

ISSN: 2583-8725

# Lex Scripta Journal

Quarterly Online and Print Edition

# Law & Policy

“Join the League of  
National & International Scholars”



## **EDITORIAL TEAM**

### ***DR. AJAY BHUPENDRA JAISWAL***

Professor & Former Head  
Department of Law  
V.S.S.D. College, Nawabganj,  
(C.S.J.M. University, Kanpur)

### ***DR. MEGHA OJHA***

Associate Professor | Legal Consultant  
| Author | KLEF College of Law

### ***PROF. DR. DEEVANSHU SHRIVASTAVA***

Founding Dean and Professor,  
GL Bajaj Institute of Law,  
Greater Noida

### ***DR. GAURAV GUPTA***

Assistant Professor,  
Faculty of Law, Lucknow

### ***MR. TUHIN MUKHARJEE***

Leadership Strategist | Business Coach  
| Author | Speaker

### ***MR. PRAKARSH PANDEY***

Author and  
Advocate, Allahabad High Court

### ***MR. AMARESH PATEL***

Assistant Professor  
at Law School,  
Amity University, Patna



**LEX SCRIPTA MAGAZINE OF  
LAW AND POLICY (VOL-4, ISSUE-1)**

Copyright © 2025, LexScripta

ISSN-2583-8725

Vol - IV, Issue - I

Published by INTEGRITY EDUCATION INDIA

**New Delhi**

First Floor, 4598/12-B, 1st Floor,  
Padam Chand Marg, Daryaganj,  
New Delhi, Delhi 110002

Phone: +91 98 11 66 62 16 (M)

Phone: +91 70 11 60 56 18 (M)

**Bengaluru**

Jallahalli East

Bengaluru, Karnataka. India.

Phone: +91 98 11 66 62 16 (M)

Email: publisher.integrity@gmail.com

**USA**

New Jersey

14 Grandview Ave, Upper Saddle River,  
NJ-07458, USA

Phone: +14805226504 (M)

**London**

37 Degree Media

64, Hodder Drive, Perivale, London UB68LL.  
United Kingdom.

Phone: +44 7950 78 18 17 (M)

Website: integrityeducation.co.in

---

© Lex Scripta Magazine Of Law And Policy, 2025

**Disclaimer**

All Copyrights are reserved with the Authors. But, however, the Authors have granted to the Journal (Lex Scripta Magazine of Law and Policy), an irrevocable, non-exclusive, royalty-free and transferable license to publish, reproduce, store, transmit, display and distribute it in the Journal or books or in any form and all other media, retrieval systems and other formats now or hereafter known. No part of this publication may be reproduced, stored, distributed, or transmitted in any form or by any means, including photocopying, recording, or other electronic or mechanical methods, without the prior permission of the publisher, except in the case of brief quotations embodied in critical reviews and certain other non-commercial uses permitted by copyright law.

The Editorial Team of Lex Scripta Magazine of Law and Policy Issues holds the copyright to all articles contributed to this publication. The views expressed in this publication are purely personal opinions of the authors and do not necessarily reflect the views of the Editorial Team of Lex Scripta Magazine of Law and Policy.

[© Lex Scripta Magazine of Law and Policy. Any unauthorized use, circulation or reproduction shall attract suitable action under application law.]

---

For any Query / Feedback  
Phone: +91 98 11 66 62 16 (Vineet Sharma)

---

Printed in India @ New Delhi

ISSN: 2583-8725

# Lex Scripta Journal

Quarterly Online and Print Edition

# Law & Policy

"Join the League of National  
and International Scholars"



# Lex Scripta Journal

---

## **Cross-Border M&A and Competition Law: Evaluating Market Definition, Appreciable Adverse Effect on Competition (AAEC), and Merger-Specific Considerations**

Author

Mahi Manchanda



# **Cross-Border M&A and Competition Law: Evaluating Market Definition, Appreciable Adverse Effect on Competition (AAEC), and Merger-Specific Considerations**

**Mahi Manchanda**

*Amity university*

*Noida*

---

## **I. Introduction**

Modern competition law evolved from systems aimed at restraining restrictive economic practices toward markets based on liberal and efficiency considerations. In India, this evolution culminated in the enactment of the Competition Act, 2002, which repealed the outdated Monopolies and Restrictive Trade Practices Act, 1969. The goal was to align India with global practices and foster competition that benefits consumers and economic development. Similarly, in the EU, a comprehensive and economically grounded system is found in the European Council Merger Regulation, 2004, governing concentrations.

