

**GUARDING CRITICAL SECTORS: REINVENTING COMPETITION  
REGULATION IN INDIA'S DIGITAL AGE**

- Mr. Syed Alwaz Asif & Ms. Akshara Rajratnam\*\*\*

**ABSTRACT**

*In the rapidly changing landscape of technology markets, competition regulators face numerous challenges in addressing the increasing prevalence of anti-competitive mergers and acquisitions. The unique characteristics of the digital sector and the evolving nature of competition demand a more robust and evidence-based approach to regulation. The Competition Commission of India (CCI) plays a critical role in navigating these complexities and ensuring a fair and competitive environment in the Indian market. The CCI should focus on strategic sectors and develop a pre-acquisition review framework to oversee mergers in critical infrastructure sectors. A mandatory filing system for acquisitions in these sectors would help regulators keep up with the rapid pace of tech deals. Defining critical sectors remains a challenge due to the need to assess both consumer impact and national security risks. Network effects, exclusionary conduct, and abuse of dominant positions are key areas of concern in this context.*

*The manuscript also discusses the ambiguity surrounding the interpretation of Section 4 of the Indian Competition Act, 2002 (ICA), which prohibits the abuse of dominant market positions. The principle of objective justification and the role of the CCI and the Supreme Court in interpreting this section are analyzed, emphasizing the need for better clarity and consistency in the application of this principle. To address these challenges, the study proposes several recommendations, including granting the CCI more independence in defining critical sectors, extending oversight to acquisitions below the threshold specified in the Competition Amendment Act, 2023, and providing clearer guidelines on the objective justification principle. Implementing these suggestions through amendments or legislation is crucial for promoting fair competition and addressing dominance issues in the technology market.*

---

\*\*\* The authors are final years law students at Dr. Ram Manohar Lohiya National Law University, Lucknow and can be reached at [alwazasif12@gmail.com](mailto:alwazasif12@gmail.com) & [rajratnamakshara@gmail.com](mailto:rajratnamakshara@gmail.com).

## I. INTRODUCTION

Competition Regulations in the west are significantly advancing an evidence-based approach to incorporate the dynamic and rapid changes in the new and relevant markets. The Federal Trade Commission (FTC) in the United States advocates for the protection of competitive markets by employing probabilistic analytical frameworks and reinstating a rigorous approach to curtail mergers and acquisitions that display anti-competitive tendencies.<sup>1</sup> At the same time, regulators in India are incorporating pre-emptive measures to prevent anti-competitive behaviour in emerging markets, which stifles innovation in the sector. In an incisive move to recalibrate the competitive dynamics within India's burgeoning digital economy, the Parliamentary Standing Committee on Commerce (PSCC) has articulated a policy recommendation to delineate and regulate entities it identifies as 'gatekeeper' e-commerce companies.<sup>2</sup> These gatekeepers are characterized by their formidable market power and their custodianship over vast troves of user data, spanning from purchasing behaviours to personal information. The PSCC's proposal is borne out of an escalating concern over the burgeoning clout of major technology corporations, which, if left unchecked, could undermine the pillars of competition, stifle innovation, and constrict consumer sovereignty.<sup>3</sup>

The report from the PSCC illuminates the hallmarks of gatekeeper companies, notably their expansive market share that bequeaths an inordinate level of control within the e-commerce domain, and the network effects that fortify barriers to market entry, consequently impeding competitive parity. The perils posed by such gatekeepers extend to potential market power abuses—including predatory pricing strategies and exclusionary platform practices as well as opacity in their data handling operations, all of which may culminate in a diminishment of consumer choice.<sup>4</sup>

The recommendation follows an upsurge in concerns about international and regional e-commerce platforms and their activities in various digital markets. The more concerning threat lies in the tech startup ecosystem since the more innovative products lead to better consumer approval and attract

---

<sup>1</sup> Federal Trade Commission. 'FTC to Restrict Future Acquisitions for Firms That Pursue Anti-competitive Mergers' (*Federal Trade Commission* 25 October 2021) <<https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-restrict-future-acquisitions-firms-pursue-anti-competitive-mergers>>, accessed on September 12, 2023.

<sup>2</sup> Standing Committee report on 'Promotion and Regulation of e-commerce in India' (June 15, 2022), <<https://prsindia.org/policy/report-summaries/promotion-and-regulation-of-e-commerce-in-india>>, accessed on November 7, 2023.

<sup>3</sup> Submission to the Department Related Parliamentary Standing Committee on Commerce, Vidhi Centre for Legal Policy, <[https://vidhilegalpolicy.in/wp-content/uploads/2022/06/220624\\_Submissions-made-to-the-PSC-on-E-commerce.docx.pdf](https://vidhilegalpolicy.in/wp-content/uploads/2022/06/220624_Submissions-made-to-the-PSC-on-E-commerce.docx.pdf)>, accessed on November 7, 2023.

