

EMERGENCE OF DIGITALIZATION AND ITS IMPACT ON COMPETITION LAW

Ashna Chhabra and Anuja Chaduhury

1. INTRODUCTION

The advent of digitalization in the Indian Economy has created a need for development and advancement in all the spheres of law. It has become indispensable to adapt the dynamic needs of the industry and urgently render protection, especially across multi-sided platforms. Competition in the digital economy requires more attention as in contrary to that prevailing in the traditional “brick and mortar” markets. The dynamic character of the digital market makes it conclusively collapse into a limited set of competitors due to the market created impediments and difficulty in independently existing in the presence of other major opponents. The sector consists of platform-based business models, multi-sided markets, network effects and economies of scale which render competition issues more complex.¹ Unlike in most economic sectors, the interconnectivity of digital economy requires unavoidable co-ordination and co-operation between the firms, which may indeed be pro-competitive.² Innovation which forms the foundation of technology-driven industries makes it more susceptible to “**violations of competition law**”. There is a continuous discussion regarding the compatibility and the scope of the existing competition law regime to address the issues arising out of virtual markets and the majority opinion with respect to the Indian scenario has leaned against it. A number of establishments in the virtual world have resorted to a strategy which involves inculcation of losses in order to ultimately gain network effects. The extent of losses being incurred by e-commerce firms in India through heavy discounting practices is estimated to the value that these businesses expect to gain from ensuring early control over the market leading to new concerns of predatory pricing for the competition law regulators³ It is reported that the combined losses of India’s top ten e-commerce companies quadrupled in the financial year 2014-15 standing at a total of Rs.51.5 billion.⁴The firms have failed to realize that such strategies might provide brief monetary rewards will be brought under the scanner of the competition authorities’ subsequently .Though there are new challenges imposed by the new industry, it has several positive impacts

¹“Digital Economy, Innovation and Competition”, Organisation for Economic Co-operation and Development(OECD), Available at: <http://www.oecd.org/competition/digital-economy-innovation-and-competition.htm>.

²Ibid.

³SmritiParsheera, Ajay Shah &Avirup Bose, *Competition Issues in India’s Online Economy* (NIPFP Working Paper Series No. 194, 3rd April 2017), http://www.nipfp.org.in/media/medialibrary/2017/04/WP_2017_194.pdf.

at:http://www.nipfp.org.in/media/medialibrary/2017/04/WP_2017_194.pdf.

⁴Id.

across the globe. It transformed industries and economies by introducing new ideas and technologies in the economy and has become the driving force for liberalization and innovation. It has contributed immensely in creating transparency and accountability across the consumer-supplier platforms. We will go on to elaborately discuss both the pro-competitive and anti-competitive angles of the digital economy focusing majorly on the Indian and the European scenario and its corresponding laws.

2. DETERMINATION OF RELEVANT MARKET

2.1. The composition of market in a Digital Economy

The emerging market revolutionised by the power of clicks and links has more intricacies than a regular brick and mortar market selling the same products. It is pertinent for any competition law authority or jurist to understand that the consumer behaviour observed in the digital e-commerce markets varies majorly with that in traditional markets. As compared to other markets, digital economy provides the players in that market huge opportunities to invest in greater degrees of innovation and technological developments. The choice of the consumers is overweighed by the quality and product features than the price. Due to its high concentration, it is relatively contestable and allows the entrants and the existing market players to reach a large segment of the market due to the strong network effects and economies of scale. The non-requirement of the heavy investments in the supply chain allows the companies to expand their operations quickly without any substantial resources. The distinctive feature of the digital economic market is the two-way benefit user group which connects the service provider and the consumer. This results in the wool gathering of a lot of data and its analysis to develop the pricing and consumer preference algorithms, sometimes making it susceptible to anti-competitive effects.⁵

