

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Implications of E-commerce for Competition Policy - Note by India

6 June 2018

This document reproduces a written contribution from India submitted for Item 5 of the 129th OECD Competition committee meeting on 6-8 June 2018.

More documents related to this discussion can be found at www.oecd.org/daf/competition/e-commerce-implications-for-competition-policy.htm

Please contact Mr. Antonio Capobianco if you have any questions about this document
[E-mail: Antonio.Capobianco@oecd.org]

JT03431274

India

Introduction

1. The e-commerce¹ sector in India has grown steadily from \$14 billion in 2014 to \$39 billion in 2017 and is expected to further reach \$200 billion in 2026.² This has been made possible due to rapid expansion in mobile and internet penetration, e-commerce sales, advanced shipping and payment options, exciting discounts, and the push into new international markets by e-businesses.

2. The advent of e-commerce has changed the way in which a business was conducted traditionally in a market place. It has helped firms in establishing market presence and enhancing existing market position by providing a cheaper and more efficient distribution chain for their products and services. E-commerce has not only lowered entry barriers for small retailers, but also provided consumers with wider choices, lower prices, increased information symmetry and personalized shopping experience.

3. Although there are a number of pro-competitive benefits of ecommerce, owing to certain characteristics, e-commerce is vulnerable to anti-competitive practices. The e-commerce market is distinguished by high rates of innovation, negligible marginal cost, increasing returns to scale and network effects. While innovation is an epitome of economic growth and development, such disruptive innovations may lead to significant market power amenable to abuse. Further, since e-commerce has emerged as a popular model for distribution in the digital economy, the segment is prone to vertical restraints. The vertical restrictions, in the digital market, are not restricted to their traditional forms but have rather moved to more sophisticated measure *e.g.* usage of software to adjust prices taking into account competitors prices, geo-blocking mechanisms, MFN clauses, price parity agreements, advertising restrictions *etc.* A relevant question that needs to be ascertained in such cases is whether the online platform is only an intermediary providing services of a platform or a distributor in the vertical chain.

4. The Competition Commission of India (the Commission) has been entrusted with the power to enforce competition law in India. Any agreement pertaining to transactions in the e-commerce space which inhibits competition in the market by causing an appreciable adverse effect on competition (AAEC) is scrutinized under Section 3 of the Competition Act, 2002 (the 'Act'), which lays down the framework for regulating anti-competitive agreements, including vertical restraints. The conduct of certain e-commerce

¹ As per OECD- An e-commerce transaction is the sale or purchase of goods or services, conducted over computer networks by methods specifically designed for the purpose of receiving or placing of orders. The goods or services are ordered by those methods, but the payment and the ultimate delivery of the goods or services do not have to be conducted online. An e-commerce transaction can be between enterprises, households, individuals, governments, and other public or private organisations. To be included are orders made over the web, extranet or electronic data interchange. The type is defined by the method of placing the order. To be excluded are orders made by telephone calls, facsimile or manually typed e-mail.

² IBEF report, 2018

players who enjoy a position of dominance in the relevant market may also be brought under the radar of Indian competition law under Section 4 of the Act, if they abuse their dominant position. Similarly, proposed merger or amalgamation of e-commerce firms whether in India or off-shore which may have an impact on competition in India, remains liable for notification under Section 6 of the Act, if they fall within the thresholds prescribed under the Act.

1. Decisional practice on E-commerce Sector in India

5. In India, thus far, the Commission has had a limited exposure to matters involving the e-commerce sector. While analysing the cases under e-commerce, it has applied a calibrated approach in order to ensure that intervention remains effective; it does not restrain innovation and would in turn help the market to regulate itself. Most of the cases in the e-commerce sectors were in the form of vertical restraints which are tested under the rule of reason. One-two cases involved allegations regarding abuse of dominant position.

2. Delineation of Relevant Market

6. Any structured analysis under the competition law starts with the relevant market delineation. Even in cases where delineation of relevant market is not formally required, an idea of market within which the alleged anti-competitive conduct has taken place guides the assessment. While delineating the relevant market in the e-commerce segment, whether dealing with the allegations relating to vertical restraints or abuse of dominant position, the Commission considered whether the online platform is only an intermediary providing services of a platform or a distributor in the vertical chain.

7. Almost in all such cases, the Commission has taken a view that though offline and online markets differ in terms of discounts and shopping experience, they are merely different channels of distribution of the same product and are not two different relevant markets. Buyers weigh the options available in both markets and decide accordingly; if the price in the online market increase significantly, then the consumer is likely to shift towards the offline market and vice versa.³ Even in cases where the Commission has not expressly subscribed to this view, the assessment indicates that the online and offline markets have been considered as two alternative forms of distribution and not as two separate relevant markets. In one such case, while assessing the appreciable adverse effect on competition (AAEC) in the relevant market, the Commission considered the market share of an entity based on its sale through online and offline channel⁴. In one of the cases⁵, while dealing with the allegation regarding abuse of dominant position by one of the e-tailer, the Commission left this issue open. It observed that *‘[i]rrespective of whether we consider e-portal market as a separate relevant product market or as a sub-*

³ *Ashish Ahuja v. Snapdeal [Case No. 17 of 2014]*.