<sup>4</sup> Standing Committee report on 'Promotion and Regulation of e-commerce in India', One Hundred and Seventy Second Report to Rajya Sabha (July, 2022). <[https://sansad.in/getFile/rsnew/Committee\\_site/Committee\\_File/ReportFile/13/159/172\\_2022\\_7\\_14.pdf?source=rajyasabha](https://sansad.in/getFile/rsnew/Committee_site/Committee_File/ReportFile/13/159/172_2022_7_14.pdf?source=rajyasabha)>, accessed on November 7, 2023.

investments from other tech behemoths. Most mergers happening due to this are horizontal, where companies try to acquire digital services to acquire the dominant cutting-edge technology and gain a first-mover advantage.

## II. MERGERS CREATING ANTI-TRUST IN THE MARKET

Generally, a merger happens when two or more businesses have joint ownership or control. This might happen as a result of a stock acquisition or amalgamation. There are three sorts of mergers, regardless of how the acquisition or merger occurs: (1) horizontal, (2) vertical, and (3) conglomerate<sup>5</sup>. A horizontal merger comprises two companies that are in direct rivalry with one another. A vertical merger involves a buyer-seller connection between two companies: a manufacturer combined with a component product supplier. A conglomerate merger extends the typology of corporate amalgamations, representing the unification of two or more firms that operate in entirely distinct or unrelated business activities. Unlike horizontal or vertical mergers, a conglomerate merger does not enhance market share in the same line of business nor does it streamline a supply chain within an industry. Instead, this type of merger typically occurs between entities that diversify an organization's portfolio by introducing a variety of different industries or markets under a single corporate umbrella.

The potential for mergers to impact markets can be dual-faceted, offering avenues for growth while also posing risks of market monopolization. A historical exemplar of the latter is the Standard Oil Company, which engaged in a series of strategic actions to dominate the oil industry in the late 19th and early 20th centuries.<sup>6</sup> Standard Oil systematically acquired a multitude of smaller competing oil refineries and related enterprises, employing tactics that included predatory pricing, exclusive dealings, and railroad rebates, which were practices that allowed them to control the transportation rates for their benefit. These strategies significantly diminished the competitive abilities of rival companies, eroding their financial stability. In its ascendancy, Standard Oil would then absorb such weakened competitors, effectively and methodically eliminating any obstruction to its market hegemony.<sup>7</sup>

This systematic approach to mergers and acquisitions by Standard Oil was seen as consolidating control over the entire supply chain from crude extraction to refinery and distribution under one corporate empire, contributing to its reputation as a monopolistic entity. The outcome of these

---

<sup>5</sup> Andreas Koutsoudakis, 'Antitrust More Than a Century after Sherman: Why Protecting Competitors Promotes Competition More than Economically Efficient Mergers' [2009] 34 U. DAYTON L. REV. 223. <<https://ecommons.udayton.edu/udlr/vol34/iss2/5/>>.

<sup>6</sup> Chernow, Ron. *Titan: The Life of John D. Rockefeller*. (New York: Alfred A. Knopf, 2007).

<sup>7</sup> Krass, Peter. *The Age of Monopoly: Capital, Competition, and the Rise of Big Business in the United States, (1865-1914*. New York: Basic Books, 1991).

practices led to the landmark case of *Standard Oil Co. of New Jersey v. United States* (1911)<sup>8</sup>, where the U.S. Supreme Court found Standard Oil in violation of antitrust laws, specifically the Sherman Antitrust Act of 1890. The decision resulted in the dismantling of Standard Oil into multiple companies, fundamentally altering the industry's structure. This historical episode underscores the longevity of inorganic growth strategies among large corporations, a pertinent consideration in the ongoing discourse on merger regulation in today's diverse and evolving marketplace.

The rapid growth of young startups in the internet sector has received little attention from regulators, despite the potential competition and national security risks they pose<sup>9</sup>. Many of the deals for acquisition of tech startups fall below the acquisition threshold for the CCI's oversight. The increasing value of behavioural data and the rise of Chinese investment in Indian tech startups exacerbate the threats to national security<sup>10</sup>. The Commission has yet to fully grasp the potential of critical technologies in the digital economy, and how stifling startups at early stages could hinder the development of disruptive innovations<sup>11</sup>.

Most technological companies in India have continued their inorganic growth by acquiring signature products of other companies. The leading example of this point is Byju, which has now become the world's most valued ed-tech startup. Byju always expanded itself beyond India; it went on an acquisition spree worldwide<sup>12</sup>.

---

<sup>8</sup> *Standard Oil Co. of New Jersey v. United States* [1911] 221 U.S.

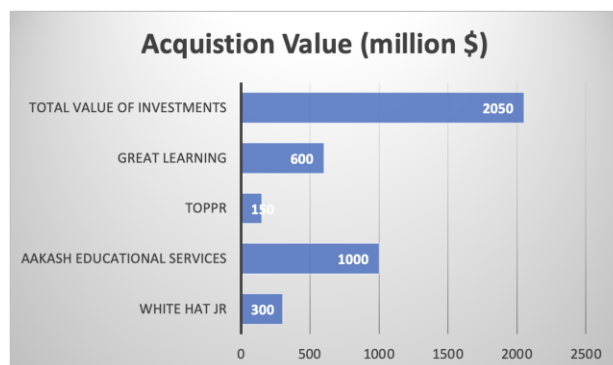
<sup>9</sup> Kiran Stacey, James Fontanella-Khan & Stefania Palma, *Big Tech Companies Snap Up Smaller Rivals at Record Pace*, Financial Times (2021), <<https://www.ft.com/content/e2e34de1-c21b-4963-91e3-12dff5c69ba4>>, accessed on September 10, 2023.