2.2. Challenges with Relevant market definition according to the traditional methods.

The diversity in the character of the digital economy is pertinent to be recognized as the factor to be emphasised while determining the relevant market in case of competition law issues. Market definition is the first step in discussing the competition and regulation concerns as it helps to establish the dominance of a substantial market share of an enterprise in an existing market. The already established tools of market definition have proved to be unsuitable due to the very nature

⁵Dr. Maria Maher, "Resetting competition policy frameworks for the digital ecosystem" (2016) Available at: https://www.gsma.com/publicpolicy/wp-content/uploads/2016/10/GSMA_Resetting-Competition_Report_Oct-2016_60pp_WEBv2.pdf, henceforth known as "GSMA".

of the digital economy. Due to the presence of more than one relevant market in the multi-sided platforms, non-reliance on the price based indicators owing to the zero pricing policy and the fluidity between the markets boundaries are the main challenges for concluding the relevant market of digital economy.⁶

Many competition law authorities fail to distinguish the two-sided transaction and two-sided non transaction markets, both of which require different treatment in the determination of market. Two-sided transactions involve direct transaction between the users on both side of the platform which demands definition of a single relevant market due to the presence of indirect network effects. While on the other side, in the case of non-transaction markets, the product might compete on one side, but not the other, for e.g. market for broadcasted media and should be defined with multiple relevant markets. The anomaly of defining relevant market was identified when the EU Commission while referring to the DoubleClick and Google acquisition case defined the relevant market as only that of “online intermediation” and ignored the two-sided markets of movie-streaming platforms and navigation markets. As a result, the acquisition of DoubleClick strengthened Google’s position as it could obtain data of other users and improved its targeted advertising.⁷

The main attraction of the consumers towards e-commerce platforms is the availability of the services at zero-pricing. This takes a problematic turn as the basis of competition ceases to exist. The traditional SSNIP tests built on the pricing changes prove to be non-functional as it cannot account for the interdependencies among prices of products in multi-sided platforms. However, many competition law authorities claim that in situations where there is no price tagged on certain products, the consumers end up paying prices in other forms, flowing from the annoying advertisements, privacy or in the form of their data, making data as a currency. The basis for substitutability by the consumers becomes the differences in product features or functionality. As the content of services becomes less comparable in the eyes of the consumers despite its glaring differences on the face value, the basis of determination of the relevant market ceases to be demand-side substitutability and is replaced by the notion of whether one enterprise is able to steal the profits of the other company.⁸ The market definition tools are inapt for adopting the

⁶Nicolai Van Gorp, Dr. Olga Batura, Challenges for a Competition Policy in a Digitalised Economy, IP/A/ECON/2014-12 (2015), http://www.europarl.europa.eu/RegData/etudes/STUD/2015/542235/IPOL_STU%282015%29542235_EN.pdf [hereinafter “EU Digital Economy”].

⁷*Id.*

⁸*Id.*

fluidity of the market boundaries which results from the creation of new markets by developing new development models.

1.3 Suggestions on the definition of relevant market definition.

The determination of relevant market should be narrowed down by not analysing how much profit turnover a particular digital platform is making, but rather by its ability to steal away the profits of another company. The analysis of the relevant turnover, pertinent for determining the dominance of a particular enterprise is to be determined by scrutinizing the strength of the competitive constraints which include the buying and selling power depending on the horizontal market power vis-a-vis the competitors, the presence of potential entry barriers and the analysis of the vertical power relations throughout the value web.⁹ Some jurists suggest that in the case of digital economy, rather than the traditional SSNIP test, there should be the usage of the Small but Significant Non-Transitory Decrease in Quality Test (SSNTDQ) which asks the question whether the decrease in the quality of the service will still retain the customer base of that platform. The China Competition Law Authorities and the EU Competition Law Commission have admitted that in online markets¹⁰, due to the zero pricing policies, emphasis is paid on quality as the significant parameter. Also, it is to be noted that in the case of digital economy, major contributor to market power is data. The ease in which data sets can be replicated and the scope of the data for competitive performance is to be considered to assess its contribution. Accessibility of data confers an unmatched advantage to the enterprises over their fellow competitors in the market.

