



## INTERPLAY OF THE GROWING DIGITAL MEDIA AND ENTERTAINMENT INDUSTRY WITH COMPETITION LAWS

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### ABBREVIATIONS FREQUENTLY USED IN THE REPORT

M&E- Media and Entertainment  
OTT- Over the top  
CCI- Competition Commission of India  
IPR- Intellectual Property Rights  
M&A- Merger and Acquisition

### 1. ABSTRACT

The Indian media and entertainment (M&E) industry is a burgeoning sector that is making major gains in the economy. Indian M&E sector is on the verge of a robust era of expansion, fueled by increased consumer demand and increasing advertising income. Over the last decade, the sector has been mainly pushed by increased digitalization and internet usage. The internet has nearly completely replaced traditional media and entertainment for the majority of people. Nobody can dispute that digital media and entertainment platforms have a substantial influence on our culture. The worldwide media landscape has shifted dramatically as a result of the corona virus epidemic. With governments imposing restrictions on people's movement, many are confined to their homes. As a result, social lives have shifted online, and online media consumption has seen a dramatic increase in recent years, driven by the at-home segments of television,

social media, online gaming, and over-the-top (OTT) media platforms.

With the industry's tremendous growth comes a slew of regulatory problems, including content regulation, broadcasting legislation, information technology regulation, social media regulation, and OTT regulation, among others. Additionally, these themes reinforce the importance of the digital economy, marketing, payment, net neutrality, and ethics, all of which have a significant impact on the M&E business. With so many industries and enterprises, whether traditional or newly entrants or entering through cross ownership, antitrust issues have and will continue to exist, and the respective competition regulators must keep a close eye on the industry, looking for any violations of applicable competition law provisions and analysing any potential antitrust issues. The purpose of this research is to examine the interaction and nexus between the digital media and entertainment sectors and existing competition law regulations, as well as to identify possible contemporary antitrust concerns in the digital sphere. The author intends to evaluate this by comparing competition law concerns in the old M&E business to how they could manifest in the industry's present digital era.

### 2. INTRODUCTION

Due to growing affluence and changing lifestyles, the Indian media and entertainment sector has enormous development potential across all categories. The Indian media and entertainment sector is expected to grow at a 13.5 percent compound annual growth rate from 2019 to 2024, reaching US\$ 43.93 billion in that year. Digitalization has altered competitiveness in established markets and



resulted in the emergence of several new ones. Today, technology, telecommunications, and internet-based firms dominate the world's most valuable brands. The Digital India campaign of the Indian government has enhanced online infrastructure, increased internet connection, and advanced research and technology. The platforms offer a range of services, including e-commerce (Amazon), social media (Facebook), online payment applications (Google Pay, Phone Pay), and search engines (Google).

However, several areas of M&E are experiencing growth during the lockout, most notably in TV, gaming, internet, and OTT. On the other hand, outdoor consumption patterns are collapsing as social distancing rules take hold, and the effect will continue long after the epidemic is over, owing to the new habit created. Additionally, the majority of segments (with the exception of news-related enterprises) are unable to supply fresh material due to stalled production across media. The M&E business is mostly reliant on advertising, which has witnessed a significant decline in recent years.

Competition policy is a type of public policy that aims to ensure that market competition is not constrained in any way that is damaging to society. The primary objective of competition policy is to safeguard society against damaging competitive conduct. Institutional support for fair and healthy competition necessitates the development of more effective regulatory and adjudicatory mechanisms. Numerous concepts interact and compete with the M&E sector in the

digital era, including media plurality, the digital economy, OTT services, digital marketing in the digital ecosystem, media ownership regulation, cross-media ownership, monopolistic trends, cases of overreach and abuse of dominance, intellectual property rights, merger and acquisition regulation, trade associations, and digital film distribution.

### 3. CONTEMPERORY CONUNDRUM AND INTERPLAY OF DIGITAL M&E WITH COMPETITION LAW

In August 2019, the CCI sought to conduct an analysis of the country's booming M&E industry in order to identify any gaps in the competitive environment and to investigate potential antitrust violations.<sup>1</sup> The research would be the first after Finance Minister "Nirmala Sitharaman" directed the Competition Commission of India (CCI) to probe antitrust activities and undertake market studies on its own. This raised the question of the extent to which competition law concerns exist in the digital M&E industry, as competition policy has a direct impact on the conduct of businesses and the structure of the industry. The researcher will now conduct an analysis and examination of the same.

While competition legislation is critical in all markets, it is especially critical in the digital world, where the digital M&E sectors are expanding in size and significance. Indeed, internet behemoths such as

<sup>1</sup> Kalra, A. (2019, August 27). *India antitrust watchdog to assess media, broadcasting sector*. U.S. Reuters. [https://www.reuters.com/article/india-](https://www.reuters.com/article/india-antitrust-media/india-antitrust-watchdog-to-assess-media-broadcasting-sector-idUSL3N25N230)

[antitrust-media/india-antitrust-watchdog-to-assess-media-broadcasting-sector-idUSL3N25N230](https://www.reuters.com/article/india-antitrust-watchdog-to-assess-media-broadcasting-sector-idUSL3N25N230) [Accessed at September 26, 2021]



Facebook,<sup>2</sup> Google,<sup>3</sup> Amazon, Disney, Netflix and Apple<sup>4</sup> are already subject to similar rules in the EU and the US, where they are accused of impairing competition. In India, Big Tech businesses have also been subjected to antitrust investigation. The CCI conducts these investigations, which encompass online search engines, Online Travel Agents (OTAs),<sup>5</sup> social media platforms,<sup>6</sup> e-commerce firms<sup>7</sup>, etc. For example, the CCI has brought numerous lawsuits against Google. Antitrust concerns regarding monopolization and misuse of monopolistic power have increased in lockstep with their market share growth. Google was fined €20.42 million in 2018 for "abusing its dominating position" in Google search by favouring its own services over those of competitors.<sup>8</sup>

### 7.1 Digital economy- Pondering upon the efficiency of antitrust conventional tools analysis and dynamic M&E digital structure

Digitalization has had a particularly profound effect on the M&E business, and the

application of competition law in digital media markets has become increasingly complicated. At every point along the value chain (most notably content distribution, end-customer access, and advertising technology), conventional media have been forced to fundamentally alter their business models. The digital economy is dynamic and fundamentally unique in comparison to traditional industries. Digital services are unusual in that they exhibit network effects, which implies that as more people use them, the product or service gets greater value.<sup>9</sup> On the one hand, this encourages market consolidation, while on the other side, it creates various channels for delivering digital services to end consumers. This indicates that newcomers can more readily and quickly challenge market power. Numerous competition authorities underlined the difficulty of resolving growing competition concerns in the digital economy using traditional competition techniques focused on pricing and consumer welfare. The dynamic structure of digital markets, zero-price services, network effects, market tipping, lock-in effects, and multi homing

<sup>2</sup> Satariano, A. (2020, June 23). *Facebook Loses Antitrust Decision in Germany Over Data Collection*. The New York Times. <https://www.nytimes.com/2020/06/23/technology/facebook-antitrust-germany.html> [Accessed at September 26, 2021]

<sup>3</sup> *Press corner*. (n.d.). (18 July, 2018) European Commission - European Commission. Retrieved September 26, 2021, from [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_18\\_4581](https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581) [Accessed at September 26, 2021]

<sup>4</sup> *Press corner*. (2020, June 16). European Commission. [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_20\\_1073](https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1073) [Accessed at September 26, 2021]

<sup>5</sup> Rubtub Solutions Pvt. Ltd. V MakeMyTrip India Pvt. Ltd. (MMT) CCI, Case No. 01 of 2020

<sup>6</sup> Harshita Chawla v WhatsApp Inc. CCI, Case No. 15 of 2020

<sup>7</sup> Delhi Vyapar Mahasangh v Flipkart Internet Private Limited and its affiliated entities and Amazon Seller Services Private Limited and its affiliated entities. CCI, Case No. 40 of 2019,

<sup>8</sup> Matrimony.com Limited v. Google, 8 February 2018. CCI, Cases Nos. 7 and 30 of 2012,

<sup>9</sup> Report of the International Developments and Comments Task Force on Positions Expressed by the ABA Antitrust Law Section between 2017 and 2019 (February 27, 2020), *Common Issues Relating to the Digital Economy and Competition*, American Bar, [https://www.americanbar.org/content/dam/aba/administrative/antitrust\\_law/comments/april-2020/sal-report-on-common-issues-relating-to-the-digital-economy-and-competition-final-4162020.pdf](https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/april-2020/sal-report-on-common-issues-relating-to-the-digital-economy-and-competition-final-4162020.pdf) [Accessed at September 26, 2021]



(the practice of simultaneously using multiple digital platforms, such as two different search engines) are all factors that must be carefully considered when defining markets and establishing market power in digital markets.<sup>10</sup>

### 7.2 Digital platform – Kill zone phenomenon, PPC and self-regulatory role of dominant platforms

A digital platform, in the form of platform apps, creates an environment for new enterprises. However, the platform owner frequently has the ability to delete apps running on its platform. Thus, every application running on the platform is in the platform owner's kill zone. A critical aspect of the kill zone phenomena is the platform owner's ability to sit back and watch innovation develop on its platform. When the platform owner notices an exceptionally fruitful invention, it can leap and devour it whole.<sup>11</sup> These massive client bases of big digital media and entertainment companies like Netflix and YouTube gather massive amounts of data on billions of users. The data is utilised to enhance the services available on digital platforms. In its current structure, competition law is incapable of addressing the numerous difficulties created by the growth of structural platforms, which tend to disrupt it.

