National Law School of India University

Scholarship Repository

Articles

Faculty Publications

1-1-2023

Antitrust Concerns vis-a-vis Disruptive Innovation – Takeaways for Competition Commission of India

Sudhanshu Kumar
National Law School of India University, Bengaluru, sudhanshu.kumar@nls.ac.in

Garima Gupta

Follow this and additional works at: https://repository.nls.ac.in/nls_articles

Recommended Citation

Kumar, Sudhanshu and Gupta, Garima, "Antitrust Concerns vis-a-vis Disruptive Innovation – Takeaways for Competition Commission of India" (2023). *Articles*. 75.
https://repository.nls.ac.in/nls_articles/75

This Research Article is brought to you for free and open access by the Faculty Publications at Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of Scholarship Repository.

Antitrust Concerns vis-à-vis Disruptive Innovation – Takeaways for Competition Commission of India

- Dr Sudhanshu Kumar and Garima Gupta[*]

ABSTRACT: *In the era of innovation, market dynamics have evolved demanding a more nuanced analysis of market competition. Innovation in digital economy does promise new products and services but it can be an amiable reality only if it is directed towards ensuring consumer welfare and a free markets space for players. Since digital markets attract innovators and disruptors, it is important for antitrust regulators to differentiate between efforts directed towards value-creation and ones aimed at destroying or impeding the same. This paper aims at theorizing around the idea of 'disruptive innovation' and its implications for competition policy for India. The paper while acknowledging the pro-competitive benefits of disruptive innovation, elaborates on the fact that incumbents or potential players may in some situations clothe a business strategy as 'disruptive' in order to evade anti-trust scrutiny. Further, practices such as rent-seeking or killer acquisitions may be adopted in order to create barriers for new players or for driving out existing players which have a strong potential of disrupting the market by offering new products or services and thereby creating a new demand, altogether. Considering the fact that an antirust regulator in such situations needs to avoid false positives and false negatives while also ensuring continued innovation, the paper deliberates upon the need to evolve fundamental strategies for antitrust assessment. Reliance has been placed upon the developments in other jurisdictions such as the European Union and United States in order to identify certain key takeaways for the Competition Commission of India ('CCI'). While CCI in the recent past has made tremendous efforts in evolving its assessment to better suit digital markets, certain fundamental understandings around which an assessment revolves also demand evolution. In this light, the paper intends to provide some level of guidance to assess complex situations demanding antitrust assessment in a manner that should not lead to chilling effects on innovation.*

[*] Dr Sudhanshu Kumar is an associate professor at the National Law School of India University, Bangalore. Garima Gupta is a Doctoral Fellow at NALSAR University of Law, Hyderabad.

1. INTRODUCTION: INNOVATION AND 'DISRUPTIVE' INNOVATION

In the age of digital markets, innovation has occupied the centre stage for sustenance and survival in the market. While markets invariably witness the success of certain players, they may be replaced by other players owing to their difference in business strategies and openness to innovative growth. From a business perspective, therefore, common management prudence attaches significant importance to performance trajectories[1] or the rate at which a product or a service improves or continues to improve in a given time frame.[2] Viewed from a larger lens, the intent is to hold on to existing customers and staying close to them in order to provide improved products, building further on the present attributes of the product in question, otherwise referred to as 'sustaining innovation'.[3] For instance, the new product launches that original equipment manufacturers like Apple, Samsung make in order to provide an incremental gain to user experience with improved camera, picture quality, user interface etc. demonstrate the strategy of 'sustaining innovation'.

The strategy of 'disruptive innovation'[4] on the other hand, instead of providing an incremental gain to an existing product, aims at creating a niche product and new market space, aimed at tapping the often-ignored customer base. Though the term is frequently used, is also often vaguely understood. The concept was originally introduced in the year 1995 to describe the strategy of introducing a new product or service completely different from the existing mainstream product.[5] Technological innovation is directed towards providing a product or service which performs worse than the mainstream products in order to reach the untapped customer base which is willing to compromise quality over lower prices.[6] To put it differently, instead of focussing on superior performance, the disruptive innovator provides comparatively worse products which are cheaper and more convenient to use.[7] The intent is to create a new

[1] C.M. Christensen and others, \ 'Disruptive innovation: An Intellectual History and Directions for Future Research*'* (2018) 55(7) Journal of Management Studies1043.
[2] J.L. Bower and C. M. Christensen, 'Disruptive *Technologies:* Catching the Wave*'* (1995) 73(1) Harvard Business Review 43,45.
[3] Ronald N. Kostoff and others, 'Disruptive Technology Roadmaps*'* (2004), 71 Tech. Forecasting & Soc. Change 141, 142-44.
[4] Alexandre De Streel and Pierre Larouche , 'Disruptive Innovation and Competition Policy Enforcement*'* (2015) OECD Working Paper DAF/COMP/GF(2015)7, < https://www.oecd.org/competition/globalforum/disruptive-innovations-competition-law-enforcement.htm> accessed February 10, 2023.
[5] Bower and Christensen (n 2).
[6] Clayton M Christensen, *The Innovator's Dilemma: When New Technologies Cause Great Firms to Fail*(Harvard Business School Press, Boston 1997).
[7] Taylor M Owings., 'Identifying a Maverick: When Antitrust Law Should Protect a Low-Cost Competitor*'* (2013) 66(1) Vanderbilt Law Review 323, 344.

market space by targeting a niche product aiming a specific set of customers which is often ignored by established incumbents and are willing to forego the need for superior performance. From a purely business standpoint, disruptive innovation enables new firms to pierce a market by offering low-end products creating an uncontested market space for themselves. For instance, the online platform of *'Meesho'* has in a similar manner disrupted the online retail market by developing a category of its own.[8] It not only does not charge sellers any commission but also advertises for unbranded products on its platform often exhibiting low quality as most of the sellers are small and unregistered players.[9] As opposed to its rivals, '*Meesho'* leveraged on the price-conscious rural or semi-urban population of the nation.

Various scholars have used different vocabulary which include but are not limited to referring disruptive strategies as '*radical innovation'*[10], '*value innovation'*[11], '*break-out strategy'*[12] or '*creation of blue oceans'*[13]. Interestingly, over the last two decades, Christensen's (1995) original theory of disruptive innovation has also undergone an evolution and wider theories have emerged. Instead of restricting the idea to a generation of low-end products, new theories suggest that '*disruptive strategies'* may also result in higher priced products or services with a higher degree of innovation.[14] Disruptions may thus either be low-end or high-end.[15] The rise of '*Apple'* and the fall of '*Nokia*' is a real life manifestation of this argument as Apple while employing its disruptive "strategy" did not float a cheaper or lower quality product.[16] While *'Nokia'* was focused on creating technologically superior products, Apple surpassed it by

[8] Apoorva Mittal, 'Meesho's diversification plan pits it against Amazon, Flipkart' *The Economic Times* (13 April 2021), <https://economictimes.indiatimes.com/tech/startups/meesho-diversification-plan-pits-it-against-amazon-flipkart/articleshow/82040521.cms> accessed 25 February2023.

[9] Nivethitha T & Dr. K. Vanaja, 'A Study on Consumer Awareness on Meesho App Among Women in Coimbatore City' (2020) 6(11) EPRA International Journal of Multidisciplinary Research 335, . 337. *Also see* generally Aditya Shastri, 'In-Depth SWOT Analysis of Meesho – One of The Fastest-Growing Reselling E-commerce Platforms In India*'*, (IIDE 3April 2022), <https://iide.co/case-studies/swot-analysis-of-meesho/> accessed 05 February 2023.

[10] M. L Flor, S. Y. Cooper and M. J. Oltra, 'External Knowledge Search, Absorptive Capacity and Radical Innovation in High Technology Firms*'* (2018) 36(2) European Management Journal 183).

[11] B. Leavy, 'Value Innovation and How to Successfully Incubate "Blue Ocean" Initiatives*'* (2018) 46(3) Strategy and Leadership 10.

[12] A. B. S. A. Jamak, R. M. M. Ali, and Z. Ghazali, 'A Breakout Strategy Model of Malay, Malaysian Indigenous, Microentrepreneurs' (2014) 109 Social and Behavioral Sciences 572.

[13] W. Chan ., Kim and R. Mauborgne, *Blue Ocean Strategy* (Harvard Business Review Press, Boston Massachusetts, 2015).

[14] J.M. Utterback and H.J. Acee, 'Disruptive Technologies: An Expanded View',(2005)9(1) International Journal of Innovation Management 1.

[15] V. Govindarajan, and P.K. Kopalle, 'Disruptiveness of Innovations: Measurement and an Assessment of Reliability and Validity*'* (2006) 27(2) Strategic Management Journal 189..

[16]Richard W Cuthbertson, Peder Inge Furseth and Stephen J. Ezell,, 'Apple And Nokia: The Transformation From Products To Services*'*, in *Innovating in a Service-Driven Economy: Insights, Application and Practice* (Springer 2015) 111-129.

developing a superior product-service ecosystem in terms of leveraging software to create a platform for developing compelling mobile experiences. This can very well be categorized as a disruptive strategy. It has been argued that disruptive strategies may not be a result of disruptive or new technology but rather a result of integrating a technology within a business model.[17] In simple terms, the technology may not itself be disruptive but must aid in value creation by amplifying performance or simplifying previous performance.[18] For instance, *'Patanjali'* in India has emerged as a disruptive force and has changed the landscape of India's Fast Moving Consumer Goods (FMCG) sector.[19] In contrast to rivals active in herbal and ayurvedic products market, *'Patanjali'* has adopted a unique business model where role of the intermediaries is kept at a minimal by establishing an integrated, direct network between farmers through adoption of distinct distribution channels.[20]

From an economy's standpoint, disruptive strategies carry the potential to change the landscape of the market space in a pro-competitive manner. Unlike sustaining innovation which operates within an existing value network, disruptive technologies by operating outside it create a new value network altogether.[21] This not only leads to innovative products but also provides increased choices and alternatives for mainstream consumers as well as the untapped consumer base. They further enhance the competitive process by offering a distinct value proposition which in the longer run may create high consumer surplus as a result of reduced incumbents' profits.[22] From a business perspective as well, disruptive innovation in most of cases may reap benefits as such strategies work in the hindsight of dominant players. Established firms focussed on providing high-end and improved products, fail to realize that the market, for low-end products, experiences a deficit, which is then targeted by disruptive innovators.[23] In other cases, once a fair amount of market share is acquired by incumbents, they develop an inertia which significantly reduces their vision to offer new products or services or to explore new but

[17] S. R. Habtay, 'A Firm-level Analysis on the Relative Difference between Technology-driven and Market-driven Disruptive Business Model Innovations' (2012) 21 Creativity and Innovation Management 290.
[18] M. Heikkilä and others, 'Viability Radar: A Practical Tool for Assessing the Viability of Transformative Service Innovations in a Healthcare Context' (2015) 5 Technology Innovation Management Review 17, 20.
[19] Report of ASSOCHAM & TechSci Research, 'Indian Cosmeceutical, Cosmetics & Personal Care Market' (2022) <https://www.techsciresearch.com/admin/gall_content/2017/10/2017_10$thumbimg111_Oct_2017_092916623.pdf> accessed 09 February 2023.
[20] Srishti Gaur and Nimit Gupta, 'Disruptive Patanjali: Changing the Indian FMCG Landscape' (2016) 5 FIIB Business Review55.
[21] Pierre Larouche, 'Platform, Disruptive Innovation and Competition On the Market' (2020) CPI Antitrust Chronicle <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3837085> accessed 18 November 2023.
[22] Giulio Federico, Fiona Scott Morton, and Carl Shapiro, 'Antitrust and Innovation: Welcoming and Protecting Disruption' (2020) 20(1) Innovation Policy and the Economy.125.
[23] Owings (n 7).

more effective business models. In both these scenarios, owing to the fact that a new value network is created and the fact that initially the disruptive innovator has a lower grip on the market, incumbents do not perceive it as a threat. This not only provides the disruptor the opportunity to gradually improve its product/service without any interference but in many cases eventually leads to its emergence as a threat to the incumbents.[24] Interestingly, the latter part is achieved by the fact that the disruptor in the long run catches up with the dominant players by adopting '*sustaining innovation'* techniques to enhance the product or service that is offered by it initially, and enriching the user experience, consequently. The classic example is that of Netflix which was originally perceived as yet another inferior business strategy.[25] While Netflix evolved its video streaming services, other video rental service providers such as Blockbuster failed to fathom the network externalities at play leading to the market tipping in favour of Netflix.[26] '*Meesho*', for instance, is now almost at par with the big players and even exhibits similar strategies.[27] Naturally, other entities running on re-seller model such as '*Amazon*' and '*Flipkart*' are now perceiving '*Meesho*' as a threat owing to its continued popularity.

