

Unclassified**English - Or. English****12 November 2020****DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Global Forum on Competition****USING MARKET STUDIES TO TACKLE EMERGING COMPETITION
ISSUES – Contribution from India****- Session IV -**

10 December 2020

This contribution is submitted by India under Session IV of the Global Forum on Competition to be held on 7-10 December 2020.

More documentation related to this discussion can be found at: oe.cd/mktcomp.

Please contact Mr. James Mancini [E-mail: James.Mancini@oecd.org], if you have any questions regarding this document.

JT03468327

Using Market Studies to Tackle Emerging Competition Issues

- Contribution from India -

1. Introduction

1. Market studies are an important constituent of the toolbox at the Competition Commission of India's (CCI/the Commission) disposal for discharging its mandate of protecting and promoting competition in markets in India. With the element of stakeholder engagement prominently embedded in them, these studies allow the Commission to gauge market developments, track evolving competition dynamics and understand specific business practices along with their implications for competition in different sectors from multiple perspectives, outside the scope and context of casework.

2. Post the enactment of competition law in India in 2003 and prior to the notification of the antitrust provisions of the Competition Act, 2002 (the Act) in 2009, a number of market studies were commissioned with the primary purpose of obtaining a broad overview of markets in select sectors of the Indian economy. Over the years of enforcement across diverse sectors, the role of market studies in the Commission's work agenda has widened. Besides adding to the Commission's knowledge base, market studies now serve as a tool for proactive market supervision that help identify competition problems emerging from conduct of business enterprises and/or from structural features of markets, which in turn informs the Commission's enforcement actions as well as its advocacy efforts.

3. The Commission acknowledges that markets may be fraught with impediments to competition that may not always lend themselves to antitrust scrutiny within the statutory framework. Market studies are considered particularly useful in ascertaining the fundamental causes that underlie such issues and accordingly help identify the appropriate instrumentality for addressing them. While market studies are not typically taken up as a non-enforcement tool to address or remedy a pre-identified competition concern in the first place, they help in developing in-depth understanding of emerging issues and can be a potent tool for the Commission's advocacy mandate especially when the competition issues emanate not from specific conduct of the firms but due to other rigidities and market inertia.

4. The Commission's emphasis on market studies has seen a marked increase in the last few years, with a number of market studies having been initiated in different sectors. While these studies have all been prompted by emerging issues or changing competition landscapes, each was triggered by a specific cause germane to the sector. Some amongst them are listed below:

- (a) the study into surge pricing in the app-based cab market in India¹ envisaged empirical examination into the pricing policies of the app-based ride hailing service providers in India with specific focus on the welfare implications of surge pricing and personalised pricing;

¹ Market Study on Competition and Regulatory Issues Related to the Taxi and Cab Aggregator Industry: With Special Reference to Surge Pricing in the Indian Context

(b) the market study on the telecom sector in India² sought to appraise new dimensions of competition in the sector in the wake of increased market concentration and convergence due to a technological shift/disruption;

(c) the market study on the pharmaceutical sector in India has been initiated with a view to appreciate the factors that influence price competition, with particular focus on the emerging issues in distribution, branded-generics, entry of bio-equivalents as also the regulation-competition interplay³;

(d) the market study on e-commerce in India was conducted to develop better understanding of the novel competition issues that were emerging with the growing importance of digital platform-centric commerce⁴;

5. At the time of drafting this paper, the findings of the cab market study and the telecom sector study were yet to be released and the market study in the pharmaceutical sector had just been initiated. Two other studies, one on Common Ownership by Institutional Investors and one on the Mining sector, were in the advanced planning stage. Thus, this submission draws from the Commission's experience with respect to the market study on e-commerce in India, which was conducted during April to September 2019 and the study report was released in January 2020.

6. For the purpose of illustration of the role of market studies in the arsenal of tools employed by the Commission to address competition issues, we briefly discuss the background, objectives and methodology of the e-commerce study and present a brief summary of the study findings in Section II. Section III brings out how the study was used to identify and tackle the emerging competition issues relating to e-commerce and Section IV touches upon the outcomes and the way forward.

2. Market Study on E-commerce in India

2.1. Background, Objective and Methodology

7. The rapid growth in e-commerce in the country in general and the growing importance of online platform-mediated commerce in particular have been the main impetus for this market study. On the enforcement front, the Commission had been receiving cases relating to e-commerce, which allowed it some exposure to the peculiarities of digital commerce, albeit limited to the facts, issues and context of the cases. What also became apparent in the course of the enforcement activities⁵ was that the distribution architecture for a large number of goods and services was undergoing a shift at a rapid pace. A need was felt to have a holistic understanding of these developments as also of the functioning of the platform-centric ecosystems from all relevant perspectives. A market study into the sector was thought to be the

² Market Study on Telecom Sector in India.

³ Market Study on Pharmaceutical Sector in India.