Platform parity clauses ('PPC') are used by platforms to prevent sellers/service providers from providing their goods or services to other platforms on more favourable terms. The procompetitive effects (increasing efficiency by preventing free riding and increasing non-price competition) and anticompetitive effects (reducing price competition and raising entry barriers) of such PPC's and noted that their scope would need to be determined on a case-by-case basis as a vertical restraint or exclusionary unilateral abuse of dominance under the Act.<sup>12</sup>

Over the last two decades, the market for digital platforms has been dominated by a few large firms, sometimes referred to as GAFAM: Google, Amazon, Facebook, Apple, and Microsoft. The market capitalization of these five businesses exceeded USD 4 trillion in 2019 – more than double the value of the whole French CAC 40 stock index. While these platforms have evolved in distinct ways, their long-term success is owing to shared characteristics. This situation calls into doubt the efficiency of competition legislation. When platforms profit from an unchallengeable power

<sup>10</sup> Trade and Development Commission , Intergovernmental Group of Experts on Competition Law and Policy (Geneva, 10–12 July 2019), Eighteenth session, *Competition issues in the digital economy TD/B/C.I/CLP/54*, United Nations Conference on Trade and Development, [https://unctad.org/system/files/official-document/ciclpd54\\_en.pdf](https://unctad.org/system/files/official-document/ciclpd54_en.pdf) [Accessed at September 26, 2021]

<sup>11</sup> Keith N. Hylton (April 2019), *Digital Platforms and Antitrust Law*, Boston University School of Law

Scholarly Commons at Boston University School of Law,

[https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=1606&context=faculty\\_scholarship](https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=1606&context=faculty_scholarship) [Accessed at September 26, 2021]

<sup>12</sup> CCI, (January 08 2021), MARKET STUDY ON E-COMMERCE IN INDIA Key Findings and Observations,

[https://www.cci.gov.in/sites/default/files/whats\\_newdocument/Market-study-on-e-Commerce-in-India.pdf](https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf) [Accessed at September 26, 2021]



structure, there is a natural tendency toward market concentration.<sup>13</sup>

### 7.3 Digital Market- Multi sided markets, monopolistic structures and new forms of antitrust misconduct

M&E marketing is becoming a critical component of digital marketing. In the case of M&E marketing, the reach and size of the audience are unmatched. Top digital marketing companies have recognised the value of digital marketing in the media and entertainment industries and have developed methods to capitalise on this opportunity. Conventional marketing tactics and strategies are on the verge of extinction. Marketing is also undergoing a transformation in the M&E sector, with artificial intelligence (AI) and machine learning (ML) influencing how it is carried out. The era of mass marketing has passed us by. As the trend toward personalization gains traction, marketers will no longer be able to toss spaghetti at the wall and see what sticks. Today's streaming firms achieve marketing success by utilising AI and machine learning to analyse data on viewer behaviour. They target hyper-segmented consumers based on their search behaviours and expectations as determined by sophisticated algorithms.

Emerging digital M&E market structures are inconsistent with the Act's definition of competition, as established in an economic

study of a product market. The emphasis on monopolistic competition or oligopolistic markets that characterised the early years of competition law implementation runs counter to the monopolistic architecture of digital platform marketplaces. Competition regulators are tasked with recognising platform market activity that veer toward monopolistic arrangements. While there has been a churning of various antitrust violations along the process, competition law and regulations defining or redefining the public interest are fundamental to the process.<sup>14</sup> Numerous digital marketplaces are extremely concentrated, with a single dominating business controlling a large portion of the industry. According to several industry estimates, Google, for example, controls more than 90% of the "search" or "search engine" market.<sup>15</sup> In the OTT industry, for example, Netflix and Amazon Prime have a significant lead over other platforms in India.

### 7.4 Position of relevant market – Imbibing the digital platform concept of zero price and boundary less markets

The relevant market definition determines whether an agreement will be subject to de minimis (insignificant) limits, whether it will be exempt from general block exemption regulations, whether an undertaking will be in a dominant position, and, to a significant extent, whether a merger will be permitted.

<sup>13</sup> Faure-Muntian, V. (2021, June 30). *Competitive Dysfunction: Why competition law is failing in a digital world*. The OECD Forum Network. <https://www.oecd-forum.org/posts/competitive-dysfunction-why-competition-law-is-failing-in-a-digital-world> [Accessed at September 26, 2021]

<sup>14</sup> Gouri, G. (2020, September 25). *Convergence of competition policy, competition law and public interest in India*. Russian Journal of Economics.

<https://rujec.org/article/51303/> [Accessed at September 26, 2021]

<sup>15</sup> John M. Newman (Vol. 72:5:1497:2019), *Antitrust in Digital Markets*, VANDERBILT LAW REVIEW, <https://cdn.vanderbilt.edu/vu-wp0/wp-content/uploads/sites/278/2019/10/11172710/Antitrust-in-Digital-Markets-1.pdf> [Accessed at September 26, 2021]



With many of its peculiarities, the digital economy complicates the use of established approaches for defining relevant markets. It is necessary to propose a new technique that is more suited to digital markets, particularly zero-price marketplaces.

Markets with no prices are ones in which no direct financial transaction exists between a vendor or a service provider and a client. Social networks are a frequent example of zero-price markets. The majority of users do not pay to use social media platforms such as Facebook, Twitter, or Instagram. It goes without stating that certain users, mostly advertising, pay for specific transactions.

However, the absence of financial transactions does not always imply that these marketplaces are totally unregulated. Buyer-seller exchanges are analogous to those seen in conventional markets, in that “firms find it lucrative to trade zero-price items with customers in return for their attention or information.” Attention as a currency is based on the reality that producers of zero-cost items fiercely fight for customers. Social networks and other providers operating on zero-price markets derive a substantial portion of their revenue from data given by users.<sup>16</sup>

Current competition law is founded on a traditional understanding of markets: if you

conduct business offline in India, you operate in a "relevant" market. However, digital media has spawned a new kind of place. It is impenetrable. Technology platforms' economic model is founded on dynamic innovation, and their market boundaries continually alter in response. For example, how can the WhatsApp market be defined? WhatsApp started as a chat network but has now expanded to incorporate a number of other services, including peer-to-peer money transfer.<sup>17</sup>

Digital platforms are defined by network effects and multisidedness, as well as by high switching costs, economies of scale, and degrees of data management, all of which are essential in defining the relevant market. Small but significant non-transitory increase in price (SSNIP) and hypothetical monopoly tests are based on pricing mechanisms and hence may not be effective methods for defining a relevant market in situations involving digital platforms that give free items or services in return for data.<sup>18</sup>

### 7.5 OTT Services – Distribution of content online and cartelization of few entities

Concurrently, we have seen a global increase in digital media consumption, as individuals sought amusement from the OTT (Over the top) platforms comfort of their homes, since

<sup>16</sup>Mária T. Patakyová, (2020), *COMPETITION LAW IN DIGITAL ERA – HOW TO DEFINE THE RELEVANT MARKET?*, EMAN 2020 Conference Proceedings The 4th Conference on Economics and Management, <https://eman-conference.org/wp-content/uploads/2020/10/EMAN.2020.171.pdf> [Accessed at September 26, 2021]

<sup>17</sup>Sivasubramanian, A. (2021, April 11). *To regulate WhatsApp and Big Tech, India's competition panel needs more teeth – and fresh thinking*. Scroll.In.

<https://scroll.in/article/990939/to-regulate-whatsapp-and-big-tech-indias-competition-panel-needs-more-teeth-and-fresh-thinking> [Accessed at 21st September 2021]

<sup>18</sup>BEUC's response to the public consultation, *MARKET DEFINITION IN EU COMPETITION LAW ENFORCEMENT: NEED FOR AN UPDATE*, BEUC, [https://www.beuc.eu/publications/beuc-x-2020-092\\_beuc\\_response\\_public\\_consultation\\_on\\_market\\_definition.pdf](https://www.beuc.eu/publications/beuc-x-2020-092_beuc_response_public_consultation_on_market_definition.pdf) [Accessed at September 26, 2021]



theatres and theatres remained closed due to the epidemic.<sup>19</sup> Here, the dominant digital media platform's monopolistic inclinations work overtime to get the upper hand in content distribution, which may result in a variety of anti-competitive behaviours and combinations.

One of the fundamental benefits of an over the top service provider is the low barrier to entry for new services, as no infrastructure investment is required in each nation where the service would be accessible. The over-the-top supplier may build and deploy the service in a single nation while gaining near-instant global access. This is extremely helpful from a competitive standpoint. To a certain extent, OTT services may need to be brought inside the ambit of each jurisdiction's current regulatory frameworks. OTT providers are quite diverse in terms of their products, value chain placement, and scale. Obligations should be imposed with a strong emphasis on proportionality.

Certain OTT services serve as replacements for and compete with traditional Internet Service Provider (ISP) services, eroding traditional income streams, used to maintain or recruit consumers. These factors raise worries about anti-trust issues. The Business Standard was the first to announce that CCI intends to conduct a research on film distribution and the impact of OTT on theatrical premieres. The anti-trust agency has received complaints from cinema owners saying that distributors are failing to provide

films and that larger participants, such as producers and large multiplexes, are monopolizing release dates.

Cartelization in the OTT sector is perilous, since a few firms monopolise it. Only Netflix and Disney+ Hotstar, he added, ebuy star-heavy big films because they believe in star value. This year, platforms are scared of it since they have not seen a return on their efforts, and as a result, the OTT platforms moved into acquisition mode, as there was a big audience waiting to be served and content availability was extremely limited.<sup>20</sup>

#### **7.6 Cross media ownership and Media Concentration- Integration resulting into potential curbing of free competition**

The ownership of several media outlets lays its trust in the Competition Commission of India (CCI) to ensure fair competition and market plurality. The Competition Act's mission may be somewhat comparable to that of the proposed special cross-ownership legislation in that it controls anti-competitive agreements, misuse of a dominant position, and combinations to avoid a material detrimental effect on competition (AAEC). However, the media market's particular characteristics make it difficult to successfully implement general competition rules. The major problem is the act's limited definition of market and the CCI's comparable interpretation. It is anticipated that this type of cross ownership in digital M&E, which results in vertical integration,

<sup>19</sup> Dar, A. (2021b, March 3). *New Rules For Digital Media Platforms And Intermediaries*. Mondaq. <https://www.mondaq.com/india/media-entertainment-law/1042234/new-rules-for-digital-media-platforms-and-intermediaries> [Accessed at September 26, 2021]

<sup>20</sup>Farooqui, J. (2021, May 12). *Cartelisation in the OTT space is dangerous: Siddharth Anand Kumar*.

