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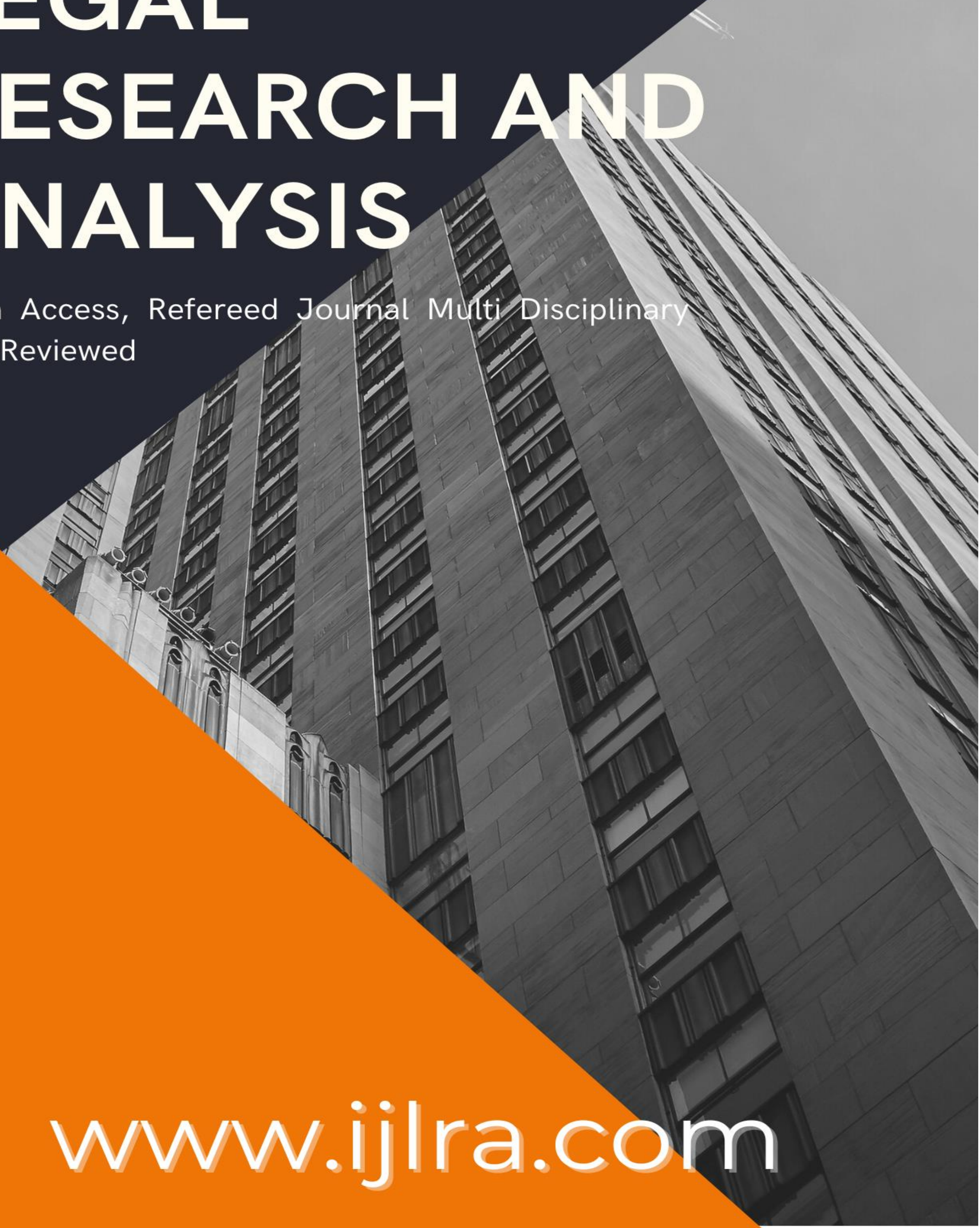

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MERGER CONTROL IN INDIA'S DIGITAL ECONOMY: RETHINKING COMPETITION LAW IN THE AGE OF BIG TECH AND KILLER ACQUISITIONS

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Introduction:

The digital economy has fundamentally altered the ways in which businesses compete, grow, expand and build market power. Unlike conventional industries, digital markets are characterised by network effects, data-driven business models, economies of scale, zero-price services, multi-sided platforms and rapid technological change. In this setting, a start-up may earn little revenue and own few tangible assets while still being highly valuable because of its data, technology, intellectual property, algorithms, user base or potential to become a significant future competitor.[1]