⁴ Market Study on E-Commerce in India: Key Findings and Observations is available at https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf

⁵ In none of the cases adjudicated by the Commission till the time of drafting of this paper, contravention of the Act was found.

most appropriate means for taking a close look at the whole stream, from producers to retailers, from incumbents to start ups, from platforms to the user-entrepreneurs dependent on them.

8. There was no a priori hypothesis of harm to competition caused by any pre-identified business practice(s) of any market player(s) that the study intended to test. The objective was to engage with all relevant stakeholders and ascertain the Commission's enforcement and advocacy priorities in relation to ecommerce, based on a greater clarity on the market developments and emerging competition-barriers, if any. The objectives, as set out in the public announcement of the study⁶, were:

1. to study market trends with a particular focus on emerging distribution methods and strategies in response to ecommerce
2. to understand business practices and contractual provisions in ecommerce, their underlying rationale and implications for competition
3. to identify impediments to competition, if any, relating to ecommerce
4. to ascertain enforcement and advocacy priorities for the Commission in e-commerce

9. While e-commerce touches a large number of sectors and product categories, the scope of the study was narrowed down to cover the three broad segments of e-commerce in consumer goods (mobiles, lifestyle, electrical & electronic appliances, and grocery), e-commerce in accommodation services and e-commerce in food services. The idea was to reach out to diverse stakeholders in the three segments to ensure that all relevant perspectives were taken into account and reflected in the study. 16 online platforms, 164 business entities [including sellers (manufacturers and retailers) and service providers (hotels and restaurants)] and 7 payment system providers from across India participated in the study. In addition, 11 industry associations, representing different stakeholder groups, also participated. To gather information pertaining to consumers, secondary sources such as existing studies/surveys were relied upon. The respondent market participants' perception of consumer behaviour and preference was also taken into account. Further, there was a presupposition of the benefits that the shift of economic transactions from brick and mortar/physical market to digital space has accorded to the consumer.

10. The study, a combination of secondary research, questionnaire survey, focused group discussions ('FGDs'), one-on-one meetings, a multi-stakeholder workshop and written submissions of stakeholders, focused on gathering qualitative insights from market participants on such trends, practices, and issues, which are relevant to competition. Information was sought from the participants on a voluntary basis, the Commission did not exercise its legal authority for the purpose.

11. Throughout the study, emphasis was laid on direct interaction with stakeholders to minimise communication gaps and to obtain full clarity on the different perspectives. Meetings were held both in the form of focused group discussions and one-on-one interactions with market participants including e-commerce platforms and business users of the platforms. With a view to encourage participants to share information and insights, the study team was careful to differentiate market studies from enforcement actions. Before sending out the survey questionnaires, meetings were held with each stakeholder group to apprise them of the aim of the study and to also assure them that the study did not form part of any investigation and/or inquiry in any of the proceedings pending before the Commission. Full transparency was maintained on how the data/information gathered would be used. Care was taken to maintain

⁶ https://www.cci.gov.in/sites/default/files/press_release/ccipress.pdf

confidentiality of individual responses within the Commission, in discussions with other stakeholders, and in the interim/final report. All publicly available documents in relation to the study contained aggregation of responses to protect the interests and identities of individual stakeholders.

12. The issues that came up during the course of the study were relatively unexplored. Moreover, divergent views were received on certain issues from the platforms and the business users riding on them. Thus, the interim findings of the survey, discussions and meetings were presented in a multi-stakeholder workshop, which brought together representatives of all stakeholder groups. By allowing discussion amongst the platforms, business users and experts on the issues identified, the Workshop helped bring additional insights and greater clarity. The Workshop was followed by publication of the interim findings on the CCI website, allowing stakeholders an opportunity for further comments.

2.2. Study Findings

13. The study helped gather useful insights and information on the key features of e-commerce in India, the different business models of e-commerce players, and the various aspects of commercial arrangements between market participants involved in e-commerce. The study also provided an opportunity to learn from business enterprises on how they were responding to the advent of digital trade and helped gauge the key parameters of competition in digital commerce.

14. The two broad issues that came up in the study were concerns around lack of neutrality of e-commerce platforms and lop-sided contracts between platforms and their business users.

- As per the business users of these platforms, certain platforms are directly or indirectly operating a hybrid model wherein they provide the digital infrastructure to connect sellers with buyers, while simultaneously engaging as a seller on the platform, which puts them in direct competition with the sellers and creates an inherent conflict of interest, as per the stakeholders. This was observed in the product retail platforms through preferred sellers and private labels of the platforms and in the food services sector through the platforms' own cloud kitchen brands. According to the business users, when e-commerce platforms serve as both a marketplace and a competitor on that platform, they have the incentive to leverage their control over the platform. The platforms have a variety of mechanisms that they can use to act upon such incentive, including their access to transaction data and prioritisation of search results.
- A fragmented supply side and only a few major intermediary platforms create a situation of asymmetry of market position/ bargaining power and dependence of individual businesses on these platforms. Platforms create significant market opportunities and offer great potential for businesses to widen their customer and market access. This also leads to a growing dependence of businesses on these platforms. The business users of platforms across the sectors studied voiced their concern regarding the one-sided contract terms imposed by the platforms and unilateral revisions in the terms owing to little or no bargaining power of individual enterprises vis-à-vis the platforms. They urged for the terms of engagement to be more fair and equitable. It was pointed out that the platform-business contract terms are changed unilaterally and with a perceptible shift in consumer behaviour towards ordering online, enterprises have to rely on platforms even if they impose exorbitant commissions and unreasonable terms.