<sup>10</sup> Krishnan Anant, *Following the money: China Inc's growing stake in India-China relations*, Brookings (2020), <<https://www.brookings.edu/research/following-the-money-china-incs-growing-stake-in-india-china-relations/>>, accessed on September 10, 2023.

<sup>11</sup> Panel Discussion on Merger control regime in India - Promoting Competitive Structures in Markets, CCI (2022), <[https://www.cci.gov.in/images/advocacy\\_speeches/en/speech1654686290.pdf](https://www.cci.gov.in/images/advocacy_speeches/en/speech1654686290.pdf)>, accessed on September 9, 2023.

<sup>12</sup> Abrar Peerzada, *Byju's continues acquisition spree, buys Austrian math-learning co GeoGebra*, Business Standard (2023), <[https://www.business-standard.com/article/companies/byju-s-continues-acquisition-sprees-buys-austrian-math-learning-co-geogebra-121120800608\\_1.html](https://www.business-standard.com/article/companies/byju-s-continues-acquisition-sprees-buys-austrian-math-learning-co-geogebra-121120800608_1.html)>, accessed on September 12, 2023.

Byju's Acquisition			
Acquisition Name	Acquisition Date	Acquisition Value (million \$)	Business Focus
White Hat Jr	Aug-20	300	Teaching coding and programming skills to children.
Aakash Educational Services	Apr-21	1000	Test preparation services for medical and engineering entrance exams.
Toppr	Jul-21	150	Online learning and test preparation resources for K-12 students.
Great Learning	Jul-21	600	Online higher education platform offering professional courses.
Total Value of Investments		2050	



The above statistics show that Byju has made acquisitions worth \$ 2 billion in India and around the globe, allowing it to dominate the ed-tech market<sup>13</sup>.

Finally, market concentrations create problems in a country which become too huge to solve<sup>14</sup>. The increased amount of concentration in specific sectors lowers business investment in the future in addition to lowering productivity<sup>15</sup>. Thomas Phillipon, has found in his research titled *'The Great Reversal'*<sup>16</sup> that the largest corporations in the United States engage in a disproportionate share of lobbying effort, potentially contributing to financial inefficiencies as the firms pursue regulations that actively engage in rent-seeking.

Market concentration is becoming increasingly significant since a few dominant players consolidate their control across industries. The key drivers of market concentration include network effects, economies of scale, access to valuable data, and strategic mergers and acquisitions. Network effects amplify the value of a product or service as more users join, creating a positive feedback loop that strengthens the dominant position of leading firms. Economies of scale enable large companies to reduce costs and increase efficiency, creating barriers to entry for smaller competitors. Access to valuable data allows market leaders to optimize their operations, target customers more effectively, and maintain a competitive edge. Strategic mergers and acquisitions can further consolidate market power, as dominant firms absorb potential rivals and expand their market share.

<sup>13</sup> *ibid.*

<sup>14</sup> Phillipon Thomas, *The Great Reversal: How America Gave Up on Free Markets*, (Harvard University Press,2019).

<sup>15</sup> *ibid.*

<sup>16</sup> *ibid.*

Market concentration has both positive and negative implications<sup>17</sup>. While it can result in enhanced efficiency, innovation, and lower consumer prices, it can also stifle competition, reduce consumer choice, and create entry barriers for new firms. Dominant firms may engage in anti-competitive practices, and data concentration raises privacy and national security concerns. Competition authorities should monitor and regulate market concentration, considering both its benefits and risks.

Competition authorities must adopt a comprehensive approach to merger assessments, considering both price and non-price effects like quality, innovation, choice, and privacy. Developing appropriate tools and techniques, such as surveys, demand estimation, and economic modelling, is crucial. A flexible, case-by-case approach, along with international cooperation and knowledge sharing, can enhance the effectiveness and consistency of merger assessments worldwide.

### III. ENHANCING CCI OVERSIGHT: PRE-ACQUISITION REVIEWS & VOLUNTARY FILINGS FOR CRITICAL SECTORS.

Amid the rapidly evolving global technology landscape, the surge in Chinese investment in India's critical sectors has raised significant concerns and challenges for competition authorities. Notably, the People's Bank of China increased its stockholding in HDFC Bank,<sup>18</sup> a systematically important domestic bank in India, causing alarm. Chinese private companies are also investing in strategically important Indian startups like Paytm, BigBasket, and Snapdeal.<sup>19</sup>

---

<sup>17</sup> OECD Policy Roundtables- Market Concentration, <<https://www.oecd.org/daf/competition/market-concentration.htm>>, accessed on September 15, 2023.

<sup>18</sup> Alarmed by Chinese Bank raising stake in HDFC, Centre revises FDI policy, India Today (2020), <<https://www.indiatoday.in/business/story/alarmed-by-chinese-bank-raising-stake-in-hdfc-centre-revises-fdi-policy-1668407-2020-04-18>>, accessed on September 11, 2023.

