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ABUSE OF DOMINANCE IN DIGITAL MARKETS – Contribution from India

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Abuse of dominance in digital markets

- Contribution from India* –

1. Introduction

1. Competition Law is an important instrument in the regulatory framework governing digital sector. The phenomenal growth in digital markets in recent years has brought with it the attendant complexities in enforcement and the newer challenges for Anti-Trust Agencies. In many respects, the digital technologies/platforms have improved and simplified our lives as consumers, but as competition authorities/regulators, it has brought greater challenges which their power and market structures pose to the consumers and the other market participants, particularly those who deal with them in some connected downstream/other market.

2. Given the variety of goals that guide antitrust enforcement and given that some of them may be incompatible, it is essential for an enforcing authority to frame its guiding policy in a clear and transparent manner. Here, it is apposite to highlight that the [Indian] Competition Act was enacted to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets. Thus, even for unilateral conduct cases, competition assessment is contextualised keeping in mind such overarching goals.

3. Last year, the Competition Commission of India (hereinafter, the ‘CCI’/‘**Commission**’) completed the first decade of its enforcement. In the last 11 years, CCI has strived to build a culture of competition in the markets through credible antitrust enforcement and regular engagement with stakeholders through advocacy outreach initiatives. During this period, CCI reviewed over 1000 antitrust cases, 750 merger filings and have held around 800 advocacy events.

4. The nature of these cases, and also the industries under scrutiny, underwent a sea-change in all these years. The initial years witnessed cases concerning simpler evidence-backed horizontal arrangements, contraventions by smaller market participants exhibiting lack of awareness of new regulatory framework, markets having legacy issues, policy induced distortions and pure consumer issues devoid of competition concerns. On the other hand, the past couple of years have seen an upsurge of more complex cases, many of them concerning hi-tech industries and digital platforms. While those traditional market economy cases involved simpler remedies to address market imperfections, the digital economy cases posed different set of challenges.

5. In India, we have received cases concerning allegations of anti-competitive practices by the e-marketplace platforms (against Amazon and Flipkart), Online search engine (Google), Online cab aggregators (UBER and OLA), Online Travel Agents (MakeMyTrip and OYO), Online food delivery apps (Swiggy), instant messaging apps (WhatsApp) *etc.* Some of these cases were closed at the initial stage as the incumbent tech players either lacked dominance or the conduct was not shown or found to be anti-

* Contribution of the Competition Commission of India.

competitive. Some of the cases are under investigation based on the *prima facie* opinion of the Commission and the final decision post investigation is yet to be taken in such cases.

2. Enforcement Experience/Challenges

6. Devising intervention in a market situation pre-supposes understanding of the market dynamics and distortions that such intervention is supposed to address. Given the very nature of these markets, it is becoming increasingly challenging to understand how these markets will evolve, what the business models the players will employ and what incentives will guide their functioning. The Commission's interventions in such markets, thus, have been nuanced so as to preserve the innovation incentives while correcting the anti-competitive conduct. Guided by a calibrated approach, the Commission has intervened in a targeted and proportionate manner to suit the situations.

7. In fact, acknowledging the importance of product design, the CCI exhibited a self-imposed regulatory forbearance from scrutinizing product designs in ascertaining anti-trust violations in *Google Search Bias* cases¹. CCI noted in its order that product design is an important and integral dimension of competition and any undue intervention in designs may affect legitimate product improvements. CCI also highlighted the importance of targeted and proportionate public intervention in digital space due to fast changing innovation cycles disrupting and reshuffling long-established positions. CCI further highlighted the special obligations expected of dominant undertakings by noting that Google, being the gateway to the internet for a vast majority of internet users due to its dominance in the online web search market, is under an obligation to discharge its special responsibility. Further, emphasising the power of Big Data, CCI noted in its order that rise of new business models based on collection and processing of Big Data is currently shaping the world. With the development of data mining and machine learning, businesses are able to offer innovative, high-quality and customised products and services at low or even zero prices, with great gains for consumers. At the same time, it cannot be denied that the benefits of providing Big Data do not come without a cost. Consumers may be increasingly facing a loss of control over their data and are exposed to intrusive advertising and behavioural discrimination. Also, the other market participants may find the possession of bid data by a dominant incumbent to be creating insurmountable entry barriers.

8. In the aforesaid backdrop, the **foremost challenge** in dealing with digital markets cases for alleged abuse of dominant position is **correct delineation of the relevant market**. This being the foundational step in any dominance analysis, any incorrect delineation will defeat the assessment that follows. Equally relevant is to understand that the assessment in rapidly changing digital markets cannot have a static approach. The enforcement experience at CCI while defining relevant market in the e-retail segment exemplifies the dynamic approach adopted by it.