Exchange4media.

<https://www.exchange4media.com/digital-news/if-i-made-a-film-there-are-only-a-few-places-where-i-can-go-to-sell-a-film-112892.html> [Accessed at September 26, 2021]



will result in monopoly and may stifle free competition, and that a clear approach to cross media and ownership restrictions is necessary for the broadcasting sector's future growth, particularly in the digital realm. Recent evidence of cross-media ownership occurred when Reliance announced the debut of Jio's OTT platform, dubbed 'Jio First Day First Show.' Users will be able to see films on the same day they are released. This platform is expected to launch in mid-2020. This immediately places Reliance Jio in direct rivalry with Hotstar, Netflix, and Amazon Prime.<sup>21</sup>

The Supreme Court decided in *Indian Express Newspaper v. Union of India* that cross-ownership exerts excessive influence over press freedom and that current legislation has manifestly failed to address it. Additionally, it demonstrates a failure of the Competition Act and demonstrates how media must be handled uniquely and separately. It is critical to remember that cross-ownership legislation is not a goal in and of itself, but rather a means to an end of increased media plurality. Any proposed legislation must have this in mind.<sup>22</sup>

Concentration in the media industry is detrimental to variety and pluralism. Due to the rising concentration of media markets globally in recent years, several questions have arisen about whether competition law and policy are sufficient to preserve media

variety and pluralism. Competition regulations can solve concentration, efficiency, and choice concerns, and will tend to promote dispersed ownership and new entrants. They cannot, however, promise any of it.<sup>23</sup>

### 7.7 Media plurality – Antitrust nature of M&E entities and Horizontal monopolies

In the world of social media, the phenomenon of media plurality is widespread and characterised by a high degree of pluralism, particularly when information is disseminated through major digital platforms such as Facebook, Instagram, and Twitter, where there is no easy way to distinguish the genuine from the plethora of fake. By and large, dominant firms bear a unique duty not to act in ways that would be detrimental to the market. Discriminatory behaviour (behaving differently with equivalent customers), predatory pricing (pricing below cost in order to drive competitors out of the market), excessive pricing (pricing significantly above cost), refusal to supply (preventing competitors from accessing services or simply refusing to deal with certain customers) and margin squeezing are all examples of abusive behaviour (where a company that is present on both the upstream and downstream markets charges competitors on the downstream market prices whereby its competitors cannot sell the products profitably). As such behaviour may

<sup>21</sup>Khatri, B. (2019, August 27). *CCI To Probe OTT Platforms, Media Companies For Competitive Gaps*. Inc42 Media. <https://inc42.com/buzz/ahead-of-reliance-entry-media-and-ott-segment-under-cci-scanner/> [Accessed at September 26, 2021]

<sup>22</sup> Review, L. S. P. (2021, April 8). *Media Cross-Ownership: Does Competition Law Suffice?* Law School Policy Review & Kautilya Society.

<https://lawschoolpolicyreview.com/2021/04/03/media-cross-ownership-does-competition-law-suffice/> [Accessed at September 26, 2021]

<sup>23</sup> Bilir, H. (2005, February 2). *Media Ownership Control: To What Extent Is Competition Law And Policy Sufficient to Provide for Diversity and Plurality in the Media?* IDEAS. <https://ideas.repec.org/p/met/stpswp/0508.html> [Accessed at September 26, 2021]





come from organic expansion or acquisitions, authorities are need to monitor the industry closely to ensure that consumer rights are not jeopardised.<sup>24</sup>

While the Reliance-Network18 merger is a significant threat to media plurality, it complied with competition law simply because competition rules are broad in scope and aim to maintain low entry barriers for new companies. Competition law is not designed to handle the plurality of news and opinions, which is an issue for the media sector in addition to the wider concern about low entry barriers. While competition in media markets is important, it is insufficient to maintain media ownership diversity. We require more media-specific regulatory mechanisms capable of preventing horizontal media monopolies across languages, states, and types of content, as well as preventing the emergence of horizontal monopolies.

### 7.8 Monopolistic trends creating barrier to entries

Monopoly in the manufacturing and engineering industries enables repression and political control, as well as the perpetuation of existing inequities, injustices, and exploitation.<sup>25</sup> Today, the digital M&E business is dominated by a small number of

corporations that operate in an oligopolistic fashion. However, the presence of a few gatekeepers who dominate a digital environment has endowed this chosen few with the ability to set the rules of the game and participate in continual self-preferencing, which may result in monopoly. Due to their market dominance and few external choices, certain platforms are increasingly able to dictate terms and conditions to users, increase use fees, control data flows from sellers to users, and distort the competitive process to their benefit.<sup>26</sup>

Due to high entry barriers and fierce rivalry from large and established M&E consolidations, smaller and less well-known firms seldom survive. Although antitrust laws protect the market against monopoly, oligopolies in which members operate in tandem to create the effects of a monopoly do not violate antitrust laws. This enables anticompetitive and monopolistic behaviour to occur without severe consequences. Oligopolies do not exist just in the M&E business; they exist in virtually every service that has been ingrained in our lives.<sup>27</sup>

Snapchat's saga, a multimedia messaging service, is an excellent illustration of this. Noticing Snapchat's growing popularity among teenagers.<sup>28</sup> Facebook offered to

<sup>24</sup>Penny, L. (2013, June 1). *Media plurality - competition law issues*. TaylorWessing. [https://www.taylorwessing.com/download/article\\_me\\_diaplurality.html](https://www.taylorwessing.com/download/article_me_diaplurality.html) [Accessed at September 26, 2021]

<sup>25</sup> Monopoly of the media | World Problems & Global Issues | The Encyclopedia of World Problems. (2019, June 18). UIA Encyclopedia. <http://encyclopedia.uia.org/en/problem/140412> [Accessed at September 26, 2021]

<sup>26</sup> Ariel Ezrachi and Agustín Reyna, (2019) *The Role of Competition Policy in Protecting Consumers' Well-being in the Digital Era*, BEUC European

Commission Organizer [https://www.beuc.eu/publications/beuc-x-2019-054\\_competition\\_policy\\_in\\_digital\\_markets.pdf](https://www.beuc.eu/publications/beuc-x-2019-054_competition_policy_in_digital_markets.pdf) [Accessed at September 26, 2021]

<sup>27</sup> Dorji, C. (2017, October 26). *Antitrust : Fighting Monopoly in the Age of the Oligopoly*. Film and Digital Media. <https://filmanddigitalmedia.wordpress.com/2017/10/25/antitrust-fighting-monopoly-in-the-age-of-the-oligopoly/> [Accessed at September 26, 2021]

<sup>28</sup> *Supra* Note 49



purchase it from users. When that effort failed, Facebook attempted to replicate Snapchat's features. Google allegedly tried to acquire Snapchat as well, but then shifted its focus to imitation. Numerous experts attributed Snapchat's user growth and share price declines to these methods.<sup>29</sup> The greatest detrimental impact of a dominating position is that companies have no motivation to enhance their productive capacity because they already benefit from monopoly rents.

### **7.9 Social media- Issue of dominant abuse, monopolization, control and anti-competitive use of big data withholding**

Social networking services are critical for connecting and networking. During the Covid-19 epidemic, it was discovered that social media usage surged significantly. However, certain platforms, such as Facebook, abuse their monopoly on social networking to engage in anticompetitive behaviour. The United States' Federal Trade Commission ("FTC") has sued Facebook for monopolisation. Following its acquisitions of Instagram and WhatsApp, and the imposition of anti-competitive constraints on software developers, it is alleged that Facebook engaged in a systematic plan to eliminate challenges to its monopoly. This resulted in a scarcity of social networking choices for internet users and an absence of competitive pricing for marketers. The Indian Competition Commission regarded data privacy as a non-price competition criteria

<sup>29</sup> Garima Sharma Nijhawan and Prof. (Dr.) Surbhi Dahiya (Dec 2020), *ROLE OF COVID AS A CATALYST IN INCREASING ADOPTION OF OTTS IN INDIA: A STUDY OF EVOLVING CONSUMER CONSUMPTION PATTERNS AND FUTURE BUSINESS SCOPE*, Amity School of Communication, Madhya Pradesh [ISSN: 2456-9011

and discovered an exploitative and exclusionary compromise on this parameter by the leading social networking app.

CCI filed a suo moto order against WhatsApp under section 26(1) of the Act. WhatsApp is claimed to be the leading participant in India's OTT messaging apps via smartphones. WhatsApp's new privacy policy does not provide users with the opportunity to opt out of the terms and policies governing the sharing of their data with other Facebook firms. The regulator referred to the policy as a 'take it or leave it' policy, describing it as wide, imprecise, and incomprehensible. It provides the firm with an unfair competitive advantage and steals away users' majority sovereign right over their personal information. Thus, WhatsApp appears to have violated Section 4 of the Act due to its exclusionary and exploitative nature. The Director-General of CCI has been directed to conduct an investigation and submit a report within 60 days after receiving the aforementioned directive. The Delhi High Court has declined to suspend the Competition Commission of India's (CCI) decision dated 24 March 21 mandating an inquiry into WhatsApp's new data privacy policy for alleged misuse of dominant position in the market for Over-The-Top (OTT) messaging apps through smartphones'.<sup>30</sup>

The CCI's intervention in the WhatsApp issue exemplifies a trend in which antitrust authorities seek to compensate for the lack or

(Online)

[https://www.amity.edu/gwalior/jccc/pdf/dec\\_28.pdf](https://www.amity.edu/gwalior/jccc/pdf/dec_28.pdf)  
[Accessed at September 26, 2021]

<sup>30</sup> WhatsApp LLC v/s Facebook Inc , CCI Suo Moto Case No. 01 of 2021  
[https://www.cci.gov.in/sites/default/files/SM01of2021\\_0.pdf](https://www.cci.gov.in/sites/default/files/SM01of2021_0.pdf)



weakness of other laws/regulations. A more effective approach to address WhatsApp's data collecting activities would have been through a personal data protection law, which is still being considered by a parliamentary committee.

