Regulating Combinations in Platform Markets: An Indian Perspective

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Abstract

Data has emerged as the most important economic asset in the digital economy. Firms in the digital era have been inclined to collect as much data as possible, which can then be used to make strategic business decisions to gain competitive significance over other market players. Data is the new oil in the global economy, and the big fish are eating up small ones to remain dominant in the market. The giant players are going for numerous mergers and acquisitions, with a special focus on small, emerging players in the market, and often, due to the requirement of a threshold for investigation, the combination goes unnoticed. The point of discussion is also whether we need a separate legislation to tackle these markets. This research focuses on the role of data, the big players and their merger patterns, and the enforcement gap in merger control regimes in global digital markets, where data plays a primary role. This research examines the intricacies of digital markets and the challenges they pose before competition authorities. While discussing the challenges, the authors have emphasised the parameters of jurisdictional threshold incorporated in competition regimes in varied jurisdictions. The research tries to propose a separate regime for digital market combinations.

Keywords: digital market, data, market power, combinations, competition law

1. Introduction

In the past few years, there has been a substantial rise in generating and storing consumer data in large volumes with minimal legal safeguards.

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There could be multiple reasons to store data; from a business perspective, data is stored and used to analyse consumer behaviour through digital tracking of consumers' e-transactions. Various technological processes, such as big data analytics and data mining, which are based on artificial intelligence, are used to make effective use of such enormous data. The primary function of these business intelligence tools is to enable the organisation to make strategic business decisions by simplifying unstructured data collected in a repository of data centres (Greiner, 2011). The outcome of this process is used to identify the pattern of consumers' consumption behaviour in business transactions (Zhang & Tan, 2020).

Contemporary markets operate in a data-driven economic model, which is often referred to as "digital economy". Digital economy corresponds to the broad range of economic activities that encompasses the use of digitised information as a key factor for the production of goods and services (G20 Research Group, 2016). The information is collected from consumers, either with or without their consent, in the form of data which is further processed in the manner explained above. Thus, market forces with substantial market power and access to such data acquire unbridled control over the demand-supply chain, which might affect the market structure (Gupta & Jha, 2020).

Digital markets offer more suitable ground to undertake complex anti-competitive practices, as such practices often remain unchecked (Newman, 2019). This is majorly due to the traditional nature of antitrust laws, which concerns itself only with the pricing models of goods and services. However, the unfair use of consumer data and minimal safety standards for data protections affects both individuals as well as other market competitors, thereby causing friction.

Today, there is hardly anyone who has not interacted with the "Big 4" of the global economy, i.e., Amazon, Facebook (Meta), Microsoft, and Google. According to the US House Judiciary Committee (2020), these online platforms significantly contribute to the global economy and cater to society through their underlying infrastructure for offering technology to exchange communication, information, and goods and services. The combined market capitalisation of these four companies is valued at more than USD 9 trillion (BI India Bureau, 2022).

It is pertinent to note that a significant portion of the growth of these companies is not organic (fundamental strength), as they have acquired major portions of their technology and valuation through tools of inorganic growth such as mergers and acquisitions (M&As) (Tyagi, 2020). These M&As strengthen the position of the dominant market players, where data rich companies acquire or merge with other data rich companies (generally smaller in size), thereby acquiring new data sets which provide competitive advantage over other market players that do not have access to such data (Gupta & Jha, 2020).

The Facebook–WhatsApp merger, Microsoft–LinkedIn merger, Google–DoubleClick merger, and similar M&As drew the attention of several antitrust agencies. However, the flawed parameters in the merger control regimes of these antitrust agencies set these tech giants free from review. First and foremost, the pricing model of antitrust laws impedes antitrust agencies from reviewing M&As, since most of the transactions involve data and not money. Secondly, the turnover and asset-based approaches act as a further block, as most of the assets of these firms are data only. So, in most M&A transactions, the asset and turnover does not cross threshold limits. This necessitates government intervention to modify its competition policy to keep a check on the anti-competitive practices of such data-rich companies. However, the Government of India, in the Competition Bill, 2022 tabled in early August 2022, has attempted to include deal value threshold under the existing Competition Act, 2002. Nonetheless, the enforcement gap will still exist due to the deal value being set so high.

This paper examines the importance of data in providing market power to enterprises. It further focuses on the M&A activities of the Big 4 tech giants and its competition law assessment. Further, it assesses various approaches conferring jurisdiction on antitrust agencies on the basis of numeric threshold, namely, turnover and asset test, market share test, and transaction size test, and the legal issues these approaches are facing in the concerned jurisdiction. Conclusively, this paper proposes the adoption of a new antitrust regime in digital market mergers. The proposed regime envisages the establishment of a separate department within CCI and a separate procedural regime for covering digital market mergers.

2. Data in the Digital Economy

Data has been reported by many economists to be the most important economic asset of the informational economy which fuels the digital market (Greer, 2019). According to Delrahim (2019), data can offer important clues about market structure and market dynamics, and therefore, it is necessary to study the ways in which market power can manifest in a market where data plays a key role. The Organisation for Economic Co-operation and Development (OECD) concluded that the usage of data has turned informational economy into a "winner takes all" dynamic, which creates anti-competitive constraints in the market. Therefore, it is important to note the significance of data in data-driven digital markets (including platform economies). In this chapter, authors examine the role that data plays in assessing the market power of enterprise as to how data provides competitive advantage to one firm that has data over another firm which lacks it. In addition to this, authors further focus on critical evaluation of traditional approaches of antitrust analysis of market power assessment in the digital economy.

