

NAVIGATING THE DIGITAL MARKETPLACE: INSIGHTS FROM COMPETITION COMMISSION OF INDIA'S APPROACH

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ABSTRACT

Following the “liberalisation, privatisation, and globalisation” (“LPG”) reforms, there have been overwhelmingly significant technological advancements during the previous three decades. Indubitably, improvements in the internet have made life simpler for individuals all over the world. Users may access a variety of services for free through platforms like search engines and social networking sites. Customers give their data in exchange for these services, even if they do not pay any money for them. These platforms sell the data to advertising firms, who use it to analyse consumer behaviour and purchasing trends and entice them with individualised and pertinent ads.

Global competition authorities have been pushed to adapt, develop, and expand their toolkit for conducting competition assessments due to the increase in the use of digital platforms and new technologies. The development of open markets and the abolition of anti-competitive behaviours are at the core of every system of competition law. For instance, *India created the “Competition Commission of India” (“CCI”) in accordance with the “Indian Competition Act of 2002” (“the Act”) in order to safeguard and promote market competition, prohibit anti-competitive behaviour, and safeguard the rights and interests of consumers.*¹ Two important antitrust laws, the “Clayton Act” and the “Sherman Act”, are in effect in the US to prevent anti-competitive behaviour. Similarly, the “Treaty for the Functioning of the European Union” (“TFEU”) aims to sanction violators who stifle fair competition in regional markets. Antitrust

regulators throughout the globe look into industry behemoths as part of their duty and file lawsuits against them when needed.

More than half of the worldwide internet market is run by the Big Five of technology: Google, Amazon, Apple, Facebook, and Microsoft. Due to these conglomerates' expansion and ongoing purchase of businesses, they have been able to engage in anti-competitive practises such market monopolisation, abuse of dominance, and the signing of horizontal and vertical agreements. These businesses are now under the scrutiny of antitrust regulators in several jurisdictions as a result of their actions. In respect to antitrust problems like search engine rigging, Android hegemony, and online advertising monopoly, Google in particular has regularly been in the centre of criticism in many regions of the world. ⁱⁱ

GROWTH OF DIGITAL ECONOMY IN INDIA

The CCI and other Indian regulatory agencies have faced particular difficulties as a result of the growth of the digital sector because of the considerable disparities between how these markets function and traditional markets. There is also a paucity of guidance from other jurisdictions as a result of authorities in other nations studying a number of concerns related to the expansion of digital markets at the same time.

As companies expand into numerous, related sectors, the participants in the digital marketplaces have recently been stronger and stronger. E-commerce services have grown and are used more often as a result, but players have also changed their growth methods, with some turning to anticompetitive tactics. The Indian competition watchdog encountered several examples of this type.

India is the second-fastest adoption of digital technology among 17 significant digital economies, according to a McKinzie Global Institute report. The digital economy in India has grown significantly over the past year as a result of covid-19, which has firmly established online services in consumers' day-to-day life and solidified the market positions of playersⁱⁱⁱ. From US\$38.5 billion in 2017, the e-commerce market is anticipated to reach US\$200 billion in 2026.^{iv}

The market is home to a number of international and domestic businesses, including Amazon, Reliance's JioMart, MakeMyTrip, Uber, and Ola, to mention a few. The Indian e-commerce sector is also home to a large number of new arrivals who operate in specialised markets and only satisfy the need for a certain category of goods or services. New entries to the e-commerce sector include Nykaa, PharmEasy, Paytm, and Zomato. These companies benefited from the e-commerce model and now serve a large number of customers. The fact that these businesses are now gone public with their shares indicates the potential for expansion of the Indian digital economy.

There is an increasing need for holding digital platforms accountable for the negative effects they have on society, both globally and in India. Recent CCI investigations into the operation of digital platforms provide proof of this. Determining a "relevant market" in which such digital platforms operate is a preliminary stage in such investigations. According to the Act, the CCI must determine what constitutes a "relevant market" based on what consumers would consider interchangeable or substitutable. The physical qualities or end use of the items, the price of the goods or services, consumer preferences, legislative trade obstacles, and local specification requirements are some of the elements that the CCI specifies must be taken into account when determining a "relevant market."