¹ Google Search Bias Case was an important milestone in CCI's enforcement in digital markets wherein the investigation was ordered way back in 2012. After detailed investigation, CCI found Google to be abusing its dominant position in online general web search and web search advertising services in India. The findings of contravention essentially pertained to placement of Google's specialised search design results (Universal Results – local, news and images; Commercial Unit – Flight Units) and search intermediation agreements entered into by Google with websites which allow the latter to incorporate Google's search functionality on their web pages. [*Matrimony.com Limited Vs. Google LLC & Others and Consumer Unity & Trust Society (CUTS) Vs. Google LLC & Others* [Case No. 07 & 30 of 2012].

9. Relevant market determination is based on market realities, keeping in view the factual matrix of each case. When CCI received its first case against an e-marketplace in the year 2014 against ‘Snapdeal’, an Indian e-commerce company [*Ashish Ahuja v. Snapdeal.com and SanDisk Corporation*²], the online and the offline markets were considered to be different channels of distribution of the same product and were not considered as two different relevant markets. In the same year, the Commission received another case [*Mohit Manglani vs. Flipkart & ors.*³] against various e-commerce companies alleging anti-competitive impact arising out of the ‘exclusive agreements’ between e-commerce websites and sellers for selling selected products exclusively on the selected portals to the exclusion of other e-portals or physical channels or through any other physical channel. In that case, though the CCI found that online platforms and brick and mortar companies are distinct channels in the same relevant market, it also observed that “[i]respective of whether we consider e-portal market as a separate relevant product market or as a sub-segment of the market for distribution, none of the entities seemed to be individually dominant”. Thus, there was an initiation of the idea of online channel being a relevant market in itself. With the evolution of e-marketplaces as a prominent mode of business transactions and shopping, the Commission responded in a dynamic and nimble way in its subsequent interventions and calibrated market delineations accordingly and, where found appropriate, considered e-marketplaces to be falling in a separate market, distinct from the offline marketplaces.

10. In another instance, when CCI reviewed a merger between two Online Travel Agencies (OTAs) in 2017,⁴ the Commission incorporated online and offline modes in the same relevant market. However, two years later in an antitrust case related to the same OTAs,⁵ it was observed that the intervening period has seen the online travel portals gaining a distinct and significantly more prominent position in the hotel reservation space in India. Accordingly, the Commission found it imperative to consider the online segment as a separate relevant market. Following the above evolving approach, the relevant market definition adopted, say two years back, may not necessarily work today. Thus, it has been Commission’s constant endeavour to keep pace with the market realities and not to be hesitant in evolving its approach to best suit such realities.

11. Another key challenge for the regulators in digital markets is to suitably mould the remedies so that the platforms or gatekeepers do not abuse or leverage their market power to enter into or protect their position of strength in the other associated verticals. The top digital platforms/companies, namely Google, Amazon, Uber, Facebook etc. offer perfect example of how the traditional consumer welfare framework in antitrust that primarily looks at price and output, may fail to capture forms of market power and effects on both/multi sides that should be relevant to antitrust. Thus, in digital markets, the theories of harm may need to be augmented to account for factors such as data, quality, choice, privacy and innovation that shape the digital competition landscape, instead of focusing only on price effects. In other words, when dealing with the digital markets, non-static harms have taken the centrestage.

² Case No. 17 of 2014.

³ Case No. 80 of 2014.

⁴ Combination Registration No. C – 2016/10/451.

⁵ Case No. 14 of 2019- *Federation of Hotel & Restaurant Associations of India (FHRAI) vs. MakeMyTrip India Pvt. Ltd. (MMT) & Ors.*

12. The CCI in its enforcement actions has also realized the **gatekeeper role played by major digital platforms**. In 2018, CCI ordered an investigation on an Information in respect of allegations pertaining to Google's Android operating system - an open source mobile operating system installed by original equipment manufacturers of smartphones and tablets. While ordering investigation, CCI noted the role of Google Play Store in acting as a gatekeeper to android ecosystem. This matter is presently under investigation⁶.

13. In 2019, the Commission also received an information⁷ from the apex representative body of the Hospitality Industry in India, alleging anti-competitive practices on part of certain Online Travel Agents ('OTAs'), namely MakeMyTrip and GoIbibo ('MMT-Go') and a domestic player namely 'OYO' providing franchising services (branding as well as listing services) for budget hotels in India. Besides abusive practices, including predatory pricing, charging of exorbitant commissions from hotels, registering and providing on its platform illegal and unlicensed bed & breakfast and misrepresentation etc., the Informant alleged imposition of price parity arrangements (akin to MFN) by OTAs in their agreement/contract with hotel partners whereby the hotel partners are not allowed to sell their rooms at any other platform or on its own online portal at a price below the price at which it is being offered on MMT-Go's platform. Further, the hotel partners are mandated to observe room parity whereby they cannot refuse to provide rooms on MMT-Go at any given point of time if the rooms are being provided on any other platform. The Commission found MMT-Go to be *prima facie* dominant in the '*market for online intermediation services for booking of hotels in India*' and ordered investigation into such allegations. Further, considering the vertical relationship between the OTAs and partner hotels, the conduct of OTAs has also been directed to be investigated under Section 3(4) of the Act that governs assessment of vertical arrangements/agreements.