<sup>19</sup> Bhowmick Soumya, *Chinese investments in Indian startups: Trends and controversies*, Observer research foundation (2021), <<https://www.orfonline.org/expert-speak/chinese-investments-in-indian-startups-trends-and-controversies/>>, accessed on September 11, 2023.

Chinese Investments in Indian Tech startups		
Company Name	Chinese Investor	Investment Amount (million \$)
Paytm (One97 Communications)	Alibaba Group	1095
OLA (ANI Technologies)	Tencent	400
Swiggy	Tencent	210
Zomato	Ant Group (Alibaba Affiliate)	512
Big Basket	Alibaba Group	300
Snapdeal	Alibaba Group	500
Dream 11	Tencent	100
BYJU's	Tencent	40
Policy Bazaar	Tencent	150
Delhivery	Fosun International	30
OYO Rooms	Didi Chuxing	100
		3437

Data from Open Sources, cut-off date June, 2021

To address these challenges and prevent market concentration, the CCI should focus on technology areas with substantial future economic value in the Indian market<sup>20</sup>. Additionally, the CCI should consider criteria like the potential for a dominant company to control an innovative industry and the projected impact of that technology on the digital economy's trajectory in the next decade.

As the Indian space sector experiences a surge in private startups<sup>21</sup>, apprehensions surrounding market concentration in emerging sectors intensify. Strategic acquisitions in these domains can jeopardize national security, given the critical data involved in their operations. Contemporary military endeavours heavily depend on data for situational awareness, command and control, and precision targeting, often engaging specialized firms for data analysis. Leveraging this data not only bolsters military efficacy but also mitigates risks to personnel and collateral damage. Nevertheless, adversaries can harness the same data to undermine military operations, resulting in significant losses.

The CCI should develop a mechanism backed up by law which can focus on acquisitions in critical sectors and enable it to develop a pre-acquisition review framework to oversee the mergers taking place in those critical infrastructures. The pre-acquisition review framework would also enable the CCI to gather information regarding the acquisitions happening in tech startups in India. Since

<sup>20</sup> Li, Eileen. 'Merger Review 2.0: Infusing CFIUS's 'Critical Technologies' Approach into Anti-Trust Oversight Of Nascent Tech Acquisitions.' Columbia Law Review, vol. 122, no. 6, 2022, pp. 1691–728. JSTOR, <<https://www.jstor.org/stable/27171760>> Accessed 15 Mar. 2023.

<sup>21</sup> Sharma Dinesh, 'Indian startups making their mark in space, Tribune India' (2022), <<https://www.tribuneindia.com/news/comment/indian-startups-making-their-mark-in-space-451618>>.

these startups are in their nascent stages of development, they lack the transaction threshold which has been proposed in the Amendment Act of the Competition Act in 2023<sup>22</sup>. Tech negotiating deals move at such a breakneck rate that regulators must set up time and money to investigate and comprehend these markets. An obligatory filing scheme would place regulators on an equitable basis with capitalists, startups, and tech heavyweights regarding which transactions influence the development of tech sectors and where the economy is heading. An involuntary filing of acquisitions in critical sectors would require further changes in Competition Act to authorize CCI legally to gather such critical information in the dynamic sector that snowballs into an important sector.

In anticipation of more definitive amendments being codified, there exists an immediate need for a provisional mechanism to encourage voluntary filings of mergers within these critical sectors<sup>23</sup>. The existing Combination Regulations have provisions in place to allow CCI to receive voluntary notifications of mergers which are not directly related to business activity<sup>24</sup>. By broadening its supervision of non-reportable acquisitions in important technological areas and stressing the advantages of pre-merger review, the CCI might entice corporations to file willingly. Furthermore, voluntary disclosures to CCI would allow the investigative branches to begin antitrust probes before acquisitions closed, and assets were closed down or incorporated into the purchaser's company in a manner that made successful disposal challenging, if not impossible.

#### **IV. DEFINING CRITICAL SECTORS: NAVIGATING THE COMPLEXITIES OF MARKET CONCENTRATION AND NATIONAL SECURITY IN THE DATA-DRIVEN ERA**

The role of regulators in delineating 'critical sectors' is fraught with complexity, primarily because such sectors' significance extends beyond mere market dynamics to encompass national security concerns. A critical sector is typically characterized by its capacity to accumulate and process vast quantities of behavioral data daily, which can have profound implications for consumer privacy and the integrity of a nation's security.<sup>25</sup> The challenge lies not just in pinpointing sectors that could

---

<sup>22</sup> Competition Amendment Act, 2023, Salient Features, <[https://www.cci.gov.in/images/publications\\_booklet/en/competition-amendment-act-2023-salient-features1684831868.pdf](https://www.cci.gov.in/images/publications_booklet/en/competition-amendment-act-2023-salient-features1684831868.pdf)>, accessed on September 16, 2023.

<sup>23</sup> Robert B. Bell, Voluntary HSR Filings: A Modest Proposal, 23 *Anti-trust* 69 (2009).