In 2016, Reliance Jio joined the wireless mobile network service market and offers its customers free calls and internet for a year. Due to the uproar this produced in the telecom industry, Jio was sued by Airtel for unfair pricing and market penetration. Reliance Jio, however, only had a 7% market share in the relevant market for telecom service providers; as a result, it was not a market leader. "In a competitive market context, when there are already significant competitors functioning in the market, it would not be anti-competitive for an entrant to push clients toward its services by offering attractive offers and schemes,". The CCI stated, 'It is impossible to classify an entry's short-term business plan to enter the market and build its brand as anticompetitive'. Given the above reasoning, the Commission is of the considered opinion that Jio does not have a prima facie case of violating the Section 4(2) (a)(ii) of the Act.

CCI's APPROACH REGARDING RELEVANT MARKET

Before 2016, the CCI considered online and offline sectors to be separate methods of distribution rather than distinct relevant markets when defining a "relevant market"^v for e-commerce businesses and marketplaces (such as Snapdeal, eBay, etc.). The CCI believed that the two markets had distinct discounts and shopping convenience, and that consumers would frequently consider both online and physical alternatives before making a purchase. Additionally, consumers were more inclined to purchase a product or service via an offline channel than an online one if the costs of the identical product or service increased considerably and vice versa.

In 2018, the CCI changed its initial perspective and acknowledged the possibility of a distinction between online and offline segments after looking into a complaint brought against e-commerce companies that claimed "abuse of dominance" through predatory pricing and preferential treatment to precise sellers, monitoring as follows:

"No doubt, to the end consumers, the distinction line between online and offline sellers is sometimes blurry, yet it cannot be denied that online marketplaces offer convenience for sellers as well as the buyers. For the sellers, they save costs in terms of setting up of a store, sales staff, electricity and other maintenance charges. The benefits afforded to buyers includes comfort of shopping from their homes thus saving time, commuting charges and at the same time they can compare multiple goods."^{vi}

The CCI dismissed the complaint in this instance despite defining the "relevant market" as "services supplied by online marketplace platforms for selling products in India" and noting that the Indian e-commerce business was still in its early stages and that no one participant appeared to hold a monopoly.

The Relevant Market Test should be used on a case-by-case basis to any business, the CCI stated in a 2021 decision involving Urban Clap, notably noting the following in connection to the "beauty and wellness" sector:

"The wellness and beauty industry in India is evolving rapidly with the emergence of new and different delivery models to offer greater ease and tailored services to consumers. One of the models that is gaining increasing prominence is that of on-demand at home services, facilitated through online technology platforms. The traditional and predominant modes of service

delivery available to users are walk-in salon services provided by beauty parlours and the services provided by independent professionals who are available at the customer doorstep on call. A combination of factors influences consumer choice for beauty/salon services which in turn have a bearing on substitutability between different modes of delivery and different service providers. These are quality of service, convenience, cost, brand image etc., with the relative importance of each of these factors depending on consumer preference as also on the specific categories of beauty services. Determination of substitutability and delineation of the area of effective competition for the Opposite Party ought to account for these nuances and complexities germane to salon services."^{vii}

REGULATION OF COMPETITION AND THE CCI'S EVALUATION ON DIGITAL MARKET BEHAVIOUR

The CCI has evaluated problems including net neutrality, leveraging, network effects, and data collecting leading to the building of market power in both its merger review and enforcement proceedings in light of the expanding importance of digital marketplaces in India. Despite being a new regulator in comparison to its worldwide counterparts, the CCI has shown via some of its significant rulings that it is nimble in adapting to the evolving difficulties of the digital markets.

A) The Regime for Merger Control

The CCI granted approval for a fully owned subsidiary of Facebook to purchase 9.99 percent of the equity share capital of Reliance Jio Infocomm Limited (Facebook/Reliance) in 2020.^{viii} The largest telecom provider in India is Reliance Jio, a Reliance Industries subsidiary. The investment made it possible for the two businesses to collaborate in the area of internet advertising and e-commerce. The business partnership with WhatsApp, a Facebook subsidiary and instant messaging service, to link users to JioMart, Reliance's new online marketplace, was an intriguing facet of the agreement.