1.1 Scope and structure

With the advent of digital markets, the dynamics of market competition have changed manifold. Digital markets in comparison to traditional brick and structure markets posit strong challenges for antitrust regulation and enforcement. Such markets being characterized by network effects and feedback loops result in extremely fast popularity of a product or a service resulting in increased hold on the market.[28] Further, data plays a central role in the functioning of digital markets augmenting economic benefits and competitive advantage often leading to exclusion of other players in the market.[29] It is also a fact that digital markets bolster dynamic

[24]Bower and Christenson (n 2).
[25] Bianca Hensen, 'Disruptive Innovation: A Case Study On How Netflix Is Transforming The Living Room' (2017) <https://research.cbs.dk/en/studentProjects/12d16da0-768c-4ce4-9fb9-c03811db9827> accessed 04 February, 2023.
[26] Rokon Zaman, 'Netflix Disruptive Innovation – Renting to Streaming' (The Waves- Technology, Society and Policy 15 March 2022) <https://www.the-waves.org/2022/03/15/netflix-disruptive-innovation-renting-to-streaming/> accessed 06 February 2023.
[27]Aayush Agarwal & Soumyajit Saha, 'In its battle with Amazon and Flipkart, Meesho becomes more like them*'*, (*The Ken* 11 Oct 2022) <<https://the-ken.com/story/in-its-fight-against-amazon-and-flipkart-meesho-becomes-more-like-them/> accessed 02 February 2023.
[28] Inge Graef, 'Market Definition and Market Power in Data: The Case of Online Platforms' (2015) 38(4) World Competition 473
[29] Victoria Fast, Daniel Schnurr, and Michael Wohlfarth, 'Regulation of Data-driven Market Power in the Digital Economy: Business Value Creation and Competitive Advantages from Big Data'(2021) 38(2) Journal of Information Technology202; Maurice E. Stucke and Allen P. Grunes, 'Debunking the Myths Over Big Data and Antitrust' (2015) 2 CPI Antitrust Chronicle..

competition due to the strong role of technology and data in their functioning. While innovation is important for an economy, any and all antitrust assessment is targeted towards existing markets, leaving potential or new markets technically outside its radar.[30] It is in this context that the present work aims at analysing the possible antitrust concerns with respect to disruptive innovation strategies. Disruptive strategies require a qualitative analysis to understand the value addition they are doing to the economy and customers' experience. There is a need to identify rent-seeking strategies which in the garb of disruptive innovation may escape antitrust scrutiny. Further, any conduct which aims at eradicating potential disruptors often remains un-identified due to the popular ex-post nature of antitrust, leaving the market with fewer players in the long run. It is pertinent to mention that considering the distinct nature of digital markets, there is a possibility that disruptive strategies feed on the distinct characteristics exhibited by digital markets such as network effects, feedback loops and switching costs, leading them to often emerge as the nemesis of established firms or even prevent the entry of potential disruptors. Since unlike sustaining innovation, disruptive innovation does not take place in existing markets, any anti-competitive conduct is extremely difficult to identify.[31]

The article is divided in to five parts. Part I lays down the foundational aspects of 'disruptive innovation' and why it should be seen differently to 'sustaining innovation'. The distinction is of utmost relevance as the nature of antitrust scrutiny changes with the former focussing on potential markets and the latter on existing markets. Part II discusses the impact of disruptive innovation/strategy on market and identifies potential antitrust concerns associated with such strategies both from the standpoint of 'disruptors' and 'incumbents'. In the course of this examination, the authors have scrutinized market conduct like rent- seeking, rent-extraction, exclusionary practices and acquisitions aimed at killing potential competitors. Part III discusses the approach of antitrust regulators of mature jurisdictions such as US and EU vis-a- disruptive innovation. Part IV presents the approach of the Competition Commission of India (CCI) in dealing with cases involving 'innovation' and discusses possible takeaways for the CCI from the experience of mature antitrust jurisdictions. Part V concludes the discussion by advocating and providing suggestions for an *ex-ante* policy of antirust assessment in order to promote competition in 'innovation markets'.

[30] Inge Graef, Sih Yuliana Wahyuningtyas and Peggy Valcke, 'How Google and Others Upset Competition Analysis: Disruptive Innovation and European Competition Law' (2014) International Telecommunications Society ≤25th European Regional ITS Conference, Brussels> .
[31] ibid.

2. DISRUPTIVE INNOVATION AND MARKET COMPETITION

Disruptive Innovation in its essence carries the potential to reshape markets by creating new product paradigms either by way of new technologies or through novel applications of existing technology. As a result, market competition is affected in myriad ways which may either be pro-competitive or result in certain situations which may raise anti-competitive concerns.[32]

2.1 Pro-competitive effects of Disruptive Innovation:

Operating outside existing value networks and capitalizing on unexplored market spaces, instead of being restricted to allocative and productive efficiency in the market; disruptive strategies promise innovation driven dynamic competition which alters the value proposition of customers.[33] They epitomize *Schumpeter's* idea of '*creative destruction'*[34] where instead of competing 'within' the market, players compete 'for' the market.[35] The difference between the two situations is that of intent and can be adopted by either an existing incumbent or a new entrant. Where players are competing 'within' the market they experiment with technology, price and quality in order to provide better products or services as compared to their competitors. On the other hand, players competing 'for' the market, instead of focusing on price, consider innovation as the bedrock. The intention in the latter case is not to compete with rivals but to create an unexplored niche market in order to attain the status of a monopolist.[36] Since, there is a constant pressure of being obliterated, it leads to continued dynamic efficiency[37] and players in the long run constantly look for break-through strategies which would not require competing with or eliminating competitors at all. Interestingly, such innovations not only increase the level of competition but also create a win-win situation for the consumers as well as the competitors.

Dynamic efficiency in comparison with allocative or productive efficiency, is not captured by the theory of perfect competition[38] and demands novel strategies backed by investment. By

---

[32] Cristina Caffarra and Oliver Latham, 'Is Antitrust in Need of Disruption: What Is Disruptive Innovation and What, if Anything, Does Competition Policy Need To Do to React to It?' (2018) 2(1) The New Frontiers of Innovation and Competition 86..

[33] Federico (n 22).

[34] Joseph Schumpeter, *Capitalism, Socialism and Democracy* (Routledge, New York 2010) 83.

[35] Antonella Laino=, 'Innovation and monopoly: The position of Schumpeter' (2011) MPRA paper, University Library of Munich, Germany

[36] Joseph A. Schumpeter, 'Science and ideology' (1949) 39(2) American Economic Review 345.

[37]Michael L. Katz and Howard A. Shelanski, 'Schumpeterian' Competition and Antitrust Policy in High-Tech Markets', (2005) available at <https://dmccartney.com/nn/files/ssrn-id925707-1.pdf> accessed 01 February 2023.

[38] Richard Whish and David Bailey, *Competition Law* (9th ed., Oxford University Press, United Kingdom 2018) 6.

making the existing competition irrelevant the disruptor does not feel the need to outperform competitors but rather achieve value-innovation. Value innovation makes competition irrelevant by leap-frogging present value networks and creating new choices.[39] Firstly, this leads to increased research and development leading to growth of the markets in general.[40] Software companies for example, although continue to compete statically, compete dynamically as well, as they continue to make new products and continue to invest in research and development.[41] Secondly, new products and services are made available leading to increased choices for customers as well.

The sudden popularity of the brand of '*Yellow Tail'* is an appropriate example. Yellow Tail is an Australian wine brand which leapfrogged the gains of popular wine brands by adopting a reconstructionist strategy.[42] By eliminating all unnecessary costs and strategies which traditional wine industries adopt, it only focussed on easy selection and easy drinking. This was in stark opposition to the traditional wine industry which promoted wines through the idea of sophistication and antiquity which in reality feared a large population away. *Yellow Tail* provided an 'easy to drink' wine with less complicated wine structure coupled with a fruity taste completely eliminating the need to preserve the wine for years.[43] The selection process was also made very simple with minimum options saving customers from choosing on the basis of aging, tannins and complexity. The result was that even non-traditional wine drinkers such as beer drinkers or cocktail drinkers became regular customers leading to soaring profits.[44]

Disruption vis-à-vis innovation or business strategy does not only provide new options for customers but also enhances competition as a process. Further, it provides an incentive to market players for innovating with the aim of not only achieving profits but also eliminating competitive constraints. Creation of new market spaces will naturally have low entry barriers due to the novel nature of the products so entry in that particular segment will be relatively smooth. Once network effects and feedback loops kick in, eventually there emerges a clear leader. More significantly, the disruptor will experience first-mover advantages in the long run

[39]Kim (n 13) 13..
[40]Ike C. Ehie and Kingsley Olibe, 'The effect of R&D investment on Firm Value: An Examination of US Manufacturing and Service Industries' (2010) 128 International Journal of Production Economics 127.
[41] Richard Schmalensee, 'Antitrust Issues in Schumpeterian Industries' (2000) 90(2) American Economic Review 192.
[42]W. Chan Kim and R. Mauborgne ., 'Blue Ocean Strategy: From Theory to Practice', (2005) 47(3) California Management Review 105..
[43] Giorgio Gandellini and Daniela Venanzi, 'Purple Ocean Strategy: How to Support SME's Recovery' (2011) 24 Procedia Social and Behavioral Sciences.
[44] Kim n(13).

due to the launch of the new product or service and penetration of the market with a new segment.[45] This further increases the motivation for a disruptor as the revenues of competitors may fluctuate in near future because of the shift in consumer behaviour.[46] *'Airbnb'*, for instance, made the best use of internet to revolutionize tourism accommodation by launching a new service i.e. peer to peer accommodation, in contrast to the traditional model i.e. renting from formal structures such as hotels. This led to a sharp spike in its growth curve[47] which was a result of the interplay of new strategy, internet economy and first mover-advantages.

