

# **Navigating Data Driven Combinations Vis-À-Vis Privacy And Antitrust Legal Framework Under Indian And Eu Laws**

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## **INTRODUCTION**

One of the most important defining factors of the last two decades is the meteoric rise of Digital Platforms and their ever-growing dominance. One cannot overlook the fact that a pattern of exponential growth driven by the online advertisement market and the concentration of “big data” being held by the Silicon Valley giants have adversely affected the possibility of healthy competition in the digital market arena. Further, even if the direct impact of the use of such data sets has been most apparent in the e-commerce sector, however, the existing research does suggest that the actual implication is more of an all-encompassing nature that pervades the traditional segmentation of the markets.<sup>1</sup> Thus, it won’t be wrong to suggest that we live in a “datafied” and digitalised world that acts as a terra incognita for us.<sup>2</sup>

In the contemporary scenario amassing and analysing large volumes of consumer data has become the new economic input for businesses today at par with capital and labour. Hence, it does not come as a surprise when big data is being equated as the “new oil”<sup>3</sup> or the “currency of the digital economy”. However, having suggested the same, the unregulated amassing and usage of such data has emerged as a growing concern regarding exploitative and abusive conduct by tech giants in the digital markets.<sup>4</sup>

Lawmakers worldwide are facing unprecedented challenges to curb the ever-growing market power of these digital platforms which has resulted in undercutting small potential

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<sup>1</sup> Schilling, M.A. (2015) ‘Towards dynamic efficiency’, The Antitrust Bulletin, 60(3), pp. 191–207. doi:10.1177/0003603x15598596.

<sup>2</sup> Sivarajah, U. et al. (2017) ‘Critical analysis of Big Data Challenges and analytical methods’, Journal of Business Research, 70, pp. 263–286. doi:10.1016/j.jbusres.2016.08.001.

<sup>3</sup> Drexler, J. (2016) ‘Designing competitive markets for industrial data - between Propertisation and access’, SSRN Electronic Journal [Preprint]. doi:10.2139/ssrn.2862975.

<sup>4</sup> Orbach, B.Y. (2010) ‘The antitrust consumer welfare paradox’, Journal of Competition Law and Economics, 7(1), pp. 133–164. doi:10.1093/joclec/nhq019.

rivals and are naming it the new “digital pandemic”.<sup>5</sup> The debate is often sparked when the question as to the extent to which such personal data can be used by these companies under the garb of improving customer experience and not as an attempt to gain an edge over the other market competitors.

To address the above concern the European Union has brought in the Digital Services Act and Digital Market Act collectively known as the Digital services Package, which introduces the concept of ‘Gatekeepers’.<sup>6</sup> In this regard, the term has been used to define entities having control over allowing access to the datasets which is critical to the growth and operation of any digital service platform.<sup>7</sup> The Digital Service Package intends to curb this element of control held by the few dominant entities through the imposition of restrictions and thereby regulating their conduct.

Hence, the proposed paper is an attempt to explore the possible exploitative conduct, including the violation of the privacy of the consumer, possible foreclosure risks presented by dominant data-holding companies for new entrants, that may arise due to the dominant position being enjoyed by the select few on account of the accumulation of data. In furtherance of the same, the research would also attempt to decipher the link between data and the relationship of the data breach to the company's market power. We have to distance ourselves from predictable price parameters as the only source of anti-competitive harm and explore new non-price parameters such as privacy, quality, data portability, etc.

### **RISE OF BIG-DATA-DRIVEN BUSINESS**

Data is regarded as one of the most valuable resources in human history. An article in The Economist suggests that data is now even more precious than oil. The term "big data" refers to vast amounts of information that are continually increasing at a rapid pace. This concept is not new; it encompasses the large and perpetually expanding data sets that organisations gather, which are often challenging to analyse conventionally.<sup>8</sup>

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<sup>5</sup>Botta, M. and Wiedemann, K. (2019) ‘Exploitative conducts in digital markets: Time for a discussion after the Facebook decision’, *Journal of European Competition Law & Practice*, 10(8), pp. 465–478. doi:10.1093/jeclap/lpzo64.

<sup>6</sup> Portuese, A. (2020) ‘European competition enforcement and the Digital Economy: The birthplace of precautionary antitrust’, SSRN Electronic Journal [Preprint]. doi:10.2139/ssrn.3733715.

<sup>7</sup> Damien Geradin, “What is a Digital Gatekeeper? Which Platforms should be captured by the EC Proposal for a Digital Markets Act”, SSRN pp. 1-20 (June 15, 2021, 10:40 pm), <https://ssrn.com/abstract=3788152>.