<sup>24</sup> Kumar, P. Ram, *India: Merger Control Comparative Guide*, Mondaq (2021), <<https://www.mondaq.com/india/antitrustcompetition-law/843858/merger-control-comparative-guide>>, accessed on September 16, 2023.

<sup>25</sup> The value and role of data in electronic commerce and the digital economy and its implications for inclusive trade and development, *United Nations Conference on Trade and Development Report* (2019), <[https://unctad.org/system/files/official-document/tdb\\_ede3d2\\_en.pdf](https://unctad.org/system/files/official-document/tdb_ede3d2_en.pdf)>, accessed on November 7, 2023.



potentially monopolize the market but also in discerning which among them are pivotal for national security.

This discernment is especially intricate in the context of emerging market concentrations where the line between essential market functions and national security interests is increasingly blurred. For instance, sectors involving sophisticated data analytics, cloud computing, and artificial intelligence (AI) are not only economically vital but also possess the power to influence socio-political landscapes.<sup>26</sup> Therefore, the CCI's task to define what constitutes a critical sector is more nuanced than merely assessing market share or consumer preference, it involves a strategic evaluation of the sector's current and future impact on national interests.

In light of rapidly expanding digital sector, it is crucial to define a '*relevant market*' in a well-considered and consistent manner by the CCI. The Competition Act of 2002, mandates the CCI to identify a 'relevant market' based on consumer perceptions of interchangeability or substitutability. The idea of a relevant product market suggests that products within this market can effectively compete with each other, assuming there is a sufficient level of interchangeability among them. Defining a market in terms of both product and geographic dimensions helps identify the actual competitors of the businesses involved, which in turn can constrain their behavior and prevent them from operating independently of effective competitive pressure.<sup>27</sup>

The CCI's approach has changed over time, with cases like *MakeMyTrip*<sup>28</sup> recognizing the differences between online and offline segments as distinct relevant markets. Given the variety of business models and distribution channels in the digital sector, a one-size-fits-all approach is insufficient. Instead, the CCI should evaluate the substitutability of online and offline distribution segments individually<sup>29</sup>. This approach may require market surveys to gain insights into consumer preferences, habits, and dependence on digital platforms. Though this method may be time-consuming and expensive, it ensures the digital sector's growth without unnecessary obstacles or overregulation, while protecting competition and consumer interests. By integrating these insights and solutions into the regulatory framework, the CCI can better accommodate the complexities of the digital market and promote a just and competitive environment.

---

<sup>26</sup> Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*, (Profile Books 2019).

<sup>27</sup> Gautam Shahi and Dr. Sudhanshu Kumar, 'Legislative Comment - The Competition (Amendment) Bill, 2022 : Conundrums of the Application of Supply Side Substitutability to Define Relevant Market', Advance Article, National Law School Business Law Review, accessed on September 17, 2023.

<sup>28</sup> *Federation of Hotel & Restaurant Associations of India (FHR/AI) v. Make my Trip*, Case Nos. 14 of 2019 & 01 of 2020.

<sup>29</sup> Simran Dhir, Akshat Kulshresth and Anuja Agrawal, 'Digital markets must be defined well for competition regulation. Mondaq' (*Mondaq*, 20 May, 2022).<<https://www.mondaq.com/india/antitrust-eu-competition-1194564/digital-markets-must-be-defined-well-for-competition-regulation>>.

CCI can look into market segments to determine whether a particular tech sector is nascent and essential to the country in the future. For example, when Reliance Jio entered the market, it made many strategic acquisitions which have made Reliance a dominant player in those areas<sup>30</sup>. It acquired DEN Networks and Hathway for Jio Giga Fibre. It acquired the likes of Balaji Telefilms, Saavn and Eros for content creation. The acquisition of Radisys and Tesseract<sup>31</sup> gave it an early-mover competitive advantage in artificial intelligence (AI), the Internet of Things (IoT) and augment/virtual reality (AR/VR). The fields in which the company is entering with its strategic investments aimed towards rapid growth signify a clear intent to dominate the markets in future. There is still a wide scope in defining what would constitute a critical sector, but industries that handle semiconductors and a large volume of behavioural data are important.

#### V. EXCLUSIONARY CONDUCT: A FORM OF ABUSE OF DOMINANCE

Exclusionary conduct is a type of anti-competitive behaviour a business uses to impede potential competitors. In *Surinder Singh Barmi v. BCCI 2017*<sup>32</sup>, the BCCI was found to have eliminated competition by granting itself jurisdiction to license or prohibit new market participants. The CCI observed that the organization's creation of an impenetrable barrier in the marketplace equates to a refusal of access to markets for the development of competitive domestic cricket leagues in India, in violation of Section 4(2)(c) read with Section 4(1) of the Act.