3. ABUSE OF DOMINANCE IN THE DIGITAL ECONOMY:

3.1 Traces of Abuse of Dominance.

The growing “**base**” of digitalization and a corresponding change in the commercial behavior has alarmed the competition law authorities across the globe. As recognized by the Antitrust law, abuse of dominance of an enterprise in a market is anti-competitive per se and not mere dominance. The abuse of dominance becomes more prevalent in the virtual economy market than in the traditional markets. Among several other causes for the rising cases of abuse of dominance in the virtual market, is the lack of entry barriers. Entry barriers are the prominent factors of consideration in the assessment of market dominance. Traditionally, the existence of

⁹*Ibid*

¹⁰GSMA, *supra* note 5.

substantial entry barriers indicated a high market share translating to monopolized market power abuse of dominance¹¹. However in the virtual markets, due to the concentration of market power in a few platforms in the e-commerce industry has enabled and encouraged these establishments to practice business by substantially controlling the market behaviour of the competitors as well as the new entrants.,

It is noted that as a result of market power, “some platforms can control access to online markets and can exercise significant influence over how various players in the market are remunerated”¹²The power to control the market behaviour of the new entrants highlights the “First-Mover” advantage that is enjoyed by the major e-commerce giants having a global presence along with an established brand loyalty. European Commission has pointed that nearly half of the internet traffic goes to only 1% of the websites that are actively trading in all the member states.¹³Though, this does not constitute per se a violation of the competition law but when such control is clubbed with other behaviours of the virtual establishments, they can be anti-competitive in nature.

To combat the first traces of abuse of dominance across the digital platforms, the European Commission investigated the search engine giant Google, who was alleged to have abused its dominant position by lowering the ranking of unpaid search results of competing services which are specialised in providing users with specific online content such as “price comparisons” (so-called vertical search services) and by according preferential placement to the results of its own vertical search services in order to shut out competing services.¹⁴Google was criticised for restricting competition and innovation. It was considered that vertical integration by Google had a major impact on innovation because it reduced the incentive for start-ups to develop alternative services: “They will have no access to the market. They will not be visible and therefore consumers will not use them.”¹⁵

3.2 Abuse by way of Network Effects.

¹¹OECD, Policy Roundtables, Barriers to Entry (2005), <https://www.oecd.org/competition/abuse/36344429.pdf>.

¹²Communication from the Commission, A Digital Single Market Strategy for Europe, COM(2015) 192, p11,

¹³SELECT COMMITTEE ON EUROPEAN UNION, House of Lords, REPORT ON ONLINE PLATFORMS AND THE DIGITAL SINGLE MARKET, 2015-16,HL, 10 (UK), <https://publications.parliament.uk/pa/ld201516/ldselect/ldeucom/129/129.pdf>, [hereinafter “House of Lords”]

¹⁴European Commission Press Release, IP/10/1624, Antitrust: Commission probes allegations of antitrust violations by Google, (Nov. 30, 2010), http://europa.eu/rapid/press-release_IP-10-1624_en.htm?locale=en.

¹⁵House of Lords, *supra* note 13.

Network effects can at any point of time turn anti-competitive and can lead to winner-takes- all outcomes. The interaction between the platform sites with interdependent demand leads to direct or indirect network effects.¹⁶The direct network effects arise where users of a particular platform give more importance to a product or a service directly increases the number of users on the platform as seen on Social Networking platforms. Such network effects can accelerate switching costs and create substantial entry barriers leading to a monopolistic tendency in the industry. However, the major players who are successful in tackling these effects can leave a major impact by drastically decreasing and limiting the choice for consumers, hence posing as a necessary evil for survival in the virtual market. In contrast, indirect network effects arise when the users of one side value a product more; the more users 'from the other side' are using the platform.¹⁷It is purely an accelerating mechanism which is building an easy path for a rapid growth in this new networked economy.