⁴ *Jasper Infotech (Snapdeal) v. Kaff Appliances [Case No. 61 of 2014]*.

⁵ *Mohit Manglani Vs. Flipkart/Snapdeal and Others [Case No. 80 of 2014]*.

segment of the market for distribution, none of the OPs⁶ seems to be individually dominant.⁷

8. In cases concerning the cab aggregator services, wherein taxi services are sold through an app, the Commission was faced with a peculiar issue *i.e.* whether a cab aggregator is only a platform that facilitates the booking of a cab for a customer and driver or is it a provider of cab services (*i.e.* radio taxi service provider). In all such cases, the cab aggregators (e.g. OLA or UBER) have claimed to be only a ‘technology company’ and not a radio taxi service provider. The Commission, guided by the relevant provisions of the Act, observed that while defining the relevant product market all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use, need to be included in the realm of relevant product market.⁷ The Commission noted that though the cab aggregators have replaced the ownership/asset based model in the radio taxi service business and is operating under the platform based model, this fact alone cannot make it a distinct category of service provider when the basic nature of service provided by it is same as that provided by other players operating under the traditional business model. Further, the Commission noted that for the end consumer, who is booking a taxi ride through a cab aggregator’s platform, identity of the driver who owns the taxi is inconsequential. The consumer perceives the cab aggregator as a service provider of radio taxi service whose service is perceived to be substitutable with the services provided by other radio taxi service operators, irrespective of the business model followed by them. Thus, it was held that substitutability, in the radio taxi industry, is between the operators and not between the drivers. This case has been dealt in this way owing to the peculiarities of the cab aggregators’ market.

3. Assessment of Market Power/Dominance

9. Rapid changes in technological markets have made the lifecycle of innovations shorter and as a result assessment of market power ephemeral. However, there exist circumstances when there are potential positions for entrenched market power due to the presence of network effects. The Commission while assessing the market power of a firm takes into consideration whole host of other factors like competitors’ strength, entry barriers, etc., instead of just relying on a market share based approach.

10. In cases related to exclusive agreements between a manufacturer and an e-portal for selling the product, the Commission on bare perusal of such agreements as per the factors listed in Section 19(3)⁸ of the Competition Act, 2002 found that these agreements

⁶OP is an abbreviated form of Opposite Party which is used for the enterprise against whom allegations are made under the Indian competition law regime.

⁷Section 2(t) of the Competition Act, 2002.

⁸ The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely:— (a) creation of barriers to new entrants in the market; (b) driving existing competitors out of the market; (c) foreclosure of competition by hindering entry into the market; (d) accrual of benefits to consumers; (e) improvements in production or distribution of goods or provision of services; or (f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

do not result in AAEC. It also considered that online distribution channel by the OPs provide an opportunity to the consumers to compare the prices, pros and cons of the product and provide convenience via door step delivery. On the basis of such factors, the Commission held that such arrangements are unlikely to create any entry barrier as most of the products which are sold through exclusive e-partners face competitive constraints.⁹ Similarly, with regards to allegations related to selling of products via authorised dealers alone, the Commission while assessing dominance took into account the level of concentration in the market across devices. Although, it found the OP to be dominant in the relevant market, but the Commission emphasized that “*the insistence by SanDisk that the storage devices sold through the online portals should be bought from its authorised distributors by itself cannot be considered as abusive as it is within its rights to protect the sanctity of its distribution channel*”.¹⁰

11. In cases concerning the radio taxi services¹¹, the Commission observed that:

“high and durable market share can be an important indicator for lack of competitive constraints and accordingly for dominance. However, that does not imply that uniform market share thresholds and a standard time-period to assess durability of market share can be applied in the same manner to all businesses/sectors. The variance across industries in terms of their inherent characteristics, such as nature of competition, technology and innovation dimensions, calls for a case-by-case assessment of market share and its implications for dominance with reference to the totality of the market dynamics and competitive strategies of firms...Moreover, market share is but one of the indicators enshrined in Section 19(4) of the Act for assessing dominance, and the same cannot be seen in isolation to give a conclusive finding. Particularly, in case of new economy/hi-tech markets, high market shares, in the early years of introduction of a new technology, may turn out to be ephemeral...”

12. The Commission, while assessing alleged dominance of the cab operator in the case didn't just follow a market share based static view but also took into consideration that the competitive process in the relevant market was still unfolding, market was growing rapidly, effective entry had taken place thereby leading to gradual decline in the operator's market share, there existed countervailing market forces that constrained its behaviour and also the nature of competition in dynamic, innovation-driven markets. Based on these collective considerations, the Commission held the view that OPs dominance in the relevant market remains unsubstantiated. Similarly, in the case related to acquisition in the travel service industry, the Commission while determining dominance not only took into account combined market share of the parties in both the overall travel market as well as in narrower sub-segments of air, hotel and bus and car bookings in India, but also considered the presence of significant competitors in the market.¹²

⁹ *Mohit Manglani Vs. Flipkart/Snapdeal and Others* (Case No. 80 of 2014)