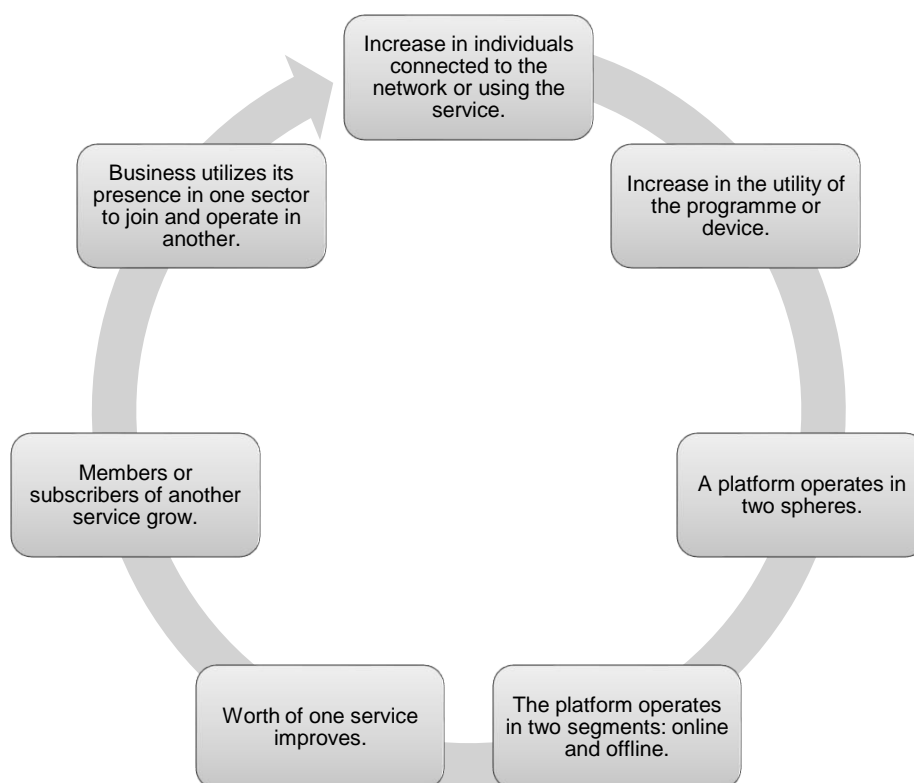
The network effect is an industrial phenomenon that occurs as more individuals become connected to the network or use the service, increasing the utility of the programme or device. While a platform operating in two spheres is essential for creating a network effect, both platforms do not have to function in the same mode. They can also function via two segments: online and offline. Hence, the network effect occurs whenever the worth of one service improves as the members or subscribers of another service grows, allowing the business to utilize its presence in one sector to join and operate in another.

---

<sup>30</sup> Gadgets Now Bureau, 'Reliance Jio customers, 7 acquisitions made by Mukesh Ambani you should know about', (Times of India, 2020), <<https://www.gadgetsnow.com/slideshows/7-companies-acquired-by-mukesh-ambani/reliance-jio-customers-7-acquisitions-made-by-mukesh-ambani-you-should-knowabout/photolist/66310246.cms>>, accessed on September 13 2023.

<sup>31</sup> List of Companies Acquired by Reliance, *Startup Talky*, <<https://startuptalky.com/reliance-industries-acquisitions/>>, accessed on September 15, 2013.

<sup>32</sup> (2017) SCC OnLine CCI 57.



The purchase of different firms by the educational-technology behemoth Byju’s for some time has prompted alarms, including the danger of Byju’s abusing its dominant position.<sup>33</sup> With a user base of fifty-seven million, along with the acquisition of brick-and-mortar business of Aakash Educational services, the platform has created a network effect to create a dominant position in the ed-tech sector. The CCI was always concerned when evaluating “network effects” u/s 19(2) of the Competition Act, 2002. However, with the introduction of technology platforms, network effects operate in its interest, resulting in significant customer footfalls on such platforms. As a result, network effects create significant market dominance that can influence competition in its advantage, as evidenced in the CCI’s recent ruling in *Federation of Hotel & Restaurant Associations of India (FHRAI) v. Make my Trip*.<sup>34</sup> Post-acquisition, more consumers would utilize Byju’s products in conjunction with Aakash, thereby, improving the product’s value. Here, the economic idea of “network effects” would accelerate expansion, with Byju’s and Aakash potentially controlling online and physical marketplaces. With Byju’s wealth, they can further tilt the market by acquiring

<sup>33</sup> Ghose Tapamoy and Dua Khushi, “The Byju’s- Aakash Deal: A missed opportunity for the CCI”, *Arbitration and Corporate Law Review* (2021), <><https://www.arbitrationcorporatelawreview.com/post/the-byju-s-aakash-deal-a-missed-opportunity-for-the-cci>, accessed on September 14, 2023.

<sup>34</sup> Case Nos. 14 of 2019 & 01 of 2020.

other businesses. This might point to Byju's eventual ability to dominate the whole education technology market based on its decisions to the disadvantage of other rivals<sup>35</sup>.

## VI. DOMINANCE & OBJECTIVE JUSTIFICATION: DIVERGENT INTERPRETATIONS

The Parker principle, famously quoted by Stan Lee as “*With great power, comes great responsibility*,” aptly captures the essence of market dominance, which is central to Section 4 of the ICA. While businesses strive for profitability, they must also avoid crossing the delicate boundary between maximizing gains and engaging in predatory behaviour. Distinguishing between dominance and abuse can be challenging, often leading to false accusations against dominant market players. Section 4 of the Competition Act, 2002, explicitly prohibits the abuse of a dominant position, emphasizing the importance of maintaining a balance between commercial success and fair competition.

