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The Competition Commission of India and Digital Markets

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I. Introduction

Ex ante intervention by *ex post* competition regulators of digital markets is a new development for India's competition regulator. The trend in Europe and the U.S. towards emphasizing *ex ante* rules of market behavior has prompted authorities in India to also develop *ex ante* rules for the regulation of digital markets.

Many authorities worldwide are concerned with the rise of a handful of large multinational companies that have established themselves as the gatekeepers to digital markets. In response, they have designed policies to encourage domestic platforms.

Platforms have spawned multiple markets on their platforms. Here, we refer specifically to data on certain markets and markets for ideas (patents) at the European Commission seminar held at Florence. Cases regarding these two markets have been filed before the Competition Commission of India ("CCI"). Digital markets in India are marked by three features;

- Protectionist;
- Emphasis on emergent markets – Platform Markets, Data Markets and Market for Ideas;
- *Ex ante* market rules issued by the CCI.

The output of the Indian Parliamentary Standing Committee on Finance has been the basic source for policies on digital markets. It identified the factors that define the size of these markets in a short span of time, defined as Systemically Significantly Digital Enterprises ("SSDEs").

It was this Committee that observed that SSDEs tip very quickly. SSDEs need to be identified early based on their revenue, market capitalization, and number of active businesses. This necessitates an *ex ante* assessment of anti-competitive behavior.

Further, a Digital Competition Act needs to be passed and a separate branch focused on digital markets created within the CCI.

So far, we have referred to "markets" as a homogenous group. But differences between markets may require additional or altogether different regulations. I will focus on two prominent digital markets - data markets and markets for ideas (patents).

The Competition Act of India (CA02, 2002) was framed to assess factors that lead to an appreciable adverse effect on competition ("AAEC") for traditional product markets. The Act's emphasis was on market size and monopolization.

A new dimension added for consideration when assessing data markets is the spread of misinformation. Several advisories and warnings have already been issued in this regard. A January 2024 advisory mandated intermediaries to comply with the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (IT Rules) and to curb spread of misinformation by "deepfakes."

[1] Former Member of the Competition Commission of India. This paper is based on public comments at the ASPIRE Advisory Board Meeting at Florence hosted by the European University Institute (EUI) in January 2025.

The owners of broadcasting spectrum such as Jio aim at expanding their reach. The likelihood of "Abusive Agreements" and "Abuse of Dominance" actions by spectrum owners requires new regulations. CCI has responded with *ex ante* rules of market conduct (the "Ten Rules") that raise queries as to whether the regulator sets the design of future markets or regulates the permissible and acceptable design of markets.

Disagreements between the government and the CCI over whether to shape the market or to encourage its growth remain unresolved.

II. Platform Markets, Data Markets, and Markets for Ideas

In my book "A Commissioner's Primer to the Economics of Competition Law in India" (Palgrave Macmillan's. Singapore, 2023), I identified four market types based on their features and economics. SSDEs fall within the framework of platform markets. The diversity of markets suggests designing innovative regulatory interventions for each, unlike prevalent traditional (non-digital) markets

The economics of platform markets and their viability depend on generating economies of scale and scope. I will restrict myself to Platform markets and the two categories of sub-markets: Data markets and Markets for Ideas.

Elements differentiating between these categories include:

i) conventional or traditional product markets with a continuum from perfect competition to monopoly, to monopolistic competition;
ii) platform markets (usually on the internet) characterized by two sides, with sellers and buyers on one side and advertisers on the other. Data network effects result in the emergence of "giant" tech firms;
iii) data markets emerging from access to the data generated and traded on platform markets; from compiling and computing varied data that is anonymized and atomized; from finding a niche in the monetization of data and to emerge as a quasi-public good;
iv) market for ideas of patents and knowledge - Standard Essential Patents ("SEPs") and bundles of patents that determine the capability of telecommunication systems used by service providers.