<sup>8</sup> <https://www.accaglobal.com>, A.- Big data, ACCA Global. Available at: <https://www.accaglobal.com/gb/en/student/exam-support-resources/professional-exams-study-resources/p5/technical-articles/big-data.html> (Accessed:23 March 2024).

The strategic decision-making processes of numerous businesses are significantly shaped by big data, prompting more companies to embrace data-driven business models to achieve a competitive "data advantage". Big data enables firms to remain competitive and efficient in the online market while offering diverse services to clients. Nevertheless, possessing extensive data may result in anti-competitive behaviours and increased market power. This situation has sparked various ethical and legal concerns recently, particularly regarding privacy and cybersecurity.

Big data is defined by four main 'V's': the volume of data, the velocity of its collection and sharing, the variety of the information collected, and its value. Each 'V' offers distinct characteristics and benefits.

Big data has emerged as a key factor in numerous mergers and acquisitions. It refers to the enormous amounts of organised and unstructured data that companies can collect and analyse to gain insights and make informed decisions. Businesses utilise big data to enhance customer experiences, streamline internal operations, and identify new opportunities. Many transactions orchestrated by major tech companies have exposed a regulatory gap that has, for the past decade, allowed several mergers and acquisitions to bypass scrutiny from competition authorities.<sup>9</sup>

Big data may be extremely important in the context of mergers and acquisitions in a variety of ways. For instance, businesses might utilise big data to find suitable acquisition targets that match their strategic objectives and offer complementary talents. Additionally, they may quantify these targets' prospective worth and assess their operational and financial performance using data analytics.

In the modern landscape, companies such as Google, Amazon, Apple, Facebook, and Microsoft dominate the digital market by owning significant platforms. The merger patterns of these tech giants indicate a similar trend in the global digital market.<sup>10</sup> By 2020, Amazon, Apple, Facebook, and others had acquired around 175 firms, including both startups and established enterprises. Google, since 2008, has purchased 168 companies that were likely competitors.<sup>11</sup>

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<sup>9</sup> Bundeskartellamt and Bundeswettbewerbsbehörde, 'Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification' (July 2018) [https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaaden/Leitfaden\\_Transaktionssschwellen.pdf](https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaaden/Leitfaden_Transaktionssschwellen.pdf) accessed 10 May 2024.

<sup>10</sup> Khaitan & Co, 'India: The Competition (Amendment) Act, 2023: An Analysis' (Mondaq, April 2023) <https://www.mondaq.com/india/antitrust-EU-competition-/1301046/the-competition-amendment-act-2023-an-analysis> accessed 10 May 2024.

<sup>11</sup> OECD, 'Start-ups, Killer Acquisitions and Merger Control' (2020) <https://www.oecd.org/competition/start-ups-killer-acquisitions-and-merger-control.htm> accessed 4 May 2024.

These companies are concerned with more than profit; they are also focused on the massive gathering of data from nascent startups. Consequently, a common strategy for large businesses to hinder competitors' growth in the market is through acquisition, such as Facebook's acquisition of Instagram, which was a horizontal merger (mergers between companies in the same sector). But sometimes, some acquisitions are hard to categorise under distinct mergers (i.e., Horizontal, vertical and conglomerate mergers), and some examples are the acquisition of Fitbit and Waze by Google, which was linked to the sharing of data.<sup>12</sup>

We are accustomed to seeing mergers and acquisitions in terms of monetary value. Nevertheless, on digital platforms, it is not just the company's shares that are transferred but also a massive data collection. The sharing of each company's unique collections of datasets is a significant aspect of most digital mergers. The merger between Google and Fitbit raised concerns about competition and privacy issues, as Fitbit's extensive health and biometric data could enhance Google's advertising capabilities and broaden its data empire, making it increasingly difficult for privacy-oriented tech firms to thrive. Despite these concerns, the European Commission approved the merger in accordance with EU merger regulations, with Google proposing several commitments to alleviate these risks.<sup>13</sup>

Data is readily accessible, with each platform collecting specific types of data through its operations. For example, while both Facebook and WhatsApp serve as social networking platforms for communication, the datasets generated by these companies differ. WhatsApp primarily focuses on users' chat and contact information, whereas Facebook, in addition to chat data, generates audio and visual datasets. When these two types of data are combined, they create a unique dataset that may be challenging for competitors to replicate. Consequently, the rise in data-driven mergers poses potential threats to privacy and personal data. The authors will examine the potential risks and harms associated with data-driven mergers in the following section.