2.1. Data/Big Data and Information Extraction

In a technical sense, *data* means a set of values of qualitative or quantitative variables or constants about one or more persons or objects (Data, 2022). *Data* and *information* have been used interchangeably, although certain researches have observed that these terms have distinct connotations. According to them, data transforms into information at the post-analysis stage or when it is seen within a context. Further, it is pertinent to note the theoretical background of big data, wherein *big data* has been defined as an information asset characterised by high volume and high complexity, primarily unsuitable to be processed by traditional data analysis tools (Mauro *et al.* 2016).

Contemporary digital markets do not depend on mere data, since technological expansion has led to a transformation of the characteristics of data; at present, informational economies run on big data accessed and collected through consumer interaction on their webspace. These big data sets derive their values on the basis of four fundamental characteristics, i.e., volume, velocity, variety, and veracity (Rubinfeld & Gal, 2017). The

significance of each characteristic feature of big data depends on myriad markets where data serves as input (digital market).

Big data comprises several links, i.e., collection, storage, synthesis and analysis, and usage (Rubinfeld & Gal, 2017). Among all links, the synthesis and analysis of data sets is of the utmost importance. This is where the role of data analytics agencies comes into play.

Electronic data processing includes a data processing cycle, which operates in four stages: input stage, processing stage, output stage, and storage stage. At the processing stage, the gathered data is turned from unstructured bits and bytes into information or derived information, i.e., application of reasoning mechanism to create new information which was unavailable to be obtained directly from data sets (Rubinfeld & Gal, 2017).

This extracted information is often referred to as actionable information, as it is an important factor for strategic decision making for firms. Advanced data science techniques such as pattern recognition and machine learning are utilised with traditional data analysis tools such as statistics in order to mine valuable information from raw and unstructured data (Varian, 2014).

2.2. Market Power Assessment in Digital Market

Market power has traditionally been defined as the ability to set the prices of goods and services above the marginal cost and to act independently of potential competitors (Meschi *et al.*, 2018). However, the big data market poses certain challenges in the market power assessment approach of antitrust agencies. Furman (2019) has argued that the traditional model of market power assessment, which focuses on parameters of increase in price above competitive equilibrium, needs to be redefined in the contextual setting of digital markets. Further, rapidly evolving consumer trends, strong network effects, large upfront costs, and high switching costs in the digital market implies that the metrics of the traditional approach do not provide a complete assessment (Oxera, 2018).

2.2.1. *Traditional Approach*

The traditional model as explicated by Abba P. Lerner in his formulaic relationship (Lerner index) between a firm's price and its marginal cost

is the most fundamental and straightforward way of assessing market power. The Lerner index explains market power in terms of elasticity of demand, wherein the percentage difference between a firm's price and marginal cost is taken as a factor for market power assessment (Rojas, 2011). The formula is produced below:

$$Li = (P\text{-}MC)/P \dotfill (1)$$

In the above formula, *Li* signifies the Lerner index, *P* signifies the firm's price, and *MC* signifies marginal cost. The Lerner index ranges from 0 to 1, wherein in a perfectly competitive firm, a firm charges price equal to its marginal cost, which means the value assigned to Li becomes zero, which indicates that such firms have no market power. If Li heads toward 1, it means that the firm is acquiring market power.

Apart from the Lerner index, we have certain other formulaic relationships enunciated by eminent jurists and economists such as Richard Posner. However, their traditional approach fails to provide coherent market power assessment tools to fit the digital market.

2.2.2. *Roadmap for the New Approach of Market Power Assessment in Digital Markets*

As noted earlier, the traditional model of market power assessment depends on a firm's elasticity of demand. Illustratively, if consumers are sensitive to price movements and if, upon the rise in price of a particular good or service, its demand falls, it can be deduced that such firms have no or minimal market power. Similarly, in the case of digital markets, market power can be assessed by applying the same principle. If, on the collection and usage of consumer data, sensitive consumers tend to limit their interaction with such digital platforms, such firms can be said to have no or minimal market power (Oxera, 2018). However, there may be very few sensitive consumers, with a large number of consumers being ignorant and/or inattentive.

Further, it has been argued that traditional indicators such as market share and elasticity of demand remain useful in market power assessment; however, additional considerations such as data must be taken into account while assessing market power. Data as a determinant of market power assessment was absent from the traditional model. Data allows firms to create sophisticated strategies, which is evidence of market power

and could result in switching costs and consumer lock in, again enabled by market power (Katz, 2019). Illustratively, the antitrust agency of the United Kingdom, the Competition and Markets Authority (CMA), found that the market power of Facebook is derived from strong network effects stemming from a large network of connected persons and limitation on interoperability with other social media platforms (Competition and Markets Authority, 2020).

Data can impart market power to firms if it has the following characteristics (Santesteban & Longpre, 2020):

- It is of high value.
- It allows for vertical differentiation.
- It is not easily accessible or replicated by others.
- It enhances network effects, switching costs, and economies of scope.

2.3. Effect of Data on Competition

Antitrust authors and commentators have argued that consumer data provides firms with an unbeatable edge. In recent times, big data firms that have a considerable amount of data use processed sufficient information to gain competitive edge and create barriers against potential competitors to turn the market in their favour. Data rich firms either use data to acquire more market power. The US government set up a sub-committee on Investigation of Competition in Digital Markets which, in its report, mentioned that Facebook used its data advantage to create superior market intelligence (acquired by data) to identify competitive threats by emerging firms and then killing those firms through acquisition strategies (US House Judiciary Committee, 2020). Antitrust concerns that arise in such a marketplace are explained below.

2.3.1. Access to Barriers

Entry barriers are defined as barriers to entry or expansion in a particular market due to technological barriers, regulatory barriers, high capital requirement, and other factors (Competition Act, 2002). The negative implication of such a data-driven digital market is the creation of strong and high entry barriers which affect market integrity (Priyanshi, 2021).