The CCI authorised the acquisition, recognising its pro-competitive implications and the rising synergies between the telecommunications sector and the digital technology sector. In parallel, the CCI assessed potential anticompetitive problems that may result from such transactions in its study. According to the CCI, combinations can be examined in the context of data-backed

market power, in which case the focus of the investigation should be on the incentives that the parties have to pool or monetize such data. Due to a mutually beneficial relationship between mobile applications and telecoms service providers, it was discovered that Reliance Jio and Facebook's data types were complimentary.

Interestingly, given that the parties claimed that they do not intend to disclose such complementary data as part of the transaction, this conclusion had minimal influence on the CCI analysis. While no observations were made on the potential routes of data sharing between the parties, competition regulators are not afraid to re-examine merger control orders if parties decide to share data later on. In this case, the CCI mitigated such concerns by specifically allowing for an ex-post enforcement review in the event that the transaction had an anticompetitive impact in the future.

A reliance on an ex-post approach in an ex-ante evaluation may result in market powers in this sector that are difficult to challenge via competition, notwithstanding the speed at which companies operate in digital marketplaces and the elevation of some businesses to entrenched market leaders.

The CCI evaluated Amazon's purchase of 49% of the shares of Future Coupons Private Limited as another example of firms attempting to enter relevant digital businesses. The competition regulator defined the boundaries of the various marketplaces where the parties operated, including those for logistical services and online payments. Notably, the CCI recognised the overlap between e-commerce platforms and the market for offline logistic services. It analysed the transaction in light of these vertical linkages, looking at how they could be reason for worry. A testament to diversification, which enables firms to occupy a bigger share of the value chain and the digital ecosystem, these incursions by players operating in the digital space in adjacent markets are increasingly evident in the digital economy.

The CCI's study of novel strategies for competing in the digital economy has benefited India's merger control system. The CCI has struck a compromise between the regulatory obligation to protect against potential anticompetitive effects of particular transactions and the convenience of doing business. However, given that network effects and feedback loops aid in the assertion of market power in digital markets, a closer examination of the potential effects of a transaction can, in problematic transactions, assist the regulator in its attempt to ensure that combinations do not lead to high levels of concentration in the long run. The CCI has relied on the presence

of rivals to soothe worries about a transaction's potential anticompetitive implications. However, because digital platforms coexist with related markets, a major player in one market may be able to exploit its position in the value chain by working with a player in a related market, resulting in an overall strong market power in the digital ecosystem.

B) The Regime for Enforcement

The brick-and-mortar business in India has experienced a significant movement in consumer behaviour toward the internet market, and the idiosyncrasies of how competition operates in the digital world have tested and unnerved established producers and manufacturers in their competitive tactics. They have expressed worry over how internet players compete in the market as a result of this. The antitrust regulator has also been keeping a watch on these players' rapid rise.

The CCI has kept an eye out for suspected anticompetitive behaviour in the digital economy and e-commerce marketplaces regarding matters like platform neutrality and exclusive agreements, among others, the CCI's 2020 e-commerce industry assessment voiced worries regarding possibly questionable behaviour.^{ix} Multiple e-commerce markets, including as online marketplaces and travel firms, were evaluated by the CCI for competition issues. After publishing its investigation, the CCI quickly concluded that the claims that other competing hotel franchises had been foreclosed as a result of an exclusive partnership between one of India's leading online travel companies and a hotel chain were true. The CCI stated in its initial ruling that MakeMyTrip Pvt Ltd, a hotel aggregator website, was party to an exclusive deal with low-cost hotel operator Oyo Rooms (MakeMyTrip Case), necessitating the delisting of other hotel chains, including Fab Hotels and Treebo.^x