2.2 Anti-competitive concerns related to Disruptive Innovation:

2.2.1 From the context of the disruptor

2.2.1.1 *Rent-seeking*:

From a new entrant's perspective, 'rent seeking'[48] can be associated with situations where the entrant instead of promising productivity, is actually aiming at appropriating the surplus of other market players.[49] In terms of innovative strategies, instead of using technology for creating surplus, firms may indulge in using technology to shift the consumer base of other players.[50] New entrants in order to pierce the market often resolve to rent-seeking techniques while portraying them as disruptive innovation strategies to avoid antitrust scrutiny. Going a step further, entrants often resort to copying or reverse-engineering an existing model to pierce the market by offering a parallel product, all in the garb of disruptive innovation.

The market for radio-taxi services explains this phenomenon in context of which Uber has been time and again referred to as a market disruptor.[51] However, the details of Uber's strategy, it

[45]C.R. Flor and M.R. Moritzen, 'Entering a New Market: Market Profitability and First-mover Advantages*'* (2020) 62 Journal of Corporate Finance 1.

[46] Dumoulin, R., & Giacomel, A., *Disruption and the strategy of hotel groups*. In. (2020). R. Dumoulin and A. Giacomel, 'Disruption and the Strategy of Hotel Groups' in G. Grefe and D. Peyrat-Guillard (eds.), *Shapes of Tourism Employment: HRM in the Worlds of Hotel and Air Transport* (John Wiley & Sons 2020)

[47]Florian J. Zach, Juan L. Nicolau and Abhinav Sharma, 'Disruptive Innovation, Innovation Adoption and Incumbent Market Value: the Case of Airbnb' (2020) 80 Annals of Tourism Research 102818.

[48] Rent-seeking in economics, refers to a situation where an individual or entity seeks to increase its own wealth without any reciprocal returns to productivity in the market leading to deadweight loss. *See*, G. Tullock, 'The Welfare Costs of Tariffs, Monopolies, and Theft' (1967) Western Economic Journal 224. It leads to social costs by wasting valuable resources. *See*, Robert D. Tollison, 'The Economic Theory of Rent Seeking' (2012) 152 Public Choice 73.

[49]Vincent Glode and Guillermo Ordonez, 'Technological Progress and Rent Seeking' (2022) available at <https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3753042> accessed 31 January 2023.

[50] William J. Baumol, 'Entrepreneurship: Productive, Unproductive and Destructive' (1990) 98(5) Journal of Political Economy 893.

[51] Henrique Schneider, *Creative Destruction and the Sharing Economy: Uber as Disruptive Innovation* (Edward Elgar Publishing 2017). *Also see*, Andrea Urbinati and others, 'An Exploratory Analysis on the Contextual

does not fall into the requirements of them being disruptive.[52] If one looks at the evolution of radio-taxi services especially in India, it will be observed that Uber was not the pioneer of the same. The uncontested market for radio-taxi services was first created by Meru in the year 2007 making use of the existing technology which provided cab details, driver's details, vehicle tracking, real-time booking and assured service.[53] Later, the market of radio-taxi services in India experienced new entrants such as Ola in the year 2010[54] and Uber in the year 2013.[55] One can argue that this has only led to broader options for customers in this particular segment.[56]

Rent-seeking may lead to ostracization of pioneers by way of free-riding by new entrants. Once the technology introduced by the pioneer is understood and replicated by the new entrant, the pioneer is thereafter driven away from the market by way of exclusionary strategies. In the 2015 case of *Meru Travel Solutions Pvt. Ltd.*[57], it was alleged that in order to drive *'Meru'* away from the radio taxi market in the city of Kolkata, Uber indulged in exclusionary practices such as deep discounting and predatory pricing. However, the regulator while opining that the latter is not a dominant player concluded that no investigation is required.[58] Interestingly, in *M/s. Fast Track Call Cab Private Ltd. v. ANI Technologies Pvt. Ltd.*[59], the contention of

---

Factors that Influence Disruptive Innovation: The Case of Uber*'* (2018) 15(3) International Journal of Innovation and Technology Management 1850024.

[52] Three reasons can be put forth for Uber's strategy not being disruptive: Firstly, Uber did not create an uncontested market space because radio taxi services were prevalent even before its entry into the market. Secondly, it did not target non-consumers or ignored section of the consumers by offering a low-end product rather it was meant for mainstream consumers, expecting a shift in the consumer choice. Thirdly, Uber's services were never considered to be inferior and were rather in the nature of 'sustaining innovation'. *See* Clayton M. Christensen, Michael Raynor and Rory McDonald, 'What Is Disruptive Innovation? Twenty Years after the Introduction of the Theory, We Revisit What it does and doesn't Explain' (2015) Harvard Business Review, <https://www.innosight.com/wp-content/uploads/2018/01/Innosight_HBR_What-is-Disruptive-Innovation.pdf> accessed 28 January 2023.

[53]Kalyani Srinivasan C and others, 'Meru Cabs: Phoenix or Failure?' (2021) 20 Academy of Strategic Management Journal 1.

[54] C. M. A. Panigrahi, Shambhavi Shahi and Amarsingh Rathore, 'Success story of a start-up–a case study of Ola Cabs*'* (2018)20(2) IOSR Journal of Business and Management 30

[55] Competition Commission of India, 'Market Study On Competition And Regulatory Issues Related To The Taxi And Cab Aggregator Industry: With Special Reference To Surge Pricing In The Indian Context Key Findings And Recommendations' (2022) 5 <https://www.cci.gov.in/images/marketstudie/en/market-study-on-cab-aggregator-industry-with-special-emphasis-on-surge-pricing1662725297.pdf> accessed 25 January 2023.

[56] A recent report by an Indian market research company observed the growing preference of Ola (84%) and Uber (80%) in urban cities as compared to Meru cabs which has a meagre percentage of 6% consumer hold. See BW Online Bureau, *'*Ola Vs Uber Vs Meru Vs Mega Cabs: Numr Research Finds Out Which Taxi App Indians Prefer', (BW Business World 23 June 2019) <https://www.businessworld.in/article/Ola-Vs-Uber-Vs-Meru-Vs-Mega-Cabs-Numr-Research-Finds-Out-Which-Taxi-App-Indians-Prefer/23-06-2019-172499/> accessed 01 February2023.

[57] *In re: Meru Travel Solutions Pvt. Ltd. v. Uber India Systems Pvt. Ltd., Uber BV & Uber Technologies International Inc.*, Competition Commission of India Case No. 81 of 2015.

[58] *Also see, M/s. Mega Cabs Pvt. Ltd. v. M/s ANI Technologies Pvt. Ltd.*, Competition Commission of India Case No. 82 of 2015; & *Meru Travel Solutions Private Limited v. Uber India Systems Pvt. Ltd.*, Competition Commission of India Case No. 96 of 2015.

[59] Competition Commission of India Case No. 6 & 74 of 2015.

disruptive innovation was used by the opposite party stating that the radio taxi market is dynamic and hence one entity cannot be held dominant. The informants on the other hand claimed that the entry of the opposite party is a mere disruptive incursion with no new offerings leading to a shift in commuters. Although it was observed by the Director General (DG) that growth of opposite party was not a result of innovation or efficiency rather adoption of low pricing model, the CCI held that since dominance cannot be proved in such a dynamic market the question is irrelevant. The CCI also mentioned that the business model of the informant and the opposite parties are different as the former is based on owned-asset model whereas the latter is an aggregator model. Hence, it held that it cannot be fairly argued that the increase in market presence of the opposite parties was merely a result of lower prices. It can be fairly argued that the assessment of 'dominance' under Section 4 by the CCI has operated within a narrowly construed space i.e. a static relevant market. As discussed later in this work, jurisdictions like European Union have evolved the concept of 'innovation market' in order to incorporate the dynamic nature of such markets which makes the assessment of 'dominance' more sophisticated and tailored to spaces which promise innovation. Due to the static model of identification of 'relevant market' prevalent in India, CCI in the above-mentioned cases, failed to appreciate that network effects carry the potential to transform the market position of players and if exclusionary practices are not identified in context of 'innovation markets', rent-seekers may take advantage of pioneers and eventually drive them to a corner. This definitely opens doors for false positives pushing the argument towards an *ex-ante* competition policy to undertake an effect-based approach in 'innovation markets' to avoid the possibility of irreparable damages.

Digital markets unlike traditional economies experience high network effects. Hence, rent-seeking activities by new entrants which do not offer a new product or service pose serious concerns. Rent-seekers primarily aim at competing 'for' the market like any other disruptive innovator, but the difference is in the nature of strategy adopted by the two groups. While the former without offering a new product or service merely adopts exclusionary strategies for attracting customers; the latter need not adopt such strategies at all as the shift in the customer base is due to the novel nature of the product or service which in itself promises first-mover advantages. The next part examines the relationship between competition 'for' the market and adoption of exclusionary strategies by rent-seekers.

2.2.1.2 *Interplay of rent-seeking by new entrants and competition 'for' the market*:

Firms using disruptive innovation as a strategy, instead of competing within the market, compete for the market which generally results in innovative products or services. However, as discussed above certain rent-seeking strategies may be clothed as disruptive strategies not always aimed at offering new levels of productivity but only towards appropriation of rents of other players. More specifically, in context of digital markets such rent-seeking strategies when assessed from the underlying intention of competing 'for' the market, raise antitrust concerns. Since, no new product or service is being offered by rent-seekers, they merely evolve strategies to create a void which incumbents are presently not offering. Resultantly, instead of working on the fundamental values of assets to result in novel products or services, the technology in hand is rather utilized to acquire relevant information about the business and strategies of other market players.[60] This often results in imitation of products or services but a specific agenda to create a demand which is not only captive but also insulates the concerned rent-seeker from competitive constraints.[61]

Since market players have autonomy with respect to business decisions, the antitrust concern is more about the process so adopted, which at times may be exclusionary or discriminatory. The distinct characteristics of digital markets unfortunately end up facilitating such intention for competition 'for' the market. Network effects are a distinct characteristic exhibited by digital markets which refer to increased popularity or usage of a product with the increased number of users.[62] Incremental gain is experienced by any user with addition of every new user to the product or service. In case of multi-sided platforms, indirect network effects also take place as value of a product or service for a particular user group is dependent on the increased number of users on the other side.[63] These characteristics further augment switching costs as digital markets are in simple words information economies which thrive on data and a customer finds it difficult to switch to any other product or service provider making the customer experience a lock-in effect.[64] A rent-seeker in the age of digital markets often capitalizes on these characteristics in order to pierce the market in a manner that de-stabilizes the business of

[60] Maryam Farboodi and Laura Veldkamp, 'A Model of the Data Economy'(2022) National Bureau of Economic Research Working Paper 28427 < https://www.nber.org/system/files/working_papers/w28427/w28427.pdf> accessed 19 November 2023..
[61] Glode and Ordonez(n 49).
[62] C. Santesteban and S. Longpre, 'How Big Data Confers Market Power To Big Tech: Leveraging The Perspective Of Data Science*'* (2020) 65(3) The Antitrust Bulletin 459.
[63] V. Fast, D. Schnurr and M. Wohlfarth, 'Regulation of Data-driven Market Power in the Digital Economy: Business Value Creation and Competitive Advantages from Big Data' (2023) 38(2) Journal of Information Technology 202.
[64] Joseph Farrell and Carl Shapiro, 'Dynamic Competition with Switching Costs*'* (1988) 19(1) The RAND Journal of Economics 123.

the incumbents. However, in order to create that opportunity instead of engaging in frontal competition, it will attack sideways in all possibility would be willing to forego profits in the initial phase.[65] Once a fair portion of customer is locked-in, it will gradually evolve its business strategies in line with traditional incumbents.

