

DIGITAL DISRUPTIONS: A COMPETITION LAW PERSPECTIVE-

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INTRODUCTION

With speed becoming the new currency of doing business, digitalization and innovation have presented significant opportunities for developing nations and transformed traditional market structures. Particularly in India, it is safe to say that the last decade has witnessed a digital revolution—so much so that it has woven itself inextricably into every sector of our economy and almost all aspects of our lives. For instance, e-commerce platforms such as Amazon, Flipkart and Myntra have swept the market and practically replaced traditional retailers/brick and mortar shops; app-based taxi services such as Uber and Ola have transformed the transportation market; Paytm has enabled the growth of a cashless economy; internet television networks such as Netflix and Hotstar have replaced traditional video home rental services; Whatsapp, Facetime, Google Duo and Skype have altered conventional means of communication; Airbnb has changed the hotel market; Cleartrip, MakemyTrip and OYO have disrupted the traditional hotel reservation market and Scootsy and Swiggy have transformed the online food delivery market. Thus, the transition into a digital economy has been marked by such “disruptive innovations” that have changed the dynamics of marketplaces and resulted in the creation of new markets which are far more efficient, where everything is done with a click of a mouse or swipe of a finger. As a result, it is not surprising that this has led to the displacement of incumbent products, firms or even industries in some cases.

While such innovative competition has provided ample opportunities and has required market players to adapt for the benefit of consumers, it has also led to an increase in opposition from incumbent operators given the apparent impact on competition in the market place. Thus, laying the foundation for several interesting antitrust discussions. At the heart of these discussions, lies the role of antitrust/competition authorities in being able to find a fine balance- by regulating such disruptions in a digital economy, in a manner that will not only promote “new and innovative forms of competition” but also address any potential anti-competitive concerns that may arise as a consequence.

This note seeks to highlight the effects of such disruptive innovations in India’s increasingly digital economy, while focussing on the Competition Commission of India’s (“CCI”) decisional

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practice in assessing competition concerns in innovation driven/high technology markets and as a result, its contribution to the evolution of such markets and the economy on the whole.

COMPETITIVE EFFECTS IN A DIGITAL ECONOMY

Considering that innovations in a digital economy are “consumer centric” and predominantly focus on providing more efficient products/services, not only in terms of quality but also in terms of cost and convenience, they receive significant attention within a short span of time and by virtue of the *networks effect*² become increasingly popular. Consequently, the first-mover/innovator usually has the advantage and rapidly garners market power- thus, assuming a seemingly “dominant position”.

Once a dominant position has been established, it may be argued that there is a greater likelihood of such dominant position being abused, including through predatory pricing to drive out existing players from the market or excessive pricing once the existing players have been driven out of the market. However, it must be appreciated that since these business models are premised on greater innovation, they face the constant threat of “creative destruction” and of being outdated, continually. Therefore, such business models despite garnering market power may face competition not only from smaller companies (in terms of market shares) which may have better technology but also from traditional incumbents who may displace the disruptive business models if the latter fail or do not stabilise in the long run. In fact, the threat of being replaced by a potential entrant with newer and better technology acts as a deterrent on the disruptive technology based models from engaging in anti-competitive practices. Arguably, the transient nature of the disruptive business models in itself acts as a pro-competitive factor in the market. Therefore, in high technology markets, the players have to *run as fast as they can just to stand still*.³

It is thus evident that the pro-competitive effects of disruptive innovations often outweigh their potential anti-competitive concerns. In the above context, it is also important to highlight that Section 4 of the Competition Act, 2002 (“Act”) does not penalize the existence of a dominant position, i.e., big is not bad. What is, in fact, prohibited under the Act, is only the abuse of such dominant position. It is, therefore, imperative for regulators, particularly, antitrust regulators to undertake a nuanced analysis of disruptive models of business, before brushing the first mover as

² An effect wherein usage of a product/service by one customer only increases its usage by other customers.

³ This is called the *Red Queen Game* phenomena. WJ Kolasky, “*What is Competition? A Comparison of US and European Perspectives*” ANTITRUST BULLETIN 32 (2004).

dominant and as a consequence, stifling innovation. Having said that, with *innovation* replacing traditional infrastructure in markets, it is also important to ensure that such dominant entities do not have the ability curtail innovation. Thus, with the increasing prominence of innovation, antitrust authorities, including the CCI are seen to be dedicating more time in assessing/investigating digital industries and dealing with complex questions arising from the same.