14. Another important case⁸ which was directed to be investigation in the year 2019 was against Amazon and Flipkart, domestically bred e-marketplace, wherein it was alleged that these marketplaces through vertical arrangements with their respective 'preferred sellers' are leading to foreclosure of other non-preferred traders or sellers from these online marketplaces. Though the Commission did not find any of the e-marketplaces dominant in the relevant market, the Commission examined the allegations under Section 3(4) of the Act. The Commission was of the opinion that the four alleged practices on these marketplaces, *namely*, exclusive launch of mobile phones, preferred sellers on the marketplaces, deep discounting and preferential listing/promotion of private labels, need to be investigated.⁹

15. One of the biggest challenges which lie in the context of digital markets is the **formulation of remedies pertaining to anticompetitive conduct in digital markets**. Antitrust remedies, primarily, being structural and behavioural have had their own share of highs and lows in various antitrust jurisdictions world over based on the experiences in the traditional markets. The characteristics like tipping of markets, stronger network effects with persistent feedback loops *etc.* in digital markets have been observed to be distinctly endemic to such markets leading to entrenchment of dominance of any entity in the adjacent markets. This also entails a larger question of timeliness of intervention of the antitrust authorities into such markets.

⁶ *Umar Javed vs. Google LLC & Ors.* [Case No. 39 of 2018].

⁷ *FHRAI vs. MakeMyTrip & Ors.* [Case No. 14 of 2019].

⁸ *Delhi Vyapar Mahasangh vs. Flipkart and Ors.* [Case No. 40 of 2019]

⁹ The investigation in this matter has been currently stayed due to an order by the Hon'ble High Court of Karnataka. The order granting stay of investigation in the matter is under challenge in the Hon'ble High Court of Karnataka.

16. Besides aforesaid, **availability of credible data**, to determine dominance and foreclosure/anti-competitive effects, remains a challenge. Since these digital firms operate globally, its difficult to get credible data/information on their Indian operations to ascertain their exact market shares e.g. in the recent case against an online instant messaging app¹⁰, the Informant relied heavily on data based on global usage/users. The Commission, while acknowledging that the data is not free from infirmities, observed that *‘in the absence of concrete data/information available in the Indian context other than the subjective information on popularity of WhatsApp, the Commission is of the view that these trends and results can be used as a proxy. More so, these trends appear to be intuitively in sync with the information available in public domain, which though does not confirm market share/strength of WhatsApp in any quantitative terms, nevertheless point towards its dominance.*

3. Recent Developments

17. Market studies are being widely used tool for competition authorities worldwide to develop a better understanding of competitive conditions within one or more sectors. Market studies are research projects that help examine the how particular markets are working, the regulatory architecture governing a sector and its implications for competition as well as to gauge patterns of consumer and business behaviour. Market studies can also form a useful basis of competition advocacy leading to recommendations for governments, sector regulators, businesses, business associations.

18. The CCI recently conducted a ‘Market Study on E-commerce in India’ to engage with industry and other stakeholders to get greater clarity on market developments, emerging impediments to competition, if any, and formulate the CCI’s advocacy priorities in relation to e-commerce.

19. Another important development took place in 2018 when the Government of India constituted the Competition Law Review Committee (hereinafter, the ‘CLRC’) to ensure that the Act *‘is in sync with the needs of strong economic fundamentals’*.¹¹ Under the aegis of this Committee, a Working Group was set up with the specific mandate to evaluate the adequacy of the legal architecture in dealing with new age markets and big data. After almost a year of deliberations and discussions, CLRC submitted its report in July 2019.¹² In its report, the CLRC deliberated upon many issues one of which being of dovetailing the Act with the current trends in digital and new age markets. It was acknowledged that the nuances in these markets would become clearer in future as jurisprudence is still evolving.

20. Some of the key observations in report, *inter alia*, pertain to the robustness of the present competition law in capturing the evolving concepts and jurisprudence in digital markets. For example, it was observed that the Act already envisages a wider ambit of ‘price’ to include data as a non-monetary consideration for markets such as zero-price markets. It was simultaneously observed that the factors for assessing dominance of any entity are wide enough to include factors of control over data and network effects which have been observed to be the sources of durable and significant market power in digital

¹⁰ *Harshita Chawla vs. WhatsApp and Anr* [Case No. 15 of 2020].

¹¹ http://www.mca.gov.in/Ministry/pdf/ReportCLRC_14082019.pdf

¹² *Ibid.*

markets. Thus, though the CLRC deliberated at length on these issues, the Act was found sufficient to deal with the issues arising from new age markets.¹³

4. Concluding Remarks

21. In conclusion, in the fast-evolving digital markets, CCI has responded dynamically than acting in a pedantic manner in crafting remedies and targeting interventions which are proportionate and targeted to preserve the innovation incentives while ensuring market corrections.

¹³ It may however, be highlighted that the CLRC report has recommended adoption of transaction value test for reviewing combinations in the new age markets as such combinations generally escape scrutiny due to low value of assets or turnover. Based on many recommendations made in the report, the Competition Amendment Bill 2020 was drafted and is currently under consideration.