The case of Amazon is a classic example of this phenomenon which entered Indian market in 2013.[66] Initially, in order to pierce the niche area of online marketing Amazon incurred heavy losses,[67] not that it was focussing on quality, it was merely poaching customers from an already existing business model. Flipkart which launched in Indian market as early as 2007 had a similar model and was rather the introducer of systems such as cash on delivery because during the time internet banking was not rampantly used.[68] The investors of Amazon being aware of the intention of Amazon to create an orbital shift in the market in the long run continued to support the aggressive business strategies which even included predatory pricing.[69] The issue gets even more complicated in digital sector as major access to any product/ service by a consumer is either dependant on the specific knowledge of various websites or is steered by the search engines, the latter being the common scenario. Due to a massive shift of consumer base, the amount of data accumulation also soared which further leads to a self-fulfilling cycle of personalized advertisements and tailored services. Amazon has also been referred to as a rent-seeker as it neither offers any incremental gains nor adds value and rather only cannibalizes profits of brands which sell on its portal.[70]

To sum it up, a new entrant who either has deep pockets, heavy funding or support of investors is able to incur losses to an extent that existing players are driven out of the market. The case of Amazon as well as Uber exemplify such situations wherein at least initially there was no value addition made by these entities and rather predatory pricing was used to enter the market and compete 'for' the market. Instead of competing 'in' the market with fair strategies, in the name of disruptive innovation they kept on incurring losses till the time customer dependency

---

[65] Pierre Larouche, 'Platforms, Disruptive Innovation, and Competition on the Market*'* (2020) Competition Policy International Antitrust Chronicle, University of Montreal Faculty of Law Research Paper..

[66] Raghaw Jhunjhunwala, Shameek Datta, & Vineet Gupta, 'Amazon v/s flipkart–the 'nash' way*'* (2018) <https://vslir.iima.ac.in:8443/xmlui/handle/11718/21730> accessed 23 January 2023.

[67] Lina M. Khan, 'Amazon's Antitrust Paradox' (2017). 126 YALE L. J. 710.

[68] Jhunjhunwala (n 66).

[69] Jeffrey P. Bezos, 'Letter to Shareholders' (1997) AMAZON.COM, INC. <https://s2.q4cdn.com/299287126/files/doc_financials/2021/ar/Amazon-2020-Shareholder-Letter-and-1997-Shareholder-Letter.pdf> accessed 5 February 2023.

[70] John Reed, 'Amazon is a Bridge Troll, a Rent seeker' (*John T. Reed's Blog* 30 June 2017) <https://johntreed.com/blogs/john-t-reed-s-news-blog/amazon-is-a-bridge-troll-a-rent-seeker> accessed 1 January 2023.

was created. Eventually, these entities did come up with sustaining innovation techniques but only when the market was more or less exclusive to them.

2.2.2 Incumbents' Strategies to impede Disruptive Innovation:

The existing and established players in the market (incumbents), develop a fear of elimination by nascent players. Hence, incumbents may derive myriad anti-competitive strategies to secure their established positions. Firstly, they may conflate innovation with imperfect rent extraction in order to evade antitrust scrutiny in the garb of innovation even when no reciprocal productivity is being offered. Secondly, the fear of a breakthrough disruptive innovation from nascent players or potential competitors makes them create a water-tight ecosystem by way of adopting exclusionary strategies. Thirdly, a more direct way of killing potential competitors capable of de-stabilizing incumbents' position is acquisition of the former. In the above-mentioned scenarios, the underlying intention of the incumbent is to eliminate any present or future competition. This can be done either by excluding rivals from tapping the customer base with innovative products or by eliminating the potential competition completely. Hence, such strategies need to be closely scrutinized in order to promote disruptive innovation in markets.

2.2.2.1 *Imperfect rent-extraction*:

Incumbents often resort to strategies to derive further benefits from their market position and resource allocation without offering any reciprocal productivity. An incumbent who holds an input relevant for a downstream market would normally resort to perfect rent-extraction as it could gain more by charging higher than curtailing the supply of the input.[71] This is referred to as the 'single monopolist profit theorem' according to which a rationale monopolist will not resort to tying in order to leverage in a secondary market because higher or perfect rents can be rather extracted from dealing with downstream players.[72] In other words, it states that tying will only be used by a monopolist if there is some form of efficiency gain.

However, the abovementioned theory has its limitations. Rent extractions by an incumbent may also be imperfect in situations where the incumbent finds it possible to make more profits by foreclosing the input to its rivals.[73] In case of integrated markets where the usage of a complementary product is dependent on the usage of the primary product, the monopolist may

[71] Ward S. Bowman, Jr., 'Tying Arrangements and the Leverage Problem*'* (1957) 67 YALE L.J. 19, 20–23.
[72] ibid.
[73] Massimo Motta, 'Self-preferencing and Foreclosure in Digital Markets: Theories of Harm for Abuse Cases*',* (2022) Centre for Economic Policy Research , Economics Working Paper Series 1851, (<https://econ-papers.upf.edu/papers/1851.pdf> accessed 19 November 2023.

squeeze the independent suppliers of the complementary product by putting competitive pressure through inefficient integration.[74] The intention is to transfer the surplus from the complementary product being offered by independent rivals to the primary product being offered by the monopolist. Such rent-extraction activities employed by incumbents, solely to maintain the monopoly position and eliminate possibilities of disruption in the market, hinders dynamic competition.

In India, in the *Matrimony.com Limited & Ors. v. Google LLC & Ors*. ,[75] Google was held liable for manipulating its search results in a manner to promote its own vertical sites by mixing vertical results with organic results. On similar lines, in the European Union (EU), Google was held to be in contravention of antitrust provisions for positioning its own comparison-shopping services more favourably as compared to its rivals' comparison-shopping services.[76] The reasoning in both cases was that such acts of self-preferencing facilitate leveraging of its market power in the market of comparison-shopping services by way of ostracizing rival players thus decreasing the visibility of other players by directing the traffic towards its own verticals. As held in both cases, in no scenario, can reduction of choices for the customers and reduction of visibility of rival players can be considered to be promoting dynamic competition.

Similarly, in the recent case of *Umar Javeed & Ors. v. Google LLC,*[77] before the CCI, Google's action of restricting or not disclosing the Application Programming Interface (APIs) of its Android Operating System to application developers was under scrutiny. CCI noted that the intention behind the conduct of Google was to stop the developers from developing competing versions of Google's Android i.e. Android Forks. Interestingly, in order to extract imperfect rents from such exclusion, Google not only does not make its APIs available to rival developers or original equipment manufacturers, but also further restricts the original equipment manufacturers from marketing any competing versions of its operating system. It further employs another mode of imperfect rent-extraction by reduced inter-operability of the APIs disabling other players from providing alternatives to consumers for switching to another operating system.

---

[74] Joseph Farrell and Michael L. Katz., 'Innovation, Rent Extraction, and Integration in Systems Markets' (2000) 48(4) The Journal of Industrial Economics 413.
[75] *Matrimony.com Limited & Consumer Unity & Trust Society v. Google LLC, Google India Pvt. Ltd. and Google Ireland Ltd.,* Competition Commission of India Case Nos. 07 and 30 of 2012.
[76] *Google and Alphabet v. Commission*, Case; T-612/17, European Commission Decision, 27 June 2017.
[77] *Umar Javeed & Ors. v. Google LLC and Google India Private Limited,* Competition Commission of India Case No.39 of 2018.

The 'single monopoly profits theory' fails in such cases because there exists a *malafide* intention to exclude rival players by way of imperfect rent extraction. The above two cases explain the fact that incumbents who have attained a significant market presence, more so in digital markets which are not merely a market-place rather an ecosystem, incumbents in the name of innovation, often adopt modes of imperfect rent extraction. The intention being continued capitalization of existing resources. Instead of providing increased productivity, incumbents indulge in restricting other players from developing competing products or services either by refusals to supply an input required for the downstream market or by adopting implicit means such as reduced interoperability.

2.2.2.2 *Exclusionary practices to impede potential competition*:

Another mode which is adopted by incumbents to protect their market position is foreclosing any competitive constraint the incumbent might experience from potential or existing players. In digital markets which have data-driven externalities, various incumbents act as 'gatekeepers'. These gatekeepers are technically the gateway for significant number of businesses to reach the end users.[78] Considering that gatekeepers occupy an important position in the digital space, they often impose discriminatory terms on market players leading to reduced visibility of the latter amongst the end-users. Digital markets can only be disrupted if the product is visible to the end users which in some situations may be hindered by watertight rules formulated by gatekeepers. For instance, EC in the *Microsoft case (2004)*[79] held that Microsoft which held a quasi-monopolistic position on the market for personal computers operating system, abused its dominant position by tying Windows Media Player to its Windows PC operating system. It was noted that the arrangement reduced competition in the relevant market by 'preventing innovations and choices' and brought a substantial detriment to consumers. Similarly, in the *Microsoft case (2009),*[80] EC held that tying of Internet Explorer with Windows Microsoft made Internet Explorer available on 90% of the world's PCs, shielding Internet Explorer from competition with other browsers, and preventing Netscape from executing a disruptive innovation strategy, which is ultimately detrimental to the pace of product innovation.

[78] Digital Markets Act 2022, Regulation (EU) 2022/1925 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R1925> accessed 3 February 2023.
[79] *Commission of the European Communities v. Microsoft Corporation*, Case COMP/C-3/37.792, European Commission Decision of 24 March 2004.
[80] *Microsoft-Tying case*, European Commission Decision of 16 December 2009, Case AT.39530.

In the recent *MMT-Go case,*[81] the incumbent, an online travel agency, was acting as a gateway for end users where hotel aggregators like *Oyo, FabHotels*, *Treebo* etc., listed low budget hotels. MMT-Go imposed restrictions on hotel partners which included price parity and room parity obligations on the hotel partners. It not only charged high commissions from hotel aggregators but also entered into preferential agreement with *Oyo* leading to denial of market access to other hotel aggregators such as Treebo and FabHotels. Since the latter did not pay the high rates of commission being charged, they were unilaterally removed from the incumbents' platform. Apart from other issues, due to the restrictions on room parity and price parity, the result was that no other online travel agency would even be willing to offer lower rates of commission to hotel aggregators because the hotel partners due to the existing restrictions were unable to offer rooms at lower prices to other players. At a more basic level, the result was reduced innovation and softening of price competition as no competing online travel agency had incentives to compete with the incumbent. Since MMT-Go held a dominant position, the presence on the same was pertinent in order to ensure continued visibility of the hotel aggregators as well as hotel partners. The room parity and price parity restrictions were solely imposed in order to impede any innovation or better terms that might have pierced the market through the channels of other online travel agencies.

