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**Theories of Harm for Digital Mergers – Note by India**

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More documents related to this discussion can be found at  
<https://www.oecd.org/competition/theories-of-harm-for-digital-mergers.htm>

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### 1. Abstract

1. With the increase in M&A activity involving enterprises engaged in digital space and given the specificities of the digital sector, the debate regarding need for fine tuning, developing, and validating the theories of harm in assessment of such M&As continues to gather significant momentum. The contribution seeks to bring out the theories of harm (such as net neutrality, self-preferencing, data-based market power) applied by CCI for assessment of combinations involving Big Tech players. Further, apart from theories of harm, there are various other issues relating to regulation of M&As in digital space viz., the transactions not meeting the traditional assets/turnover based notification thresholds, issues of traditional assessment and remedy framework not being adequate to have the necessary effect on competition or failing to produce the efficient outcome. In this regard, the Government of India has taken a slew of measures for reviewing the fulcrum of the competition regime in India specifically in context of digital space. The write-up also seeks to discuss measures implemented/under consideration such as introduction of transaction value/deal value based thresholds for determining notification requirement of M&As which may not meet the traditional thresholds and discussion on need for a separate law on competition in digital markets etc.

### 2. Introduction to the M&A regulatory framework in India

2. The Competition Commission of India (CCI) is mandated to carry out the review of mergers and acquisitions under the Competition Act, 2002 (**Competition Act**). The mergers and acquisitions qualify for notification to and review by CCI if they meet thresholds prescribed in the Competition Act. As regards the forms of M&As, the Competition Act considers all transactions involving acquisition of shares, voting rights, control, or amalgamations.

3. In India, the regulatory regime is mandatory and suspensory in nature and the relevant party or parties are required to file a notice of the proposed transaction before consummation and ensure that the same does not come into effect until the maximum timeline for review prescribed under the Competition Act expires or the Commission's order on the same is issued, whichever is earlier.

4. In terms of the provisions of the Competition Act, CCI is mandated to assess the M&A transactions at the threshold of appreciable adverse effect on competition (**AAEC**). Accordingly, the Commission, if it is of the opinion that the combination has or is likely to have an AAEC, shall either direct that such combination shall not take effect or, if such adverse effect can be eliminated by suitable modification to the combination, it may approve the transaction with such modification.

5. The framework for determination of threshold of AAEC as contained in the Competition Act is broad based and spans the AAEC considerations, viz., market shares, extent of barriers to entry, extent of effective competition likely to sustain in the market, etc., to macro considerations in terms of relative advantage, by way of the contribution to the economic development, by any M&A having or likely to have AAEC or whether the benefits of the combination outweigh the adverse impact of the combination. This broad-based approach allows CCI to develop and validate various plausible theories of harm in

the context of transaction under review. CCI has applied the aforesaid assessment framework in M&As across sectors, including digital M&As, and has never faced any limitations in terms of assessing or remedying any transaction, if needed. Thus, the experience of CCI, albeit limited, indicates that, at least in terms of review of M&A transactions, the existing legal framework allows for fine tuning the existing theories of harm or developing newer theories of harm considering the specificities of digital sector.

6. That said, limitations of the existing legal framework have been felt in the areas of notification thresholds which could allow certain transactions capable of AAEC to escape notification and review. There have been some developments in this regard in the form of changes made in the Competition Act by the Competition (Amendment) Act, 2023.

7. Further, it is felt that the challenges in the review of digital mergers extend beyond the fine tuning or development and validation of newer theories of harm to the area of designing and implementing a remedy or a modification. This aspect has also gained significant attention in recent times. The Parliamentary Standing Committee on Finance, in its report of December 2022, has made certain observations on, *inter alia*, the regulation of digital markets.

8. This note seeks to contribute primarily to the topic of ‘Theories of Harm in Digital Mergers’ by setting out the experience of CCI as regards the specific issue of theories of harm. However, for the purpose of completion, the note also sets out the developments in India on related topics, viz., notification of digital mergers and other challenges posed by the digital sector, which potentially require changes in legislative framework.