III. Data Markets

The sale of data by platforms has raised uncomfortable questions regarding the ownership of data and the accrual of revenue from the sale of said data. The sheer variety and extent of Indian data has whetted the appetites of platforms. A spate of regulations aimed at platform markets, particularly directed at the five "Big Tech" companies, is not only meant to help build up "India Platforms" as a counter to the global platform markets, but also to counter their access to data.

The prominence of data has generated Data Markets enhancing the importance of platform markets. Technical Institutes such as the Indian Institutes of Technology are now selling data (scientific data; software improvements; Artificial Intelligence). Startups prefer to buy data related to their business rather than establishing data collection centers of their own.

A multiplicity of regulations and regulatory authorities characterize the platform market scenario in India. Regulations have been issued by the Ministries of Finance, of Commerce, and of Information Technology; by the Telecom

Regulatory Authority of India ("TRAI") and by the CCI. The CCI has, in quick succession, issued decisions on antitrust abuses regarding Big Tech and ecommerce, extending its scope from being only an *ex-post* regulator to also being an *ex ante* regulator.

IV. Digital Competition Act

The draft Digital Competition Bill 2024 was introduced in Parliament in March 2024. It has yet to come up for discussion. The Digital Personal Data Protection Bill (2003) was passed by Parliament on Aug.9, 2023. The Bill Lays down Guidelines for processing digital personal data in a manner that recognized the rights of individuals to protect their personal data and the need to process such personal data for lawful purposes.

The Digital Competition Act was suggested by the powerful Parliamentary Committee on Finance to selectively regulate digital enterprises in an *ex ante* manner. This meant defining which digital enterprises could be considered "Systemically Significantly Digital Enterprise" ("SSDE") in terms of value or turnover. It also required the definition of penalties. The obligation of self-reporting to the CCI by SSDEs as applicable under sub-section 2 of Section 3 is mandatory.

The Government has also announced policies to encourage the growth of domestic platforms. Online e-commerce players such as Meesho and Reliance-Jio are examples of such domestic platforms. The economics of nurturing local platform markets while retaining the global outreach of e-markets is reminiscent of protectionist policy of the 70s and 80s.

DOT has identified 36 products such as routers, ethernet switches, media gateways and Gigabit Passive Optical Network equipment in which the local content should not be below 50 percent and in some cases not lower than 60 percent.

The scenario is complex, as there are i) the "Big Five" tech companies, who need to be regulated; along with ii) local platforms –SSDEs- who need to be protected. Consequently, the Commission, in defining fairness in competition, retains the process adopted in mergers: i) will every successful enterprise be seen as unfair in the eyes of competitors? and ii) what is the role of competitive constraints in ensuring that dominant players do not assert their position (presumed to be superior) on account of their large size?

Allegations in the digital market arena often hinge around Abuse of Dominance (Section 4 of the Act) and not on Section 3, Anti-competitive Agreements; where "dominant position" means a position of strength held by an enterprise in the relevant markets which allows said enterprise to i) operate independently of other competitive forces prevailing in the market; ii) manipulate its competitors, consumers, or the relevant market in its favor.

V. Rules of Fairness

The CCI recently announced "Ten Conduct Rules" for Licensable Operating Systems, directed at the use of Android mobile devices in a market dominated by two mobile ecosystems: Android and Apple. These ten rules determine that users of Android are part of a Mobile Application Distribution Agreement ("MADA"), Anti-fragmentation Agreement ("AFA"), Android Compatibility Commitment Agreement ("ACC"), and Revenue Sharing Agreement ("RSA").