Similarly, in the case of *XYZ v. Alphabet Inc., Google LLC & Ors.*,[82] CCI held that Google was acting as a gatekeeper for application developers and the restriction imposed on them for exclusively using Google's in-house payment mechanism i.e. G-Pay was an abuse of its dominant position. The imposition was in such a nature that any derogation on the part of an application developer would have led to its delisting from Google's Playstore which is pre-installed in all devices functioning of Android operating system. Since, Google by way of its Android operating system is dominant in the market of licensable operating system for smart mobile devices in India, the bargaining power of application developers massively reduces due to the cross-side network effects at play. The net result of such kind of restrictions is that potential disruptors in the market of unified payment system or other application developers lose the incentive to disrupt the market with new and innovative products/ services leading to narrowed customer choices.

[81] *In re: Federation of Hotel & Restaurant Association of India & ors. V. Make My Trip and Ibibo and Oyo*, Competition Commission of India Case Nos. 14 of 2019 and 01 of 2020.
[82] Competition Commission of India Case No. 07 of 2020; Case No. 14 of 2021 & Case No. 35 of 2021.

Incumbents who are technology giants exercise extreme influence on the market dynamics due to the strategic role they play for the end users as well as other players. Not only do they possess deep pockets, but they also control huge and varied consumer data enabling them to shape the face of Indian markets. In situations as described above, any form of exclusionary conduct by way of these gatekeepers leads to a proportional decrease in the possibility of any creative disruption.

2.2.3.3 *Acquisitions aimed at killing potential competition*:

A leading source of innovation in any given market space is the constant inflow of new players equipped with novel business ideas. In most cases, despite being asset light or having a low-turnover, new businesses or start-ups are the carriers of new business strategies.[83] Acquisitions of such start-ups or new businesses may either be pro-competitive or may be with the intent of eliminating a potential source of competition.

Pro-competitive acquisitions are aimed at facilitating research and development activities which a nascent player might not be able to afford. In such cases, the vision of the target is integrated into the 'ecosystem' of the acquirer instead of eliminating it altogether, exhibiting a rationale of 'efficiency'.[84] However, certain acquisitions often referred to as 'killer' acquisitions are aimed at eliminating any competitive risk that the concerned incumbent might face in future. The term 'killer' signifies the intention of the incumbent to block innovation in order to pre-empt any future competition.[85] Such form of acquisitions may either be horizontal where the entrant is producing a similar product or service; or may even be vertical where the entrant produces a complementary product which could give a competitive edge to the incumbent.[86] The *Facebook/Instagram merger* was approved as it did not cross the thresholds as per the law, however, it was argued that the underlying intention of Facebook was to

[83] Ministry of Corporate Affairs, Government of India, 'The Report of Competition Law Review Committee' (2019) <https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf> accessed 19 November 2023.
[84] J. Cremer, YA de Montjoye and H Schweitzer, 'Competition Policy for the Digital Era' (2019) European Commission 117-118 <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 24 January 2023.
[85] Leonardo Rocha e Silva and others, 'Killer Acquisitions: Startups, Disruptive Innovation and Antitrust Intervention–Where are we and where are we Heading to?' (*IBRAC* 2019)<https://ibrac.org.br/UPLOADS/Eventos/433/25_IBRAC_2019_KILLER_ACQUISITIONS_EN.pdf> accessed 2 February 2023.
[86] C. Cunningham, F. Ederer and S. Ma, 'Killer acquisitions' (2018) Yale School of Management, Working Paper <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3241707> accessed 1 September 2022.

eliminate a potential competitor.[87] A history check of Facebook's acquisitions exposes the fact that most of them had an underlying intent of acquiring data of customers and in many cases the targets have been completely removed from the market.[88]

It has been observed that a majority of the acquisitions, especially by tech-giants such as Google, Apple, Facebook, Amazon and Microsoft lead to disappearance of the products which were being developed by the target company.[89] Antitrust scrutiny is evaded due to the positivist requirements of 'threshold value'. In certain cases, the asset value of the target company is so miniscule that the required thresholds under competition law are not met. In other cases, since the product does not fall within the product market so defined hence the merger is considered as being a conglomerate merger, keeping it outside antitrust scrutiny. Another recent trend that has evolved in acquisitions related to digital conglomerates is that of 'acqui-hire' where acquisition of target is not geared towards benefiting own self but merely to hire skilled employees of the target.[90] This leads to destabilization of the target and future growth of the acquirer.

Take for instance, CCI's approval for merger of *BYJU's/Akash Educational Institutions*, which according to the regulator does not cause any appreciable adverse effect on competition even when the latter gets sole control over the former.[91] Interestingly, both the entities operate in the non-formal education sector in India having certain overlaps in the type of services so offered. The CCI observed that the proposed merger does not cross the threshold of 10% as stipulated by law. Further, it observed that there are other players in the market such as Career Point, FIITJEE, Udemy etc. which pose significant competitive restraints. However, it must be noted that post-acquisition since BYJU's business model is that of online services, it will experience positive network externalities which may lead to the market tipping in its favour. The said premise is more potent in the backdrop of the recent acquisitions which BYJU has already

[87] Australian Competition and Consumer Commission, 'Digital Platforms Inquiry- Final Report', (2019) 80 <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf> accessed 12 December 2022.
[88] ibid.
[89] A. Gautier and J. Lamesch, 'Mergers in the digital economy' (2021) 54 Information Economics and Policy 100890.
[90] Reeya Rakchhandha, 'The Digital Economy and Killer Acquisitions: A Comparative Analysis of the CCI's Merger Thresholds for Digital Markets' (2022).
[91] Competition Commission of India, 'Combination Registration No. C-2021/04/831' (2021) <http://164.100.58.95/sites/default/files/Notice_order_document/Order831.pdf> accessed 19 November 2023..

materialized including acquisition of Whitehat Jr., LabinApp, Osmo and Scholr, indicative of the intention to assume greater market power.[92]

The issue becomes more explicit if reference is made to the *Facebook/WhatsApp* merger which was approved by the European Commission.[93] In India, when an action was brought in 2016 against the change in the privacy policy of WhatsApp by way which data of users could be shared with Facebook and related entities, the CCI did not perceive it as a threat to market competition.[94] CCI rather observed such practice is only going to enhance user experience and the users had the option to delete their accounts in case they did not intend to share their data. In was only in 2021 that CCI initiated a *suo moto* proceedings against WhatsApp regarding the anti-competitive effects of the privacy policy.[95] The *Facebook/WhatsApp* experience apprises us about the fact that CCI should not neglect the role that network effects play in a digital space. The dependency so created is evident in the form of lock-in effects and resultant switching costs that the consumers face. Hence, any proposed merger in a digital market although may technically fall out of antitrust scrutiny as per the stipulated law, but the underlying intention more than attaining synergy could be to either kill the target due to the potential threat it poses or to acquire it in a manner that promises potential dominance to the acquirer.

3. APPROACH IN US AND EU TO PROTECT INNOVATION

Any antitrust enforcement agency, more particularly in the age of digital markets, needs to appreciate the need and value for innovation. A natural corollary to this proposition is that innovation markets demand a more dynamic perspective toward antitrust enforcement as well as policy. In this direction, there has been some development in jurisdictions such as United States and European Union which endeavour to promote and protect disruptive innovation as an important aspect of antitrust policy. An analysis of such steps in other jurisdictions promises a meaningful contribution to develop the Indian position in this context.

3.1 United States ('US'):

[92] Tapamoy Ghose and Khushi Dua, 'The Byju's-Aakash Deal: A missed opportunity for the CCI', (*The Arbitration and Corporate Law Review* 5 July 2021) <https://www.arbitrationcorporatelawreview.com/post/the-byju-s-aakash-deal-a-missed-opportunity-for-the-cci> accessed 22 January , 2023.

[93] *Facebook/WhatsApp Merger Procedure*, European Commission (Brussels) Case No. COMP/M.7217, 03/10/2014.

[94] *Shri Vinod Kumar Gupta v. WhatsApp Inc.*, Competition Commission of India Case No. 99 of 2016.

[95] Competition Commission of India, *Suo moto case against WhatsApp Inc. LLC and Facebook Inc*., Suo Moto Case No. 01 of 2021.

In order to promote dynamic competition, 'innovation' as a parameter was included within the antitrust framework of US in the 1990s. It was observed that analysis cannot be limited to current markets as this approach does not include potential competition from entities which fall outside such markets. It was advised that innovation competition demands an assessment around Research & Development ('R&D') practices, potential and restrictions.[96] While the debate was in context of mergers, US brought into force the Antitrust Guidelines for the Licensing of Intellectual Property, 2015 which put forth the idea of 'innovation markets'. The guidelines defined such markets as one which consists of R&D directed towards genesis of new products/ services/ processes and their close substitutes on the basis of R&D efforts, technology and products.[97]

Specifically, with respect to mergers and acquisitions, in accordance with Section 7A[98] of the Clayton Act, 1914 any merger or acquisition which meets or exceeds the jurisdictional thresholds determined by the Federal Trade Commission (FTC) is required to be notified and can be consummated only after the designated waiting period has elapsed. Such thresholds are revised annually by the FTC.[99] As per the 2023 notification of FTC, the revised size-of-transaction threshold stands to be 111.4 million dollars which implies a lesser value transaction does not attract antitrust scrutiny.[100] The size-of-person test as per the revised threshold will apply in case the transaction value exceeds 111.4 million dollars but is equal to or lesser than 445.5 million dollars.[101] The size-of-person threshold has been increased to 22.3 million dollars and 222.7 million dollars respectively.[102] This basically means that any proposed merger or acquisition which does not meet the size of transaction test and if applicable, the size-of-person test as well, it does not require to be notified leading to no antitrust scrutiny. Considering the fact that start-ups with novel ideas and business strategies due to lower scale are often asset light, any act of acquiring them may fall outside the said thresholds.

---

[96] R.J. Gilbert and S.C. Sunshine, 'Incorporating Dynamic Efficiency Concerns in Merger Analysis: The Use of Innovation Markets' (1995) 63(2) Antitrust Law Journal 569.

[97] United States Department of Justice, 'Antitrust Guidelines for the Licensing of Intellectual Property' (2015) <https://www.justice.gov/atr/IPguidelines/download> accessed 19 November 2023.

[98] Inserted by Hart-Scott-Rodino Antitrust Improvements Act of 1976, Public Law 94-435, 90 Stat. 1390.

[99] Clayton Act 1914, s 7A(a)(2) .

[100] Federal Trade Commission, 'Revised Jurisdictional Thresholds for Section 7A of the Clayton Act' <https://www.ftc.gov/system/files/ftc_gov/pdf/p859910sec7anewhsrthresholds2023.pdf> accessed 5 February 2023.

[101] ibid.

[102] ibid.