Both the Indian and EU competition laws feature substantive tests to govern mergers. In India, the relevant threshold is the occurrence of an Appreciable Adverse Effect on Competition (AAEC), while in the EU, the test checks whether a merger will Significantly Impede Effective Competition (SIEC). Although the underlying principle of protecting competitive markets remains the same, the conceptual framework, approach to interpretation, and application of both tests vary greatly. This paper compares the two tests to examine their efficacy and identify potential reforms.

## **II. The AAEC Test under Indian Competition Law**

The fundamental principle governing mergers under Indian competition law is that they should not result in an AAEC. This concept is not explicitly defined but is reflected in multiple provisions of the Competition Act (mainly Sections 3, 4, and 6). However, it finds an explicit listing of guiding factors under Section 20(4) which allows the Competition Commission of India (CCI) to determine the likelihood of a combination causing anti-competitive effects. The lack of a precise statutory definition offers an advantage to the CCI by providing significant latitude in its approach, though this could potentially lead to uncertainty about the thresholds of "appreciable" and "adverse" for businesses.

### **Threshold-Based Regulation and Its Implications**

A critical aspect determining the operation of the AAEC test is the threshold system established under Section 5 of the Act. It stipulate thresholds based on the assets and turnover of the transacting parties beyond which the mergers are considered 'combinations' and must be examined by the CCI. This approach is built on the assumption that only very large transactions have the potential to damage the market, but this theory fails to address the potential anti-competitive effects of small and medium-sized mergers. Moreover, certain mergers that have an appreciable effect on niche and developing markets would not even be investigated under the present thresholds, thus leading to an overall narrow scope of AAEC.

### **Factors Determining AAEC**

To determine whether a combination has resulted in an AAEC, the CCI takes into account several factors listed under Section 20(4), such as, market concentration, barriers to market entry, the extent of vertical integration of the firms and their level of effective competition in

the relevant market. The CCI also considers factors related to the consumer welfare aspect of a merger, such as pricing of products, product quality and innovativeness. This shows that the CCI adopts a more qualitative, multi-faceted approach than the one found in many developed economies, where reliance is mostly placed on quantitative analyses, particularly market share.

### **Limitations of the AAEC Test**

Despite its holistic framework, the AAEC test suffers from a multitude of limitations. First, the vague concept leaves much to the discretion of the CCI and results in ambiguity. Secondly, there is a one year restriction from the date on which the combination is entered into within which the CCI can investigate it. Thus, the potential for a lengthy anti-competitive effect could be overlooked. Third, reliance on thresholds limits the jurisdiction of the CCI. Fourth, an inability to quantifiably assess consumer impact and fairness in pricing weakens the efficacy of the AAEC test. These factors contribute to an imprecise yet adaptable assessment mechanism under the AAEC test, requiring further enhancement.

### **III. The SIEC Test under EU Competition Law**

#### **Evolution from the Dominance Test**

The SIEC test represents an improvement on the initial EU merger control approach, which used a "dominance test" based on whether a proposed merger would create or strengthen a dominant position in the market. Although effective in addressing mergers leading to dominance, the dominance test had weaknesses in handling oligopolistic markets, where mergers could harm competition without creating a dominant position. To address this deficiency, the ECMR introduced the "significant impediment to effective competition" (SIEC) test which has a broader scope. The SIEC test covers not only situations of dominance but any instance that may "significantly impede effective competition", particularly, though not exclusively, through the creation or strengthening of a dominant position.

#### **Scope and Analytical Approach**

The SIEC test replaces the focus on dominance with a broader concept of anti-competitive harm, enabling a review of any merger likely to restrict competition, not just through market dominance. It covers both unilateral and coordinated effects where companies may be able to independently raise prices or coordinate tacitly through the merged entity and by doing so negatively impact the market. This ensures a more effective tool to control a broader range of anti-competitive scenarios. The approach of SIEC is heavily influenced by economics; it includes sophisticated economic models like Herfindahl-Hirschman Index (HHI) to analyse markets.

#### **Institutional Strength and Advantages**

The SIEC test in the EU competition law regime boasts of being built on robust institutional support and a well-developed body of case law. The Commission's extensive experience of applying SIEC and numerous cases that it has adjudicated are a great source of predictability and clear guidelines for businesses engaged in the process of M&A. A key advantage is the interplay between economics and law that the SIEC test ensures through its analytical framework. Furthermore, the broad applicability of the SIEC test through its ability to scrutinize both unilateral and coordinated effects guarantees a more efficient control of mergers.