3.3 Data-related Abuse

“Data” is the major assets of a virtual business and every major platform is interested in the increasing its reservoir of exclusive data by entering into agreements with other platforms and to prevent the access of such data to other players and new entrants. The virtual market is purely data-driven and is more likely taken undue advantage of by the rival players as well as the platforms to which it belongs. It is one of the potential means of abusive manipulation.. In addition to this, there is major degradation of the security provided to personal data of consumers across platforms, associated with violation of consumer rights. The customers neither approve of nor are unaware of the misuse of their personal data by the platforms and how their personal data has become a business commodity which is shared by the major players in the digital market for which they didn't sign up.

4. MERGERS AND ACQUISITIONS

When Google undertook 187 acquisitions, it was appropriately opined that “In this way, a powerful platform can foreclose future markets and throttle innovation; it would leverage its own market power instead of competing on merits and is likely to prevent others from competing on merits.”¹⁸European Commission recently faced a huge challenge regarding in the

¹⁶JOHN E. KWOKA& LAWRENCE J. WHITE, THE ANTITRUST REVOLUTION: ECONOMICS, COMPETITION, AND POLICY 606 (6th ed., 2013).

¹⁷MASSIMO MOTTA, COMPETITION POLICY: THEORY AND PRACTICE 451 (2004).

¹⁸Nicolai Van Gorp&Dr Olga Batura, *Online Platforms and the EU Digital Single Market*,

Whatsapp-Facebook Merger, which was considered as one of the landmark deals as Facebook successfully bid over Whatsapp for \$19 Billion. One of the major areas of concern in this particular deal was the restriction of competition in the relevant market. EU identified the relevant market as a combination of three markets i.e. The Communication Market, Social Networking and Online Advertising Market. However, this bid eventually received a green flag by the authorities in Europe and the US. As far as Indian Competition regulators are concerned in the Whatsapp Case¹⁹ regarding the inquiry into the alleged abuse of dominance by Whatsapp Inc., the Competition Commission of India held a different stand with regard to the relevant market of Whatsapp than what was initially bought before by the Informant and it also observed that these instant messaging applications cannot be treated or be compared to the traditional messaging services rendered primarily by the Telecom Service Providers.

2. VERTICAL RESTRAINTS IN THE DIGITAL ECONOMY

The nature of the Digital Economy strives on innovation and technological development which makes it extremely susceptible to imposition of non-price vertical restraints. The vertical restraints as in the traditional markets have the same aim of facilitating collusion and softening competition among the enterprises existing in the digital economy. Though instruments such as the Resale Price Maintenance (RPM) aim to eliminate competition among the sellers, the price transparency in the online markets makes it difficult for the platforms to enter into a cartel, proving to be a lesser concern than its practice in the traditional market.

Vertical restraints have always been weighed on the golden scale of rule by reason, appreciating the pro-competitive effects it brings in with its usage. They are believed to mitigate the free-rider service problem that may compel customers to use the services provided by the traditional markets, before jumping onto the online services. Vertical restraints compel the retailers in engage in demand-enhancing activities such as servicing and advertising. They have also been successful in incentivizing the retailers to promote the manufacturer's brand, by prioritizing it by showing in the top search lists rather than demoting it to remote particular searches.²⁰

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-internal-market-subcommittee/online-platforms-and-the-eu-digital-single-market/written/24920.html>

¹⁹Shri Vinod Kumar Gupta v. WhatsappInc.Case No. 99 of 2016, CCI.

²⁰OECD, POLICY ROUNDTABLES, VERTICAL RESTRAINTS FOR ONLINE SALES (2013), <http://www.oecd.org/competition/VerticalRestraintsForOnlineSales2013.pdf>, hereinafter EU Vertical Restraints.