Such entry barriers may create a competitive advantage and motivate big data firms to engage in practices that amount to exclusionary conduct and creation of artificial barriers to maintain their strength, therefore affecting both consumers and potential competitors. There are certain barriers which are unique to big data market, as follows:

- Technological barriers, including uniqueness of data, data compatibility, interoperability, and accessibility of required analytical tools pose barriers to potential competitors due to their limited resources (Rubinfeld & Gal, 2017).

- Legal barriers include network effects, high switching cost, lock-in strategy, regulatory mechanism of data protection, and privacy laws (Rubinfeld & Gal, 2017).

2.3.2. *Blurred Scope for Level Playing Field*

Strategic decision making for enhancement of decisional value and improvement of profitability has always been instrumental in the business landscape. Processed data (information) is key to such informed decision making. Nonetheless, such a decision cannot be referred to as informed decision making (in a fair sense), since such information is not available to other market players. Constraints like data ownership and data sharing may be contested by non-data rich firms, but data rich firms tend to refuse sharing of such data. Firms that do not have access to such information fail to compete effectively with firms that have such information. Therefore, it undermines the goal of competition policy to create and maintain a level playing field in such a relevant market.

2.3.3. *Justification Under Theory of Harm*

Theory of harm in antitrust jurisprudence explains how a particular conduct of a firm constitutes the violation of antitrust regulations and results in harm to fair competition in relevant markets in reference to relevant legal tests (Zenger & Walker, 2012). It must be prima facie seen from a reasonable man's prudence that the interests of consumers and potential competitors are undermined by the conduct of firms. This normative approach of antitrust assessment has two fundamental

parameters, i.e., exploitative and exclusionary conduct which, in effect, harm both sides of the market (consumer and potential competitors).

As noted earlier, entry barriers in the form of high-switching costs, network effects, lock-in strategy, etc., and refusal to share data with other non–data rich firms are exploitative to both consumers and competitors and exclusionary to potential competitors, inflicting harm on both sides of the market and affecting fair competition. Though antitrust assessment on such jurisprudential approaches differs, no coherent theory of harm has been developed so as to be applied in every case, and thus, assessment has to be carried out on a case-by-case basis. The big data market approach may be different for search engines like Google and platform economies for multi-sided intermediaries like Amazon (whose conduct is discussed later in this paper).

3. Merger and Acquisition Activities of the Big 4

As noted earlier, the Big 4 have indulged in a series of M&A activities. However, not all of these acquisition deals are a matter of discourse here; instead, only those M&A activities will be tracked whose primary purpose was the acquisition of data to develop market intelligence. Based on the investigation by the sub-committee set up by the Federal Trade Commission of top tech giants' conduct in digital markets with respect to their anti-competitive practices, major acquisition deals that posed competitive threats due to data are as follows.

3.1. Facebook

Facebook has been the largest social media platform since the last decade and a half. It offers several services through its platform, which creates enormous user connectivity. In its quarterly report, Facebook disclosed that it has around 1.79 billion daily active users and around 2.7 billion monthly active users, with an average revenue of USD 7.05 per user (Meta, 2020). It has nearly 90% market share, so it can be seen as a quasi-monopolist worldwide. It is the largest social media network in the world, with 22.9% of the population registered as active users (Heinz, 2018). Thus, it can be safely stated that Facebook has maintained dominance in the market of social media platforms.

Nonetheless, the German antitrust authority, Bundeskartellant, reported that Facebook has maintained and expanded its dominance in the market through a series of mergers and acquisitions of companies that it viewed as a competitive threat, then proceeded with selective exclusion of competitors from using its platform (Facebook Inc., 2019). Bloomberg reported that, in the 18 years (2004–22), since its foundation, Facebook has acquired as many as 63 companies (Facebook, 2020). The relevant acquisitions of Facebook are as follows.

3.1.1. WhatsApp

Prior to Facebook's merger with WhatsApp, WhatsApp maintained its robust privacy policy. Its data was separate and compartmentalised. Privacy policies prior to the merger stated that WhatsApp does not collect user data, i.e., names, location, emails, and content of encrypted texts between users (WhatsApp, 2012). On the event of the merger, the co-founder of WhatsApp stated in his blog that WhatsApp will "remain autonomous and operate independently" from Facebook and that "nothing" will change for users because there "would have been no partnership between our two companies if we had to compromise on the core principles that will always define our company, our vision and our product" (Facebook, 2014). Following the merger, WhatsApp's privacy policy was changed, which allowed it to share data with Facebook (Griffin, 2019).

3.1.2. Onavo

In 2013, Facebook acquired Onavo, a mobile web analytics company. Onavo used to collect data on app usage, browsing history, search history, location, personal messages, and Amazon order history, providing non-public real-time data about user engagement, which was used by Facebook as an "early bird warning system"(Morris & Seetharaman, 2017). Through this strategy, Facebook used to identify fast-growing apps which could pose a competitive threat to Facebook's dominance. Further, the sub-committee found that, prior to Facebook's merger with WhatsApp, Facebook used Onavo's data model to track WhatsApp's growth projection to determine whether WhatsApp's growth is killing Facebook Messenger (US House Judiciary Committee, 2020).

3.1.3. Atlas

In 2013, Facebook acquired Atlas, an advertisement platform, from Microsoft for USD 100 million to measure and manage ad performance. Atlas used to capture data to track conversions, wherein it tracked the specific action taken by the user in response to an ad (US House Judiciary Committee, 2020). The working of Atlas can be best understood by the following example: If a user saw a Zara ad on any web portal, after enabling an ad to be served to the user, Atlas used to record its impression as well as whether or not the user clicked on the ad. Later, if a user buys the same item from Zara, it recognised and recorded the user's action of conversion of merely clicking on an ad during web streaming to buying the product through recording the device's unique ID. It was reported by the sub-committee that Facebook's primary strategic rationale for the integration of Atlas into its ad services was to improve its ability to measure ad performance and use identity-based targeted advertisement through the user's Facebook interface which, in turn, will result in a highly efficient targeted advertisement mechanism (US House Judiciary Committee, 2020). Facebook believed that integration of its unique data and user engagement with Atlas's intelligence tool will boost its value.