### 3. Theories of Harm in Digital Mergers – The CCI Experience

9. CCI, in its limited experience of reviewing digital mergers, has reviewed transactions potentially leading to concerns on self-preferencing. Apart from this, CCI has reviewed transactions potentially leading to concerns over net-neutrality and data-based market power with transactions involving acquisition of minority stakes by big tech companies in a telecommunication service provider. In the fintech space, CCI has reviewed a transaction wherein the concerns related to the potential envelopment of a digital payments ecosystem. The theories of harm applied in assessment of these transactions are discussed hereunder.

#### 3.1. Concerns Over Self-Preferencing

10. The Commission considered and examined concerns of self-preferencing in two transactions, both involving a M&A transaction between a digital platform and a manufacturer of goods. The first transaction involved Hyundai Motor Company (**Hyundai**) and Kia Motors Corporation (**Kia**), engaged in the business of manufacturing and distribution of automobiles, and ANI Technologies Pvt. Ltd. (**ANI/Ola**) and Ola Electric Mobility Private Limited (**OEMPL**), whose primary business is to operate a platform for ride-hailing services (**Hyundai/Ola**<sup>1</sup>). The second transaction involved an entity forming part of the Walmart Group, which comprises Walmart Inc. (**Walmart**) which, *inter alia*, operates, a marketplace based e-commerce platform in India, and Aditya Birla Fashion and Retail Limited Transaction (**ABFRL**), which is engaged in the business of manufacturing and retailing branded apparels, footwear, and accessories through its retail

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<sup>1</sup> Comb. Regn. No. C-2019/09/682. The order is available on CCI’s website and can be accessed at <https://cci.gov.in/combination/order/details/order/235/0/orders-section31>

stores, multi-brand outlets, departmental stores, online retail platforms, and e-commerce marketplaces across India (**Walmart/ABFRL**<sup>2</sup>).

### **3.1.1. Hyundai/Ola transaction**

11. As a part of transaction, Hyundai and Kia were acquiring less than 5 percent shareholding in Ola and OEMPL, respectively, along with envisaging strategic cooperation in relation to fleet operation, connected car-platform mobility solutions, development of electric vehicles, e-mobility business in India, etc.

12. The platform of Ola integrated city transportation for customers and drivers onto an online platform ensuring convenient, transparent, safe, and quick service fulfilment. Additionally, Ola, through its wholly owned subsidiary i.e., Ola Fleet Technology Private Limited (OFT), was also engaged in the business of operational car leasing, thereby procuring passenger cars of different makes including Hyundai and leases them to drivers who in turn, used the vehicle in different ways to earn their livelihood. OEMPL then envisaged to operate primarily in the electric vehicles value chain, with a focus on charging infrastructure. The business of OEMPL was at a nascent stage and was then conducting feasibility studies and analysis through pilot tests to establish charging infrastructure for two-wheeler and three-wheeler electric vehicles.

13. CCI observed that OFT cabs were preferred over other cabs in the Ola marketplace, as (a) the gross booking value and incentives of OFT cabs are relatively higher; and (b) as per the ANI strategic cooperation agreement and the internal board presentation of Hyundai, the concerned parties intended to leverage Ola assets to promote leasing of Hyundai vehicles to Ola drivers. CCI's specific concern was that, as a result of the combination, if Ola were to prefer drivers owning Hyundai or Kia vehicles, such preference might place other drivers/cabs registered in the Ola marketplace at a disadvantage.

14. Accordingly, Hyundai and Kia offered a voluntary modification that strategic collaboration amongst Hyundai, Kia, and Ola would be on a non-exclusive basis. Further, as submitted, the algorithm/programme of the marketplace of Ola would not: (a) give preference to the driver solely based on the brand of the passenger vehicles manufactured by the Hyundai or Kia; or (b) discriminate against any driver based solely on the brand of the passenger vehicles manufactured by any other automobile manufacturer.