True, such social media platforms may assert that they survive on User Generated Material (UGC) and, in contrast to traditional media, exert no editorial control over the content prior to transmission/publication/dissemination. This may be accurate to a limited extent about the original publishing of the content, since the bigger controversy concerns the platforms' treatment of the content post-publication. In other words, assuming that editorial control may be exercised solely prior to material publishing may be incorrect, given the nature of such platforms and their ex post facto editorial control, which is generally allowed for and formalised in their privacy policies and terms of service.<sup>31</sup>

#### 7.10 IPR – Interplay with competition law and issues in the digital platforms

Both competition law and intellectual property law have emerged as distinct bodies of law, notwithstanding their overlap. While competition law seeks to expand access, intellectual property law seeks to restrict it. By establishing limitations within which rivals can exert their control over their property, intellectual property rights appear to violate competition law. Section 3

discusses anti-competitive agreements, but section 3(5) discusses the interface between the laws, which provides a blanket exemption for IPR-related licencing agreements in order to promote market innovation, but also regulates practises that have a Significant Effect on the Market due to the abuse of such dominant position under Section 4.<sup>32</sup> Each IPR subject matter does not have to be in violation of competition law. Simply expressed, limitations associated with intellectual property licencing agreements are banned if they have the potential to have a material detrimental effect on competition (AAEC). Unless the IP licensor possesses considerable market power, the CCI is unlikely to reach an AAEC conclusion. For example, any attempt by an IP licensor to influence the IP licensee's pricing decisions (for the licenced IP) would be seen suspiciously as a potential 'resale price maintenance' agreement.

Copyright is the most often violated intellectual property right in the M&E. The interaction between the two disciplines is rather complex, as the two are in conflict, which is why, in younger countries such as India, Copyright Law is excluded from competition law applicability. However, as the sector grows, the two rules work in tandem to promote dynamic competition in the market. Nonetheless, when it comes to application, Competition Law is used to limit the Copyright's exclusivity. Copyright law is intended to safeguard the interests of creators of motion pictures, books, and other

<sup>31</sup> Deepak, S. J. (2021, February 6). *Social media, free expression and competition law*. The Daily Guardian. <https://theguardian.com/social-media-free-expression-and-competition-law/> [Accessed at September 26, 2021]

<sup>32</sup> Maheshwari, N. (2019, May 21). *Conflict Between Intellectual Property Law And Competition Law: Critical And Comparative Analysis*. Mondaq. <https://www.mondaq.com/india/cartels-monopolies/807504/conflict-between-intellectual-property-law-and-competition-law-critical-and-comparative-analysis?type=popular> [Accessed at September 26, 2021]

*Critical And Comparative Analysis*. Mondaq. <https://www.mondaq.com/india/cartels-monopolies/807504/conflict-between-intellectual-property-law-and-competition-law-critical-and-comparative-analysis?type=popular> [Accessed at September 26, 2021]



copyrightable works and to motivate them to create new works.

This was also a point of contention in the film Vishwaroopam. <sup>33</sup>S3(5)<sup>34</sup> of the Competition Act exempts agreements entered into in support of the exploitation of an intellectual property right. If the licencing conditions are 'reasonable,' IP owners are permitted to impose any restriction.

IP infringement on digital media can manifest itself in a variety of ways:

- Counterfeit products - sadly, the internet is replete with counterfeit goods. While counterfeiters formerly operated through independent websites and e-commerce platforms such as Amazon and eBay, they now appear to be selling their wares via social networking platforms.
- Unauthorized material - Intellectual property infringement can also occur as a result of the unauthorised use or distribution of content, such as text, photos, or videos.
- Trade mark infringement by businesses - both registered and unregistered trade mark rights.
- Infringing products - this might be a registered or unregistered design or a patent protecting a product. <sup>35</sup>

There are several instances illustrating the intersection between IPR and competition

<sup>33</sup> *Raaj Kamal Film International Informant v. M/s Tamil Nadu Theatre Owners Association Opposite Party*  
[https://www.cci.gov.in/sites/default/files/012013\\_1.pdf](https://www.cci.gov.in/sites/default/files/012013_1.pdf) Case No. 01 of 2013

<sup>34</sup> Nothing contained in this section shall restrict—the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under:

law. The Bombay High Court decided in *Aamir Khan Productions Pvt. Ltd. v. Union of India*,<sup>36</sup> that the CCI has jurisdiction over all cases relating to competition law and intellectual property rights. Additionally, the CCI determined that an IPR-related right is not sovereign in character but rather a statutory right conferred by a statute<sup>37</sup>

The Supreme Court highlighted the issue of conflicting legislation in *Entertainment Network (India) Limited v. Super Cassette Industries Ltd*, <sup>38</sup>, the court comments that while the copyright holder retains complete monopoly, the monopoly is restricted in the sense that if the monopoly disrupts the smooth running of the market, it violates competition law, as was the case with the rejection of licence. While it is true that IPR owners can reap the benefits of their labour through licencing, this is not always the case. The court decided in *Union of India v. Cyanamide India Limited & Another* that charging exorbitant rates for life-saving medications falls within the purview of price regulation and that the CCI has jurisdiction over such matters. When alternatives are few, there is always a risk of monopolisation, which impairs market efficiency. Additionally, the same idea has been reaffirmed in many jurisdictions.<sup>39</sup>

Historically, intellectual property protection has been a highly valued and successful

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<https://www.clarionsolicitors.com/articles/intellectual-property-infringement-on-social-media-a-growing-problem>

<sup>36</sup> (2010) 112 Bom L R 3778,

<sup>37</sup> *Kingfisher v. Competition Commission of India*, Writ petitions no. 1785 of 2009.

<sup>38</sup> 2008(5) OK 719

<sup>39</sup> *United States v. Microsoft*, 38 1998 WL 614485 (DDC, 14 September 1998).



instrument for discouraging those who would do so. Now that distribution has become increasingly digitally connected and worldwide in scope, IP protection is critical to the total growth that our species is capable of. Regulators, however, have not kept up with technological advancements, enabling for unscrupulous actors to benefit on the efforts of others. The media and entertainment industries are diverse, encompassing television serials, feature films, radio, music, and over-the-top (OTT) platforms such as Netflix and Amazon Prime. Within this vast business, directors, producers, screenwriters, actors, artists, and technicians labour day and night to get the screenplay to the screen. Given the amount of labour and money involved, it is critical to safeguard this industry's intellectual property rights. Intellectual property protection safeguards unique ideas and inventions while also accelerating the growth of the firm.<sup>40</sup> As there is not clear tools and demarcation for identifying IPR infringements in the digital platforms, it makes it readily easy to use other people's intellect and innovation to have a competitive advantage which shall in turn hinder free and fair competition in the market which the antitrust scrutiny ultimately strives for.

### **7.11 Abuse of dominant position- Slow enforcement machinery and instances of how dominance is abused**

Numerous competition law enforcement concerns might arise as a result of M&E's

digital transformation, particularly if either the on-demand platform or the content supplier has a dominating market position. Industry leaders may not have developed yet. However, the proliferation of digital media providers will eventually result in new media consolidation (either vertical or horizontal consolidation), raising possible antitrust problems.

The present mechanism for enforcing competition law is inefficient in sophisticated technical areas such as digital platforms, and by the time effective rulings are issued, the market may have already 'tipped' in favour of the guild business. Additionally, the prominence of certain digital platforms has elevated them to the status of de facto 'gatekeepers' of particular online markets, since they set the conditions of entry for users. Intriguingly, in digital marketplaces, a business can have a detrimental effect on competition even if it does not have a dominating position. While the CCI is actively promoting fairness in digital markets, the necessity for some sort of regulation is clearly apparent.

The information imbalance and analytical capability of dominant rivals in digital M&E enables data-driven businesses to leverage advanced algorithms and machine learning techniques to facilitate targeting, discriminatory practises, and behavioural manipulation. These activities may have an effect on demand patterns and wealth distribution.<sup>41</sup>

<sup>40</sup> Banerjee, S. (2021, July 8). *Role of IP in media and entertainment*. Ipleaders. <https://blog.ipleaders.in/role-of-ip-in-media-and-entertainment/>

<sup>41</sup> BEUC, (28 November 2018) '*Personalised pricing in the digital era*', note for the joint meeting between

the OECD Competition Committee and the Committee on Consumer Policy, [https://one.oecd.org/document/DAF/COMP/WD\(2018\)129/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2018)129/en/pdf)



The aforementioned issue is best illustrated by the case of *Matrimony.com vs. Google*<sup>42</sup>, in which the CCI determined that Google was dominant and abused its control on three counts:

- a) The Act's Section 4 (2) (a) I was breached by an unfair practise of pre-determined ranking of ads that was not strictly based on relevancy. This judgement was made due to Google's habit of assigning preset places (1st, 4th, and 10th) to their Universal Search design for display during a user's search, regardless of its relevancy to the searched item.
- b) Unfair imposition of search options/services on consumers by conspicuous display and positioning of Commercial Flight Units with a link to Google's specialised search option for flights also breached Section 4 (2) (a) I of the Act by depriving them of alternative choices.
- c) The limitations placed on publishers by the negotiated search intermediation agreements are unjust since they limit their options and prevent them from utilising competing search engines' search services. This violates Sections 4 (2) (a) I 4 (2) (c), and 4 (2) (e) of the Competition Act, 2002.

### **7.12 Horizontal and vertical integration - Anti competitive integration and antitrust compliance review of commercial agreements**

Industry players are also confronted with the subject of antitrust compliance examination of their commercial agreements. Antitrust analysis becomes more complicated as a result of new kinds of online dissemination. A party to an agreement in the new digital media environment might be a supplier, a content provider, a platform operator, a joint selling partner, and/or a competitor.<sup>43</sup> With the rise of digital platforms, concepts such as 'cartelisation' and 'predatory pricing' are no longer as straightforward as they once were. Three new processes are initiated as a result of digital platforms. Digitisation, de-intermediation, and de-agglomeration. This same pattern of digitisation-disintermediation-disaggregation has permeated several other sectors of the M&E business.<sup>44</sup>

Vertical constraints on digital M&E businesses may have a harmful effect on competition and customer welfare. While such constraints may be justified in order to safeguard non-price dimensions of competition (e.g., through exclusive or selective distribution partnerships to avoid free riding on a distributor's customer service), they can also reduce competition within product marketplaces. For instance, a provision requiring price parity may compel certain suppliers to offer at a higher specified price.