3.2. Google–DoubleClick

Among the other M&A activities of Google, its merger with ad service agency DoubleClick is worthy of examination. Google acquired DoubleClick in 2007 for USD 3.1 billion (Story & Helft, 2007), entering the market of display advertisement—an area where Google, at the time of acquisition, had no substantial presence (US House Judiciary Committee, 2020). At the time of acquisition, Google told the Federal Trade Commission (FTC) and Congress that it will not combine DoubleClick's user data with its own ecosystem (Shrinivas, 2020). Further, FTC noted that evidence demonstrated during the proceedings suggests that any aggregation of data resulting from the proposed acquisition is unlikely to harm competition and thus, closed further investigation (Federal Trade Commission, 2007). However, in 2016, Google reversed its commitment and went on to combine the user data of DoubleClick with data collected through its own web ecosystem, which includes a range of service products, such as Google Maps, Google Search, YouTube, and Gmail.

Nowadays, Google collects data from all third parties and combines it with its own data to create super profiles of users to eliminate competitors and for efficient targeted advertisement (Jeon, 2021).

3.3. Amazon

The acquisition strategy of Amazon focuses primarily on the elimination of competitors from the market and gaining access to valuable consumer data. Since its inception in 1996, Amazon has acquired more than 90 undertakings, with an estimated acquisition cost of more than USD 37 billion (Amazon, 2020). The diversification of business by Amazon—from brick-and-mortar supermarkets to music and OTT industry—fortified its stock of consumer data. During the sub-committee's investigation, an Amazon executive stated, "Amazon is first and foremost a data company, they just happen to sell stuff" (US House Judiciary Committee, 2020).

Among other acquisitions made by Amazon, its acquisition with Whole Foods and PillPack is worthy of examination for antitrust analysis. Amazon acquired Whole Foods at around USD 13.7 billion in 2019 (US House Judiciary Committee, 2020). CNBC observed that the acquisition of Whole Foods provided Amazon with a treasure trove of data (Hirsch, 2018). This data includes the behaviour of a consumer in both the brick-and-mortar as well as digital market (Hirsch, 2018). Therefore, in addition to Amazon's entry in the grocery market, this acquisition expanded Amazon's connectivity with prime members of Whole Foods in the form of providing it access to unique consumer data. Secondly, the sub-committee on the review of documents during its investigation found that PillPack's acquisition provides insight into its strategy of seeing an acquisition as a tool for data collection and using that data to cross-sell its products in different lines of business (US House Judiciary Committee, 2020).

3.4. Microsoft–LinkedIn

The merger of Microsoft with LinkedIn raised a few antitrust concerns for antitrust authorities, especially the European Commission. It is pertinent to note that the most noteworthy aspect of the EC's examination was the analysis of horizontal effects on competition by the combination of data sets by merged entities (European Commission, 2016). During its investigation, the EC noted two possible outcomes with regard to

the combination's horizontal anti-competitive effects. First, the merging parties may increase their market power for data supply or frustrate entry of potential competitors, or it may create an entry barrier on combination of data sets by merging entities (Giannino, 2017). Second, the pre-merger competition would disappear in the event of merger approval. However, the EC found this merger to be unlikely to cause any competition issues for manifold reasons, primarily the presence of data protection laws in the European jurisdiction (Giannino, 2017).

4. Current Thresholds for Merger Review

The antitrust scrutiny of mergers rests on whether such transactions transgress the threshold limits, as prescribed in competition policy. Before examining the issue of jurisdiction of antitrust agencies in matters where combination transgresses the threshold limits, it is significant to emphasise the legal framework of such merger review.

4.1. Working System of Merger Control

Competition policy is predominantly concerned with the prevention of anti-competitive practices and preservation of market integrity and consumer welfare. Corporate tools for inorganic growth have long been recognised to have both positive and negative impact on competition and market structure (OECD, 2020). Therefore, competition policy, while not considering it illegal, assesses such transactions on a case-to-case basis on the basis of the rule of reason standard (essentially an effects-based approach) (Werden, 2013). Such transactions are often referred to as mergers, combinations, and concentrations in different jurisdictions; these terms are used interchangeably in this paper.

Substantive analysis of combination commences with the determination of whether a particular transaction qualifies to be a combination. While doing so, it is pertinent to examine the degree of control which was shifted as a result of the transaction. Once it is established that control has been shifted and thresholds have been crossed on the parameters of concerned competition regulation, the next assessment is the determination of anti-competitive effects of such transactions on the market. In varied jurisdictions, the nomenclature of the assessment technique may differ; for instance, in the EU, the test is termed "significant impediment in effective

competition" (SIEC), whereas in India, the test is termed "appreciable adverse effect on competition" (AAEC). Nonetheless, the Commission may disapprove the transaction if it affects the market structure in a manner that significantly reduces competition.

4.1.1. *Jurisdictional Thresholds*

In order to confer jurisdiction on competition agencies to review mergers, competition policies across various jurisdictions enumerate numerical thresholds. Once a transaction transgresses these threshold limits, the jurisdiction of the concerned competition agency gets triggered and such transaction falls under antitrust scrutiny. In most jurisdictions, the system of mandatory notifiability of combinations to the concerned antitrust agency is in place, which essentially means that once the combination transgresses the threshold, it becomes mandatory to notify antitrust agencies for their approval. These numerical thresholds differ in approaches, as listed below:

4.1.1.1. *Turnover-Based Approach*

Turnover is used as a proxy for economic resources that would be combined as a result of a combination (Whish & Bailey, 2015). Turnover thresholds are relatively simple and objective mechanisms for determining jurisdiction allocation (Whish & Bailey, 2015). Article 1(2) of EUMR sets numerical thresholds that invoke community jurisdiction. It provides for an aggregate turnover limit, wherein the jurisdiction of the EC is invoked if any transaction by undertakings' aggregate worldwide turnover exceeds GBP 5,000 million and aggregate community-wide turnover of each of at least two undertakings exceeds GBP 250 million (European Union Merger Regulation, 2004). Belgium, China, Germany, France, Italy, and several other nations follow a similar turnover-based approach, with some differences in the value of the threshold (Practical Law, n.d.*).