CCI'S DECISIONAL PRACTICE

With the power to impose the highest economic penalties and stringent behavioural prohibitions having grave consequences, the role of the CCI has been pivotal in the development and process of digital disruption. Tracing the decisional practice of the CCI, particularly its recent stance in the *Google Case*⁴, it is safe to say that the CCI, has attempted to adopt a nuanced and balanced approach while dealing with such high technology industries/business models.

For instance, starting with the early cases of *In Re:Mr. Ashish Abuja and Snapdeal.com &Anr.*⁵ and *In Re: Mr. Deepak Verma and Clues Network Private Limited &Ors.*⁶, the CCI held that online channels and brick and mortar shops were merely two distinct distribution channels of the retail sector in India and hence did not constitute distinct (narrow) relevant markets for the purposes of the Act. Further, while delineating the scope of relevant product market in *In Re: Bharti Airtel Limited and Reliance Industries Limited & Reliance JioInfocomm Limited*⁷, the CCI opted for a broad definition encompassing the entire wireless telecommunication services market as opposed to the narrow market of 4G services only, on the basis that “*in this ongoing process of evolution, it is not appropriate to differentiate wireless telecommunication services based on technologies used for providing such services*”. However, the CCI has also used innovation as a distinguishing factor in the Google Case, wherein after taking into account the reach of the services to the consumers, pricing and the monitoring mechanism, the CCI came to a conclusion that the online and offline modes of advertising were not part of the same relevant market. Therefore, it is clear that the CCI has steered away from a mechanical application of traditional tools in dealing with innovation driven markets and has taken cognizance of the market realities on a case-by-case basis.

Further, in light of the changes in the market structure introduced by the digital economy, not only has the CCI considered “standard business practices” as an important factor in its

⁴ Matrimony.com Limited v. Google &Ors., Case No. 7 & 30 of 2012. (“**Google Case**”) The CCI held Google liable only for three out of the various counts raised by the informant.

⁵ Case No. 17 of 2014.

⁶ Case No. 34 of 2016.

⁷ Case No. 3 of 2017.

competitive assessment⁸, it has also acknowledged the pro-competitive effects arising from disruptive innovation. For instance, in *In Re: Mr. Mobit Manglani and Flipkart & Ors.*⁹, dismissing allegations in relation to whether exclusive agreements entered into between e-portals and manufacturers were anti-competitive, the CCI noted that *with new e-portals entering the market, competition was only increasing and thus, the exclusive agreements did not prima facie create entry barriers*. It was further observed that distribution through the online channel only provided an opportunity to the consumers to compare the prices as well as the pros and cons of the product. Through the option of delivery right at their door steps, consumers were provided the opportunity to accept the goods at their convenience.

The importance of the *disruptive* factor is also evident from the CCI's assessment in abuse of dominance cases. Thus, while rejecting allegations of abuse of dominance by Ola Cabs in Bengaluru, the CCI reiterated this position, by noting that in high technology markets, *high market shares, in the early years of introduction of a new technology, may turn out to be ephemeral*. Considering that such markets function on the principle of *networks effect*, market leadership position can be fragile or transient during the initial stage of evolution of the market, being the stage for *network creation*.¹⁰ While the transitory nature of market shares in high technology markets has also been recognised by the CCI in the Google Case, the CCI still considered Google to be dominant since its market shares *“have been consistently high, which suggests that it has got other advantages, besides technical advantages, which insulate its market position”*, thereby indicating that the CCI seems to be distinguishing between emerging and established technology markets.

Taking its pro-innovation approach a step further, in *In Re: M/s. Mega Cabs Private Limited and ANI Technologies*¹¹, the CCI ruled that *inability of the traditional players to compete with the efficiency of the new entrant (innovator) did not equate to creation of entry barriers within the meaning of the Act*. Thus, acknowledging that the objective of competition law is to *preserve competition* and not *protect competitors*. Similarly, in the Google Case, the CCI clarified that *intervention in such markets should be targeted and proportionate*.

Keeping with the approach of recognising market realities and innovation, while dealing with an allegation of predatory pricing in *In Re: Bharti Airtel Limited and Reliance Industries Limited &*

⁸ In re: Shri Vinod Kumar Gupta and Whatsapp Inc., Case No. 99 of 2016; In re: Fx Enterprise Solutions India Pvt. Ltd. vs. Hyundai Motor India Limited, Case No. 36/2014.