15. Besides, the issue of deep discounts offered or jointly funded by platforms with the business users came up as a concern that according to the enterprises was feeding the growth-over-profit strategy of the platforms but often went against the commercial interest and business proposition of the business users. The pricing and other key decisional power was allegedly shifting from businesses to the intermediary platforms. Vertical restraints such as platform parity clauses and exclusive agreements between certain platforms and large business users were also observed.

3. Tackling Emerging Issues Through Market Studies: E-commerce Study – A Case in Point

16. As mentioned earlier, the market study on e-commerce was not envisaged as a means to deal with any pre-identified issue. The study led to identification of a set of competition issues, largely comprising practices of online intermediary platforms, which in certain specific circumstances could violate the provisions of the Act. The Commission found these issues suitable for examination on a case-by-case basis under its enforcement mandate. Nevertheless, the intrinsic structural features of platform-centric market configurations, such as bargaining power imbalance and information asymmetry between platforms and their business users underpinned most of the emerging issues in e-commerce. These infirmities were viewed to be more amenable to be addressed through non-enforcement tools.

17. It was felt that irrespective of the market position of the intermediary platform and without a determination of violation of the competition law, improving transparency over certain areas of the platforms' functioning could bridge information asymmetry, which in turn could positively influence competition not only on the platform but also between platforms. Thus, the study findings were used as a basis for targeting focused advocacy with the e-commerce marketplace platforms. In the final report of the market study, a list of areas was enumerated for self-regulation by the e-commerce marketplace platforms. Under its advocacy mandate, the Commission urged the e-commerce platforms to put in place a set of self-regulatory measures, which included:

- Improving transparency over certain areas of the platforms' functioning, such as search ranking, collection/use /sharing of data and user review & rating mechanism.
- Devising ways to govern the following aspects to protect the interests of all contracting parties –a) revision in contract terms and b) discount policy

18. The market study further helped the Commission identify its broad enforcement and advocacy priorities in the e-commerce sector, which inter alia include the following –

- Ensuring competition on the merits to harness efficiencies for consumers
- Increasing transparency to create incentive for competition and to reduce information asymmetry
- Fostering sustainable business relationships between all stakeholders

4. Outcomes and the Way Forward

19. The insights gained from the market study contributed in full appreciation of the facts and allegations in the subsequent enforcement activities of the Commission in e-commerce.⁷ Further, the study had outlined certain vertical agreements that in specific circumstances could contravene the provisions of the Act. Post the publication of the report, some enterprises reportedly changed their existing distribution arrangements to be in compliance of the Act, regardless of their market position. Some brands reportedly stopped online platform-exclusive launch of their new product lines and some brought in pricing, model and promotion parity between online and offline channels.⁸

20. The study led to large scale deliberations on the identified issues across stakeholders including the policymakers. A series of questions were raised in the Parliament of India regarding the study and its findings, to which the CCI had provided detailed inputs. The study report was shared by the CCI with the relevant Ministries/Departments of the Government of India, including the Department for Promotion of Industry and Internal Trade, Ministry of Commerce & Industry, Government of India which is in the process of framing a comprehensive policy on e-commerce in India.

21. The self-regulation advisory was well received by all stakeholders, though some expressed apprehension regarding its effectiveness in absence of legal backing. Certain stakeholder groups, as part of the study, had urged the Commission to recommend ex ante platform-to-business (P-2-B) regulation for e-commerce. However, without having undertaken a detailed review of the necessity and potential impact of a P-2-B regulatory framework, the Commission did pursue with that suggestion.

22. Going ahead, based on its experience and the impact of the self-regulation advisory issued as part of the e-commerce study, the Commission will examine whether such recommendations based on market study findings can be converted into Code of Conduct requiring compliance from the industry.

23. Market studies will continue to play an important role in identifying and diagnosing emerging competition issues by exploring the different drivers and clarifying what options there are to tackle them from a competition policy, competition enforcement, regulatory, or other policy perspective.

⁷ Delhi Vyapar Mahasangh vs Flipkart and others, Case No 40 of 2019 (CCI, 2020); Lifestyle Equities C.V. and another v. Amazon Seller Services Private Limited and others, Case No 09 of 2020 (CCI, 2020)

⁸<https://economictimes.indiatimes.com/tech/hardware/samsung-withdraws-cashback-scheme-with-amazon-pay-after-offline-retailers-protest/articleshow/74060711.cms>