “RISK OF INCORRECT INTERVENTION” *VIS-À-VIS* THE “RISK OF INCORRECT CLEARANCE”¹³:

With the intention of appearing business-friendly, the existing legislation on merger assessment lays excessive emphasis on avoiding incorrect intervention. However, such an approach could come at the cost of unknowingly giving clearance to incorrect mergers. Digital markets demand a change in the way mergers are assessed.

A harmful merger could prevent the development of competitors in two main ways - Firstly, when the incumbent of a digital market acquires an entity that is an actual or potential competitor. Secondly, when the incumbent acquires an entity that supplies a complimentary product/service. Therefore, an incorrect approval to a merger deprives actual or potential competitors of the opportunity to improve their products and better challenge the incumbent.

Thus, Competition authorities fail to assess potential counterfactual situations, neglect the possible evolution of the target company in the absence of a merger and resultantly increase the risk of incorrect clearance.

IV. WAY FORWARD:

Having discussed the challenges faced in the present Competition Law environment – it is opportune to enumerate solutions to help mould the future of competition in India.

¹³*Ex-Post Assessment Of Merger Control Decisions In Digital Markets*, Lear (May 09, 2019)
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803576/CMA_past_digital_mergers_GOV.UK_version.pdf.

IV.I EVOLUTION OF REGULATIONS:

The CCI should be thinking of evolution, not revolution, to effectively deal with competition¹⁴. On the subject of reform, the CCI must work towards developing and designing an *ex-ante* regulation of digital platforms. To support this endeavour, the CCI must invest in building up their in-house expertise; ensure collection of robust documentary evidence, particularly against cartelization; outline the relevant timeframe for merger review, taking into account the complexity of the transaction; redefine counterfactuals; collaborate with digital businesses, investors and venture capitalists; and understand how firms use data and artificial intelligence algorithms. It is highlighted that a substantive test¹⁵ and rule of reason approach¹⁶ be introduced to determine whether a merger ought to be blocked and in pursuance of digitization, greater focus be placed on the inter-operability within multi-sided platform markets¹⁷.

Further, co-ordination and collaboration internationally are essential. The digital economy is global, hence, CCI must continue to work with international counterparts, and share best practices and develop a common approach to issues in M&As.

IV.II INCORPORATE ALTERNATIVE JURISDICTIONAL THRESHOLDS:

The aim of merger notification thresholds is to eliminate transactions, which are unlikely to disrupt the AAEC dynamics of a market. The present CCI chief has pitched for reconsidering the existing thresholds, that might have a "blind spot" when it comes to dealings in the digital space¹⁸, and evaluating whether there is a demonstrable 'enforcement gap' in its

¹⁴Supra Note 3.

¹⁵ Richard Whish, *Competition Law* 788, (2005), Oxford University Press.

¹⁶ Vinod Dhall, *Overview: Key Concepts in Competition Law- Competition Law Today (Concepts, Issues and the Law in Practice)*, Oxford University Press 2007.

¹⁷ Digital Competition Expert Panel, *Unlocking Digital Competition*, (March 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

¹⁸ *Competition Law: CCI chief D.K. Sikri seeks changes in uniform threshold norms for M&As*, THE ECONOMIC TIMES (May 11, 2018),

| LAW AUDIENCE JOURNAL |
| VOLUME 2 | ISSUE 1 | ISSN (O): 2581-6705 |
| INDEXED JOURNAL | IPI VALUE (2019): 2.32 |
| IMPACT FACTOR (2018): 2.527 |

implementation. In digital markets, the Deal-size of transactions is strikingly high, reflecting essentially the value of data owned by the target company. Therefore, taking inspiration from its German and Austrian counterparts, the CCI should either replace existing thresholds or complement them, using Transaction value or Market-Share thresholds.

'Transaction-size/Deal-value' threshold captures transactions where companies may have a low turnover but high Transaction Size. Deal-value is the sum of the amount paid by the acquiring company for an equity stake in a target company and the net debt of the target company¹⁹. Similarly, the Lear Report²⁰ recommended placing more focus on the transaction value and scrutinizing the rationale behind the acquisition by ensuring that - Firstly, the transaction value indicates the possible competitive significance of a transaction; Secondly, the valuation is conducted efficiently; and Thirdly, the deal-size test takes into account the local nexus required.

Alternatively, the authorities could introduce a *Market-Share* threshold, implemented by the Competition and Markets Authority, UK²¹. If the parties' combined share of supply exceeds a stated benchmark, the CCI should exercise its jurisdiction. Market share thresholds must be consistent with global practices, since consideration of appropriate 'market' could be inherently subjective. If implemented successfully, it could prove to be influential globally. The thresholds must incorporate appropriate standards of materiality by laying emphasis on the acquirer's ability to influence market policy relevant to the behaviour of the target entity. The CCI must be concerned with protecting such entities so that they may enter and contest

<https://economictimes.indiatimes.com/news/economy/policy/competition-law-cci-chief-d-k-sikri-seeks-changes-in-uniform-threshold-norms-for-mas/articleshow/64125187.cms>.

¹⁹ Karunjit Singh and Deepshikha Sikarwar, *A liberal competition law in the works to facilitate M&As*, THE ECONOMIC TIMES (May 14, 2019),

[//economictimes.indiatimes.com/articleshow/69316407.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst](https://economictimes.indiatimes.com/articleshow/69316407.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst).

²⁰ Supra Note 13.

²¹ Shalaka Patil, Payel Chatterjee, Shashank Gautam, M S Ananth, Aditi Jha, Simone Reis and Pratibha Jain, *Competition Law in India- Jurisprudential Trends and the way forward*, NISHITH DESAI ASSOCIATES (April 2013),

http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Competition%20Law%20in%20India.pdf.

the incumbents' markets²². In a nutshell, an optimal notification regime should identify and capture mergers with 'significant potential'²³ for anti-competitive effects from the entire gamut of consummated mergers.