The CCI launched an independent inquiry into WhatsApp's revisions to its privacy policy. The order is a ground breaking examination into the potential misuse of a non-price component by a putative dominating company. The CCI noted in its prima facie opinion (given before the inquiry had begun) that WhatsApp's new privacy policy was forced on users by law.^{xi} WhatsApp was able to exchange data with Facebook thanks to the policy. Because customers had no choice in WhatsApp's conduct and the company was speculatively thought to be the market leader in instant messaging, the CCI initiated an inquiry for lack of consumer consent. For lack of jurisdiction, the Delhi High Court rejected the CCI's ruling. The lawsuit lies at the nexus of the nation's data privacy regulations and competition legislation. Therefore, it was

argued that the subject matter pertained to privacy and was outside the purview of the CCI's regulatory mission. The High Court maintained the CCI's authority. It was decided that even though the Supreme Court of India is now involved in a legal dispute over the privacy policy, the CCI's probe was restricted to a review of WhatsApp's dominating position and its capacity to impose terms and conditions on its users. The Delhi High Court acknowledged the competitive issues in the case, such as the scarcity of alternatives and the high costs.

EUROPEAN UNION DIGITAL MARKETS ACT

The European Union (EU) has taken significant steps to regulate digital markets and address the challenges posed by dominant tech companies. One such initiative is the Digital Markets Act (DMA)^{xii}, proposed by the European Commission in December 2020 which has been finalised and put into action since May 2023. The DMA aims to establish a fair and competitive digital market by introducing new rules for large online platforms acting as "gatekeepers." These gatekeepers, such as Google, Amazon, Facebook, and Apple, hold substantial market power and influence over online ecosystems.

A. Implications of the Digital Markets Act:

Strengthening Competition: The DMA seeks to enhance competition in the digital market by imposing specific obligations on gatekeeper platforms. These obligations include preventing self-preferencing, providing access to data for competitors, and ensuring interoperability with other services. By addressing these practices, the DMA intends to create a level playing field and foster innovation by allowing smaller players to compete.

Consumer Protection: The DMA aims to protect consumers' interests by addressing unfair practices and enhancing transparency. It introduces provisions to ensure that users have more control over their data and can freely switch between different platforms. It also prohibits unfair conditions for business users and requires gatekeepers to provide clear information on ranking criteria and any preferential treatment.

Regulatory Oversight: The DMA establishes a regulatory framework with the creation of a Digital Markets Unit (DMU) within the European Commission. The DMU will monitor and enforce compliance with the DMA's provisions, conduct investigations, and impose penalties

for non-compliance. This centralized oversight aims to ensure consistent enforcement across the EU and avoid fragmented approaches by individual member states.

B. Concerns and Challenges:

Definition of Gatekeepers: One of the key challenges is determining which companies qualify as gatekeepers. The DMA provides criteria based on size, user reach, and control over key platforms and services. However, defining clear thresholds may be complex, and there is a risk of inadvertently capturing smaller players or excluding some dominant platforms that may have significant market power.

Impact on Innovation: Critics argue that strict regulations may hinder innovation and investment in the EU's digital sector. They argue that imposing stringent obligations on gatekeepers might discourage new entrants and discourage existing players from developing new services and features. Striking the right balance between regulation and innovation is crucial for the DMA's success.

Extraterritoriality and Global Impact: The DMA's provisions apply not only to EU-based gatekeepers but also to non-EU companies offering services to European consumers. This extraterritorial reach raises concerns about potential conflicts with other jurisdictions' regulations and the risk of retaliatory measures from countries where these gatekeeper companies are headquartered.

Compliance Costs and Administrative Burden: Implementing the DMA's provisions and ensuring compliance can be challenging and costly for both gatekeepers and regulatory authorities. Gatekeepers may need to make significant changes to their business practices and systems, while regulatory authorities need adequate resources and expertise to effectively enforce the regulations.

Unintended Consequences: There is a possibility that the DMA's regulations may have unintended consequences. For example, certain obligations may favor larger players who have the resources to adapt, potentially entrenching their market dominance. It is essential to continuously evaluate the impact of the DMA and make adjustments as necessary to avoid any unintended negative effects.