15. Considering self-preferencing as a key theory of harm, CCI found it appropriate to approve the aforesaid acquisition of stake by an auto make in a digital company only on the basis of the modification offered.

### **3.1.2. Walmart/ABFRL Transaction**

16. The proposed transaction involved acquisition by Walmart of a minority shareholding of less than 10 percent, in ABFRL. The Commission noted that, as per the commercial agreement executed as part of the acquisition transaction, it has been agreed that certain identified branded products of ABFRL will be distributed through ecommerce platforms of the Walmart Group to the exclusion of certain platforms identified in the agreement. It was observed that the Walmart Group runs certain prominent e-commerce platforms like Flipkart, Myntra, and Jabong in India for the relevant category of products, amongst others. It was further noted that ABFRL, on the other hand, deals with/owns several premium clothing brands such as Louis Philippe, Van Heusen, Allen Solly, Peter England, and Pantaloons. Upon consideration of the proposed commercial agreement

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<sup>2</sup> Comb. Regn. No. C-2020/12/792. The order is available on CCI's website and can be accessed at <https://cci.gov.in/combination/order/details/order/175/0/orders-section31>

between these parties, the Commission's concern related to the exclusive arrangement envisaged by way of the commercial agreement between the parties, raising a potential concern that the identified ABFRL brands therein may get preferential treatment in their respective product categories in terms of search ranking, etc., on the e-commerce platforms run by the Acquirer's group in India, which may affect intra platform competition between brands/sellers and result in the market outcome being influenced or determined by the platform instead of it resulting from competition on the merits amongst the brands/sellers.

17. However, considering the overall assessment of the transaction and the regulatory framework, the Commission decided to issue an advisory to Walmart that it should not indulge in any such conduct that would amount to leveraging their control over the platform in favour of the identified ABFRL brands, to the disadvantage of other sellers/service providers on the platform.

### 3.2. Concerns over Net Neutrality

18. The CCI examined the concerns of adverse effect on net neutrality in transactions involving Google and Jio and Facebook and Jio.

19. The Google/Jio transaction<sup>3</sup> involved acquisition of around 8 percent equity stake by Google in Jio Platforms Limited, directly or indirectly, engaged in operating digital applications and provision of mobile telephony services to users across India. Alongside the equity transaction, the parties agreed to collaborate and develop new low-cost smartphones and operating system for such devices. The activities of the parties are similar in the spheres of mobile app distribution, supply of apps and mobile/web services, supply of advertisement services, and supply of mobile operating systems and are complementary/vertical in terms of OTT applications and content of Google and the telecommunication services offered by Jio. The Facebook/Jio transaction<sup>4</sup> involved acquisition of around 10 percent equity stake by Facebook in Jio.

20. Among other theories of harm applied in the review of the aforesaid transactions, one area of concern was net neutrality.

21. CCI observed that, with the evolution of the telecommunication sector in terms of technological upgradation and consequent smartphone and data revolution, the user experience and the modern mobile telephony services have become completely different from the services of conventional telecom service providers (TSPs). On one hand, TSPs are gearing to provide 'triple play' (voice, video, and data) and 'quad play' (voice telephony, television, fixed line and mobile internet) services, whereas on the other hand, seamless data connectivity and increasing demand for internet-based applications and content have resulted in synergetic cooperation between TSPs and OTT application developers. All this has led to TSPs offering innovative tariff packages for bundled voice, data and OTT services.