Interestingly, “Dominance” is not used once in this section, but “the dominant position” is used instead. The phrase “dominant position” is defined by the act as the level of market power a firm possesses in the relevant market to the point when it can function autonomously from the competitive pressures impacting its competitors, consumers, or target market in India.

The crux of the matter revolves around whether violators of Section 4 of the ICA face absolute liability. Legal principles do not operate in isolation but emerge from the interplay of various circumstances. Consequently, an action that may appear “unfair” might not necessarily contravene the law<sup>36</sup>, leading to the concept of objective justification. Objective justification implies that certain conduct by a dominant firm, which could prima facie seem anti-competitive, may be considered legal and justified if it fulfils specific criteria or purposes, such as achieving efficiencies, benefiting consumers, or is a necessary result of independent business strategy not aimed at harming competition.

In India, the ongoing debate on the ‘objective justification theory’ highlights the gaps in understanding the fundamental structure of Section 4 of the Act. The Supreme Court’s decision in the case *Competition Commission of India v M/S Fast Way Transmission*<sup>37</sup> serves as a significant reference for the interpretation of the ‘objective justification’ defence within Indian competition law. In this case a broadcaster of a news channel, entered into a channel placement agreement with

---

<sup>35</sup> Ghose Tapamoy and Dua Khushi, The Byju’s- Aakash Deal: A missed opportunity for the CCI, *Arbitration and Corporate Law Review* (2021), <<https://www.arbitrationcorporatelawreview.com/post/the-byju-s-aakash-deal-a-missed-opportunity-for-the-cci>>, accessed on September 16, 2023.

<sup>36</sup> Rizvi, Zisha, Decrypting the Concept of Abuse of Dominant Market Position: Trends in India and EU (February 26, 2020). Available at SSRN: <<https://ssrn.com/abstract=3578864>>, accessed on March 13, 2023.

<sup>37</sup>(2018) 4 SCC 316.

the Multi System Operators (MSOs), forming part of the Fast Way group, for a period of one year. The agreement was terminated by the MSOs after one year, citing low television rating points (TRP) and spectrum constraints. The broadcaster filed a complaint with the CCI, alleging that the termination of the agreement was an abuse of dominant position by the MSOs. The termination of the channel placement agreement was scrutinized under the lens of abuse of dominance. However, it is the reasoning of Supreme Court behind the termination that is pivotal in the context of ‘objective justification’.

The MSOs defended their decision to terminate the agreement based on practical considerations such as low TRPs and spectrum constraints. They posited that such factors necessitated the termination, implying an objective and justifiable rationale for their actions that was unrelated to an intent to abuse their dominant position. Despite this defence, the Court determined that the MSOs did indeed abuse their dominance. It was concluded that the given reasons did not suffice to justify the termination. This ruling implicitly touches upon the ‘objective justification’ concept, albeit without providing a concrete endorsement of the theory. The Court’s analysis indicates that for a ‘termination for cause’ to be acceptable, the justifications provided must be compelling enough to override concerns of anti-competitive behaviour. The MSOs’ argument of low TRPs and spectrum issues did not meet the threshold set by the Court for objective justification.

Therefore, while the ‘objective justification’ defence exists as a legal argument, its successful application is subject to strict scrutiny. The ruling suggests that simply stating reasons that appear objective is not enough; they must withstand rigorous assessment against the backdrop of anti-competitive concerns. The burden of proof lies heavily on the dominant enterprise to demonstrate that their conduct was proportionate, non-discriminatory, and necessary, rather than a veiled attempt to engage in exclusionary practices or exploitation of their dominant market position.

The principle of Objective Justification is firmly established in European Union Competition Law<sup>38</sup>. The EU’s recognition of the defence is systematic, with the concept being utilized to exempt a dominant enterprise from liability by proving the necessity of its conduct to achieve a legitimate objective. Notably, the EU model specifies that the efficiencies must be directly connected to the conduct, be indispensable, and that their benefits should outweigh any negative competition impacts without eliminating effective competition entirely. The EU’s sophisticated application of the objective justification defence in competition law is evidenced by the jurisprudence, such as the case of *United Brands Company and United Brands Continental BV v Commission of the European*

---

<sup>38</sup> D Hildebrand, *The Role of Economic Analysis in the EC Competition Rules* (2nd edn Kluwer Law International The Hague 2002), p. 388.

*Communities*<sup>39</sup>. In this case the court held that safeguarding an entity's commercial interests is vital for maintaining equitable competition in the marketplace, however this defence cannot be reasonably sustained if it involves reinforcing a dominant market position through abusive practices. The EU had consistently applied the doctrine to exempt a dominant enterprise from liability by substantiating that its conduct was indispensable for achieving a legitimate goal. Moreover, this refined application requires that the efficiencies must be intrinsically linked to the conduct, absolutely necessary, and that the positive outcomes must sufficiently counter any negative impacts on competition without eradicating all effective competition. This multifaceted and meticulous application is indicative of the EU's mature legal infrastructure in competition matters, honed through years of regulatory practice and case law refinement<sup>40</sup>.