## **IV. Comparative Analysis of AAEC and SIEC**

### **Conceptual and Structural Differences**

The AAEC test and the SIEC test, while seeking to achieve the same goal of competition protection, vary significantly. The AAEC test aims to establish the likelihood of a measurable adverse impact on the competition market, whereas the SIEC test is oriented toward whether competition itself will be "significantly impeded." The wording of the AAEC suggests a minimum threshold of harm and an outward looking perception of effects, while SIEC denotes a much higher and more concrete assessment criterion. Although SIEC seems to hold a relatively higher threshold than AAEC, its defined conceptual framework helps better attain the said threshold.

### **Legal Certainty and Predictability**

A noticeable discrepancy between the two tests lies in the legal certainty offered. Due to the absence of a statutory definition, the AAEC test often results in varying judgments as there is a large degree of discretion allowed to the CCI, while the extensive body of case law and guideline documents provided under SIEC offers greater clarity and predictability. This difference plays a major role in decision making for cross-border mergers, where a high level of certainty regarding legal implications is of utmost importance.

### **Economic Orientation and Analytical Depth**

The SIEC test adheres to established economic principles and analyses through sophisticated models. This enables the SIEC to better analyze potential impacts on competition within different market structures. Though the AAEC test also incorporates economic factors, its analysis lacks the desired depth due to a limited use of standardized models and tools.

### **Market Context and Applicability**

It is crucial to appreciate the distinct market structures in which these tests operate. While the EU has a more integrated market, India's market is developing and its consumers have divergent and unique tastes and preferences. Therefore, it is unrealistic to assume that a test that operates effectively in the EU will work in India without any changes. AAEC, with its ability to offer flexibility, makes it adaptable for the varied Indian markets, however, it needs refinement in its analysis.

## **V. Need for Reform in the Indian Framework**

Based on the comparative study, there is a clear case for reform in the Indian competition law framework to ensure better enforcement of the AAEC test. The first step in this direction should be the inclusion of a clear statutory definition of AAEC to eliminate ambiguity and inconsistencies. The second issue pertains to the threshold-based approach. It needs to be revised so that it allows the CCI to investigate mergers with lesser asset and turnover requirements if they pose an AAEC. Lastly, the time limit of one year should be extended so that any long-term adverse effect of a merger can be accounted for properly.

The inclusion of modern economic tools and models to conduct comprehensive competition analysis would also improve the effectiveness of the AAEC test, akin to the application of these models under the SIEC test in the EU. It is also necessary for the CCI to develop a robust case law and consistently reasoned decisions so as to provide clarity to businesses and greater predictability for the market. The Competition Act, with such reforms, can make India's merger control regime more equitable and aligned with global practices.

The AAEC test in India and SIEC test in the EU are both essential regulatory tools for M&A activity. Though each test caters to the unique economic and institutional landscape of their

respective regions, both have shared goals of competition promotion and consumer protection. The SIEC test is inherently more comprehensive, accurate, and transparent compared to the AAEC due to the robustness of its analytical framework and substantial case law. Conversely, the AAEC test offers flexibility but is hampered by ambiguity and lacks analytical precision. However, the AAEC test in the Indian context cannot be deemed inferior on its own terms. While its adaptability caters to Indian market conditions, it is imperative to strengthen it. Reforms aimed at clearer definition, more responsive thresholds, extended review period, and a stronger economic foundation would be highly beneficial. Eventually, an ideal merger control system would strike a balance between market efficiency and preventing anti-competitive practices, something that the AAEC test, with the necessary amendments, can and should strive to achieve in India.

---

## **BIBLIOGRAPHY**

### **Books**

- Agarwal, Manish & Bhattacharjea, Aditya, Competition Law and Policy in India, Oxford University Press, New Delhi, 2010.*
- Goldberg, Alan H., Competition Law Today: Concepts, Issues and the Law in Practice, Oxford University Press, 2007.*
- Ramappa, T., Competition Law in India: Policy, Issues and Developments, Oxford University Press, New Delhi, 2006.*
- Whish, Richard & Bailey, David, Competition Law, 9th edn., Oxford University Press, Oxford, 2018.*

### **Articles and Research Papers**

- Chakravarthy, S., "India's New Competition Act, 2002: A Work in Progress," (2004) 5 Business Law International.*
- Ghosh, Subhadip & Ross, Thomas W., "The Competition (Amendment) Bill 2007: A Review and Critique," (2008) 43 Economic and Political Weekly.*
- Horner, Neil, "Unilateral Effects and the EC Merger Regulation," (2006) 2 Hanse Law Review.*
- Monti, Giorgio, "The New Substantive Test in the EC Merger Regulation," LSE Law Working Paper No. 10/2008.*
- Neven, Damien, "Competition Economics and Antitrust in Europe," (2006) 21 Economic Policy.*
- Tiwari, Neeraj, "Merger under the Regime of Competition Law: A Comparative Study of Indian Legal Framework with EC and UK," (2011) 23 Bond Law Review.*
- Tilak, Jitheesh, "Regulating Mergers and Acquisitions: An Insight into Competition Laws in India," (2004) 32 International Business Lawyer.*