4.1.1.2. *Turnover and Asset Approach*

Indian merger control regulations incorporate turnover and asset test, wherein Section 5 of the Competition Act, 2002, prescribes the threshold limits. If the combined turnover or asset crosses the threshold, the transaction will have to be notified to CCI for prior approval. If the

transaction of the combination is met with any of the following thresholds, CCI must be mandatorily notified:

The threshold limits are as follows (Competition Act, 2002):

- Combined asset in India exceeds INR 2,000 crores or combined turnover in India exceeds INR 6,000 crores, or

- Combined worldwide assets exceeds USD 1 billion (including assets in India) or combined worldwide turnover exceeds USD 3 billion (including turnover in India), or

- The acquirers' group and target have combined assets in India that exceed INR 80 billion or combined turnover in India that exceeds INR 240 billion, or

- The acquirers' group and target have combined assets globally that exceed USD 4 billion (including assets in India) or combined turnover globally that exceeds USD 12 billion (including turnover in India).

4.1.1.3. Market Share–Based Approach

The market share approach essentially involves the assessment of a proposed transaction on the parameter of market share of the resultant entity. Market share tests may not have wide global acceptance, but some developed competition law regimes such as Singapore, New Zealand, and Spain have adopted such an approach (Practical Law, n.d.). As per the Singapore Competition Act, 2004, though the notification of mergers is not mandatory, it is advisable to notify them in the following two cases:

- Market share of resultant entity exceeds 40%, or

- Market share of resultant entities falls between 20% and 40%, and post-merger market share of the largest three firms exceeds 70%.

4.1.1.4. Transaction Size Approach

In light of major enforcement gaps, a number of jurisdictions have introduced transaction cost or transaction size approaches, notably the US, Germany, and Austria. Transaction size test captures transactions that escape the contours of merger control laws due to their low turnover and asset (essentially emphasising mergers in digital economy).

German competition law provides for both turnover and transaction size test. Section 35 of GWB states that a transaction must be notified to the Bundeskartellamt if it crosses the turnover threshold, whereas, in case it fails to cross turnover threshold, the act provides for turnover threshold in addition to transaction size of the merger (Competition Act, 2013). The German regime has a dual approach, i.e., turnover threshold and transaction size. If any combination falls under any of them, the German antitrust authority's jurisdiction to scrutinise the combination gets triggered. Nonetheless, the transaction size has not been made a standalone parameter for merger review. Thus, there are two parallel approaches of assessing combinations.

Similarly, in the US, the test culminates in the transaction value, where transaction size as a standalone parameter can attract merger control regulation. The law states that a transaction which exceeds the value of USD 101 million is subject to the Hart-Scott-Rodino Antitrust Improvement Act, 1976. In addition to this, any transaction value that falls between USD 101 million and USD 403.9 million is further subjected to size of person test; any transaction value beyond USD 403.9 million does not need to meet this size of person test, and therefore, directly confers jurisdiction on FTC and Department of Justice (DOJ) (Fenwick & West LLP, 2022).

5. Issues and Challenges in the Indian Competition Law Regime

5.1. Traditional Antitrust Approach in the Competition Act, 2002, and the Peculiarity of Digital Markets

The traditional approach of antitrust analysis poses a major enforcement gap in digital market mergers. Almost every approach conferring jurisdiction to concerned antitrust agencies on the basis of numeric threshold is facing shortcomings in regulating combinations in the digital market. The procedural infirmity essentially raises the question of inability of competition regimes, as mere accumulation of large data sets may not always generate revenues sufficient enough to meet relevant jurisdictional thresholds (Schoning & Ritz, 2018).

Data rich companies in the digital market are generally at a nascent stage. They often operate in the market not to gain immediate profit or revenue but to create network effects in order to have a broad user database. These approaches have been observed to be effective in the

brick-and-mortar market, where the monetary value has been assigned to the offered goods and services (Zhou, 2021), whereas the issue arises in the digital economy, where the most valuable asset of the firm is data, which is almost impossible to be weighted in monetary terms, since the value of data differs as regard to its use.

The controversy of the WhatsApp–Facebook merger further stirred the debate as to whether the current threshold approach is adequate to tackle the peculiarities of the digital market. While Facebook invited the Commission to examine the transaction within its referral system, certain other significant transactions, such as Facebook–Instagram and Google–Waze, avoided the scrutiny (Yüksel *et al.*, 2020). Similarly in India, Zomato's acquisition of UberEats was not reported to CCI due to its low turnover and asset size and the consequent non-fulfilment of thresholds.

Inducing market share or transaction size threshold in Competition Act, 2002 — A viable solution?

In major jurisdictions, the turnover and asset test of merger review has proved to be a fiasco, and consequently, market share test was **induced** within competition regimes (as previously discussed) to supplement turnover and asset test. Though this approach helped competition authorities bring the Facebook–Instagram (2012) and Google–Waze (2013) mergers within the review system of the UK, this approach came up again with endogenous infirmity, which renders it less pragmatic for the digital market (Zhou, 2021). Market share threshold brings uncertainty in merger control and is inconsistent with internationally accepted best practices, since the determination of the appropriate market is inherently subjective (Founding Partners, 2019).