### **COMPETITIVE SIGNIFICANCE OF BIG DATA IN MERGERS**

Big data is asymmetrical and has several uses.<sup>14</sup> Big data may be used by businesses to increase efficiency, but it also has the potential to take advantage of customers. There are two

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<sup>12</sup> Organisation for Economic Co-operation and Development (OECD), "Start-ups, killer acquisitions and merger control – Note by BEUC", pp. 1-7 (2020).

<sup>13</sup> European Commission, 'Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings' (2008) OJ C95/1, para 59.

<sup>14</sup> Organisation for Economic Co-operation and Development (OECD), "Start-ups, killer acquisitions and merger control – Note by BEUC" pp. 1-7 (2020).

primary privacy-related effects that mergers, particularly in the context of digital platforms, may have on the market's competition. The first is that these mergers can cause a deterioration of privacy standards. Moreover, these mergers may lessen the competition for greater privacy protection.<sup>15</sup>

### **Withering of Consumer Privacy Standards**

Customers all around the world enjoy free services but pay a high price by disclosing their sensitive personal information since privacy is frequently at risk in the digital age. These days, companies like Facebook or WhatsApp provide customers with free services to collect important personal information, enabling advertising to target consumers more effectively by anticipating their daily routines and behavioural patterns.<sup>16</sup>

As a result, in these markets, the impact of a merger on a product's price (which is considered a measure of competitiveness) is either non-existent or minimal. In such marketplaces, the impact of combinations may frequently be observed through non-price characteristics, such as the impact on quality or privacy.<sup>17</sup>

As a result, to derive benefits from the merger in the relevant market(s), the merged entity might neglect privacy issues, potentially compromising the quality of the product. For example, the European Union (EU) emphasised that data security and privacy are critical elements of non-price competition in the Facebook/WhatsApp merger.<sup>18</sup>

With this merger, a significant privacy risk to users' data became a reality when WhatsApp updated its privacy policy. Before the Facebook/WhatsApp merger, Facebook maintained that there would be no change in WhatsApp's privacy policies. Nevertheless, after two years, WhatsApp revealed that it would be sharing its user data with the Facebook group of companies to better customer experience, which significantly lowered the privacy safeguards provided to WhatsApp users and contradicted WhatsApp's earlier pledges. Later developments in the Facebook/WhatsApp case presented issues that may have been addressed at the time the acquisition was authorised.

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<sup>15</sup> Lakshmi Data Protection Aspects in Merger Reviews, IRCCL (Mar. 15, 2023, 9:29 P.M), <https://www.irccl.in/post/data-protection-aspects-in-merger-reviews>

<sup>16</sup> Competition Law Review Committee, 'Report of the Competition Law Review Committee' (July 2019) <https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf> accessed 10 May 2025.

<sup>17</sup> Nambiar, L. (2021) Data Protection Aspects in merger reviews, IRCCL. Available at: <https://www.irccl.in/post/data-protection-aspects-in-merger-reviews> (Accessed:01 May 2024).

<sup>18</sup> Markk Scott, E.U. Fines Facebook \$122 Million Over Disclosures in WhatsApp Deal, The New York Times (Mar. 15, 2023, 10:00 A.M), <https://www.nytimes.com/2017/05/18/technology/facebook-european-union-fine-whatsapp.html>

Facebook was also fined \$122 million by the EU for providing false information about its technological capabilities for sharing user data.<sup>19</sup> In such a situation, consideration of such additional non-price competition factors while conducting merger evaluations becomes crucial since customers are compensating these platforms through these non-price ways.

### **Maintaining the Integrity of the Specifications**

The next issue is connected to reducing competition in privacy-related elements by strengthening network effects and lock-in effects that occur in the digital market.<sup>20</sup> The Facebook WhatsApp merger raised questions about economies of scale and the concept of direct and indirect effects to be introduced in the Indian merger analysis regime. These network effects are frequently observed in multi-sided marketplaces and especially in data significant mergers.

When a new user joins a network, it can have an effect on how valuable the network is to the existing members. This is known as network effects. When complementary goods and services flourish and boost the value to consumers on the other side of the market, or when the network becomes more attractive to its members, these are examples of indirect network effects.<sup>21</sup> Direct network effects occur when the presence of additional users on one side of the market influences the value of consumers on the opposite side of the market.<sup>22</sup>

As more of their friends and acquaintances sign up for the same social media or communication network, a site like WhatsApp or Facebook becomes more appealing to users. This suggests that a self-reinforcing process is in play, where a database becomes increasingly attractive (and cheaper to manage) as the network grows larger. One of the worries is that network effects may lead to crowded marketplaces and enhance incumbents' positions while preventing new enterprises from entering. To put it another way, network effects may cause snowball effects in which marketplaces favour a small number of players.<sup>23</sup>

Furthermore, there is a chance that mergers will result in lock-in consequences. The lock-in effect explains why switching to a different product is harder or pointless unless the majority of users of the original product do the same.<sup>24</sup> Mergers reinforce network and lock-in effects,

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<sup>19</sup> Id.