This development has exposed an important limitation in traditional merger regulation. Merger-control systems have generally used the parties' turnover and asset values to decide whether a transaction warrants review. In digital markets, however, those financial indicators may not capture a transaction's real competitive significance. A large technology undertaking may acquire a promising start-up at a substantial valuation even though the target has limited revenue, few physical assets or only a modest existing market presence. Such an acquisition may nevertheless remove a potential future rival and reinforce the acquirer's position before the target can develop into an effective competitor.

India has responded to these concerns by adapting its competition-law framework to the realities of digital markets. The Competition (Amendment) Act, 2023 introduced a transaction-value threshold as an additional route for assessing certain combinations. This was followed by the Competition Commission of India (Combinations) Regulations, 2024, which clarify both the calculation of transaction value and the meaning of 'substantial business operations in India.' Together, these measures are an important effort to align India's merger-control regime with the changing character of competition in the digital economy.

[1] Competition Commission of India, *The Competition (Amendment) Act, 2023 – Key Amendments: At a Glance* (2023), [CCI, Competition (Amendment) Act, 2023 — Key Amendments].

Understanding Merger Control under Indian Competition Law:

In India, mergers and acquisitions are principally regulated by Sections 5 and 6 of the Competition Act, 2002. A merger, amalgamation or acquisition that meets the statutory thresholds is treated as a 'combination' and, where required, must be notified to the Competition Commission of India ('CCI') before implementation. The CCI's central inquiry is whether the proposed transaction has caused, or is likely to cause, an appreciable adverse effect on competition ('AAEC') in the relevant market in India.

Section 6 of the Act prohibits combinations that cause, or are likely to cause, an AAEC. The CCI may consequently approve a combination, approve it subject to modifications, or prohibit it when the likely competitive harm cannot otherwise be addressed.

For many years, the Indian merger-control regime primarily relied on the assets and turnover of the enterprises involved to decide whether a transaction came within regulatory scrutiny. That approach was broadly appropriate for traditional industries, in which a firm's financial scale often indicated its market position and influence. Digital markets have weakened this relationship, making conventional financial thresholds less capable of identifying transactions with potentially significant competitive consequences.

The Digital Economy and the Enigma of “Killer Acquisitions”

A growing concern in the regulation of digital mergers is the practice often described as a 'killer acquisition.' The expression generally refers to an established or powerful digital enterprise acquiring a smaller, innovative firm that could develop into a serious competitor. The concern is that the deal may be driven, at least partly, by a desire to prevent the emerging firm from challenging the incumbent in the future, rather than solely by a need to obtain its technology or business capabilities.

The concern is especially difficult in digital markets, where competition often depends on innovation, technological advancement and the ability to scale a user base quickly. At the time of acquisition, a start-up may have modest revenue but considerable capacity to disrupt an established market. Its algorithms, intellectual property, data, technology, innovative business model or expanding user network may form the basis for substantial future competition. An assessment based only on the target's current financial performance may therefore overlook its real competitive importance.

Facebook's acquisition of WhatsApp, now part of Meta, became a prominent example in international debate about these transactions. WhatsApp's expanding global user base gave it substantial strategic value at the time, although its revenue was limited relative to the acquiring enterprise. The transaction therefore fuelled wider concerns about whether conventional merger-control mechanisms could identify acquisitions of rapidly growing digital businesses. Comparable debates have since arisen over major technology platforms acquiring innovative start-ups in different jurisdictions.

India's digital sector has also seen considerable consolidation, particularly in e-commerce. Walmart's acquisition of a controlling interest in Flipkart was reviewed by the Competition Commission of India (CCI) against the background of the fast-developing online retail market. The CCI approved the transaction, but the proceedings illustrated the relevance of considerations beyond the parties' immediate financial size, including market concentration, network effects and the competitive relationship between digital marketplace platforms.

The wider lesson is that a firm's current turnover may reveal only part of its competitive value in digital markets. Its prospects for growth, capacity for innovation, technology, data resources and ability to challenge established firms may be equally, and sometimes more, important to merger-control analysis.