### **Statutes and Legislations**

- The Competition Act, 2002 (India).*
- The Companies Act, 2013 (India).*
- The Securities and Exchange Board of India Act, 1992 (India).*
- The Foreign Exchange Management Act, 1999 (India).*
- The Insolvency and Bankruptcy Code, 2016 (India).*
- Treaty on the Functioning of the European Union (TFEU), Arts. 101 and 102.*
- Securities Act of 1933 (United States).*

*Securities Exchange Act of 1934 (United States).*  
*Federal Competition and Consumer Protection Act, 2018 (Nigeria).*  
*General Data Protection Regulation (GDPR), 2016 (European Union).*

### **Case Laws**

*Competition Commission of India v. Steel Authority of India Ltd., (2010) 10 SCC 744.*  
*Vodafone International Holdings BV v. Union of India*  
*Volvo AB v. Commission (Volvo/Scania), [2001] OJL 143/74.*  
*Skanska/Scancem, Case No. IV/M.1157.*  
*Telia/Telenor, Case No. COMP/M.1439.*

### **Web Sources**

*European Commission – Competition, available at: <https://ec.europa.eu/competition>*  
*Securities and Exchange Board of India official website, available at: <https://www.sebi.gov.in>*  
*Competition Commission of India official website, available at: <https://www.cci.gov.in>*  
*Reserve Bank of India official website, available at: <https://www.rbi.org.in>*

## **EDITORIAL TEAM**

*PROF. (DR.) BANSHI DHAR SINGH*

Professor,  
Ex. Dean & Head,  
Faculty of Law,  
University of Lucknow

---

*DR. KALPESHKUMAR L GUPTA*

Founder ProBono India, Legal Start-ups,  
Law Teachers India

---

*DR. SUDHANSHU CHANDRA*

Assistant Professor, Manuu Law  
School, Maulana Azad National Urdu  
University (Central University),  
Hyderabad

---

*PROF. (DR.) SANJAY SINGH*

Director  
of IIMT College of Law

---

## **INTERNATIONAL EDITORIAL TEAM**

*PROF. DR. MARC OLIVER OPRESNIK*

President and CEO  
Opresnik Management Consulting  
and Opresnik Business School

---

*PROF. DR . COMRADE AMB.  
CHUKWUNONSO C  
HARLES OFODUM ESQ*

Chancellor, ALSA University.  
Legal Director for Nigeria, World  
Association for Humanitarian Doctors

## ABOUT LEX SCRIPTA JOURNAL

**Lex Scripta Magazine** is a premier peer-reviewed online and print journal dedicated to advancing scholarly research in law, policy, and social sciences. With the vision of promoting academic excellence and fostering a culture of intellectual exchange, the magazine provides a distinguished platform for academicians, researchers, legal professionals, and students to publish their original work and contribute to contemporary legal discourse.

Each submission undergoes a rigorous double-blind review process conducted by a panel of eminent national and international professors, ensuring the highest standards of quality and academic integrity. Lex Scripta not only encourages original and innovative research but also strives to bridge the gap between theoretical insights and real-world applications in the legal domain.

Contributors and editorial members receive global recognition through certificates and publication opportunities, while readers gain access to insightful, authoritative, and thought-provoking content across diverse areas of law and policy.

Now managed by Integrity Education India, Lex Scripta Magazine is committed to expanding its academic footprint through enhanced digital presence, global collaborations, and university partnerships. Upholding its ISSN identity, Lex Scripta continues to evolve as one of India's most trusted and respected journals in the field of legal research and education.

## KEY FEATURES

- | **Scholarly Insights** – Access in-depth, peer-reviewed research articles written by distinguished academicians and legal experts.
- | **Global Perspectives** – Explore diverse viewpoints on law, policy, and governance from national and international scholars.
- | **Authentic Content** – Read verified and academically sound articles that uphold the highest standards of research quality.
- | **Knowledge Enhancement** – Stay updated with emerging trends, case studies, and policy developments across multiple legal domains.
- | **Easy Accessibility** – Enjoy seamless access to online editions and exclusive hardcover issues for academic and professional use.



CONNECT WITH US **9811 666 216**  
**7011 605 618**