<sup>20</sup> Damien Geradin, "What is a Digital Gatekeeper? Which Platforms should be captured by the EC Proposal for a Digital Markets Act", SSRN pp. 1-20 (June 15, 2021, 10:40 pm), <https://ssrn.com/abstract=3788152>.

<sup>21</sup> Bhattacharya, S. and Buten, M.C. (2021) Privacy as a competition law concern: Lessons from Facebook/WhatsApp, SSRN. Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3785134](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3785134) (Accessed: 23 April 2024).

<sup>22</sup> Id.

<sup>23</sup> Id.

<sup>24</sup> Nambiar, L. (2021) Data Protection Aspects in merger reviews, IRCCL. Available at: <https://www.irccl.in/post/data-protection-aspects-in-merger-reviews> (Accessed: 24 May 2024).

resulting in a sharp increase in the combined entity's user base and the expulsion of current competitors that respect privacy. Furthermore, this creates formidable barriers to entry for potential competitors who value privacy. The Microsoft/LinkedIn merger is a prime illustration of this. While network effects skewed the professional social media market in LinkedIn's favour, the merger also helped the company grow (for instance, by pre-installing LinkedIn on Windows platforms).<sup>25</sup>

This might hamper the emergence of LinkedIn rivals that offer more privacy protection. As a result, mergers have the potential to limit competition in privacy-related areas. A merger of data-rich corporations that further concentrate the market raises concerns that it would create barriers to entry and undermine competition. Such risks mentioned above are present in the data-driven merger also due to the regulatory gaps in the competition/antitrust law. The next part of this research work discusses the regulatory gaps in the antitrust/competition law regarding data-driven mergers.

### **THE LACK OF VIABLE PRIVACY PROTECTION MEASURES UNDER THE INDIAN MERGER CONTROL**

The Competition Act serves as the main legislation governing combinations (mergers and acquisitions) in India. Sections 5 and 6 of the Act contain the pertinent regulations related to this; according to section 5 of the Competition Act, a merger must be reported to the CCI (Competition Commission of India) when the specified thresholds regarding asset value and turnover are reached. The asset value is determined based on the book value, as indicated in the audited financial statements for the "financial year immediately preceding the financial year in which the proposed merger occurs."<sup>26</sup> To assess this value, both tangible and intangible assets, such as brand value, goodwill, and intellectual property rights, are included.<sup>27</sup>

In a notification that was released in 2011, the Ministry of Corporate Affairs introduced the concept of a target de minimis criteria. Under this transaction, notification is not required if the target's assets in India are valued at less than 3.5 billion rupees or if the target's turnover is less than 10 billion rupees. This exception creates issues for the digital economy, particularly when it comes to platforms with multiple users, like WhatsApp and Google, which offer free services.

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<sup>25</sup> Ibid.

<sup>26</sup> The Competition Act, 2002, § 5.

<sup>27</sup> Kalpana Tyagi, "Big Data Mergers: Bridging the Gap for an Effective Merger Control Framework", CCI Journal on Competition Law, vol. 1, pp. 29-52 (2020).

### **Regulatory Gaps in the Indian Merger Control Regime**

India's merger control framework is founded on a turnover threshold. Any individual or entity wishing to engage in a combination is required to inform the Commission in accordance with Section 6(2) of the Act prior to completing the combination. The rationale for choosing this kind of notice framework is to prevent any unscrambling-related collateral social costs as well as the potential complication that could arise if the merging companies are required to demerge. This is in addition to the negative impact on the market that would result from allowing the transaction to proceed.<sup>28</sup>

The merger control framework in India is constrained in that Section 6 of the Competition Act applies solely to combinations outlined in Section 5 of the Act (which establishes asset and turnover thresholds to classify specific mergers and acquisitions as combinations). Consequently, the CCI lacks the authority to assess all types of combinations occurring in India. This inherent limitation is evident in various cases, one notable example being those involving data-driven mergers. In the coming chapters for amendments in 2023 you see the amendments and changes to these laws that the Indian government has made.