### **7.13 Cartelization in film distribution- Potential to transpire into the digital platforms and OTT**

<sup>42</sup> Case Nos. 07 and 30 of 2012, <https://www.cci.gov.in/sites/default/files/07%20%26%20%2030%20of%202012.pdf>

<sup>43</sup> Ioannis Lianos (August 2019), *Competition Law for the Digital Era: A Complex Systems' Perspective*, Centre for Law, Economics and Society (CLES) Faculty of Laws, UCL London,

[https://www.ucl.ac.uk/cles/sites/cles/files/cles\\_6-2019\\_final.pdf](https://www.ucl.ac.uk/cles/sites/cles/files/cles_6-2019_final.pdf) [Accessed at September 26, 2021]

<sup>44</sup> Balakrishnan, A. (2021, June 18). *Competition Law in Digital Platform Era*. Rediff. <https://www.rediff.com/business/column/ajit-balakrishnan-competition-law-in-digital-platform-era/20210618.htm> [Accessed at September 26, 2021]



This issue was presented in the case of *FICCI Multiplex Association of India v. United Producers/ Distributors Forum*<sup>45</sup> which concluded that "controlling and fixing the market" is a necessary component of cartel formation. The Association of Motion Picture and Television Program Producers and the Film and Television Producers Guild of India Ltd acted in a cartelized manner. Certain agreements between operators and producers/distributors were made to restrict supply. One of the arguments advanced by the opposing parties was that the agreement between the association of producers/distributors created had to be similar to a joint venture designed to increase efficiency<sup>46</sup>. However, in this case, the CCI determined that because the producers/distributors failed to demonstrate how the impugned agreement increased efficiency in production, supply, and other areas, and that, on the contrary, the controlled/limited supply of the films increased prices, the CCI rejected the opposing parties' arguments and imposed a penalty on the defendants.

Several examples of cartelization (section 3(3)) include the following:

The Kerala Film Exhibitors Federation (KFEF) is responsible for instructing distributors not to give Malayalam and Tamil language film prints to M/s. Crown Theatre. And if a distributor does not comply with KFEF's directives, the distributor is

boycotted, and the distributor's films are not played in the State of Kerala's member cinemas.<sup>47</sup>

Similarly, M/s PVR Ltd. complained about M/s Film Distributors Association (Kerala) FDA (K) imposing a revenue sharing model on PVR rather than enabling PVR to negotiate individually with the association's individual distributors. Additionally, they enforced fines/penalties for disobedience and prohibited films from being screened in other cinemas throughout Kerala.<sup>48</sup>

The CCI stated that denying market access to films or programmes in other languages by the Karnataka Film Chamber of Commerce (KFCC) is unjustifiable because a film producer or artist has the option of dubbing his film in another language or not. Similarly, the spectator should have a choice in terms of film/programme selection. Thus, the Commission found that the Kerala Film Exhibitors Federation and Others' practise of restricting film distribution to pre-selected release centres violates the Act's requirements of section 3(3)(b) read in conjunction with section 3(1).

The centuries-old associations are utilised as platforms to cartelize and obstruct the open market, admission of new companies, and technological advancements. The cinema associations cannot fight new technology or creative and superior technological solutions disguised as an association, since the

<sup>45</sup>(25.05.2011 – CCI), Case No.01/2009

<sup>46</sup> The Proviso to Section 3(3) of the competition Act states: Provided that nothing contained in this subsection shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

<sup>47</sup> Re:M/S. Crown Theatre vs Kerala Film Exhibitors COMPETITION COMMISSION OF INDIA, Case No. 16 of 2014

<sup>48</sup> M/s Cinemax India Limited (now known as M/s PVR Ltd.) v. M/s Film Distributors Association (Kerala) (Competition Commission Of India) 62/2012 | 23-12-2014



competitive forces manifested in consumer choices will take control and will not be protected by competition law.<sup>49</sup> There are several examples of cartelization in the conventional M&E business, which is likely to expand in the digital era due to the industry's rapid growth.

#### **7.14 Combination regulation- Merging and acquiring to impede competition, a trend in the digital M&E**

The Indian competitive landscape is quickly developing and has begun to address these problems. Apart from acquisition, another strategy for establishing market power is to persuade customers through the use of their financial capital to subsidise their goods. This technique is especially appealing for bigger businesses with access to greater financial capital, which may engage in activities such as deep discounting, cash-back incentives, and other programmes aimed at attracting new customers and establishing the network effect.

One strategy for dominating platforms to stymie market competition is to acquire prospective competitors. A growing worry in the digital era is if and when the purchase of targets with specialised data resources might considerably restrict competition via horizontal, vertical, or conglomerate impacts. While these mergers can be beneficial to

competition by enabling the provision of new services through access to richer data sets, they can also result in a concentration of control over valuable and non-replicable data resources and provide merging parties with better data access than their competitors; when they result in a particularly valuable combination of different data sets.<sup>50</sup>

When media companies merge, net neutrality is jeopardised. These large corporations, who also control internet usage and the radio, may potentially make information available that is slanted in their political direction or limit usage for opposing political views, thereby destroying net neutrality.

In markets where there are still rivals who may exert restriction on the merging businesses without jeopardising the market's competition, the CCI tends to take a more permissive stance on the subject at hand. This tendency resurfaced in the CCI's approach to the Prime Focus Limited merger with Reliance MediaWorks Limited. When considering this combination, the CCI conducted a survey of the market for post-production services to ascertain information about existing competitors, and concluded that due to the abundance of competitors, there were no concerns about adverse effects on competition to consider, and thus the referred to combination was approved by the CCI.<sup>51</sup>

<sup>49</sup> Sanghi, A. (2018, February 17). *Cartelization in film industry in India*. MarketExpress. <http://www.marketexpress.in/2018/02/cartelization-in-film-industry-in-india.html> [Accessed at September 26, 2021]

<sup>50</sup> Some examples- Commission decision of 6 September 2018 in Case M.8788 – Apple/Shazam; Commission decision of 6 December 2016 in Case M.8124 – Microsoft/LinkedIn; Commission decision of 3 October 2014 in Case M.7217 –

Facebook/WhatsApp; Commission decision of 4 September 2012 in Case M.6314 – Telefónica UK/Vodafone UK/Everything Everywhere/JV; Commission decision of 11 March 2008 in Case M.4731 – Google/DoubleClick.

<sup>51</sup> Pandey, A. (2019, January 18). *M&A transaction in TV and Entertainment Industry*. IPleaders. <https://blog.ipleaders.in/ma-transaction-tv-entertainment-industry/> [Accessed at September 26, 2021]





The CCI considered various criteria in finding that the Combination would not raise any AAEC concerns, including the Parties' and their rivals' market share, existing market circumstances, and competitive limitations imposed by other competitors. The CCI examined nine horizontal overlaps between the Parties while assessing the Combination. Additionally, the CCI evaluated three vertically related markets for the Combination and concluded that there would be no adverse competition law concerns because each vertical market was characterised by either a negligible presence of the Parties or the presence of significant competitors who would continue to exert competitive constraints on the Parties post-Combination.

This is critical from a competitive standpoint since, as seen above, numerous large technology companies have purchased startups at an early stage in order to eliminate possible competitors and build ecosystems. Possessing a dominating position in any segment of the market provides a business with a competitive edge in promoting their other services.

The increased concentration of market power within a few digital giants will disproportionately harm small and medium-sized businesses, startups, and, of course, end consumers. Both end users and smaller businesses must be aware of the competition

problems that arise in a constantly changing market and take steps to protect their share.<sup>52</sup>

### 7.15 Problems in timely enforcement

In India, there hasn't been much jurisprudence established in terms of alternate methods for resolving competition concerns. Although government enforcement is a viable option, it seldom assists the direct victims of unlawful activity, forcing them to turn to private action. This results in a multiplicity of procedures before several fora, which is fiercely opposed by many academics who advocate solely public enforcement of competition law concerns, given the nature of the conflicts. The lack of jurisprudence on the arbitrability of competition law issues only raises unresolved concerns about whether arbitration may be utilised as another instrument for competition law enforcement. However, the total lack of private enforcement would prohibit parties involved in competition-related disputes from being compensated, as penalties issued by statutory authorities for violations of the Act would not compensate the injured party for its losses.<sup>53</sup> Because of the fast speed of the digital M&E business, private enforcement is required to deal with cases promptly and quickly.

Private enforcement is a relatively new idea in India, yet it is one of the most important aspects of competition law, requiring litigation or alternative dispute resolution

<sup>52</sup> Author, G. (2021, February 16). *Competition law issues in digital advertising and search services market*. MediaNama. <https://www.medianama.com/2020/10/223-competition-law-issues-in-digital-advertising-and-search-services-market/> [Accessed at September 26, 2021]

<sup>53</sup> Payel Chatterjee and Simone Reis, *Competition Commission of India vis-à-vis Alternate Forums - Is it actually an option?*, Private Enforcement of Competition Law Issues, Nitesh Desai, [https://www.nishithdesai.com/fileadmin/user\\_upload/pdfs/Research%20Articles/Private%20Enforcement%20of%20Competition%20Law%20Issues.pdf](https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Articles/Private%20Enforcement%20of%20Competition%20Law%20Issues.pdf) [Accessed at September 26, 2021]



processes as a means of settling competition issues. There hasn't been a single case resolved in India on private enforcement to far, although there are outstanding cases awaiting a decision on the subject of private enforcement under the Indian competition paradigm. On the whole, private enforcement is described as "litigation brought by an individual, a legal entity, an organisation, or a government agency in order for a court to find an antitrust violation, order the collection of damages, and impose injunctive reliefs."