The ten rules issued by CCI reveal markets envisaged in terms of market fairness, similar to those issued by the EU Commission. The rules include:

1. **Anti-Steering Provisions:** The Committee recommended that SSDEs should not define the conditions of usage, including: (i) access to the platform; (ii) preferred status; or (iii) placement on the platform, for the purchase or use of products or services which are not part of or intrinsic to the platform.
2. **Platform Neutrality and Self-Preferencing**: The Committee opined that platform neutrality must be ensured at all costs, observing that self-preferencing (i) leads to negative effects on downstream markets; and (ii) gives an unfair advantage to the leading player, i.e., the platform itself. Self-preferencing by mediating access to supply and sales markets by presenting its own offers in a more favorable manner; or by pre-installing its own offers on devices or integrating them in any way in offers provided by the platform was also deemed not acceptable.
3. **Bundling and tying:** In keeping with the rejection of self-preferencing the Committee opted to discourage "bundling and tying" of related services which results in: (i) information asymmetry; (ii) restriction of consumer choices; and (iii) elimination of rival companies, ultimately leading to consumers paying higher prices. Further, SSDEs should not force business users or end consumers to subscribe to or register with any ancillary services as a condition for being able to use any of the platform's core services.
4. **Data Usage:** Access to data, particularly the exclusive data of digital companies, has become a major factor to ensure supremacy among digital companies as data emerges as the new oil of digital business. Data is a zero-price or non-price factor. As a country where surveys and data availability provide a rich source of varied data its usage was a major concern revolving on data privacy. Access to data by platform markets that require no permission can harm privacy and hamper the development of a competitive digital business environment.

   Thus, the Committee recommended that SSDEs should not: (i) process the personal data of consumers (using services of third parties) to provide online advertising services; (ii) combine personal data from relevant core services of the platform with personal data from third-party services; (iii) cross-use personal data from relevant core services into other services; and (iv) sign consumers on to other services within the platform in order to combine personal data, unless a specific choice has been given to the end consumer and consent has been obtained.

5. **Mergers and Acquisitions**: The Committee observed that "killer acquisitions" are one of the issues most frequently raised in digital markets. Given that the CCI reviews transactions based on asset and turnover-based thresholds, several high value transactions involving Big Tech companies have escaped the CCI's scrutiny since they did not meet the prescribed thresholds. Accordingly, the Committee recommended that a SSDE should, prior to the implementation of any intended concentration or any agreement, public tender announcement, or acquisition of a controlling interest in another company, inform the CCI of any such concentration where the merging entities or the target

company provide services in the digital sector or enable the collection of data, irrespective of whether it is notifiable to the CCI.

6. **Deep Discounting and Dynamic Pricing**: The Committee observed that deep discounting is a common concern peculiar to e-commerce, food delivery, and hotel booking sites. Further, practices such as "dynamic pricing," bogus sales, and markdowns have: (i) resulted in service providers losing control over the final price, since the authority to determine discount rates rests with the platform; and (ii) impaired the ability of offline players to sell and make profits.

   Thus, the Committee recommended that SSDEs should not: (a) limit business users from differentiating commercial conditions on its platforms; and (b) prevent business users from offering the same products or services to end consumers through third-party online intermediation services or through their own direct online sales channels at different prices/conditions (i.e. the recent merger of Disney with Jio).

7. **Exclusive Tie-Ups and Parity Clauses**: The Committee observed that exclusive arrangements by the e-commerce platforms not only hamper the business of other e-commerce platforms but may also lead to losses for brick-and-mortar sellers. Additionally, the inclusion of platform price parity ("PPP") clauses results in increased prices for the consumer.

   Accordingly, the Committee opined that exclusive tie-ups by major digital platforms can: (i) foreclose markets; (ii) restrict competition; and (iii) ultimately lead to increased prices for the consumer. Therefore, the Committee recommended that SSDEs should not prevent business users from offering the same products or services to end consumers through third-party online intermediation services or through their own direct online sales channels at different prices/conditions, so that fair market conditions prevail.