In order to address the above-mentioned issues, the United States Horizontal Merger Guidelines, 2010 ('2010 Guidelines')[103] are relevant which focus on 'innovation competition'.[104] A firm which falls outside the product market of the incumbent may exert competitive pressure on the latter which may induce the incumbent to derive strategies to acquire the said firm. In 1995, it was observed that a concept of 'innovation market' must be introduced to assess the impact of a merger in downstream product market as well as upstream innovation markets.[105] The intent of the 2010 Guidelines is to prohibit any merger which is aimed only *"to create, enhance or entrench the market power or to facilitate its exercise"*.[106] Guideline 2.2 of the same envisages the types of evidence that may be referred for assessing the anti-competitive effects of a merger. One of such direct evidences, is the *'disruptive role of a merging party'*. One of the theories of harm enables the authority to scrutinize a merger likely to diminish innovation competition by influencing the merged entity to reduce its level of innovation.[107] The other theory of harm so associated is that of elimination of a 'maverick firm' by way of a proposed merger in order to eliminate potential competition.[108] Maverick firms have been further described as one which play a disruptive role in the market, eventually benefitting the customers.[109] Further explanations have been provided in order to identify a maverick firm which are: (i) ability to threaten market competition with new technology or business model; (ii) carries an incentive to initiate price-cuts; (iii) ability and incentive to increase production; and (iv) often could have opposed industry norms on price setting or other such norms.[110] Hence, in this respect in opposition to the earlier totality of circumstances approach, maverick firm is now considered a direct evidence to scrutinize a merger aimed at or resulting into its elimination. Further, in order to curtail oneself from over scrutinization, relaxations have also been maintained if the proposed merger demonstrates possible failure of one of the firms absent the said merger[111], ease of entry[112] and efficiencies[113]. Notably, the law allows the agency to challenge a merger owing to its anti-competitive effects even if it was not

[103] US Department of Justice and Federal Trade Commission, 'Horizontal Merger Guidelines*'* (2010) <https://www.ftc.gov/system/files/documents/public_statements/804291/100819hmg.pdf> accessed 5 February 2023.
[104] ibid.
[105] Gilbert and Sunshine(n 96).
[106] US Department of Justice(n 103) 2.
[107] ibid Guideline 6.4.
[108] ibid Guideline 2.1.5.
[109] ibid.
[110] ibid.
[111]ibid Guideline 11.
[112] ibid Guideline 9.
[113] ibid Guideline 10.

challenged during review, meaning there is no limit to challenge even consummated mergers.[114] Further, even Section 2 of the Sherman Act, 1890 has been interpreted to evaluate any exclusionary conduct which may facilitate creation or maintenance of monopoly power even by way of an acquisition.[115]

A combined reading of the above-discussed positions explains the fact that in US even if the thresholds so stipulated are not met, the regulator has the authority to scrutinize a merger if it carries the potential to impede future competition, more specifically in innovation markets.

In innovation markets, a number of merger investigations have taken place wherein identification of a maverick firm was one of the important issues.[116] The theory of harm challenging such mergers was that at least one of the firms in the proposed merger played a disruptive role in the market promising innovative competition in the near future. In 2011 the proposed acquisition of *T-Mobile* by *AT&T*[117] was challenged as the regulator feared that apart from increased prices and fewer options, the acquisition would have severely impeded innovation. T-mobile was seen as being a disruptor and AT&T might have perceived a competitive threat from it.

In case a merger is consummated, then structural reliefs such as divestitures are granted which aim at reversing the anti-competitive effects. However, in case of recent mergers, further integration of the target into the acquiring entity can also be prohibited by seeking a Hold Separate Agreement to be active till the FTC takes a definitive decision regarding divestiture or unwinding of the parties' businesses. In the 2019 case of *Otto Bock Healthcare*,[118] even though the merger between Otto Bock and Freedom Innovations did not meet the reporting thresholds, soon after the merger was consummated, the FTC initiated an investigation. As a part of the arrangement a Hold Separate Agreement was entered into to prohibit further integration of the businesses of the entities and later a complete divestiture was ordered in the spirit of maintaining competition in the market.

---

[114] 15 U.S.C. § 18a(i)(1).

[115] OECD, 'Start-ups, killer acquisitions and merger control- Note by the United States' DAF/COMP/WD(2020)23 (2020) <https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/oecd-killer_acquisiitions_us_submission.pdf> accessed 1 February 2023.

[116] *United States v. H&R Block Inc*., 833 F. Supp. 2d 36 (D.D.C. 2011) (No. 1:11-CV-00948); *Lab. Corp. of Am*., FTC No. 9345 (Nov. 30, 2010); *United States v. Ticketmaster Entm't, Inc.*, No. 1:10-CV-00139 (D.D.C. Jan. 25, 2010); *United States v. Dean Foods Co*., No. 10-C-0059 (E.D. Wis. Jan. 22, 2010).

[117] *United States v. AT&T Inc.*, No. 11-01560 (D.D.C. Sept. 16, 2011).

[118] In re *Otto Bock HealthCare N. Am., Inc.* (Docket. No. 9378).

In addition to the above, certain other bills have been put forth by the US Congress in order to facilitate 'innovation' in digital markets. The American Innovation and Choice Online Act,[119] has been proposed to curb discriminatory conduct which are aimed at self-preferencing own products/ services by tech giants. The term 'covered platforms' have been defined using certain thresholds which are based on the number of active users and control factor. The proposed bill is proscriptive as it prohibits certain types of conduct by covered platforms. Section 3(a) (1) to 3(a)(3) prohibit self-preferencing, limiting ability to compete and discrimination by covered platforms. An option to rebut has been provided for other offences ranging from Section 3(a)(4) to 3(a)(10) which include restrictions on interoperability, tying, use of non-public data, restrictions on access to data, pre-installation of apps etc. Under Section 3(b)(2) affirmative defence has been made available for prohibitions under Section 3(a)(4) to (10) for conduct which has not resulted or would not result in material harm to competition. The burden of proof lies on the defendant to prove the same by a preponderance of evidence i.e. proving that relevant propositions are more likely true than not true. On similar lines, the Open App Markets Act[120] has been drafted to reduce the power of gatekeepers in the app market in order to increase choices, improve quality and reduce costs for consumers. Among other things, the proposed bill also aims at protecting users' privacy and security.

3.2 European Union ('EU'):

The phrase 'innovation in competition' was introduced in the EU by way of the Guidelines on the Applicability of Article 101 TFEU to Horizontal Co-operation Agreements, 2011 ('2011 Guidelines').[121] The 2011 Guidelines lay emphasis on innovation with respect to R&D which may be difficult to locate in existing relevant markets.[122] Any proposed merger in EU is assessed under the EC Merger Regulations in order to determine any potential anti-competitive effects it may have in the common market.[123] In order for a merger to be pre-notified and

---

[119] United States Congress, American Innovation and Choice Online Act <https://sgp.fas.org/crs/misc/R47228.pdf> accessed 30 June2023.

[120] United States Congress, Open App Markets Act <https://www.congress.gov/bill/117th-congress/senate-bill/2710> accessed 30 June 2023.

[121] Communication from the European Commission, 'Guidelines on the applicability of Article 101 of the Treaty on The Functioning of the European Union to Horizontal Co-operation Agreement' (2011/C 11/01) <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF> accessed February 01, 2023.

[122], ibid [119].

[123] Council Regulation (EC) No 139/2004, 'On the Control of Concentrations Between Undertakings' <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0139&from=EN> accessed 1 February 2023.

examined under the said regulation, certain thresholds have to be met which have been enshrined under Article 1 paragraph 2 and paragraph 3.[124] The intent is to declare those mergers compatible with common market which do not significantly impede effective competition in the common market or a substantial part of it.[125] The test enshrined in such situations is the assessment of the after effects of the proposed merger vis-à-vis remaining credible R&D poles.[126] In order to qualify for a credible pole a competitor offering research and development must be a close substitute of the one in question. This in a way enables the EC to look beyond existing markets in order to identify potential disruptors. Similarly, there are Guidelines on Non-Horizontal Mergers, 2008, which apply to cases where undertakings belong to different relevant markets.[127] One of the criteria for investigation is merger wherein the target due to a recent innovation has the potential to expand significantly.[128] In simple terms, both these guidelines also aim at protecting potential competition as well.

When the theory of harm in case of a proposed merger is 'reduced innovation', a relevant market might not exist at all as the prospective innovation may be disruptive in nature. In such situations, EC has referred to the concept of 'innovation spaces', categorising within it, products for which innovation competition generally takes place. The merger of *Dow/DuPont*[129] was approved by the EC in 2017 on the condition of divestiture in DuPont's pesticide business including the R&D wing. The EC with respect to its assessment of innovation competition opined that R&D is a focussed effort and it does not take place across all product categories. Hence, the innovation spaces need to be identified. The merger in its proposed form would have led to removal of incentives for the parties to continue with ongoing innovation and would have also reduced the incentives to evolve new pesticides for the market. What appears from such decisions is that assessment of innovation competition is more qualitative in nature which instead of focussing on identifying existing markets, focuses on the capability of the merging parties. If the capabilities of the parties overlap then it might be seen as a case that would require investigation.

---

[124] ibid.
[125] ibid Article 2.
[126] ibid 120.
[127] Official Journal of the European Union, 'Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the Control of Concentrations Between Undertakings' (2008/C 265/07) <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:265:0006:0025:en:PDF> accessed 1 February 2023.
[128] ibid see[26].
[129] *Dow/DuPont merger case*, Case M.7932, European Commission decision of 27 March 2017 <https://ec.europa.eu/competition/mergers/cases/decisions/m7932_13668_3.pdf> accessed 4 February 2023.

While static tools such as level of substitutability or market shares are useful in assessment in case parties are existing players, such tools might not be enough to assess potential competition. The reason being a potent competitor might not have a presence in the market at all. In such situations assessing the potential or innovation competition is dependent on evidence which is industry specific. For instance, in the merger of *Johnson & Johnson/Actelion,*[130] instead of merely referring to static tools the EC also investigated the corporate arrangements which the target had with a R&D joint venture as the understanding was a demerger of the venture into a separate company after the proposed merger. The EC has also referred to parties' specialisation, R&D plans, targets of new products, assets, track-record of launching new products as well as patent portfolios in order to understand the capabilities of the parties to promote potential competition.[131]

In order to deal with issues related to restrictive arrangements, the Block Exemption Regulations ('BER') of 2010[132] and 2014[133] are relevant. Both these regulations lay emphasis on the need to analyse innovation levels in competition. The 2010 BER more specifically aims at promoting disruptive innovation in cases where R&D agreements are being entered between parties which may lead to generation of new products and creating a new demand. Such cases under the regulations are exempted from the application of Article 1 of TFEU provided competition is neither being restricted nor eliminated in a particular market.[134] The 2014 BER focuses on licensing agreements which have exclusive grant back provisions and the same are not exempted from application of Article 101(1) of TFEU.[135] Since grant-back provisions lead to exclusive license of any improvement made by the licensee back to the licensor, they reduce the possibility of innovation. This is because licensor's increased market power may lead to further restrictive understandings, excluding other players.

---

[130] *J&J / Actelion merger case*, Case M.8401, European Commission decision of 9 June 2017 <https://ec.europa.eu/competition/mergers/cases/decisions/m8401_740_3.pdf> accessed 4 February 2023.

[131] Bayer/Monsanto merger case, Case M.8084, Summary of European Commission decision of 21 March 2018 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018M8084(02)&rid=8> accessed 4 February 2023.