22. Against the aforesaid backdrop, CCI considered it relevant to examine whether the transactions would lead to any preferential treatment to Google/Facebook applications or content in RJIO's network, i.e., in telecommunications parlance, the transaction needed to

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<sup>3</sup> Comb. Regn. No. C-2020/09/775. The order is available on CCI's website and can be accessed at <https://www.cci.gov.in/combination/order/details/order/151/0/orders-section31>

<sup>4</sup> Comb. Regn. No. C-2020/06/747. The order is available on CCI's website and can be accessed at <https://www.cci.gov.in/combination/order/details/order/275/0/orders-section31>

be examined in terms of any plausible effect on the ‘net neutrality’ of Jio’s telecommunication network.

23. CCI observed that there are safeguards in place in the form of regulations issued and implemented by the telecom sector regulator in India and the telecom licence conditions of Jio. Further, CCI, on the incentive aspect, considered that the transaction involves acquisition of a minority stake of less than 10 percent and non-observance of net neutrality obligation may be prejudicial not only to the licensee (i.e., Jio) but also to the investment made by the Google/Facebook. Based on the same, CCI did not find it necessary to examine this aspect further.

### **3.3. Concerns arising from sharing of data leading to data backed market power**

24. CCI, during the review of Google/Jio transaction and Facebook/Jio transaction, also examined the potential harm which could arise from sharing or pooling of data of Google and Jio. To this effect, it considered the data policies of Google and Jio and Facebook and Jio and noted that, while both Google and Jio and Facebook and Jio possess data regarding user behaviour, the key consideration in assessment would be the purported ability and incentives on the part of parties to pool or share their databank and monetise such data.

25. CCI’s concerns were mitigated by considering, inter alia, the clarifications offered by Google and Facebook. Google clarified that the collaboration with Jio does not contemplate a combination or sharing of the parties’ pre-existing proprietary and confidential datasets, or future datasets, that the parties may generate through their activities outside the collaboration. It was further clarified that each party will have access only to the data generated under the collaboration necessary to serve the legitimate business purposes of the collaboration and subject to applicable laws, including data collection and privacy policies, personal rights, and consents. Facebook also clarified that data sharing is not the purpose of the transaction and that either side will not acquire ownership of the other’s data. Facebook further detailed the limited data which will be received/sent between the specific entities of Facebook and Jio.

### **3.4. Multi-layered presence in ecosystem triggering complementary effects leading to creation of barriers to entry/expansion**

26. The PayU/Billdesk transaction<sup>5</sup> involved acquisition of 100 percent of the equity share capital of IndiaIdeas.com Limited (Billdesk) by PayU Payments Private Limited (PayU), a Naspers Group entity. Both PayU and Billdesk operate in digital retail peer to merchant (P2M) payments ecosystem in India and offer activities making up various levels/stages of a digital P2M payments, viz., activities relating to payment aggregation (standalone/recurring payments) provided to online merchants, enterprise technological solutions to other players in payments ecosystem enabling payment aggregation, fraud detection and prevention solutions to banks, etc.

27. PayU and IIL were both found to have significant presence in certain segments of the payments ecosystem, such as payment aggregation services resulting in concerns of direct loss of strong competitive constraints leading to AAEC in those specific segments. Further, there were concerns that, in the context of the overall payments ecosystem, while prior to the transaction, PayU India and Billdesk had different areas of strengths and weaknesses, the combined entity may have a position of strength in more layers of the

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<sup>5</sup> Comb. Regn. No. C-2022/04/920. The order is available on CCI’s website and can be accessed at <https://www.cci.gov.in/combination/order/details/order/61/0/orders-section31>

payments ecosystem and gaining an ability/incentive to create barriers to entry/expansion for others, leading to AAEC.

28. On the aspect of entrenched presence in the ecosystem, the Commission examined whether the same is a common industry practice that is desired as a basis to compete and grow or if the same is a desired vehicle to engage in exclusionary conduct. The stakeholder responses indicated that multi-layered presence is a standard industry practice and the same was also reflected in the functioning and evolution of payments ecosystem in India. It was further noted that different players are trying to gain multi-layered presence and trying to develop business models which confer them with at least some strategic advantages and under the circumstances, such expansion appears to be a basis to compete and grow, and accordingly, can be considered inherent to the functioning of payments ecosystem.