The European Union Digital Markets Act represents a significant step in regulating digital markets and addressing the challenges posed by dominant tech companies. By establishing clear obligations for gatekeepers, the DMA aims to foster competition, protect consumers, and ensure fair and transparent practices in the digital economy. However, implementing and enforcing these regulations will require careful consideration of potential implications and addressing concerns to strike the right balance between regulation, innovation, and global cooperation. Such a regulation can also have impact on developing countries which are currently integrating themselves with digital literacy and are surrounded by a growing startup market. Striking a balance between and making a decision regarding the need for an ex-ante regulation like DMA or improving one's ex-post measures (improving CCI'S shortcomings in India's context) is the need of the hour. It can not be neglected that although posed with challenged, CCI in India has advanced praiseworthy judgements tackling various concerns associated with digital markets. India has adopted a committee^{xiii} recently to analyse the need for an ex-ante regulation in its market through comparison with legislations like the DMA. In light of this, policy makers should make an informed decision.

CONCLUSION

Online markets have taken the place of traditional business structures as the global economy shifts toward digitalization. Because they are inter-platforms, online marketplaces link merchants, buyers, and advertisements to enable transactions. These platforms provide a multifaceted environment that internalises transaction costs and capitalises on network effects across various user groups. These platforms have boosted market price competitiveness and price transparency, which has an impact on the distribution and pricing methods used by both producers and retailers. Future times will see a rise in the difficulties brought on by the data-driven marketplaces and the digital economy. The CCI must work to examine these instances in more depth in order to concentrate on current issues involving digital monopolies that are used as benchmarks for competition assessments in other countries.

An economy that is always growing presents the CCI with a very dynamic regulatory environment. As a result, the CCI of India must continually adapt to the complexity of regulation. India's digital economy is still in its infancy. The competition regulator must strike

a balance between regulation and action to support the recent growth while making sure that innovation is not stifled. Like other significant competition authorities, the CCI is taking a measured approach, with any action normally coming after a thorough examination.

It is crucial that the CCI carefully consider the question of "relevant market," and more specifically, the question of whether the online and offline distribution segments of such a market are interchangeable in each case and industry, given the rate at which India's digital sector is growing and the emergence of several issues prompted by this growth. The digital industry in India requires accurate market analysis and, in certain situations, rectification. For this, a consistent strategy that involves all parties, including the customer, would guarantee that the nation's digital tale is not hindered by excessive regulation or other unjustified obstacles.

Early in its existence, the CCI was presented with significant challenges in digital marketplaces, which was like throwing it into the deep end of the pool. It must establish consistent and unambiguous rules for the upcoming decade of enforcement as it develops its jurisprudence in digital markets, whether by forging its own course in light of policy concerns in India or by adopting worldwide jurisprudence. In conclusion, it is crucial that the CCI's strategy in digital markets be carefully thought out, consistent, and appropriate, in order to provide the digital sector room to flourish while preserving the interests of consumers and competition and analysing whether India needs an ex-ante regulation like the DMA in this instance, is crucial albeit it should also come with proper safeguard considering the challenges posed by such an ex-ante regulation.

ENDNOTES

ⁱ Anil Kumar Bharadwaj and Maria Khan, “Introduction to Competition Law: Part-1 Basic Introduction, Competition Commission of India” 2016.

ⁱⁱ Lauren Feiner, “Google’s Antitrust Mess: Here Are All the Major Cases It’s Facing in the U.S. and Europe,” CNBC.

ⁱⁱⁱ Fortune India “How Digital India can become a success story”, 2021.

^{iv} IBEF, India E-Commerce Report, June 2021

^v Deepak Verma v. Clues Network Pvt. Ltd. & Ors., Case No. 34 of 2016

^{vi} All India Online Vendors Association v. Flipkart India Private Limited & Anr., Case No. 20 of 2018

^{vii} Prachi Agarwal v. Urbanclap Technologies India Private Limited, Case No. 30 of 2020

^{viii} Combination Registration No. C-2020/06/747

^{ix} Market Study on E-Commerce in India Key Findings and Observations, 2020

^x Case No. 14 of 2019

^{xi} In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users, Suo Moto Case No. 01 of 2021

^{xii} Digital Markets Act, 2022 (European Union).

^{xiii} Standing Committee Report Summary Anti-Competitive Practices by Big Tech Companies, PRS LEGISLATIVE RESEARCH (Dec. 29, 2022), https://prsindia.org/files/policy/policy_committee_reports/Report_Summary-Anti-Competitive_Practices_by_Big_Tech_Companies.pdf.