However, some particular emerging practices such as the price-parity agreements or best-price guarantee clauses incorporated in the agreements between the manufacturers and the retailers have raised the concerns among the anti-trust regulators to have the potential to showcase anti-competitive nature.

5.1 Price-Parity Clauses and Retail Price Most-Favoured Nation Clauses

Such clauses is an agreement between a seller and an electronic trade platform where the seller undertakes not to charge on that platform a price that is higher than the price that he charges on other platforms.²¹ They are instruments to ensure that the manufacturers are not providing better incentives to the other competitors in the market, and if so, the same may be directed to them as well. They entered the sphere of digital economy, under the scrutiny of the Commission with the investigations on Amazon who had clauses with its various manufacturers to be informed of the most favoured or alternative terms offered to their competitors and in the Online Booking sector.

5.1.1. Potential Effects of the Parity Clauses:

The most relevant competitive effects are likely to occur in the markets where the platforms compete against each other and the prices of the goods/services sold on that platform in relation to other competing platforms. It is easier to foresee the anti-competitive effects of such clauses.

The most visible effect is the foreclosure of the entry of new competitors in the relevant market. For instance, if “A” and “B” are two competing enterprises which desire to enter the market for Soft-toys. The most obvious strategy would be to lower the transaction fee from the sellers, so as to allow them to charge lower prices and attract the buyers. However if A has signed price-parity agreements with the sellers, covering the new entrants as well, this will prevent the sellers to charge them lower prices on the new platform. This will restrict the new entrant to attract new buyers. This plays a major role when competition is based on non-price elements and strong network effects.²²

²¹*Ibid.*

²²Luca Aguzzoni&Ors., *Can 'Fair' Prices Be Unfair?*, OFFICE OF FAIR TRADING, (2012), http://www.learlab.com/wp-content/uploads/2016/04/Can-%E2%80%98Fair%E2%80%99-Prices-Be-Unfair_-A-Review-of-Price-Relationship-Agreements.pdf.

Such clauses have also been evidenced to soften the competition between the competitors. Suppose A demands a higher transaction-based fee from the sellers that use it than platform B and the sellers have signed such a clause with platform A, they will have to charge on A a price that is not higher than the price charged on platform B. This would reduce the prices that they would charge the buyers on A and subsequently increase the same on B. Buyers of B, will to some extent, subsidise the buyers on A. This would reduce B's incentive to decrease its fee and increase A's incentive to increase its fee as the sellers would have to spread the increase across the prices on both the platforms. The end outcome remains that both platforms charge a high fee to sellers. This further worsens when both have entered into price parity agreements with the sellers and get the more incentive to raise seller's fee.

An across-platform parity clause may facilitate collusion between platforms and also between sellers. Such clauses improve the ability of one platform to monitor each other as the sellers will definitely complain about the higher prices they have to pay on other platforms. Less price variety improves the sellers' ability to monitor each other pricing decisions and reduces the costs of enforcing a horizontal agreement.

However it can be denied that such clauses may help a high cost/high quality platform to defend its quality investments by preventing other platforms from free-riding on them.

5.2 Dual Pricing

Though it donning an innocent garb, dual pricing is a competitive threat aimed directly against the online sales. The system of dual pricing involves the imposition of different prices to the retailers based on whether he chooses to sell the product online or over-the-counter. The manufacture's selling prices have a direct impact on the determination of the retailer's selling prices and the and by increasing the margin between the two gives the manufacturer the power to determine the retailer's choice of sales channel for the sale of his products. An unattractive MSP for online sales can reduce the online market for that product to zero, thus dismantling the online distribution channel for that product.²³ When the German Commission prevented the usage of agreement that provided a special rebate to the products sold at brick-and-mortar shop and the prices in the online distribution market was relatively higher, the German Commission