29. However, notwithstanding the inherence of the multi-layered presence, the crucial aspect which required analysis was degree of such presence. CCI noted that the combined entity is not likely to have a position of strength in any of the layers of the payments ecosystem, which confers it with the ability or incentive to create any barriers to entry/expansion. CCI was of the view that the key for triggering complementary effects/portfolio effects is the significant position of strength in at least one segment which can act as the source of leveraging the presence of the entity in other segments of the ecosystem. Accordingly, it was concluded that, while the transaction will enable greater presence of the combined entity, the same is not likely to be accompanied by the degree to the extent which raises any competition concerns.

## 4. Other concerns regarding digital mergers and recent developments in India

### 4.1. Adequacy of existing legal framework as regards assessment and remedial framework

30. Though the assessment and remedial framework as contained in the Competition Act may be dynamic enough to be applied to both the digital and the conventional sector, there may be situations where the conventional approach of reviewing a transaction in the framework of relevant market and various factors such as market shares, etc., in terms of strict interpretation, may become a barrier in developing or applying a new theory of harm. Moreover, there may be situations in which the likely harm inferred may not be capable of being remedied without significant changes of the extent which potentially nullify the transaction itself.

31. The Parliamentary Standing Committee on Finance submitted its report on 'Anticompetitive Practices by Big Tech' in December 2022 wherein, inter alia, it has been proposed that India needs to enhance its competition law to address the needs of the digital market. Economic drivers of such markets facilitate a few players in dominating the ecosystem and the government should introduce a Digital Competition Act to ensure a fair, transparent, and contestable digital ecosystem. Apart from the above, the Parliamentary Standing Committee also made recommendations on identifying and regulating Systemically Important Digital Intermediaries (SIDIs) with regard to various concern areas, viz., data usage, self-preferencing, anti-steering etc. In the context of M&As, the Committee recommended that a SIDI should inform CCI of any intended M&A where the target provides services in the digital sector or enables the collection of data, irrespective of whether such transaction is notifiable to CCI as per the prescribed thresholds for the notification of M&As.

32. The Government of India, in February 2023, set up a Committee on Digital Competition Law (CDCL) to examine the need for a separate law on competition in digital markets with the mandate of submitting a report to the government including a draft Digital Competition Act (DCA). As a part of its review, the CDCL, will *inter alia*, assess the sufficiency of the Competition Act to deal with challenges posed by the digital economy and need for ex-ante regulations.

33. It is felt that the aforesaid changes which are under consideration, if implemented, can also complement the existing M&A regulatory regime.

#### 4.2. Adequacy of notification criteria

34. The thresholds for notification of a M&A transaction were provided in terms of values of assets and/or turnover of the parties to the transaction. The Competition Law Review Committee (CLRC), which was set up in October 2018 and submitted its report in July 2019, was of the view that most of the acquisitions in digital markets derive value from data or some business innovation held by the target. In such acquisitions, the target may not have a huge asset base and may be offering products/services that are either free or generate insignificant turnover. This may be because the business model of companies in digital markets is often such that they do not generate any significant revenue for a number of years, focusing initially on user growth, and, in such instances, the value of the target's sales is a rather poor indicator of the transaction's significance for competition. Accordingly, the CLRC recommended for inclusion of deal value threshold in the Competition Act. The Government of India has amended the Competition Act in 2023 and a deal value test for notification has been introduced as part of the Act. The change plugs a gap which could have led to certain significant transactions escaping the review.

35. To summarise, while the experience of CCI has been limited in terms of review of digital mergers, it will be appropriate to state that the theories of harm need to be fine-tuned or even newer theories may be required. The review framework in accordance with the conventional approach is robust for assessment and identification of concerns to a large extent but may be required to be complemented by ex-ante regulations for ensuring that there are no enforcement gaps.