Transaction Value Threshold: A Significant Shift in India's Merger-Control Framework

A major change introduced by the Competition (Amendment) Act, 2023 is the transaction-value threshold ('DVT') in Section 5 of the Competition Act, 2002. The amendment extends merger regulation beyond the conventional assessment of the parties' assets and turnover.

Under the amended framework, a transaction may qualify as a 'combination' when its value exceeds Rs. 2,000 crore, provided that the target enterprise has substantial business operations in India as prescribed by the applicable regulatory framework. The threshold is particularly relevant in the digital sector, where enterprises with limited revenue or physical assets may still attract very high valuations. It enables the Competition Commission of India ('CCI') to examine transactions that could otherwise fall below the usual financial thresholds.

The Competition Commission of India (Combinations) Regulations, 2024 give further direction on calculating transaction value. The assessment need not be confined to the initial purchase price stated in an acquisition agreement. Depending on the transaction's structure, it may include different forms of consideration, such as direct or indirect payments, amounts payable immediately or later, specified future payments and consideration arising from

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interconnected transactions. Certain technology-support, licensing and other arrangements connected with the transaction may also be relevant.

This wider approach to transaction-value calculation is particularly significant for technology-sector deals. Digital acquisitions are frequently structured through complex contractual arrangements rather than a single upfront payment. Considering those elements can provide a more realistic estimate of a transaction's economic value and reduce the risk that strategically important acquisitions avoid merger review simply because the target has a small financial footprint.

The Strategic Importance of Data in Digital Mergers:

Data is a significant source of competitive advantage in digital markets. Platforms gather information on users, transactions, preferences and behaviour, which can improve algorithms, advertising, products and customer engagement. Unlike traditional assets, data's competitive worth may lie less in its accounting value than in its scale, quality, uniqueness and utility.

Accordingly, a merger can raise competition concerns even where the parties are not direct competitors. When an established platform acquires a data-rich business, the combined datasets may strengthen its market position, increase entry barriers and make it more difficult for rivals to compete.

Likewise, acquiring a smaller undertaking in an adjacent market may permit a dominant digital ecosystem to use its existing users, technology and infrastructure while removing a possible future competitor. The CCI should therefore apply a forward-looking assessment that accounts for data, ecosystem expansion, network effects and potential competition, rather than relying solely on current market shares.

The Role of the CCI:

The CCI's role is not to prevent acquisitions merely because they involve large technology companies. Acquisitions may give start-ups capital, technology and access to wider markets, and may thereby promote innovation. The decisive question is whether the transaction is likely to cause material harm to competition.

Under Section 20 of the Competition Act, 2002, the CCI examines factors such as market structure, market shares, entry barriers, competitive conditions and available substitutes. In digital markets, those considerations should be assessed together with innovation, access to data, interoperability, switching costs, network effects and potential competition.

Balancing Innovation and Competition:

Regulation of digital mergers must balance the protection of competition with the encouragement of innovation. Intervention may be needed when dominant firms eliminate emerging competitors, but overly intensive scrutiny could deter investment and restrict legitimate exit opportunities for start-ups.

The analysis should therefore focus on a transaction's likely competitive effects, rather than simply on the acquirer's size. India's Green Channel mechanism advances this approach by permitting qualifying transactions that raise no significant competition concerns to obtain approval through a simplified process. This can be especially valuable in fast-moving digital markets, where regulatory delay may affect commercial opportunities.

Challenges Ahead:

The transaction-value threshold ('DVT') has improved India's capacity to review significant digital acquisitions, yet practical challenges continue. They include valuing transactions that involve contingent or non-cash consideration, predicting whether a start-up may become a future competitor, defining markets that involve interconnected digital services, and assessing competitive conditions that change quickly.

Effective digital merger control therefore requires a flexible, forward-looking framework that addresses not only conventional indicators, but also data, innovation, network effects, potential competition and ecosystem power.

Conclusion:

India's digital economy calls for merger control that extends beyond conventional measures such as assets and turnover. The transaction-value threshold introduced by the Competition (Amendment) Act, 2023, together with the 2024 Combinations Regulations, is an important step in that direction.

Looking ahead, Indian merger policy must pursue two objectives: preventing dominant firms from eliminating potential future rivals while continuing to promote innovation and investment. In digital markets, the central issue is not only who competes today, but also whether a transaction may shape tomorrow's competitive landscape.