[132] Commission Regulation No 1217/2010, 'On the application of Article 101(3) of the Treaty on the functioning of the European Union to categories of research and development' O.J. 2010 L335/36 (2010) < https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010R1217&from=EN> accessed 23 January 2023.

[133] Commission Regulation (EU) No 316/2014, 'On the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements', O.J. 2014 L93/17, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0316&rid=1> accessed 23 January 2023.

[134] Commission Regulation (EU) No 316/2014 (n 132) Article 5(a).

[135] ibid Article 5(1)(a).

Quite recently there have legislative initiatives taken by EU by way of the Digital Markets Act **('DMA, EU')**[136] and which has in part been notified since May 2023. DMA, EU primarily aims at regulating the conduct of large online platforms being referred to as 'gatekeepers' under the Act which function as an important gateway between businesses and consumers. It aims at curbing the situation of a bottleneck being created by these gatekeepers due to their strategic position and ability to make rules privately. More particularly, Article 12 of the DMA, EU provides that any practice shall be considered to limit contestability of platforms and resultantly unfair if inter alai, the practice so engaged carries the potential to impend innovation and limit the choice of business users and consumers. On similar lines, the Digital Markets, Competition and Consumer Bill[137] **('DMCC, UK')** originated in UK but is yet awaiting assent. It identifies a category of firms having a 'strategic market status' and aims at their ex-ante regulation. Each such identified firm would be required to comply with specific conduct requirements and firms which shall not be designated as such will be continued to be governed under existing competition rules. Further, firms identified as enjoying a 'strategic market status' would be required to comply with mandatory reporting requirements for any proposed merger or acquisition although certain thresholds have been stipulated for the same. While both these legislations have similar objectives, they do have significant differences. Under the DMA, EU, entities meeting the prescribed thresholds will be assumed to be regulated by the said legislation. On the other hand, UK has adopted a discretionary mode of identification of firms enjoying 'strategic market status' based on substantial and entrenched market power, significance of the firm strategically, turnover and nexus of the firms' activities with UK. Further, the obligations and restrictions imposed by the DMA, EU are generally applicable to all 'gatekeepers' whereas the DMCC, UK adopts a tailored approach depending on the firms' activities. Further, the DMCC, UK has adopted the Chicago school of thought in order to provide exemptions in case the benefits outweigh any adverse impact on competition whereas the DMA, EU does not prescribe any such rules. The underlying intent of these laws is the promotion of innovation by ex-ante regulation of certain conduct be gatekeepers/ firms enjoying strategic market status as the case may be, so that bottlenecks are not created, and other players have the platform to innovate and provide wider choices to consumers.

---

[136] European Union, Regulation (EU) 2022/1925, Digital Markets Act 2022 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R1925> accessed 28 June 2023.

[137] United Kingdom, Digital Markets, Competition and Consumers Bill, April 2023 <https://publications.parliament.uk/pa/bills/cbill/58-03/0294/220294.pdf> accessed 26 June 2023.

4. THE INDIAN POSITION: SCOPE FOR FURTHER DEVELOPMENT

The Indian competition law regime as it exists today heavily relies on assessment of 'dominance' in a given 'relevant market' in order to investigate an exploitative or exclusionary practice of an incumbent. In context of combinations particularly, presently Section 5 establishes certain thresholds which have to be met in order to qualify for any investigation under Section 6 of the Competition Act, 2002 ('the Act'). With respect to promoting innovation, certain provisions of the Act may be relied upon. Section 4 of the Act frowns upon any conduct which limits or restricts 'technical or scientific development'. Similarly, Section 20 of the Act requires the CCI to also consider the 'nature and extent of innovation' while determining the possible adverse effect a combination may have.

The delineation of relevant market is crucial to the examination of anti-competitiveness of the actions taken by businesses. The market definition is of particular importance in the case of disruptive innovations since one of the disruption's distinctive characteristics is its capability to disrupt the existing market and destroy the incumbent firms. The emphasis however of the competition law still lies on the static inefficiency on the market due to collusive or unilateral actions. The attention probably is lesser on the effects of innovation. Since, in disruptive innovations, competition takes place at the level of market definition, already defined market does not remain constant throughout the examination and keeps on fluctuating. Therefore, the calculation of overall market power and the assessment of anti-competitive effect is not conclusive.

The 'relevant market' so determined is aimed at protecting only sustaining innovation ignoring the fact that disruptions occur in new markets. These markets in the digital era are dynamic due to network effects and feedback loops at play. From a disruptor's perspective who is a new player, the concern lies with the fact that rent-seeking strategies may be adopted while clothing them as disruptive innovation in order to evade antitrust scrutiny although the basic intent is to ostracize an existing player. In the case of *M/s. Fast Track Call Cab Private Ltd. v. ANI Technologies Pvt. Ltd.,*[138] irrespective of the fact that the DG pointed out that there was no case of disruption, CCI held that there was no case of abuse, as dominance cannot be proved. The CCI could have explored the idea of 'innovation spaces' as prevalent under EU law which would have enabled it to identify the rent-seeking strategy of low-pricing and further enabled

[138] Competition Commission of India, Case No. 6 & 74 of 2015.

a forward-looking assessment considering the fact that innovation spaces are sensitive to network effects.

From an incumbent's standpoint, as discussed above, the primary issue is of abuse of its existing position by way of imperfect rent-extraction in order to exclude existing or potential rivals who promise market disruption. While CCI has given progressive opinions in the recent past, the issue at hand is a long-term one, demanding a fundamental change in the understanding of markets. In the case of *MMT-Go case*[139]*; Umar Javeed & Ors. V. Google LLC*[140] & *XYZ v. Alphabet Inc., Google LLC & Ors.*[141], while CCI identified abuse on the part of the incumbents, the assessment was based on static relevant markets and establishment of dominance. For instance, in both the cases pertaining to exclusionary practices by Google, CCI merely passed a cease-and-desist order also in addition to imposing penalties. It needs to be understood that markets promising innovation and research & development demand certain commitments from the incumbents' end. The CCI while acknowledging the importance of APIs could have aimed at deriving a market basis 'data' and then providing access to data to break the network effects and putting developers/OEMs at equal footing as that of Google to develop their own Operating System/ apps or Android fork versions.

Even cases involving combinations such as the *Facebook/WhatsApp merger*[142] apprise us of the fact that CCI should not underestimate the potential of network effects to completely overturn the existing market dynamics. In such cases, assessment of relevant market and dominance on static terms might not play well in the long run.

It is true that the growing debates around digital markets have led to certain developments in context of Indian competition law. Recently, the Act has been amended by way of the Competition (Amendment Act), 2023 **('2023 Amendment')**[143] providing for various amendments focusing on broadening the scope of investigations under cartels, merger control,

---

[139] *In re: Federation of Hotel & Restaurant Association of India & ors. V. Make My Trip and Ibibo and Oyo*, Competition Commission of India Case Nos. 14 of 2019 and 01 of 2020.

[140] *Umar Javeed & Ors. v. Google LLC and Google India Private Limited*, Competition Commission of India Case No.39 of 2018.

[141] Competition Commission of India Case No. 07 of 2020; Case No. 14 of 2021 & Case No. 35 of 2021.

[142] *Facebook/WhatsApp Merger Procedure*, Competition Commission of India Case No. COMP/M.7217, 03/10/2014.

[143] Ministry of Law and Justice, The Competition (Amendment) Act, 2023, No. 09 of 2023 <https://www.cci.gov.in/images/legalframeworkact/en/the-competition-amendment-act-20231681363446.pdf> accessed 1 June 2023.

enforcement related issues and other behavioural factors. While many of the amendments have been notified by the CCI,[144] some are awaiting enforcement.

The 2023 amendment by way of section 2 amends the definition of 'relevant product market' but only to the extent of including supply side substitutability due to reduced switching costs and existence of economies of scope and/or scale. Even after the said amendment and its notified enforcement, the effect is that only sustaining innovation in a given market can be assessed owing to the static way in which markets are defined.

One of the key amendments under Section 5 of the 2023 Amendment is inclusion of a 'size of transaction test' along with the 'deal-value threshold' in order to assess mergers and combinations. The intent is to include within its ambit even those transactions where the enterprise being acquired has minimum assets and turnover but carries the potential of innovation owing to it having access to valuable data, technology, market information etc.[145] It must be noted that the threshold for 'value of transaction' has been proposed as Rs. 2000 crore so any transaction falling below it would not require investigation.[146] The proposed text has certain difficulties. Firstly, considering startups often are asset light and initially do not have a strong hold on the market, it is not necessary that the said threshold will necessarily be met. The target may have other incentives or threats for which it either seeks acquisition or acquiesces to acquisition. Secondly, the recommendation states that the manner of calculation of the value of a transaction will be determined by regulations[147], which again raises certain ambiguities. In the same light, the definition of 'control' has been proposed to include 'material influence' but the same has been left to be described by appropriate regulations.[148] Among other things, it has also recommended the application of the 'effects-based test' in abuse of dominance cases and the said test must be incorporated in the legislative framework under Section 4 and 19 of the Competition Act, 2022. This is a welcome approach considering that the analysis will lead to a balanced approach while also taking into consideration the pro-innovation effects of a conduct. Further, the 53rd Report of the Standing Committee on

[144] Ministry of Corporate Affairs, Notification dated May 18, 2023 <https://www.cci.gov.in/legal-framwork/notifications/details/151/0> accessed 1 June 2023.
[145] The Competition (Amendment) Act, 2023, No. 09 of 2023 (n 143), s 5.
[146] ibid.
[147] ibid.
[148] ibid.

Finance,[149] while focussing on the big-tech companies and anti-competitive practices in digital markets has recommended an *ex-ante* assessment of potential anti-competitive conduct.[150]

The recent decisions of the CCI have also marked a significant development towards CCI's holistic approach towards ensuring market competition, pro-business view as well as penalizing conducts which may chill innovation in the future. Decisions such as *Umar Javeed v. Google LLC*[151], *In re: XYZ v. Alphabet Inc.*[152], *MMT-Go case*[153] and *Bharat Matrimony case*[154]; demonstrate CCI's efforts towards curbing any conduct which may stifle innovation or eliminate existing or potential competitors. However, considering the nature of digital markets, a more dynamic approach needs to be adopted which must not just ensure competition in the market but must also aim at promoting 'innovation competition'. The CCI *inter alia* must also give 'network effects' a prominent place in any investigation related to digital markets particularly which will also have a significant effect on the remedies. An important step in this direction was taken by CCI in the *MMT-Go case*[155] where considering the volatile nature of platform markets and the irreparable harm which network effects may cause in such market space, CCI granted an interim injection under Section 33 of the Act.