The conventional method of assessing competition leads to a significant enforcement gap regarding mergers in the digital sector. This is due to the fact that, unlike in other countries, large datasets are not recognized as valuable assets, and digital companies often offer free services, resulting in low revenue that escapes regulatory examination. The issue of privacy is also compromised because of this exception based on revenue. A clear example is Facebook's acquisition of WhatsApp. The \$19 billion purchase of Facebook impacted roughly 1.7 billion individuals globally, yet it did not require notification to the CCI since the Section 5 threshold was not met.<sup>29</sup>

The traditional merger control system is ineffective in the digital age, and enterprises that provide free services can simply avoid the usual barrier. Also, Past data-driven mergers, such as Google/Double Click, Microsoft/LinkedIn, and Facebook/WhatsApp, have eased CCI's grip since the thresholds were not violated during the merger transaction and are believed to be

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<sup>28</sup> Published by sitcnujs View all posts by sitcnujs et al. (2018) The Big Data Problem in mergers and acquisitions, Society for International Trade & Competition Law. Available at: <https://nujssitc.wordpress.com/2018/08/31/the-big-data-problem-in-mergers-and-acquisitions/> (Accessed: 01 May 2024).

<sup>29</sup> Shilpi Bhattacharya and Miriam C. Buiten, *Privacy as a Competition Law Concern: Lessons from Facebook/WhatsApp*, 5 (2018), Available at SSRN: <http://dx.doi.org/10.2139/ssrn.3785134>.



abusing dominance concurrently.<sup>30</sup> This raises significant issues in the realm of merger regulation. To begin with, relying on high threshold criteria alone is inadequate for addressing zero-value digital mergers. Additionally, non-price factors such as data sharing and network effects are omitted from merger assessments. As a result, data-driven mergers that are not properly examined could result in AAEC (Appreciable Adverse Effect on Competition) issues, potentially fostering an anti-competitive environment in the market.<sup>31</sup>

### **REFORMS INITIATED THROUGH THE COMPETITION COMMISSION OF INDIA**

The Competition Commission of India (CCI) opted not to review Facebook's purchase of WhatsApp, even though WhatsApp has a significant foreign user base. Conversely, the European Commission investigated this transaction using its referral system. The CLRC committee report notes that numerous digital transactions have avoided scrutiny due to existing asset and turnover thresholds. A pertinent example is Zomato's acquisition of Uber Eats, which went unreported to the CCI owing to its limited turnover and asset scale. Thus, the conventional method of antitrust analysis reveals a substantial enforcement gap in the context of mergers in digital markets.

In the report titled “Report of the Committee on A Free and Fair Digital Economy Protecting Privacy, Empowering Indians,” Justice B.N. Krishna noted that the exemption based on turnover poses a risk to privacy. Relying solely on assets and turnover as criteria is problematic for firms that provide free services to consumers and do not necessarily possess assets or generate turnover in India. This issue is particularly significant in the digital economy, especially for complex platforms like WhatsApp and Google that offer no-cost services. As a result, a zero-cost digital platform seldom meets the necessary legal standards. Ironically, despite the critical nature of data and its four Vs—value, volume, velocity, and veracity—achieving success in the Indian market is crucial for any cross-platform messaging application's effectiveness. The aforementioned litmus test fell short; current fusion control remains weak precisely in areas where big data demands strong oversight.<sup>32</sup>

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<sup>30</sup> International Competition Network, 'Framework for Merger Review Cooperation' (2012) [https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG\\_FrameworkforMergerReviewCooperation.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_FrameworkforMergerReviewCooperation.pdf) accessed 10 May 2024.

<sup>31</sup> Shilpi Bhattacharya and Miriam C. Buiten, “Privacy as a Competition Law Concern: Lessons from Facebook/WhatsApp”, pp. 1-12 (2018), Available at SSRN: <http://dx.doi.org/10.2139/ssrn.3785134>.

<sup>32</sup> Kalpana Tyagi (2020) ‘Big Data Mergers: Bridging the gap for an effective merger control framework’, Competition Commission of India Journal on Competition Law and Policy, pp. 29–52. doi:10.54425/ccijoclp.v1.4.

**CLRC's Report Concerning Deal Value Threshold**

In its 2019 report, the Competition Law Review Committee (CLRC) said that the CCI needs broader power to assess any transactions or acquisitions that don't meet the standards outlined in Section 5 of the Competition Act of 2002 (the Act). According to the research, mergers involving businesses operating in the "digital sphere" have suffered as a result of the Competition Commission's limited power.<sup>33</sup>

The committee noted that over 400 acquisitions had been undertaken by leading internet companies in the past ten years, some of which were expensive, such as Microsoft's \$26 billion purchase of LinkedIn.<sup>34</sup> The committee pointed out that because of their initial emphasis on user growth, the goal may provide low-revenue digital acquisition products and services. In these situations, the target's sales value is the best measure of the competition's importance; in light of this, the committee debated whether the current level for combination notice is sufficient.