The multi-sided and dynamic features of platform economies in the digital market magnify the complexity of relevant market determination. As a result of ex-ante scrutiny, the pre-estimation of market share will reflect market share change in horizontal cases while not neglecting, although less efficiently indicating such market share change in non-horizontal cases (Ramirez, 2020). It is pertinent to note that, in the digital economy, the majority of mergers are of the non-horizontal category (Argentesi *et al.*, 2019).

Similarly, the transaction size approach may be regarded as ideal to supplement current monetary thresholds, but at the same time, it is not impeccable. Researchers have criticised the induction of a new transaction value threshold, primarily on the basis of three points. Firstly, the absence of empirically tested cogent evidence fills the enforcement gap, meaning that there is no empirical data which shows that the transaction size threshold will definitely resolve the issues of digital market combinations, which may add administrative burden on CCI. Secondly, it will have a chilling effect on innovation and investment (Founding Partners, 2019). Thirdly, in cases of cross-border mergers, there is no definite criterion to establish local nexus, which further intensifies the complexity of breakdown of transaction value to a specific territory (Ramirez, 2020).

Nonetheless, the arguments contented above are unsustainable, since the introduction of any new regulation brings a certain degree of uncertainty and adds administrative burden at the beginning. CCI has come forward from time to time to provide clarifications, concept notes, and circulars in order to bring clarity and effective enforcement. Similarly, there is no evidence to suggest that any of the activities of CCI and the government relating to the competition regime has led to the reduction of investments or innovation. Investment has appeared to be more dependent on other factors such as tax, political stability, and contract enforcement (Hussain & Parashar, 2021).

Furthermore, one of the key issues in digital market transactions remains the non-inclusivity of data as a factor for antitrust assessment. In digital market mergers, transaction size threshold takes into account the value of such data, since the deal not only reflects the actual valuation of the firm as a going concern but certainly indicates the potential of such a firm with regard to the future growth and competitive advantage it may provide to the acquirer firm (Monopolies Commission, 2015). Large firms paying high amounts to firms with low turnover reflects the existence of competitive significance and potential gain (Buzzell *et al.*, 1975). Thus, the introduction of transaction value threshold will certainly add a new tangent to the existing merger control framework by bridging the enforcement gap to a certain extent. Though transaction value threshold could not be considered the sole parameter of jurisdictional threshold, it may supplement the current turnover and asset threshold.

5.2. Disproportionate Threshold

The International Competition Network suggests that states, while setting notification thresholds, must take the size of their economy and the relevant threshold of the other jurisdiction into metrics (International Competition Network, 2008). When the Indian legislature enacted the Competition Act, 2002 in the early-2000s, it set INR 1,000 crores for assets and INR 3,000 crores for turnover as a threshold for pre-notification mandate. Further, in 2011, according to the Ministry of Corporate Affairs, the threshold for turnover was raised to INR 4,500 crores, which was raised to INR 6,000 in 2016, and proportionate changes in assets threshold were made accordingly. Similarly, in 2011, the de minimis exemption threshold was introduced, according to which combinations of any firm with turnover less than INR 750 crores and assets less than INR 250 crores were exempted from merger review. This de minimis exemption threshold was further increased in 2016 to INR 1,000 crores and INR 350 crores for turnover and assets, respectively. Very little or no data is available as to how government policy arrived at these figures. The only lead, in this regard, can be found in the 2016 notification, wherein the increase in the wholesale price index was stated to be the criterion for increased thresholds.

On comparison of India's GDP with established competition regimes, it is found that, despite the large GDPs of the US, China, EU, and Japan, their threshold limits are significantly lower compared to India (Hussain & Parashar, 2021). Other states, including France, Germany, and the UK, have at least ten times lower threshold limits, whereas states such as Italy are closest to India in terms of threshold limit, but even that has a gap of more than USD 200 million, as India's turnover threshold was USD 800 million, whereas Italy's turnover threshold was USD 570 million. This has led to a situation where India and Italy receive a low number of pre-merger notifications. On average, the US receives more than 1,600 notifications per year and Germany receives around 1,100. Other regimes such as Brazil, EU, South Africa, and China mark 300+, whereas India stands at less than 100.

The International Competition Network further suggests that threshold limits may be higher in regimes where antitrust agencies have been entrusted with residuary powers to scrutinise transactions which

fall below threshold mark (Founding Partners, 2019). In contrast, in India, despite having a threshold at the higher end, CCI lacks residuary powers compared to other competition regimes such as the US, Brazil, Canada, Japan, and China.

5.3. Absence of Robust Legal Framework to Encapsulate Data as a Non-Pricing Parameter for Antitrust Analysis

Traditional antitrust approach concerns itself only with the pricing model of goods and services; however, with the changing dynamics of the market, it has been contended that if non-price variables are equally important, it would be helpful to consider potential collusive arrangements that could have an impact on those variables (Leary, 2013). The complexity of the digital market posed a major enforcement gap not only in merger control but in several other aspects of antitrust regulations, primarily due to non-inclusivity of data as a non-price parameter of antitrust analysis.

CCI's reluctance in *Shri Vinod Kumar Gupta v. WhatsApp Inc.* (2016) in incorporating data as a non-price parameter further increased the conundrum. On the other hand, antitrust agencies such as EC and FTC showed eagerness in this regard. EC, in the Facebook–WhatsApp case (2014), indicated that data privacy and data security are key parameters of non-price competition. It reaffirmed its stance in the Microsoft–LinkedIn (2016) merger, wherein data privacy was recognised to be a significant factor of "quality". Similarly, the US FTC, in the Google–DoubleClick (2008) merger, noted that such mergers may adversely affect non-price attributes of competition such as quality and privacy.