While the above-discussed developments seem to be pro-innovation, disruptors more specifically need to be provided the ecosystem which enable them to create new demands by offering new products or services without the fear of being eliminated or acquired. The incumbents of the market may target potential disruptors and thus prevent the market from being disrupted in the first place. Since disruptive innovation happens at the level of new markets, the traditional test of 'dominance' is not a suitable choice to identify rent-seeking strategies or abusive conduct. It is only when the market is defined in a narrow manner and in the space of 'innovation', the abusive conduct can be identified which in most cases negates

[149] Standing Committee on Finance, 17th Lok Sabha, Anti-competitive Practices by Big-Tech Companies, Ministry of Corporate Affairs, 53rd Report, New Delhi (2022-2023)<https://eparlib.nic.in/bitstream/123456789/1464505/1/17_Finance_53.pdf> accessed 1 February 2023.
[150] ibid 31.
[151] *Umar Javeed & Ors. V. Google LLC and Google India Private Limited*, Competition Commission of India Case No.39 of 2018.
[152] *In re: XYZ v. Alphabet Inc., Google LLC, Google Ireland Ltd., Google India Pvt. Ltd. And Google India Digital Services Pvt. Ltd.*, Clubbed: Competition Commission of India Case No. 07 of 2020, Case No. 14 of 2021 and Competition Commission of India Case No. 35 of 2021.
[153] *In re: Federation of Hotel & Restaurant Association of India & ors. V. Make My Trip and Ibibo and Oyo*, Competition Commission of India Case Nos. 14 of 2019 and 01 of 2020.
[154] *Matrimony.com Limited, Consumer Unity & Trust Society v. Google LLC, Google India Pvt. Ltd. and Google Ireland Ltd.*, Competition Commission of India Case Nos. 07 and 30 of 2012.
[155] *In re: Federation of Hotel & Restaurant Association of India & ors. v. Make My Trip and Ibibo and Oyo*, Competition Commission of India Case Nos. 14 of 2019 and 01 of 2020.

any possibility of establishment of dominance of the disruptor. Further, potential disruptors being small in size, their acquisition often escape antitrust scrutiny as they do not breach the turnover / asset threshold required to trigger competition enforcement. Even where some of these acquisitions are notified, there is a challenge to prove anti-competitive effect on the market. Given the importance of 'innovation competition', competition regulators in many countries are looking at 'innovation' in evaluating anti-competitive conduct and mergers. Objections have been raised in proposed combinations[156] where it was feared that the effects of merger would negatively affect innovation in the relevant market[157] or would foreclose innovation in upstream or downstream market[158] through exclusionary practices[159]. The complaint against Google, for instance examined the allegation that the "company's anticompetitive practices harm competition and consumers, reducing the ability of innovative new companies to develop, compete, and discipline Google's behaviour". It has been argued that application of traditional price and market structure approach to examine conducts and combinations in the innovation market may not be correct.[160]

It is also pertinent to mention that the Ministry of Corporate Affairs by a notification dated February 06, 2023, has constituted a Committee on Digital Competition Law ('CDCL').[161] The aims of CDCL inter alia are to assess the adequacy of the existing Act to deal with the challenges of digital economy, need for an ex-ante regulatory mechanism and other research related activities to ensure competition in digital markets. One side of this development is that placing various types of markets in silos might prove to be more destructive as players might take advantage in situations where a given conduct does not holistically fall in either of the types of markets. While the other viewpoint is the acknowledgement of a crisis in the age of digital markets and initiation of a dialogue in that respect.

In this backdrop and pending any specific legislation or amendment focussing primarily on innovation in digital market, fundamental concepts which enable an assessment under Indian competition law need to be evolved:

---

[156] Federal Trade Commission, 'FTC Seeks to Block Microsoft Corp.'s Acquisition of Activision Blizzard, Inc.' (*FTC* 8 December 2022) <https://www.ftc.gov/news-events/news/press-releases/2022/12/ftc-seeks-block-microsoft-corps-acquisition-activision-blizzard-inc> accessed 29 January 2023.
[157] *United States v. Microsoft Corporation*, 253 F.3d 34 (DC Cir 2001).
[158] *In the Matter of Illumina, Inc, A Corporation and GRAIL, Inc*, Docket No 9401, 2021.
[159] *United States v. Google LLC*, Case 1:20-cv-03010 <https://www.justice.gov/atr/case/us-and-plaintiff-states-v-google-llc> accessed 31 January 2023.
[160] Daniel F. Spulber, 'Antitrust and Innovation Competition' (2022) 11(1) Journal of Antitrust Enforcement5.
[161] Ministry of Corporate Affairs, Government of India, Notification No. COMP-06/11/2022-Comp-MCA, dated February 06, 2023.

A. *Deal-value threshold for merger investigation:* The matrix of 'deal value threshold', though yet to be notified, is a welcome step as notification of lower value mergers will give an opportunity to the competition regulator to examine whether the acquisition is of a potential disruptor and whether such acquisition will lessen competition by restricting innovation. Because the qualitative value of the disruptor may be high, and the cost for the procurement may reflect the importance and financial reward of the innovation in the future, thus buying a low turnover firm with a high price might be an indication of harm to innovation and deserves careful examination.[162] However, it may so happen that a merger or combination may escape even the Rs. 2000 crore threshold so stipulated by the 2023 Amendment owing to the fact that the target may be extremely asset light or may agree for acquisition due to the fear of being obliterated or due to almost nil grip of the market. In such situations, the concept of 'maverick firm' as applied under the US Horizontal Merger Guidelines may be of relevance especially in context of identification of a disruptor.

B. *Defining 'relevant market' as 'research and development' market or 'innovation market' in some situations:* Delineation of relevant market is essential for the examination of anti-competitive behaviour. With respect to disruptive innovation, the identification of relevant market is challenging for the competition authorities who are more accustomed to looking at 'static inefficiencies' on the market due to anti-competitive agreements or abuse of dominance in comparison to examination of effects on innovation. Since, in disruptive innovation, 'competition takes place at the level of market definition'[163], market definition keeps fluctuating affecting the calculation of overall market power and effect on competition. This calls for adaptive assessment 'aiming at preventing potential disruptors from marketing-shifting or widening the overlap of lower-end value network, rather examining if the existing enterprises' practices actually have the effects of raising the costs for new entry and therefore foreclosure of the market as ordinarily defined.'[164] In this context, the approach of EU can be adopted where instead of identifying defined markets, 'innovation spaces' are identified to assess the level of existing or potential R&D activities.

---

[162] Drawing from this experience, the German competition authority suggested in 2015 applying a size of transaction threshold to encompass acquisitions involving start-ups with low revenue at the time they are bought. See Bruno Lasserre, 'New business models and competition enforcement: must we ride the tide of change?' (2015) 11(1) Competition Policy International 27.

[163] Hsin-Fang Wei, 'Does disruptive innovation "disrupt" competition law enforcement? The review and reflection' Paper on Taiwan International Conference Competition Policy in Global and Digital Economy (2016) <https://www.ftc.gov.tw/upload/636d4e6f-2570-4b26-b746-d0904c18e2db.pdf> accessed 2 February 2023.

[164] Streel and Larouche (n 4).

C. *Examination of 'effects of innovation as entry in future goods market'*[165]*:* While the displacement of incumbents with the successful entry of disruptors need not indicate anti-competitive conduct, the process of disruption must be protected. Therefore, mergers that have the sole objective of maintaining market power through acquisition of possible competitors and in the process curtailing innovation must be closely scrutinized. Since, acquisitions of new entrants or start-ups may also create efficiency gains for the new firms, the challenge for the antitrust regulators is to distinguish between combinations for monopolization from combinations that enhance innovation competition. If the sole purpose of the proposed acquisition is not to achieve technological synergy but eliminate a disruptive or innovative player, competition authorities must raise an objection.[166]

5. CONCLUSION

Different theories on innovation, be it Arrow's[167] 'positive co-relation theory'; or Aghion's[168] theory of 'inverted-U relationship between competition and innovation'; or even Schumpeter's[169] 'theory of monopoly rents', converge on the fact that competition regulators must '*protect the process of innovation by keeping the market open for potential innovators'*[170]. As discussed earlier, disruptive innovation has huge implications for both the market and the incumbents. With the expansion of scholarship around disruptive innovations, more established firms are now able to monitor and track start-ups. The incumbents can prevent disruption by either acquiring the potential disruptor or by creating an incompatible environment characterised by vertical restraints, predatory strategies or use of intellectual property rights as defence, rendering disruption non-feasible. Firms with market power are more likely to take active steps to prevent disruption. New players on the other hand may camouflage mediocre business strategies as disruptive in order to evade antitrust scrutiny. The competition regulators must therefore take into account 'dynamic efficiency' involving innovation in their assessment of combinations or any conduct which may result in chilling effects on innovation.

---

[165] Ilene Knable Gotts & Richard T Rapp, 'Antitrust Treatment of Mergers Involving Future Goods*'* (2004) 19 Antitrust 100.

[166] See, for instance, Department of Justice Complaint, *United States of America v Visa Inc and Plaid Inc* [2020]: <https://www.justice.gov/opa/press-release/file/1334726/download> accessed 28 January 2023.

[167] K. J Arrow, 'Economic Welfare and the Allocation of Resources for Invention', in R. Nelson, *The Rate and Direction of Inventive Activities: Economic and Social Factors* (Princeton University Press 1962).

[168] P. Aghion and others, 'Competition and Innovation: An Inverted-U Relationship' (2005) 120(2) Quarterly Journal of Economics 701.

[169] J.A. Schumpeter, *Capitalism, Socialism and Democracy* (New York: Harper and Brothers, 1942).

[170] Streel and Larouche (n 4).

Competition regulators have in the past intervened to protect disruptive innovation[171] so that the efforts for disruption are not hindered by dominant entities.[172] The CCI has taken a contemporary view in the recent past in assessing a conduct which may restrict innovation in future.[173] While the trend of antitrust assessment is evolving, in India specifically, no dedicated rules or guidelines are in place which target 'innovation markets'. In this context, this paper emphasizes on the importance of identification of innovation markets and potential disruptors in order facilitate an *ex-ante* antitrust assessment to avoid any irreparable damage.

Further, it has been argued that acquisitions in the digital space must be looked from a sceptic, if not a conservative lens. While thresholds based on turnovers or deal value may be helpful, certain acquisitions may not fall in either category due to the target being extremely asset-light or low deal value which may be a result of acquiescence of the target fearing future obliteration. The underlying test in such cases then becomes a case-to-case analysis of the intent of the acquisition and future possibility of synergies in R&D activities. At the cost of re-iteration, digital markets are distinct from traditional markets with the former facilitating tipping of the market in the favour of the first or early mover. This may lead to irreparable harms and hence demands an *ex-ante* policy for future conducts aimed at impeding competition and dynamic efficiency in markets.

****

[171] Microsoft-Tying Case (n 80); *See also*, Commission Guidelines on Vertical Restraints, OJ C 230 of 19.5.2010, p. 1.
[172] Howard A. Shelanski, 'Information, Innovation and Competition Policy for the Internet' (2013) 161 University of Pennsylvania Law Review 1684.
[173] See decisions such as *Umar Javeed & Ors. v. Google LLC and Google India Private Limited*, Case No.39 of 2018; *In re: XYZ v. Alphabet Inc.*, Google LLC, Google Ireland Ltd., Google India Pvt. Ltd. And Google India Digital Services Pvt. Ltd., Clubbed: Case No. 07 of 2020, Case No. 14 of 2021 & Case No. 35 of 2021; *In re: Federation of Hotel & Restaurant Association of India & ors. v. Make My Trip and Ibibo and Oyo*, Case Nos. 14 of 2019 and 01 of 2020; & *Matrimony.com Limited, Consumer Unity & Trust Society v. Google LLC, Google India Pvt. Ltd. and Google Ireland Ltd.*, Case Nos. 07 and 30 of 2012.