The committee noted that because India has a different antitrust law than other countries, CCI is unable to assess transactions, even when it is clear that there has been harm to competition. This is due to the fact that the Competition Act does not grant the CCI any remaining authority to examine any transactions that do not need to be reported. The committee further noted that in order to evaluate non-notifiable mergers, competition regulators such as the European Commission, which lack residuary jurisdiction, employ a different technique. Due to a low threshold, the Facebook/WhatsApp merger was reported to the European Commission. However, because it satisfied the notification requirement in all three EU member states, the EC assessed the merger under its case referral mechanism.

In nations such as Brazil and Ireland, regulatory bodies have exercised their residual authority to assess transactions even when the required thresholds were not satisfied. As a result, the CCI was unable to examine mergers that did not need to be notified. The commission also pointed out how Germany and Austria addressed certain operational challenges that emerged from implementing a deal value threshold by issuing a series of guidelines.<sup>35</sup>

Consequently, it was suggested that the Competition Act be amended to incorporate an enabling clause that would allow the government to establish necessary criteria, including a deal-value threshold for merger notifications. It was determined that any thresholds should be

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<sup>33</sup>Report of the Competition Law Review Committee (2019). Available at: <https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf> (Accessed: 01 May 2024).

<sup>34</sup> Ibid.

<sup>35</sup> Competition Law Review Committee, 'Report of the Competition Law Review Committee' (July 2019) <https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf> accessed 10 May 2025. ↵

established based on local nexus requirements and transparent, objectively measurable methods for calculating the necessary figure.<sup>36</sup>

### **COMPETITION AMENDMENT ACT, 2023**

By the CLRC's suggestions, the Indian government had introduced the Competition (Amendment) Bill, 2022, which amended various aspects of the country's competition legislation. One of the key changes is the establishment of a new criterion for notifying the Competition Commission of India (CCI) about any combinations.<sup>37</sup> The amendment specifies that should the value of any transaction involving control, shares, voting rights, etc., exceed Rs. 2,000 crores, a combination notice must be submitted to the CCI. Additionally, it grants the Central Government the power to exempt certain transactions from the requirement of filing combination notices under the Act.

The prevalence of data-driven mergers is rising in India, making it crucial for the government to closely examine these transactions. In India, big data is not classified as an asset, and digital companies often do not generate substantial revenue due to offering free services, which can lead to the regulator overlooking these deals. Moreover, Indian competition regulations face another challenge: they ignore data as a non-price factor in antitrust assessments. This omission of data as a non-price component has resulted in a significant enforcement gap in regulating the digital market, overseeing mergers, and managing other aspects of antitrust laws.

The landscape of merger control in India is currently undergoing significant changes. The Competition Commission of India (CCI) is increasingly prioritising the review of acquisitions involving large data companies and is actively examining and disputing mergers with substantial data components. A challenge for the CCI in evaluating these transactions is that mergers and acquisitions centred on big data often include companies with low revenues but considerable data resources.

### **Recent Updates to Merger Control Regulations**

#### **Competition (Amendment) Act, 2023**

The Competition (Amendment) Act, 2023,<sup>38</sup> has brought about several important changes to India's merger control framework. The amendments, which received approval from the

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<sup>36</sup> Ministry of Corporate Affairs, Government of India, Report of the Competition Law Review Committee-July 2019, pp. 128, para 5.14 2019

<sup>37</sup> Competition (Amendment) Act, 2023 (Act No. 8 of 2023).

<sup>38</sup> Competition (Amendment) Act, 2023 (Act No. 8 of 2023), ss 5-6

president in April 2023, constitute the most comprehensive revision of the Competition Act since its inception.

### 1. Deal Value Threshold

A key change is the establishment of a 'deal value threshold' for notifying combinations. According to this new regulation, transactions exceeding a deal value of ₹2,000 crore (around \$242 million) must be reported to the CCI if the target entity has 'substantial business operations in India'.<sup>39</sup> This change aims to include high-value acquisitions, especially in the digital and technology sectors, where the target may have minimal assets and revenue but holds substantial market potential or valuable data assets. The implementation of the deal value threshold brings India's merger control framework in line with countries like Germany and Austria, which have adopted similar thresholds to capture transactions involving innovative startups or digital enterprises. However, the success of this threshold will depend on the clarity around what defines 'substantial business operations in India,' a term that the CCI is expected to clarify through subsequent regulations.<sup>40</sup>

### 2. Revised Timelines for Merger Review

The amendments have altered the timelines for merger reviews, establishing a 30-day timeframe for the CCI to develop a prima facie opinion on whether a detailed investigation is necessary. Should the CCI opt to conduct a detailed review, it is required to complete the examination within 150 days from the notification date, with a possible maximum extension of 30 days. Previously, the statutory timeline was set at 210 days, often resulting in extended uncertainty for businesses.<sup>41</sup> The new timelines are anticipated to accelerate the merger review process, providing greater certainty to businesses while aligning India's framework more closely with international norms. Nevertheless, concerns persist about the CCI's ability to meet these deadlines, particularly with complex transactions that require thorough analysis.