8. **Search and Ranking Preferencing:** The Committee observed that users search using keywords on any platform and receive results based on algorithms. As such, organic search results should list products/services without any bias, i.e., list top selling or highest rated results on the top rather than prioritizing any sponsored products. However, if the search results show any other products taking precedence, it indicates search bias in favor of sponsored products, or orders fulfilled by the platform/marketplace itself. Further, the Committee observed that selecting high-quality, relevant keywords for advertising campaigns can help advertisers reach the right customers at the right time. As such, the Committee recommended that: (i) a SSDE must provide to any third party offering online search engines access to fair, reasonable, and non-discriminatory terms; (ii) any query, click, and view data containing personal data should be anonymized; and (iii) a SSDE should not provide favorable treatment to the products/services/lines of business of its own platform *vis-à-vis* to those of another business user in an unfair and discriminatory manner.

9. **Third-Party Applications:** The Committee observed that gatekeepers

restrict the installation or operation of third-party applications and thereby prevent the users from using any application other than their own. In this regard, the Committee recommended that: (i) a SSDE should allow the installation and use of third-party apps/app stores using its own operating system; and (ii) a SSDE should not prevent third-party apps or app stores from being set as default.

10. **Advertising Policies:** The Committee observed that consumer data can be leveraged for cost effective targeted advertising, and it has led to: (i) increased market concentration across many levels of the supply chain; and (ii) issues of self-preferencing and conflict of interest. The Committee recommended that SIDIs should not process the personal data of end consumers (using services of third parties) for providing online advertising services. Further, the Committee opined that regulatory provisions are required to ensure that contracts between news publishers and SSDEIs are fair and transparent.

VI. Online e-Markets – The Reality

Platform Markets in turn have spawned: i) Data markets; and ii) Markets for Ideas. These are two markets that other competition authorities around the world have not paid sufficient attention to.

A. Data Markets

Platform markets are primarily dominated by one or two players, often two-sided or multi-sided, who generate considerable data. Data generated on these platforms are valuable for designing goods and services that then generate further consumer data, in turn sold in a separate market called Data Markets. Data is monetized with data markets emerging.

Algorithms create spaces to surf platforms and for linking markets. Firms that can develop their own websites and not rely on listing by major platforms provide the requisite competitive constraints. In India, most start-ups create their own websites. Most Indian consumers interact with these on a daily basis, even for daily grocery shopping, using websites from firms such as Swiggy and Zomato, which create a competitive atmosphere. Surprisingly, radio taxis using broadband are not considered to be platforms although they interact through a main platform.

The initial cases raised against platforms were on agreements- Section 3(4) of CA02. Later cases filed against platforms were predicated on Abuse of Dominance - Section 4. These cases were focused on Amazon and Flipkart, and included: a) Deep discounts offered by platforms as compared to prices offered by brick-and-mortar shops; b) Price Parity Clauses; c) Exclusive Agreements; d) Platform to Business Contract terms; e) Platform Neutrality; f) Algorithmic collusion; g) access to large amounts of consumer data, and related privacy concerns.

Several cases brought before the commission helped convince us that access to data enables profiling of consumers and can lead to locking effects. Data becomes an asset that can be bought and sold - or just rented out - emerging as the "new oil" for business.

In a Suo Moto investigation in 2021, when WhatsApp made it mandatory for users of their platform to accept their "Terms and Conditions," CCI's investigation into the co-joint markets of OTT messaging and Online Display Advertising found violations to Sections 4(2)(a)(i) (dominant enterprise imposing unfair conditions – take it or leave it); 4(2)(c) (denial of market access), & 4(2)(e)(leveraging of dominance). Under Section 27 of the Competition Act, the commission then

levied a penalty of Rs. 213 crs (US$ 25.4m) on Meta

Access to data on Indian consumers is available from several sources, including surveys of health and household consumption rates. Indian firm Catamaran, for instance, partnered with Amazon in a joint venture intended to exploit these data markets. Reference is to Big Data and represent market power of large platforms. Issues that come up are: Who owns the data? Do consumers have a share in their data or is that simply the "fee" for surfing? Is data privacy an anti-trust issue, as alleged by the EU Commission? Can privacy walls be built through the use of AI? These questions and concerns need to be studied by Authorities before expanding their scope of intervention from *ex post* to *ex ante* actions. Governments have announced several other legislative actions, including on Privacy and Data Protection. They are in the negotiating stages as emergent platforms of startups.