²³“Vertical Restraints in the Internet Economy” (2013) Available at: http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/Vertical%20Restraints%20in%20the%20Internet%20Economy.pdf?__blob=publicationFile&v=2

recognized the anti-competitive nature of such policies in hindering the possible structural change towards online distribution and prevented the use of the same.²⁴

5.3 Selective Distribution as a ban on online sales

By limiting the scope of the online distribution offerings to selective distribution platforms, the manufacturers restrict the retailers in order to maintain their status of their brand, their credence and the luxury of their product. These restraints are employed to not create a negative impact for the luxury products in the minds of other retailers based on the poor quality standards of a single retailer. It means to limit the provision of the incentives to few authorised retailers only. It also aims to provide the customer base of the product to have the access to full and complete information from the retailers whom the manufacturers sanction for distribution. However, these selective distribution practices have the potential to restrict the intra-brand competition and lead to the foreclosure of certain kinds of distributors in an online platform and are considered to be a hard-core restriction.²⁵

6. FEW CONSIDERATIONS:

The competition law authorities are slowly recognizing digital economy paving its way in indulging into anti-competitive agreements and activities. The nature of the digital economy while guaranteeing more transparency and efficiency for the regulators to monitor them, can also shove the anti-competitive effects under the veil behind the computer screen. All the anti-trust jurists have firmly formed their opinion against the utility of the present techniques in the legal provisions to deal effectively in the light of emerging issues of the digital economy. Efforts have been made to considerably understand the nature of the market as opposed to the traditional markets and the significant changes in the consumer behavior towards e-commerce, regardless of it selling the same products.

The legislative action requires primarily, the constitution of an efficient body consisting of members ranging from fields of competition law and consumer law protection, science and technology, economics, business fields, anthropologists studying the consumerist behavior, etc. to recognize the nature of the digital economy and its functioning. Efforts have to be made in order to fully understand; not only the anti-competitive risks but also the data protection risks

²⁴Cf. Activity Report of the Bundeskartellamt 2011/2012, document 17/13675, p. 74 Available at :http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Taetigkeitsberichte/Bundeskartellamt%20-%20T%C3%A4tigkeitsbericht%202012.pdf?__blob=publicationFile&v=5.

²⁵EU Vertical Restraints, *supra* note20.

involved in this technologically-run market. A full assessment of the market would be fundamental in the formulation of either a separate legal mechanism to deal exclusively with the issues arising out in the e-commerce industry and imposing penalties for the offenders, or in the understanding of the various amendments, additions and the removal of the severable parts in the existing legislation to incorporate the risks involved. Recommendations can be borrowed from the successful models and proposals that have been advocated by German Competition Law Authority and the EU Competition Law Commission. The legislation has the burden also to educate the inspectors, authorities and the administrative machinery involved in the investigation and proceedings of such cases.

In the recent cases which emerged in the recent facet of digital economy Whatsapp-Facebook merger case, Ola-Uber Taxi case, Reliance Jio case, etc. posed a unique question of authority allocation of the cases. While the Competition Commission of India is riddled with the powers to decide cases relating to the competition law related issues pertaining to every sector of the economy; individualized authorities like Telecommunication Regulatory of India also has some distinct powers to decide, investigate and adjudicate cases relating to the anti-competitive activities relating to the technology sector. Hence, when an issue of anti-competitive violation surfaces, there has to be a judicial precedent prescribing the overriding power of one authority over the other. The legislation can also aim to either dedicate a separate quasi-judicial branch within the CCI who focuses especially on cases related to the digital economy or there can be a creation of separate quasi-judicial body under the new formulated legislation and TRAI and CCI can be relieved from commencing proceedings against the same.

7. CONCLUSION

Giving due consideration to all the dimensions of the digital market and their impact upon the competition regime it can be reasonably concluded that the ambit of the competition law currently in force is not wide enough to include under its purview the dynamic obstacles prevailing due to digitalization and there is a need for establishment of a separate enactment and regulating authorities to meet the rising challenges.