In view of the foregoing, in March 2021, CCI took suo motu cognizance against the new privacy policy of WhatsApp, wherein several aspects of data were extensively discussed. CCI noted as follows: "Today's consumers value non-price parameters of services viz. quality, customer service, innovation, etc. as equally if not more important as price. The competitors in the market also compete on the basis of such non-price parameters". Further, CCI asserted privacy to be the major component of non-price competition, and in digital markets, arbitrary data collecting and sharing might give dominant companies a competitive edge as well as have exploitative and exclusionary effects. The matter is sub judice before the Supreme Court. In addition to this, CCI conducted a study

on the telecom sector (2021), wherein Rahul Matthan remarked that, in a data-driven economic model, non-price factors are more important than price factors.

Despite FTC's recognition of data as a non-price parameter for antitrust analysis, Tom Rosch, former FTC Chairman, noted that the current merger guidelines in US federal laws did not go far enough and clearly lack a coherent framework for analysing non-price parameters with principled distinctions. The changing stance of CCI has a certain bearing, but nothing concrete has been established yet. Neither the Supreme Court nor the recent Competition Bill, 2022, have made references in this regard.

5.4. Lack of CCI's Residuary Powers to Assess Mergers

Unlike other jurisdictions, the Competition Act, 2002 does not entrust CCI with residuary powers to assess transactions unless the jurisdictional thresholds are met. The grant of such power may cause considerable anxiety among market players since it would create uncertainty over which deal would be scrutinised (Hussain & Parashar, 2021). The system has been in place in a number of jurisdictions, including the US, UK, Canada, and Brazil, and such power has been exercised several times.

However, the EC has decided not to rely on residuary power, and instead, adopted a referral system. In the Facebook–WhatsApp deal, despite the fact that the transaction does not cross EUMR threshold, the EC investigated the matter under its referral system. Nonetheless, the referral system cannot be adopted since the EC is a unique political and economic union consisting of a number of states, whereas India is a single state. Though competition law regimes across the globe have theoretical and jurisprudential underpinnings from EU laws on competition, the adoption of a referral system within a state's national legal order is unpragmatic.

Furthermore, the need for CCI's residuary power is important not only from the perspective of digital market mergers but for competition regulation as a whole. Such power can prevent undesirable transactions in the brick-and-mortar market which, due to the ingenuity of market participants, fell outside the scope.

6. Framework for a New Regime

Owing to inefficiency, the provisions of Competition Act, 2002 are not sufficient to address the challenges of digital market activities. Although attempts could be made by introducing transaction-value threshold and residuary powers of CCI, such an attempt may reduce the onus but cannot eradicate the problem as a whole. Such a structure is already in place in certain jurisdictions such as the US; however, the situation persists.

Authors contend that, in order to overcome this situation, CCI needs to move away from its pigeonholed approach. In light of the entrenched market power that these firms possess, enhanced ex-ante regulations to prevent these firms from exploiting market competition becomes imperative. In view of the foregoing, the authors propose a new competition regime which envisages the establishment of a new department within CCI and the creation of information utility databases. Such a department would be entrusted with the function of scrutinising the conduct of firms in the digital market on the parameters set under the proposed regime, whereas the information utility database would record the names of enterprises that function in the digital market. The salient features and working of proposed regime are provided below.

6.1. Establishment of a New Department Within CCI

In order to modernise the competition regime, the Digital Market Taskforce suggested the establishment of a Digital Market Unit (DMU) in the CMA (2020). A similar approach would be instrumental in tackling the problems of the digital market in the Indian context. Authors infer the theoretical and conceptual underpinnings of the working model of the department from the underlying framework suggested by the taskforce. Nonetheless, the legislative framework deviates from that suggested by the taskforce.

The department shall seek to further the interests of consumers in the digital market by promoting competition and innovation. Such a department shall be the centre for expertise in the digital market, inculcating the capability of understanding the nuances of the business models in the digital economy. In addition to this, the department is expected to build up its expertise on the working model of participants in

the digital economy, such as the role of data, artificial intelligence, cloud computing, and internet of things. In doing so, the department shall work in association with the Ministry of Electronics and Information Technology and the National Informatics Centre (NIC).

The department would not only function as an agency for merger control but for the scrutiny of every anti-competitive conduct in the digital market, be it anti-competitive agreements or abuse of dominant position. In cases of investigation under Section 3 and Section 4 of the Competition Act, 2002, CCI may develop an internal referral system. CCI shall refer the matters associated with the digital market to the department. In determining whether the matter should be referred to the department for further investigation, CCI may take a test into account. Such a test contemplates an evidence-based assessment wherein firms' substantial and entrenched market power in a digital activity provides it with a strategic position, and such a strategic position helps the firm(s) undertake alleged anti-competitive conduct. The department shall then proceed with the substantive antitrust analysis keeping in mind the role of digital tools. Contrastingly, in cases of combinations, CCI shall directly refer the matter to the department if it falls under the contours of the proposed Section 6A of the Competition Act, 2002.

6.2. Creation of Information Utility Database

This proposed regime contemplates the creation of an information utility database wherein data relating to certain enterprises is to be recorded. The Central Government is expected to formulate rules along the following lines. The information utility database is a self-registering mechanism where firms are obligated to register themselves if they fulfil the criteria. Firstly, the firm collects the data of at least 10,000 users through ICT tools. Secondly, the government may provide criteria for determining the nature of such data collection.

In determining the nature of data collection by firms, which obligates the company to register themselves, the Central Government may, for the purpose of formulating rules in this regard, take into consideration the following two factors:

- Data is not easily accessible or replicated by others, essentially meaning that data is not in the public domain.

- Data collected, on being processed, has the potential of enabling the firm to make strategic decisions to gain competitive significance over others in the concerned industry.