¹⁰ *Ashish Ahuja Vs. Snapdeal* (Case No. 17 of 2014)

¹¹ *Fast Track Call Cab / Meru Vs. ANI Technologies* (Case No. 06 and 74 of 2015)

¹² *MIH Internet SEA Pte Limited, Singapore and MakeMyTrip (MMT) Limited* (Case No- C-2016/10/451)

4. Mergers and Acquisitions

4.1. eBay Singapore Services Pvt. Ltd. And Singapore/Flipkart Limited, Singapore¹³

13. In a combination between e-commerce platforms, the Commission received a notice pursuant to Subscription Deed entered into between Flipkart and eBay Singapore and Share Purchase Agreement entered into between Flipkart and eBay India Private Limited. As per it, eBay Singapore would own about 6.2 per cent shares (on a diluted basis) in Flipkart and eBay India will become a wholly-owned subsidiary of Flipkart. The Commission observed that eBay Singapore (through eBay India) and Flipkart are engaged in providing marketplace-based e-commerce platforms to facilitate transactions between customers and sellers. Therefore, there existed a horizontal overlap between the business operations of the Parties. However, it was observed that the incremental market share is not significant either at the level of ‘Overall B2C’ market or its sub-segment i.e. ‘Online B2C’ market. On basis of the assessment, the Commission approved the combination between the parties.

4.2. MIH Internet SEA Pte Limited, Singapore and MakeMyTrip (MMT) Limited¹⁴

14. The combination between MIH Internet and MakeMyTrip (MMT) Limited, pertains to acquisition of 100% of Ibibo Group Holdings (Singapore) Pte Ltd. by MMT Limited from MIH Internet and the subsequent acquisition of 40% stake in MMT Limited by MIH Internet. The Commission noted that the activities of the parties overlap in the provision of travel services in India. It noted that the travel services in India can be availed through three alternative channels: (i) travel agencies (ii) direct suppliers, and (iii) online travel aggregators. Most of these channels operate on a ‘hybrid model’ wherein a Travel Channel has both online as well as offline presence to provide convenience to customers with specific online or offline preferences. It was observed that characteristics of products and services available with the different Travel Channels are similar and prices offered are comparable with each other. Further, from demand side perspective, it is easy for a consumer to switch between online and offline modes within and across Travel Channels in the two main activities related to travel products and services- i.e. information gathering and purchase at any point of time without incurring significant switching cost.

15. The Commission observed that the relevant product market may be defined as the market of ‘sale of travel and travel related services in India’. Further, it was noted by the Commission that there is a presence of significant number of competitors in the overall market for travel products and services and sub-segments of air, hotel, bus and car bookings. It was also observed that there exists a vertical relationship between businesses of the Parties with regards to online payment service provider “PayU”. However, it was observed that in this segment, PayU faces significant competition from other players.

16. On assessment of the proposed combination on the basis of factors stated in sub-section (4) of Section 20 of the Act, the Commission approved the combination.

¹³ Case No- C-2017/05/505

¹⁴ Case No- C-2016/10/451

5. Some Miscellaneous Factors

17. Apart from the delineation of relevant market and the assessment of market power, there are other instances which highlight the decision practice adopted by the Commission in the e-commerce sector. For instance, in case of allegations related to predatory pricing in the radio taxi industry, although the Commission didn't find the OP dominant, but it held the view that to attract prospective consumers/rider to experience the taxi services on this newly introduced model, it was necessary to make it attractively affordable to riders and profitable to drivers. With regards to funding the parties received from the private equity funds, it held that there is no evidence that the access to such funding was inequitable and that the market for financing was not competitive and had aberrations. Moreover, it was their penetrative pricing strategy that facilitated them to garner high market shares in short span of time as well as develop the networks to a size that could provide sufficient positive externalities to the participants of the network. The Commission further opined that at this stage, it is difficult to determine with certainty the long-term impact of this pricing strategy as the market is yet to mature and the Commission is thus, hesitant to interfere in a market, which is yet to fully evolve.

18. Moreover, the Google order¹⁵ by the Commission has proved to be pivotal for the growth of the e-commerce sector as the e-commerce firms require positive spillovers (e.g. visibility in results) from platform technologies. With the help of its order, the Commission has been able to ensure to an extent a level playing for all firms irrespective of their sizes. The order has also emphasized on the special responsibilities of platform technologies like Google towards competition law and has positively contributed towards boosting internet eco system and confidence amongst start-ups

6. Conclusion

19. The Commission has emphasized in its orders that the technology markets are not a homogenous monolith. Instead, there exist numerous relevant markets within this sector, each having competition dynamics unique to itself. It has also taken cognizant of the fact that innovation cycles are progressing at a fast pace in the digital economy disrupting and reshuffling long-established positions. In this context, it has emphasized in its orders that public intervention in such markets should be targeted and proportionate and must not inhibit innovation.

20. The Commission is therefore adopting a cautious approach wherein any uncertainty surrounding any new business model is not viewed from prism of an anti-competitive lens, but rather is examined on its merits.

¹⁵ *Matrimony.com Limited Vs. Google LLC &Others* (Case Nos. 07& 30 of 2012)