### 3. Hub-and-Spoke Structures

The amendments have widened the definition of anti-competitive agreements to incorporate hub-and-spoke structures, in which parties not acting as direct competitors or in a vertical

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<sup>39</sup> Competition Commission of India (Procedure in Regard to the Transaction of Business Relating to Combinations) Amendment Regulations, 2023, reg 5

<sup>40</sup> Ibid.

<sup>41</sup> Competition Commission of India (Procedure in Regard to the Transaction of Business Relating to Combinations) Amendment Regulations, 2023, reg 5

relationship coordinate their actions via a third party ('hub'). While primarily related to anti-competitive agreements under Section 3 of the Act, this provision also affects merger control as the CCI may assess potential combinations that could enable such structures.<sup>42</sup>

#### 4. Broadened Definition of Control

The amendments have refined the definition of 'control' to encompass the capacity to exert 'material influence' over an enterprise's management, operations, or strategic commercial decisions. This expanded definition corresponds with the CCI's decision-making practices, which have developed over time to embrace a more sophisticated interpretation of control. The revised definition is expected to encompass a broader array of transactions, including minority acquisitions that grant substantial influence without equating to traditional concepts of control. This could impact private equity investments, strategic partnerships, and other collaborative arrangements wherein the acquirer pursues influence without complete control.

#### **Competition Commission of India (Combination) Amendment Regulations, 2023**

Alongside the legislative amendments, the CCI has implemented several modifications to its Combination Regulations aimed at streamlining the merger review process and improving regulatory efficiency.

1. The CCI launched the 'Green Channel' approval process in 2019, which has been further enhanced through later amendments. This system allows combinations with no horizontal or vertical overlaps to be automatically approved upon filing a notice with the CCI, subject to specific conditions. The Green Channel has notably lessened the regulatory load for straightforward transactions, with over half of notifications benefiting from this faster process since its inception.<sup>43</sup>

2. The CCI has updated its notification forms to lessen information requirements and streamline the filing procedure. Form I, the short form notification, now concentrates on the crucial information necessary for the CCI's evaluation, while Form II, the long form notification, is designated for combinations with significant

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<sup>42</sup> Cyril Amarchand Mangaldas, 'India: The Competition (Amendment) Act, 2023 – Key Changes And Impact' (Mondaq, May 2023) <https://www.mondaq.com/india/antitrust-eu-competition-/1304042/the-competition-amendment-act-2023-key-changes-and-impact> accessed 10 May 2024.

<sup>43</sup> Competition Commission of India (Procedure in Regard to the Transaction of Business Relating to Combinations) Amendment Regulations, 2023

horizontal or vertical overlaps. These changes are intended to lower compliance costs and hasten the review procedure for less complicated transactions.

3. The CCI has granted exemptions for specific types of combinations from the mandatory notification obligation, such as the acquisition of shares or voting rights not exceeding 25% of the total shares or voting rights of the target enterprise, undertaken solely as an investment or in the regular course of business. These exemptions have added much-needed clarity and alleviated the regulatory burden for routine investments.

India's merger control reforms are indicative of a larger worldwide movement to update competition laws to tackle the challenges posed by the digital economy. Various regions, including Germany and Austria, as well as the European Union, have recently implemented transaction value thresholds to monitor high-value acquisitions of innovative startups or digital firms.<sup>44</sup>

The broadened definition of control aligns with the stance taken by competition authorities in the United Kingdom and the European Union, which regard 'material influence' or 'decisive influence' as adequate to establish control for merger control purposes.<sup>45</sup> This expanded definition enables competition authorities to examine a wider array of transactions that could impact market competition, even those not involving the acquisition of traditional control rights.