Such prima facie assessment has to be done by the firms themselves; if a firm fails to comply with this obligation and later, during investigation, it is found that the firm was evading its obligation even after having sufficient knowledge, CCI may impose a suitable fine. It may seem that the provisions possess considerable subjectivity, but owing to the ex-ante nature of merger control policy, the instances of subjectivity and presumption in provisions are inescapable, especially when dealing with a much complex market structure. There will always be a presumption that if a firm is collecting a considerable amount of data, such data is going to be processed and used.

6.3. Inserting Section 6A in the Competition Act, 2002

The salient features of the proposed amendment to the Competition Act, 2002 are as follows:

- Enterprises listed in the information utility database shall not enter into combinations which cause or are likely to cause appreciable adverse effect on the competition within the relevant market in India. Further, such combinations are void.

- Any transaction crossing a minimum threshold limit and transacted between the parties, where at least one party is an enterprise listed in the information utility database shall be mandatorily notified to CCI, wherein CCI shall have direct jurisdiction of investigating the notified combination as it does under the current regime after notification.

  A substantially lower threshold is still a requirement to filter out major combinations, since it is not possible for CCI to investigate every single combination. Such a threshold may be decided by the Central Government in consultation with CCI on sound principles of macroeconomics. Further, the jurisdictional threshold will

adopt the transaction value test, and therefore, the transaction of combination shall be assessed on the basis of its deal value.

- CCI shall have residuary power to investigate the transaction of combinations that fall below the threshold limit but the transactions are between parties where at least one party is an enterprise listed in the information utility database. CCI may invoke its residuary power either suo motu or on the basis on any complaint.

    It is necessary to provide CCI with residuary power to investigate combinations even in cases where the enterprises do not cross the threshold. Even if an enterprise has zero revenue or zero turnover, CCI would still be in authority to investigate the matter if the transaction is transacted between enterprises listed in information utility database. This is because today's start ups may, in the future, become multimillion corporations. The sub-committee noted that these underdog start ups have challenged the status quo and have become monopolies in their respective segments.

- If CCI takes cognizance of the matter, either through the mandatory notification provision or by invoking its residuary powers, the jurisdiction to decide upon such matter shall lie exclusively with the department. Such matter must be mandatorily referred to the department for further investigation.

7. Conclusion

Insatiable thresholds and intricacies of digital market's dynamics have always impeded the antitrust scrutiny of digital market mergers and thus, created enforcement gaps. Jurisdictions across the globe have made attempts to bridge enforcement gaps, but none have yielded fruitful results. Jurisdictions such as Spain and the UK, which work on the share of supply tests along with a turnover approach, despite having residuary powers, are still facing jurisdictional gaps. The Advice of Digital Market Taskforce report noted, in regard to the working of the share of supply test in the UK, that there is a risk that this test fails to capture many transactions entered into by most of the powerful digital firms because it cannot capture mergers where the relationship between the merging parties is of a purely vertical nature (Founding Partners, 2019).

In the US, the Stigler Committee on Digital Platforms (2019) noted that we need to change the threshold for merger review in markets where DPs operate, basing it on transaction value or some other criteria. However, the committee did not substantiate further in this regard. Similarly, the EC's reluctance in adopting transaction value test owing to its referral system (Gassier, 2019) is blocking the roads for a coherent antitrust approach.

Recently, the Government of India introduced the Competition Bill, 2022, which attempts to bridge the enforcement gap perceived by digital market platforms. The bill introduces the deal value threshold and sets the transaction value threshold at INR 2,000 crores. Thus, it will be mandatory for enterprises to notify CCI of any transaction if the deal value exceeds INR 2,000 crores and if either of the parties has "substantial business operations in India". There is still no cogent evidence available as to how the government arrived at this threshold value. Nonetheless, the attempt is appreciable in light of the ongoing enforcement crisis. However, the bill does not talk about inclusion of data as a non-pricing parameter. Thus, CCI will not be able to consider the data in antitrust scrutiny. Inclusion of data is not only relevant to assess non-compatibility of digital market mergers with respect to competition law jurisprudence but is also instrumental in scrutinising other antitrust assessments in the digital market, including the determination of relevant market, abuse of dominant position, and other anti-competitive arrangements. Similarly, the bill makes no reference to the grant of residuary power of CCI to assess combinations falling outside the threshold.

The Indian competition regime needs to depart from its non-interventionist (Krishnan & Unni, 2019) and pigeonholed approach. The focus should now be on how to bring more and more digital market combinations within CCI's jurisdiction. This paper demonstrated the shortcomings of current merger control laws in India with respect to digital market combinations. The authors conclusively suggest that, in addition to the proposed regime, for digital market mergers, the legislature should modify current rules regulating combinations. The legislature should amend merger control laws by incorporating transaction value threshold with significantly low amount of deal value; reducing the current threshold limits for turnover and asset; conferring CCI with residuary powers to

access combinations even if any transaction does not transgress threshold limits; and including data as a non-pricing factor for antitrust analysis.

The amendment in competition policy, along this line, is necessary not just for digital market mergers but for merger control in general. The transaction value threshold and residuary powers of CCI are still necessary for antitrust assessment in the brick-and-mortar market, helping CCI prevent undesirable transactions which, due to the ingenuity and inventiveness of market participants, fell outside CCI's jurisdiction. As of now, CCI does not have any residuary power to access any transactions that do not fall under its jurisdiction. In light of the present issue, it is important to grant CCI with residuary power as a tribunal. The proposed regime attempts to resolve the issue for digital market mergers, although introducing a new regime is a long-term plan and it will take a considerable amount of time to prepare a robust, comprehensive, and coherent legal framework. Nonetheless, the authors find that the new regime for digital market combinations is a viable solution in light of the ongoing enforcement gap worldwide. For the time being, the best that the government can do is amend competition policy according to the abovestated suggestions.

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