#### 4. RECOMMENDATIONS

Rapid technological advancements and the emergence of virtual markets, networks, and platforms in India suggest that the Indian competition authority may lack the tools necessary to fully fathom the multidimensional nature of the competition structure in the digital M&E era, and that they may need to take a more nuanced approach to identifying relevant markets than has been done previously. The fast growth of the digital economy also highlights the fundamental question of whether an economics-based legislation should be rigidly structured or allow for market dynamics to be incorporated.<sup>54</sup>

##### 8.1 Rectifying monopolistic tendencies through analyzing network, market and big data effects on antitrust mechanisms

By establishing a new monopolistic violation for structural digital platforms, we can prevent monopolies from emerging by imposing sanctions when there is a very real

possibility of their becoming reality, most notably as a result of anti-competitive conduct. When assessing market and monopolistic power, regulators should not depend only on market shares or market concentration. Rather than focusing exclusively on market definition and market power, we will examine incentives and competitive consequences. Regulators should not make the mistake of assuming that network effects alone guarantee considerable market power. In this regard, variables to examine include the following: (i) whether switching costs are minimal; (ii) whether multi-homing is available; and (iii) whether platform congestion will cause users to migrate to other platforms.

It should not be assumed that access to big data alone would result in competitive advantages. Controlling a certain sort of data permits the exclusion of competition in specific markets, which is why the focus should be on the real competitive implications of the behaviour at issue. In terms of remedies, competition authorities should ensure that: (i) feasible remedies exist to address specific concerns; and (ii) those remedies do not impose prohibitive costs or other risks to the competitive process, such as a chilling effect on incentives to innovate or an increased risk of collusion.

##### 8.2 Mergers and Acquisitions (Combination) through bench marking of variety of data, new notice data system and residual jurisdiction to digital M&A's

<sup>54</sup> Gauri, G., & Pandya, K. (2020, November 4). *The Indian competition law experience– its history and its (digital) future*. Taylor & Francis Online.

<https://www.tandfonline.com/doi/full/10.1080/24730580.2020.1843316?scroll=top&needAccess=true>  
[Accessed at 21st September 2021]



The Competition authorities approach to M&A research in the media and entertainment sectors is largely consistent with our approach to other types of strategic alliances in non-media businesses. Reforming antitrust legislation through the introduction of a new required notice system for all M&A transactions using digital platforms that come under the regulator's jurisdiction, coupled by a provision for ex post regulation under carefully controlled conditions. Additionally, the type of governance required for monitoring and regulating structural digital platforms must be defined.

When it seems as though a merger is taking place in a multisided market when strong indirect network effects have been seen in either direction or both sides. It is critical to examine the merger's possible impact on customers in light of such network effects. A merger that increases the entry threshold is problematic only if it protects the merging businesses against efficient and effective new entry; similarly, a merger involving a potential entrant is likely to damage competition only if certain features exist (including high market concentration).

Rather than that, where antitrust examination is warranted, competition authorities should depend on fact-intensive research guided by well-established and empirically grounded economic theory to forecast the competitive implications of a proposed merger, regardless of whether big data is involved. M&A remedies should be proportionate and utilized to successfully restore or sustain competition,

not to decide market outcomes, and there should be a strong connection between the remedy and the theory of harm in each case. CCI must therefore benchmark the variety of data in the acquirer's possession, compare it to the variety of data in the acquired's possession, and then determine whether the variety of data in the control of the merged entity or acquirer firm will have long-term negative consequences for data-driven innovation, including excessive centralization. This is only one example of matching the solution to the cause, and a similar focus on the real harm must govern any future reform of competition law to accommodate the digital era.<sup>55</sup>

As an alternative to raising thresholds, the competition agency might be authorised to evaluate proposed mergers of concern that are not subject to notice, thereby decoupling (residual) jurisdiction from reportability. This may be combined with a voluntary notice mechanism that would provide legal clarity to parties to mergers that could raise antitrust concerns while also drawing the attention of the enforcement agency to potentially problematic deals. Without a date or time restriction for such reviews, all non-notifiable transactions would be exposed to substantial ambiguity over whether a review would be undertaken.

### **8.3 Establishment of ex-ante regulation in purview of the dominance of digital platforms and expedite actions**

Faced with the inherent inadequacies of competition law, it is necessary to adopt ex

<sup>55</sup> Padmanabhan, A. (2020, February 17). *Reforming competition law for the digital age* | Opinion. Hindustan Times. <https://www.hindustantimes.com/analysis/reforming->

[competition-law-for-the-digital-age/story-vwawHp3NrDZcCCFTE70AI.html](https://www.hindustantimes.com/analysis/reforming-competition-law-for-the-digital-age/story-vwawHp3NrDZcCCFTE70AI.html) [Accessed at 21st September 2021]



ante regulation. Along with ordinary competition law, a statute governing structural digital platforms must be drafted. The toolbox for this regulatory right should enable the promotion of a transparent culture; the establishment of obligations and the development of technical standards to facilitate data portability and service interoperability; the recognition of certain data as essential infrastructure and the provision of access to it; the affirmation and maintenance of the principle of terminal neutrality.

There is growing recognition of the limitations of merely relying on competition law enforcement to address competition problems presented by digital platforms. Additionally, there is a recognized need to regulate such platforms ex ante, or in advance, in order to address issues before they arise, that is, to pre-empt certain anticompetitive practices rather than waiting until they cause competition-related harm in the market and attempting to fix them ex post, particularly given that the latter requires significant time and resources. A bifurcated system can also keep a regulator's 'confirmation bias' in ex-post procedures in check if a business avoids bad outcomes in ex-ante proceedings. While India should embrace ex-ante regulation for digital markets, it should strive to find a balance between the benefits provided by large platforms through network effects and the

possible anti-competitive impacts of a platform's actions.<sup>56</sup>

There are several mechanisms that can be engaged to facilitate and expedite action: Developing preventive measures to avert irreversible harm, increasing the use of behavioral treatments, and lowering procedural delays that are universally regarded excessive.

#### 8.4 Defining Relevant Market<sup>57</sup> according to the digital dynamic and concepts

It is critical to evaluate if online services are regarded to be in the same market as traditional services in your jurisdiction. Competition regulators should take care to define the relevant market precisely. Market definitions and the market strength of relevant undertakings should be evaluated using a comprehensive economic analysis that takes into account the unique dynamics of the relevant market. Additionally, customer tastes and the competitive landscape must be addressed. Because businesses in digital marketplaces compete on technical advancement and innovation, competition authorities should consider that a business's market share alone is insufficient to establish a dominant position. Competition in online markets is always dynamic and driven by technology.<sup>58</sup>

<sup>56</sup> Kathuria, V. (2021, March 31). *A Legal Toolkit for Fair and Competitive Digital Markets in India*. ORF. <https://www.orfonline.org/research/a-legal-toolkit-for-fair-and-competitive-digital-markets-in-india/> [Accessed at 21st September 2021]

<sup>57</sup> THE COMPETITION ACT, 2002 (12 OF 2003), Section 2(r) "relevant market" means the market which may be determined by the commission with reference to the relevant product market or the relevant

geographic market or with reference to both the markets;

<sup>58</sup> Capacity Building (2019, September 09), *Competition Policy in the Digital Era*, International Telecommunication Union (ITU), [https://www.itu.int/en/ITU-D/Conferences/GSR/2019/Documents/Competition-Policy-in-the-Digital-Era%20-GSMA\\_training.pdf](https://www.itu.int/en/ITU-D/Conferences/GSR/2019/Documents/Competition-Policy-in-the-Digital-Era%20-GSMA_training.pdf) [Accessed at 21st September 2021]



The market environment and customer preferences are distinct. Business models, in particular, are finely balanced in multi-sided markets (markets that connect two or more different but interdependent sets of customers). Competition regulators must use caution in determining whether to interfere and must keep in mind that the internet services market is typically more dynamic than traditional marketplaces.<sup>59</sup> We should place equal weight on damage theories and the discovery of anti-competitive tactics in digital marketplaces.

Competition authorities must examine not only monetary transactions but also data flows that may be detected in the market when defining a multisided market. In digital industries, competition authorities must apply new criteria for defining the relevant market.<sup>60</sup> Given how difficult it was to identify the relevant product market in the traditional M&E sector, it will become even more difficult to describe it in the digital arena due to its sheer size. Developing an analytical approach for finding the key criteria for structurally identifying digital platforms. This framework may be used to generate a list of platform names.

Additionally, given the rapid pace of change in the form of innovation cycles and market entry and departure, market definition in digital marketplaces should allow for more dynamic research.

Despite the difficulties associated with market definition and other elements of evaluating digital platform markets, the researcher thinks that existing and new analytic tools are capable of addressing these difficulties. As a result, the researcher

believes that further rules are unnecessary to address these issues and that competition authorities should evaluate competitive constraints on an individual basis within the present framework.

### 8.5 Recommendation of CLRC (Competition Law Review Committee), 2019 on Digital Markets

In India, the Ministry of Corporate Affairs ("MCA") established a Competition Law Review Committee ("CLRC") to provide recommendations about amendments to the Competition Act, 2002 ("Act"). In late 2019, the CLRC issued its report. A portion of the paper was devoted to assessing the existing Act's capacity to deal with digital marketplaces. The CLRC recognised the critical role of data in digital markets and noted that the current definition of price under Section 2(o) of the Act is broad enough to include non-monetary considerations such as data, and that Section 19(4) of the Act gives the CCI sufficient discretion to consider an enterprise's control over data as a factor in determining its dominance. The CLRC advised that, in order to cope with digital markets, it may be prudent to consider criteria other than the present assets and turnover limits in India, and that a 'size of transaction' or 'deal value' criterion might be incorporated into the Act's merger control framework. As a result, the Draft Competition (Amendment) Bill, 2020 (the "2020 Bill") seeks to enable the CCI and the Central Government to incorporate innovative elements into the criteria for determining whether a considerable detrimental effect on competition or relevant markets exists under Section 19. Additionally, it offers a proposal to amend

<sup>59</sup> *Supra* Note 42

<sup>60</sup> *Supra* Note 43



Section 5(c) of the Act to include a proviso authorising the CCI and the Central Government to notify additional merger notice thresholds. These modifications have been kept open-ended to enable for the development of sector/market-specific criteria (for behavioural offences) and thresholds (for merger notice) that will encompass digital marketplaces as well.<sup>61</sup>

### 8.6 Abuse of Dominance of big data scrutiny and recoupment before the abuse confects

In suitable situations, the CCI may use the notion of necessary facilities to enable interoperability between a dominant company found to be abusing its position and other market participants. This would encourage the expansion of network effects while maintaining the economy's unity.<sup>62</sup>

These are certain steps that can be taken to regulate ABD in the digital M&E space:-

a) Under current Indian competition legislation, the competition authority has the

<sup>61</sup> Lakshmikumaran, C., & Sandeepan, N. (2021, January 27). *A multi-jurisdictional review of legislative trends in antitrust regulation of digital markets*. Lexology.