The principle established in the United Brands Case is echoed in the ruling of the CCI in the matter of *East India Petroleum Private Limited vs. South Asia LPG Company Private Limited*<sup>41</sup>, where the latter compelled companies to exclusively utilize its cavern facilities and imposed prohibitively high bypass fees, rendering their market operation unsustainable. South Asia LPG Company's defence, citing the protection of its commercial interests, was dismissed by the CCI on the grounds that such conduct amounted to an abuse that eliminated market competition through the imposition of inequitable and biased terms upon East India Petroleum.

The CCI has also held in *Kapoor Glass Private Limited vs. Competition Commission of India*<sup>42</sup> that safeguarding commercial interests encompasses the defence of a company's intellectual property rights as well. In this case the Competition Appellate Tribunal (COMPAT) upheld the CCI's decision regarding Schott India's refusal to engage with Kapoor Glass, which was attempting to imitate Schott's products. The COMPAT confirmed that such denial of engagement did not constitute a breach of the Act since an enterprise has the right to preserve its brand reputation and prevent the dilution and violation of its trademark. The CCI acknowledged that the safeguarding of a trademark constituted a valid commercial interest for Schott India.

The Commission's judgment suggests that efficiencies must be balanced against the potential for anti-competitive effects, which could be detrimental to the market. This balancing act was evident in the contrasting outcomes of the East India Petroleum case and Kapoor Glass Pvt. Ltd. v.

---

<sup>39</sup> European Court Reports 1978 -00207, Judgment of the Court of 14 February 1978, *United Brands Company and United Brands Continenteaal BV v. Commission of the European Communities, Case 27/76*, <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61976CJ0027>>, accessed on November 7, 2023.

<sup>40</sup> Roger J. Van Der Bergh and Peter D. Camesasca, *European Competition Law and Economics*, Intersentia, 2001, p. 5.

<sup>41</sup> Case No. 76 of 2011, Competition Commission of India.

<sup>42</sup> 4240 Appeal No. 92/2012 with I.A.No. 183 of 2012 & I.A.

Competition Commission of India, wherein the latter saw efficiency justifications accepted on account of cost and economies of scale benefits.

An analysis of these cases reveals that both the CCI and the Supreme Court have developed similar yet distinct interpretations of Section 4. While the Supreme Court recognizes the principle of objective justification, it doesn't base its decisions solely on this principle.

The evolving landscape of competition law suggests a pressing need for clearer guidelines on the application of the objective justification defence. Such guidelines would ensure a consistent approach and provide a more predictable legal environment for businesses. Furthermore, statutory incorporation of this principle could eliminate judicial inconsistency and better align India with global competition law standards.

In sum, objective justification in competition law is a complex defence that demands careful consideration of the intended and unintended effects of dominant market behaviour. Ensuring the proper use of this defence is essential for the preservation of competitive markets, which in turn promotes innovation and serves the broader interests of consumer welfare.

## VII. CONCLUSION

Ultimately, the CCI should have autonomy in determining critical sectors vital to the nation's economic and security interests. To enhance oversight, the CCI should adopt forward-looking regulatory approaches that anticipate future market trends and foster competition. This includes reducing entry barriers, promoting market openness, and ensuring adaptable and responsive regulatory policies. International cooperation, regulatory flexibility, and stakeholder engagement are crucial for robust oversight.

Periodic reviews of regulatory frameworks enable policy refinement and optimization, leading to improved oversight and prevention of monopolistic situations. Acquisitions below the threshold in the Competition Amendment Act of 2023 should also fall under CCI scrutiny. A more comprehensive understanding of the courts' objective justification principle is needed, as the CCI has made seemingly contradictory determinations in dynamic markets, such as the Flipkart case (2018), the Amazon Flipkart investigative Order (2019), the Ola case (2015), the Google case, and the Airtel and Reliance Industries dispute (2017)

The nuanced application of the "objective justification theory" underscores the intricate interplay between preserving a firm's competitive advantage and preventing the misuse of a dominant market position. Section 4 of the Competition Act, with its list of prohibited dominance abuses, remains non-exhaustive, and the omission of a stance on "penetrative pricing" strategies has, in

instances such as the Jio phenomenon, enabled companies to skirt dangerously close to monopolistic dominance. The judicial discourse—reflecting through the Supreme Court’s deliberations in *Competition Commission of India v. M/S Fast Way Transmission*—underscores the exigency of a meticulous framework for interpreting what constitutes legitimate “objective justification” within the realms of Indian competition jurisprudence. This framework must accommodate the evolution of market dynamics while maintaining fidelity to the intent of the Act—protecting competition.

To conclude, fostering a competitive market in India necessitates that the CCI and judicial authorities tread a careful path—balancing the imperatives of promoting business innovation and growth against the potential hazards of market concentration and dominance. It is a balance that must be constantly recalibrated to reflect the evolving economic context, informed by a clear understanding of the “objective justification” principle and its appropriate application within the competition law framework. This delicate equilibrium is vital for preserving the integrity of the market and ensuring that it operates to the benefit of all participants within the economy.