The Green Channel approval process is modelled after similar processes in other jurisdictions, such as the streamlined procedure outlined in the EU Merger Regulation and the automatic approval system utilised in Singapore. These processes aim to lessen the regulatory burden for straightforward transactions while enabling competition authorities to direct their resources towards more complicated cases.<sup>46</sup>

### **Challenges in Implementation**

The successful enactment of the recent reforms faces several obstacles. The CCI must clarify essential concepts like 'substantial business operations in India' and 'material influence' to

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<sup>44</sup> European Commission, 'Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings' (2008) OJ C95/1, para 59

<sup>45</sup> International Competition Network, 'Recommended Practices for Merger Notification and Review Procedures' (2018) [https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG\\_NPRecPractices2018.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf) accessed 10 May 2024

<sup>46</sup> Competition Commission of India, 'Green Channel Notification' (Press Release, 13 August 2019) [https://www.cci.gov.in/sites/default/files/press\\_release/PR-13-2019-20.pdf](https://www.cci.gov.in/sites/default/files/press_release/PR-13-2019-20.pdf) accessed 10 May 2024.

ensure regulatory certainty for companies. Additionally, there are concerns regarding the CCI's ability to meet the revised timelines for merger reviews, particularly in complex transactions that require thorough analysis. The introduction of the deal value threshold could result in an uptick in the number of notifiable transactions, potentially overburdening the CCI's resources. To effectively evaluate combinations in the digital economy, which often feature intricate business models and data-centric markets, the CCI will need to bolster its technical expertise and analytical capabilities.

### **Future Perspectives**

Looking ahead, India's merger control framework is expected to keep evolving to meet new challenges and align with international best practices. The CCI may further fine-tune its regulations and guidance to provide a clearer understanding of essential concepts and reduce compliance expenses for companies.

Additionally, the CCI might adopt a more differentiated approach to remedies, moving past structural remedies like divestitures to include behavioural remedies that tackle specific competitive issues while maintaining the potential advantages of combinations. This approach could be especially relevant in the digital economy, where traditional structural remedies may not adequately address competitive concerns.

The increasing digitalisation of the economy might require further updates to India's merger control framework, potentially incorporating specific provisions for mergers rich in data or those involving algorithmic coordination. Furthermore, the CCI could consider strengthening international cooperation to effectively review cross-border combinations that impact multiple jurisdictions.

### **CONCLUSIONS AND SUGGESTIONS**

The recent changes carry important consequences for businesses engaged in or looking to enter the Indian market. The implementation of a deal value threshold increases the number of transactions subjected to merger control, especially within the digital and tech industries. Companies must carefully analyse whether their deals meet this threshold and if the target possesses 'substantial business operations in India.'

The broadened definition of control may encompass a larger array of transactions, including minority investments and strategic partnerships. Businesses should assess whether their deals bestow 'material influence' over the target, even if they do not obtain conventional control

rights. The updated timelines for merger review provide enhanced predictability for businesses, potentially speeding up the approval process for transactions that are time-sensitive. Nonetheless, it remains to be seen if the CCI can consistently meet these timelines, particularly for intricate transactions requiring thorough analysis. The reforms are designed to improve regulatory efficiency by simplifying the notification process, minimising information requirements, and implementing expedited approval methods. The Green Channel approval process notably alleviates the regulatory burden for simple transactions and enables the CCI to concentrate on more complex cases.

The introduction of a deal value threshold addresses an oversight in capturing high-value acquisitions within the digital economy, aligning India's merger control framework with global practices. However, the success of this threshold is contingent on the clarity regarding what exactly constitutes 'substantial business operations in India.' The primary aim of merger control is to prevent combinations that may adversely affect market competition and consumer welfare. The recent reforms bolster the CCI's capability to examine potentially anti-competitive mergers while lessening regulatory burdens for transactions that raise minimal competitive issues.

The widened reach of the merger control framework, mainly through the deal value threshold and the extended definition of control, allows the CCI to evaluate a broader spectrum of transactions that may influence competition in the Indian marketplace. This is especially pertinent in the digital economy, where traditional asset and turnover thresholds might overlook transactions involving innovative startups or companies rich in data.

India's merger control regime has undergone significant transformation in recent years, with the most recent amendments introducing several important reforms. The introduction of the deal value threshold, expanded definition of control, revised timelines for merger review, and streamlined notification process collectively represent a comprehensive overhaul of the merger control framework. These reforms aim to enhance regulatory efficiency while strengthening the CCI's ability to review potentially anti-competitive combinations, particularly in the digital economy. They align India's merger control regime more closely with global best practices while addressing specific challenges in the Indian market. The effectiveness of these reforms depends on their implementation and the CCI's capacity to provide regulatory clarity, adhere to timelines, and develop the expertise required to assess complex combinations. As India's economy continues to grow and evolve, its merger control regime will likely undergo further



refinement to balance the dual objectives of promoting beneficial business combinations and preventing those that could harm market competition and consumer welfare.