In the early years of the CCI, the predominance of Section 3 was the historical concern with cartels, which was brought into focus by "unwritten agreements." Recent cases are now focused on consumer data, privacy, and issues pertaining to Data Markets.

B. Standard Essential Patents ("SEPs"): Markets for Ideas

Standard Essential Patents ("SEPs") become important alongside Data Markets. SEPs refer to a bundle of patents approved by any Standard Setting Organization for interoperability and/or meeting global standards. They need to meet FRAND or RAND compliance requirements. As the whole bundle has to be bought together, this leaves little scope for Authorities to act on the bundle. Licensing Fee requirements and the institutional structure of SEPs vary.

Tying of patents into a bundle attracts both Section 3(4) Agreements or Section 4: AoD or both sections of the Act. Cases against Ericsson filed with CCI touched different dimensions of SEPs laying the foundations for a separate market: Market for Ideas, as an emergent market that combines roots of knowledge, access to patents and patent rights for innovators this market is an area of major discussion. I hope our future areas of discussion will focus on knowledge and innovation emphasizing the institutional strengths of India with that of EU.

VII. Interventions

Some of the measures suggested come from the Google case combined with the mandatory use of the Googles Play's Billing System ("GPBS"). The focus is on developing business rules that consider online markets.

CCI Media emphasis has drawn from the Google Orders and the ten rules of appropriate behavior for a dominant player in e-markets as stated above on the Big Techs at the global level as stated above. CCI has also drawn rules of competitive behavior for Big Techs at local level. Penalties have been levied on all three. The two Google Orders are on the mandatory use of Google Play's Billing System ("GPBS") and on the agreements that smart-phone manufacturers have to agree for installation of Android. Make My Trip and OYO were fined were fined for restrictions on hosting travel firms on their OTA (Online Travel Agency).

ANI a news agency sues Open AI in a New Delhi Court accusing ChatGPT of using its published content without permission to train its artificial model.

In this framework how do overtures of protectionist policies pan out? Three concerns emerge.

- First, we are dealing with cross-border commerce and services that cannot be restricted to national boundaries. Online

marketplaces are multi-sided platforms that connect sellers, buyers and advertisers to facilitate transactions between them. A platform offers a multisided environment that internalizes transaction costs and takes advantage of network effects across different user groups.

- Second, Indian companies – and especially emerging software companies – are keyed into global markets. Third-party online marketplaces play a central role in e-commerce in India. An estimated 64 percent of digital retail trade in India is through online platforms. While large brands or retailers own and manage popular standalone websites, online commerce in India is driven largely by third party platforms. Intermediation by online platforms allows for an online presence of businesses, without being required to operate their own websites. The indirect network effects contribute to the growing importance of online platforms and most sellers and services.

- Third, and perhaps the most significant point, is that companies - including new ventures – have global shareholding patterns. For instance, Amazon owns shares in Jio the Indian platform market, as well as in Flipkart and other similar competitors.

VIII. Conclusion

"Obsession was with size and market power is a historical obsession of earlier regulations and control policies raising several uncomfortable questions on the assessment of emergent platform market or data markets and in the case of bundled patents." (A Commissioner's Primer to Economics of Competition Law in India; Geeta Gouri, Palgrave Macmillan, p.3)

The two prime questions are:

- Do the emergent markets viz data markets and markets for ideas require regulation by the competition authorities?
- What form of regulation is appropriate?

The ten market rules set out by CCI suggest that markets need to be shaped under a prevailing mindset of market apprehensions. This is more representative of a protectionist approach to markets. Markets shift and change to business requirements. Regulators are slow in their responses. Less regulation in digital markets is a preferred option to the few SSDEs.