IV.III MARKET POWER ASSESSMENT:

The CCI must acknowledge that 'material influence' also amounts to control within the ambit of the law. The same cannot be assessed on the basis of objective factors like 'quantum of shareholding' or 'availability of special/veto rights', but ought to mandate a deeper analysis of the market realities, similar to the one undertaken in the *Jet-Etihad* case²⁴. As data becomes crucially important and largely helps in conferring and retaining market power, the authorities should also consider network effects. Germany's revised competition law includes new criteria such as direct and indirect network effects, parallel use of services, switching costs and undertakings' access to relevant data, for assessing market power.

IV.IV ENHANCE BASELINE UNDERSTANDING OF 'RELEVANT MARKETS':

Given the divergent views of the regulator and transaction parties, assessment of AAEC needs to be conducted for each notifiable transaction on a case-by-case basis, to provide a comprehensive meaning to '*relevant market*'. The objective being, to identify actual competitors that are capable of preventing an entity from behaving independently of competitive pressures²⁵. In case of multi-sided markets ruled with network effects, authorities should take note of the monetary value and data flow, akin to that introduced in Germany²⁶,

²²Hogan Lovells, *EU Competition in The Digital Age*, (May 02, 2019), http://ehoganlovells.com/cv/81e298ff73151298f9968119d70475f43f0e4362?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original.

²³ICN Merger Guidelines Workbook, *ICN Recommended Practices For Merger Analysis*, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_RPsforMergerAnalysis.pdf.

²⁴Jet-Etihad (C-2013/05/122, Order dated 19 December 2013), <http://www.mondaq.com/india/x/785104/Antitrust+Competition/Control+Under+The+Competition+Law+Regime>.

²⁵CCI v. Coordination Committee of Artist and Technicians of WB Films and Television, Civil Appeal No. 6691 of 2014.

²⁶Section 18 (2a), Act against Restraints of Competition in the version published on 26 June 2013, https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html#p0024.

as these markets provide free goods/services in exchange for data. Further, the regulator must also strive for a sound understanding of key digital market indicators. This will aid in determining when acquisitions reflect a 'succumb' or 'be quashed' threat or offer a promising path to commercial development.

IV.V ENHANCE ANTITRUST ENFORCEMENT THROUGH ADMINISTRATIVE EFFICIENCY:

The focus of reforms should be to demystify Competition law by hardwiring economic principles into business philosophy and government policy framework, removing high entry-level barriers and providing easy access to those suffering from anti-competitive conduct. The use of flexible tools, discretion and foresight, when reviewing a proposed transaction in the digital space, is essential for assessing AAEC. Given that the development of India's merger control regime depends on the efficacy of enforcement in this 'Time of Populism', it would be prudent to ensure that robust and credible compliance programmes are encouraged and incentivized; there is a consistent application of principles²⁷ and the law does not impede free and undistorted competition.

V. CONCLUSION:

A free-market economy is pervasive across the globe and competition is the accepted norm for its successful functioning. With the objective of maximising the benefits of competition, the need of the hour is to undertake a comprehensive assessment of competition legislations and policies. We are entering into an interventionist era, with regulators aggressively responding to the political and economic challenges created by digitization. The Indian Competition regime is forward-looking, intends to make markets contestable and enable all to enjoy the fruits of development. However, the notification thresholds accompanied with "catch-all" features prompt frustration from entities. Consequently, it is important to develop an innovative perspective on the application of the existing instruments to better serve consumers in the fast-changing digital world and devise new tools, wherever necessary.

²⁷Supra Note 21.

In furtherance of the same, the CCI must draw persuasive values from international co-operation arrangements and converge and develop international standards.

A sound Competition Assessment Programme formulated in line with the International Competition Network's ('ICN') Guiding Principles'²⁸ on *Transparency, Fairness and Informed Consent*; would not only help in building a vibrant competition culture but also help in improving the competitiveness of the economy, attract investment by easing up doing business in India, strengthen market forces and bring in competitive neutrality²⁹.

Through the adoption of a cohesive regulation that strikes equilibrium amongst the anti-competitive effects and pro-competitive justification of challenges posed; regulations and regulators can work in tandem to avoid abuse of dominance and breach of data protection. The best competition advocacy for the regime to grow is to effectively enforce policies and adapt to changing market trends. It is only if entities are poised to adapt this change, that the CCI can expect to successfully further their goals of preserving competition.

Thus, it would be opportune to conclude with an insightful excerpt from Hon'ble Ex-Prime Minister, Dr. Manmohan Singh's statement at the Asian African Conference³⁰:

“Increased competition- internal and external- helps those who are strong enough to benefit from the new opportunities. However, it can hurt those who are ill-equipped to face the challenges of competition... At the national level, the state must be modernized to create an environment conducive to creativity and growth and also to ensure that the fruits of growth are fairly and equitably distributed.”

²⁸ ICN, *ICN Guiding Principles for Procedural Fairness in Competition Agency Enforcement*, (2018), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AEWG_GuidingPrinciples_ProFairness.pdf.

²⁹ Competition Commission of India, *Competition Assessment Toolkit*, (July 4, 2018), https://www.cci.gov.in/sites/default/files/whats_newdocument/COMPETITION%20ASSESSMENT%20TOOLKIT.pdf.

³⁰ Dr. Manmohan Singh, *Statement by Prime Minister Dr. Manmohan Singh at Asian-African Conference*, (April 23, 2005), <https://idsa.in/resources/speech/Asian-AfricanConference-ManmohanSingh>.