⁹ Case No. 80 of 2014.

¹⁰ In Re: Fast Track Call Cab Pvt. Ltd, Meru Travel Solutions Pvt. Ltd. v. ANI Technologies Pvt. Ltd., Case No. 6 & 74 of 2015.

¹¹ Case No. 82 of 2015.

*Reliance JioInfocomm Limited*¹², the CCI emphasised that *Reliance Jio* was a new entrant, and in a competitive market scenario marked by the presence of big incumbent players, *it would not be anticompetitive for an entrant to incentivise customers towards its own services by giving attractive offers and schemes*. However, the CCI also recognised the flip side to the technology markets in the Google Case (wherein the CCI held that Google had abused its dominant position under Section 4 of the Act *inter-alia* by promoting the use of its own vertical flight search services and thereby indulging in search bias), by noting that by virtue of *network effects*, “*in the digital economy, players with strong market position often enjoy virtual hegemony, due to the “winner takes all” phenomenon*”. Therefore, in its attempt to strike a balance, the CCI held that in order to accurately assess whether a dominant enterprise in the digital space is abiding by special responsibility, it is important to take cognizance of fast-moving innovation, the novel products and services at issue, and the nature and extent of network effects that might exist. Such observations of the CCI also demonstrate its attempt to steer away from applying traditional tools of assessment to innovation driven markets in a digital economy. The CCI’s approach is reinforced by its recognition of access to information as a mode of consideration in the Google Case. The CCI noted that while Google provided its search services free of cost to the users (in the traditional sense), the users offered indirect consideration to Google by: (a) providing their attention or “eyeballs” to the Search Engine Results Page; and (b) allowing Google to collect and use their information, resulting in attraction of more advertisers and generating revenue.

Additionally, the CCI’s assessment of impact on innovation, though evolving, is also evident in its review of mergers and acquisitions. Pertinently, “nature and extent of innovation” is also stipulated as a factor under Section 20(4) of the Act.¹³ For instance, in *Denali/EMC Corporation*¹⁴, while dealing with the information systems sector, the CCI noted that the said combination does not give rise to anti-competitive effects since the relevant market would remain competitive post combination on grounds of being marked by *technical innovation* with low barriers to entry. Similarly, in dealing with the TV broadcasting sector, the CCI took into account the ease of entry in the market and the sufficient scope of innovation and competition, while clearing the transaction.¹⁵ It is important to highlight that in the international context as well, competition authorities have started to consider loss of an “*independent innovator*” from the market as a fit case for seeking divestments from the merging parties.

¹² Case No. 3 of 2017.

¹³ Please note that Section 20(4) of the Act provides factors to be taken into account by the CCI in assessing the likelihood of an appreciable adverse effect on competition arising from the merger/acquisition under review.

¹⁴ Combination Registration No. 2016/01/370.

¹⁵ Independent Media Trust/RB Mediasoft, Combination Registration No. C-2012/03/47.

As such, with the level of existing and potential innovation gaining prominence in the CCI's assessment of mergers and acquisitions, seemingly benign transactions which may have the effect of stifling innovation, may also be heavily scrutinised by the CCI. However, as a necessary corollary, a merger of the top two competitors in a digital economy may not be considered as problematic so long as it can be demonstrated that there is a likelihood of other entities entering the market and displacing this merged entity by virtue of technological superiority.

CONCLUSION

Owing to the transition of the Indian economy into a digital economy and the government's increasing focus on promoting *ease of doing business* by providing varied incentives, the reality is that India is all set to embrace and accelerate digital disruption. In fact, India has been ranked third in terms of showcasing promise for maximum disruptive technology breakthroughs. However, in order for this to be a *turning point* for traditional industries in India, a lot depends not only on economic reforms but also on the ability of law makers/regulators to provide a focused government policy and stable regulation. As such, the role of the CCI, in particular, is extremely critical since, by virtue of the policy it adopts, it can either bolster or impede the development of a market/industry.

To its credit, in under ten years of commencement of the Act, the CCI has aligned itself with international best practices since it has so far adopted a balanced approach and refrained from premature intervention in innovation driven/high technology markets, and intervened only when necessary, thus providing necessary headroom for disruptive innovations in India.