<https://www.lexology.com/library/detail.aspx?g=81d014ee-f076-4e5c-881f-cbdd56fbcf26> [Accessed at September 26, 2021]

<sup>62</sup> Jain, S. (2018, March 15). *Growth Of Digital Economy – A Challenge For Competition Regulators*. Mondaq. <https://www.mondaq.com/india/antitrust-eu-competition-/683170/growth-of-digital-economy-a-challenge-for-competition-regulators> [Accessed at 21st September 2021]

<sup>63</sup> The Sherman Antitrust Act (1890), *Section 2*. Monopolizing trade a felony; penalty Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall

ability to investigate abuses of dominance after they have been created, allowing businesses to escape when domination is anticipated in the near future. In the digital era, the effect of dominance occurs much more swiftly than it does in a traditional corporate paradigm. A revision in the legislation is required to allow CCI to intervene in such situations of impending domination as well. This is analogous to the US Sherman Act's Section 2<sup>63</sup> 'attempt to monopolise' criterion. Additionally, they argue that CCI should be able to detect whether two distinct businesses are individually dominant in a relevant market at the same time, given the possibility of abusive behaviour in duopoly circumstances.

b) As a corollary to the idea of impending dominance, legislative amendments to enable CCI to apply the recoupment of losses' standard to predatory pricing<sup>64</sup> allegations. However, there are compelling grounds against courts using the recoupment reasoning to predatory pricing determinations.<sup>65</sup>

c) When market power is leveraged in the M&E sector, competition authorities must

be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court., [http://neconomides.stern.nyu.edu/networks/ShermanClaytonFTC\\_Acts.pdf](http://neconomides.stern.nyu.edu/networks/ShermanClaytonFTC_Acts.pdf)

<sup>64</sup> *Supra* note 93, Section 4 Explanation (b) "predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.,

<sup>65</sup> Christopher R Leslie (November 2013), '*Predatory Pricing and Recoupment*', Columbia Law Review, Vol. 113, No. 7, <https://www.law.uci.edu/faculty/full-time/leslie/PredatoryPricing.pdf> [Accessed at 21st September 2021]



distinguish between leveraging on the merits and leveraging only on the basis of market power. In the digital economy, aggressive leveraging (attempting to establish a foothold in a neighboring market) is less anticompetitive than defensive leveraging (trying to prevent others from gaining ground on your market). The former may really be a catalyst for creativity.

We require additional policy and legal instruments, interim remedies for potentially abusive behaviour, and new definitions of damage theories to undertake a thorough examination of digital platforms. Market power assessment in the context of digital platforms requires analysing different criteria. Access to and control of data is crucial and confers market power, and this feature is further reinforced by network effects.

If remedies are necessary to counterbalance anticompetitive consequences associated with the possession of a collection of data, they should be narrowly tailored to meet the alleged harm. Competition regulators must assure the following in the event of an antitrust intervention:

- The researcher suggests for resolving the specific problems exist; and
- Those remedies do not impose excessive expenses on the competitive process or pose significant dangers to it. Care must be taken to ensure that any such solution does not result in a deterioration of competitive outcomes, whether as a result of a chilling impact on innovation incentives or as a result

of the greater danger of collusion posed by information sharing.<sup>66</sup>

### **8.7 Regular monitoring of digital platform acting as self-regulators which may result in impeding fair competition**

As recent economic scholarship has emphasised, several platforms, particularly markets, serve as regulators, establishing the norms and institutions by which its users interact. The fact that platforms make their own rules is not an issue in and of itself; rather, one should encourage competition between diverse business models and platform designs and foster innovation in the digital marketplace arena. To address these sorts of issues, dominant platforms must guarantee that their rules do not obstruct open, undistorted, and fierce competition without a compelling reason. A dominating platform that establishes a marketplace must maintain a fair playing field and refrain from using its rule-making authority to influence the result of the competition. Additionally, non-dominant platforms have a regulatory function. This must be monitored regularly by competition authorities.<sup>67</sup>

### **8.8 Social Media and Digital Platforms- Developing new regulatory measures and guidelines**

The Competition Authority should assist the system by introducing new regulatory measures for this industry rather than dealing with individual complaints.

<sup>66</sup> *Supra* Note 43

<sup>67</sup> Christol, R. (2019, June 24). *Competition Policy In The Digital Era: The European Commission Publishes Its Report*. Mondaq.

<https://www.mondaq.com/france/antitrust-eu-competition-/817862/competition-policy-in-the-digital-era-the-european-commission-publishes-its-report> [Accessed at 21st September 2021]



1. New social media regulations: If the Competition Authority determines that the current laws do not address or are insufficient to address the challenges, it may be necessary to introduce separate laws and a separate wing to handle cases involving these social platforms with the appropriate expertise who understands the technology and workings of these platforms.

2. Guidelines: Alternatively to enacting lengthy law, the Competition Authority may take a gentler approach by establishing guidelines to be followed. Alternatively, it might examine guidance until the necessary law is enacted. The rules may serve as an example of anticompetitive activities involving digital platforms, such as anticompetitive agreements involving the collection or exchange of sensitive information via data and algorithms on platforms. Additionally, the recommendations might contain elements to examine when determining a digital platform's dominating market position and behaviour that could be construed as an abuse of dominance, such as a refusal to trade without explanation.

3. Market research: Another more gentle technique is market research - markets may be examined and studies on competition published. These studies and papers look at corporate practices and competition problems concerning prominent digital platforms and offer recommendations for resolving such difficulties. Certain nations have utilized these market surveys to inform the development of new legislation.

### 8.9 Effective and active implementation of Digital Rights Management Technology to protect IPR in the digital arena

Digital Rights Management (DRM) technologies (sometimes referred to as Electronic Rights Management Systems) safeguard copyright by identifying and preserving the work's content, restricting access to the work, assuring the work's integrity, and ensuring payment for access. It was suggested in the WIPO Internet treaties of the WIPO Cooperation Treaty (WCT) and the WIPO Performers and Phonograms Treaty (WPPT) in order to provide a flexible and internationally enforceable framework for regulating digital copyrights. DRM systems prohibit unauthorized users from obtaining material. Access is controlled by a user ID and password, as well as licensing agreements. There is still a disconnect between the fact that DRM is active in Indian legislation and its efficient implementation. Competition authorities can push for the adoption of DRM technology to ensure that the relationship between intellectual property rights and antitrust rules is consistent in the Digital M&E sector, where copyright infringement is a frequent occurrence.<sup>68</sup> Other technologies like Technical Protection Measures (TPM), Digital Watermark Technology, Digital Signature Technology and Electronic Marking should also be effectively implemented.

### 8.10 Commitment and Settlement remedies

<sup>68</sup> Sougata Chattopadhyay. (March 2013), *Intellectual Property Rights in Digital Environment*, Conference: Reprographic Rights and Copyright Act : Challenges and Management At: Indian Statistical Institute,

Kolkata.  
[http://eprints.rclis.org/28939/1/Intellectual%20Property%20Rights%20in%20Digital%20Environment\\_ISI.pdf](http://eprints.rclis.org/28939/1/Intellectual%20Property%20Rights%20in%20Digital%20Environment_ISI.pdf) [Accessed at 21st September 2021]





These are consensual remedies in antitrust proceedings that competition authorities employ to bring an investigation to a close by accepting commitments/settlements offered by the parties to resolve the agency's recognised competition concerns. Legally, commitment and settlement are distinct in terms of recognising or denying the antitrust infringement and associated culpability. Parties give commitments without admitting wrongdoing, but the regulator feels there are prima facie grounds for a thorough inquiry. Commitments are frequent in mergers and acquisitions.

The use of commitment and settlement by major international enforcement bodies has been widely praised. For example, according to the United States' response to an OECD report on Commitment Decisions.

*“Settlements are an important procedural tool, because they let the agencies and the target parties resolve their disputes effectively, quickly, and thoroughly.”*

The commitment and settlement processes must be distinguished from a private, voluntary settlement reached between an informant and a suspected antitrust offender. The Competition Act has no specific provision for settlements. In *Tamil Nadu Film Exhibitors Association v. CCI*<sup>69</sup>(2015), the Madras High Court interpreted the CCI's ability to issue residuary orders to the point of requiring parties to come into compromise or settlement. Similarly, the Supreme Court permitted an individual financial creditor to settle following the start of the Corporate

Insolvency Resolution Process (CIRP), a process similar to how the CCI functions in rem.

At the moment, India lacks private settlement procedures relating to vertical agreements and abuse of dominance cases, two of the most common antitrust breaches in the digital M&E business. Regrettably, this precludes CCI from imposing conditions or extracting a win-win pro-competitive commitment from violating businesses. Commitments are available following a prima facie order but before the DG Report is submitted, but settlements are available only after the DG Report is submitted, save in situations of cartels.

### 8.11 Adopting the Digital Markets Act

Following months of consultation, the European Commission proposed two new digital rules in December 2020: the Digital Services Act (DSA) and the Digital Market Act (DMA). Whereas the DSA seeks to improve regulation of online material in order to prevent and punish unlawful content, the DMA focuses on regulating the digital market in order to uphold antitrust laws. These two documents are centered on digital platforms, which will be the topic of disputes between European institutions, national legislatures, and Member States. The Digital Markets Act (DMA) provides a set of objective criteria for determining whether a major online platform qualifies as a so-called "gatekeeper." This enables the DMA to keep focused on the issue at hand, which is big, systemic internet platforms.<sup>70</sup>

<sup>69</sup> Writ Appeal Nos.1806 and 1807 of 2013

<sup>70</sup> European Commission. (2020, October 12). *The Digital Markets Act: ensuring fair and open digital markets*. Europea.

[https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en) [Accessed at 21st September 2021]



The DMA especially targets Big Tech firms. The DMA recommended classifying some platforms as "Gatekeepers" based on their user base, capitalization, market dominance, or revenue, most likely including Apple, Google, Facebook, and Amazon. It attempts to prevent major firms from abusing their market dominance and to allow for the entry of smaller and new players.<sup>71</sup>

These requirements will be satisfied if a business:

- has a solid economic position, has a large influence on the internal market, and operates in a number of EU member states
- has a significant intermediation position, i.e., it connects a sizable user base to a sizable number of firms
- possesses (or is soon to possess) an established and enduring market position, implying that it is steady over time

The Commission will conduct market investigations to ensure that the new gatekeeper regulations maintain pace with the rapid evolution of digital marketplaces. These provisions will enable the Commission to:

- classify businesses as gatekeepers;
- dynamically update gatekeeper duties as needed; and
- Provide remedies for systemic violations of the Digital Markets Act provisions.

## 5. CONCLUSION

Digitization is having a major effect on our economies, communities, information access, and ways of life. It has ushered in

much-needed innovation, new products and services, and has become ingrained in our everyday lives. However, there is growing concern about its pervasiveness, political and societal effect, and, more importantly for our purposes, about the concentration of power in the hands of a few extremely big digital corporations. The M&E sector was already flourishing, but digitization accelerated its growth exponentially.

By offering further guidelines, competition agencies can help to the improved functioning of the digital M&E. For example, advice may be required on how to define dominance in the digital world or on the behaviour responsibilities of dominant platforms. The guidelines on non-horizontal mergers should be revised to incorporate new conglomerate conceptions of damage. Similarly, rules on data sharing and pooling, as well as on data access and interoperability requirements, would provide businesses with greater legal certainty. Given the sector's rapid growth and our current incomplete understanding, these principles may need to be modified on a regular basis. We have emphasised the importance of innovation as a primary objective of competition law: invention is a significant characteristic of the digital economy, and impacts on innovation will frequently be more relevant than price effects in evaluating the effects of entrepreneurial tactics.

However, because digital commodities are mainly based on futures markets, it is difficult to distinguish between anti-competitive objectives and regular commercial tactics. Anti-competitive

<sup>71</sup> Wikipedia contributors. (2021, July 21). *Digital Markets Act*. Wikipedia.

[https://en.wikipedia.org/wiki/Digital\\_Markets\\_Act](https://en.wikipedia.org/wiki/Digital_Markets_Act) [Accessed at September 26, 2021]



behaviour refers to rival relations that are not based on merit, but rather on collusion or foreclosure, and that hurt rivals and customers. Due to the dynamic nature of digital marketplaces, collusion is improbable. The difficulties associated with analysing antitrust tendencies in digital marketplaces are in majority due to expropriating and components that have a little economic impact on the firm yet jeopardize supply continuity. A misclassification of such methods as anticompetitive may have a detrimental effect on market dynamics. Competition regulators should exercise caution in labelling all acquisitions as anti-competitive, since these takeovers can occasionally act as a catalyst for innovation among smaller businesses. Similarly, conventional methods of assessing relevant markets and dominance, such as delineating market borders, analysing market power, and determining whether a firm's behaviour is anticompetitive, are no longer applicable. This is because digital businesses have been dynamically redefining market limits by competing primarily on the basis of innovation, which has reshaped market structure. As a result, market shares or profit margins provide less information about market dominance.

We may anticipate more debate about whether the present legal framework for competition law can handle access-related concerns raised by digital platforms and the M&E industry, or whether these challenges will require ex ante regulation of platforms. It remains to be seen if and how competition authorities and lawmakers will alter the antitrust tools available to them to handle antitrust problems in digital media.

The features of the present digital ecosystem appear to advocate against the imposition of one-size-fits-all solutions (and the regulatory inclination to do so). Rather than that, stakeholders (regulators, telecoms operators, and OTTs) should consider evidence of detrimental impacts due to a lack of competition or anti-competitive behaviour before using ex ante or ex post regulatory or enforcement measures.

Anti-competitive agreements and abuse of dominant position are critical components of maintaining 'fair competition for the greater benefit' in the market. Unlike traditional M&E markets, digital markets grow rapidly and involve a variety of technological issues that may prove difficult for competition authorities to administer or understand at first glance, but we have seen that CCI orders are issued to prevent BigTech and digital M&E giants from abusing their dominant position. Such instructions will help the economy and the general public.

In a market context dominated by a few major businesses with established positions of dominance in certain core areas and serving as the focal point of an increasing digital ecosystem, novel theories of damage may be required. In such setting, the purchase of a start-up may result in the ecosystem's dominance being strengthened, even if the overlap is not inside the acquirer's more narrowly defined product market, or if the overlap in this distinct product market does not create competition issues.

Due to the creative and dynamic character of the digital world, as well as the fact that its economics are not fully understood, estimating the consumer welfare impacts of specific activities is exceedingly challenging.



Given platforms' concentration tendencies and the high entry barriers in some of the markets they dominate, a finding that they restrict other firms' ability to compete on the platform or in the market in a way that is not clearly competitive on the merits should trigger a rebuttable presumption of anti-competitiveness. It should be the obligation of the dominant platform to demonstrate that the behaviour at issue generates appropriate compensating efficiency advantages. Given the scope of the presumption and the fact that our understanding of possible countervailing efficiencies is continually growing, competition authorities and courts should thoroughly investigate such efficiency defences. Platforms function as gatekeepers for the relationships they facilitate. If they are dominant, they have an obligation to regulate in a pro-competitive manner. In Section III, we examined the doctrine's implications for competition policy in depth. Dominant platforms should be held accountable for ensuring interoperability with supplementary service providers. When APIs (protocol and data interoperability) and their access are available, they will be examined and will be subject to the same self-preferencing, transparency, and platform-as-regulator criteria.

Without a doubt, there is no conflict between the purposes and objectives of the IPR and the Competition Act, 2002. Both statutes encourage innovation and consumer welfare. To achieve the middle route, domains of two laws have been harmoniously constructed. A detailed examination reveals that resolving a disagreement between two laws cannot be performed in isolation. While they are parallel to one another, their aims are converging. Despite this contentious topic, they resolved it in such a way that both laws

will triumph, promoting innovation and consumer welfare in the process.

Intellectual property has taken on a greater importance in the digital age. As more content is posted to the Internet, issues such as copyright infringement become increasingly prevalent. Following its creation, authors and artists' work requires protection to prevent it from being misused by others.

If antitrust enforcers determine that anticompetitive consequences are as severe as they appear to be, they should pursue remedies along the lines outlined. Antitrust enforcement and increased market competition, on the other hand, may be insufficient to address all of the social concerns generated by these and other digital platforms. As others have suggested, issues like as the conflicts of interest and monitoring discussed in this short, as well as the societal harm caused by extensive misinformation distribution, may need governmental involvement. Nonetheless, strong enforcement of current competition legislation can contribute to reducing the reach and influence of established and well-defended models and allowing for the emergence of alternative models.

There is growing recognition of the limitations of merely relying on competition law enforcement to address competition concerns presented by social/digital platforms. Additionally, there is a recognised need to regulate such platforms *ex ante*, or in advance, in order to address concerns before they occur, that is, to pre-empt certain anticompetitive activities rather than waiting until they create competition-related harm in the market and attempting to remedy them.



The necessity to regulate online platforms is becoming more acknowledged, taking into account a variety of policy considerations, including competition, consumer protection, and privacy. It is also critical to avoid restricting freedom of expression and speech and to maintain them open to competition and innovation from new entrants. Not only do these platforms' business methods have ramifications for competition, but also for customers and their privacy. This needs a comprehensive strategy including close collaboration between competition, consumer protection, and data protection agencies.

India's antitrust laws are based on a mindset that promotes business size and dominance. Only "abuse of dominance," that is, imposition of unfair or discriminatory terms or pricing in the acquisition or sale of products, is prohibited under our competition rules. However, this may not be the best method for investigating antitrust violations on digital platforms.

One conclusion that may be drawn is that competition law should not be changed. Rather than that, they would argue, any significant changes should occur in other legal frameworks such as data protection laws or telecommunications regulation, TRAI, or intellectual property protection provisions that are better equipped to rebalance market structures and restore a level playing field for new digital players and traditional media and entertainment businesses. However, rather than being rewritten, existing competition law guidelines may be updated to better reflect the effect of digital business models.

The CCI has proven great experience in assessing combinations in the media, entertainment, and broadcasting sectors by taking into account the many elements of the value chain. The CCI's approach to the media, entertainment, and broadcasting industry is anticipated to strengthen in the future years, based on its decade of experience, which will assist firms engaged in M&A operations in this area. Given the fast evolution of technology and digitalization, the CCI will need to establish worldwide best practices for assessing the relevant market in the media, entertainment, and broadcasting sectors.

There is no reason to abandon competition law enforcement in cyberspace, nor is there a case for stronger restrictions in the realm of network economics. The critical step is to establish a dynamic concept of competition law that takes into consideration the influence of competition law enforcement on the incentives to innovate not only of the dominant business, but of all market participants.

Despite the report's lofty title, it cannot and will not be the final word on how competition policy can adapt to the digital era. Rather than that, one can hope that it contributes usefully to the ongoing conversation between competition policy practitioners and academia about how competition policy can best shoulder its share of the responsibility for defining and enforcing a new legal framework for the digital world that serves the citizens' interests.

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