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**Data Portability, Interoperability and Competition – Note by India**

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This document reproduces a written contribution from India submitted for Item 1 of the 135<sup>th</sup> OECD Competition Committee meeting on 9-11 June 2021.

More documents related to this discussion can be found at  
<https://www.oecd.org/daf/competition/data-portability-interoperability-and-competition.htm>

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### 1. Introduction

1. Data portability has been identified as a procompetitive measure to empower consumers to choose among competing providers. Specifically, data portability could theoretically reduce the switching costs consumers face, for example if they must reproduce all of the information and content inputted into a digital content platform whenever they switch providers. If consumers are able to bring their data with them, new firm entry and thus greater contestability may be possible. Data portability can also enable comparison services in markets with complex pricing structures<sup>1</sup>.

2. Interoperability, on the other hand, can promote competition by allowing different systems to communicate with one another. This can include standards that enable real-time data sharing across services (e.g. cross-posting social media content on multiple platforms), and those that enable the combination of functionalities (e.g. having a single account log-in across multiple different online services). Interoperability can make multi-homing easier by allowing consumers to use multiple competing or complementary services through a single access point. This would ensure network effects are preserved while potentially addressing barriers to entry and promoting competition in a market<sup>2</sup>.

3. The implementation of both data portability and interoperability measures involves numerous conceptual, practical, technical and legal questions that needs to be explored *ex ante* to keep the regulatory preparedness ahead of the curve and also to maintain comity between market regulators (*i.e.* Anti-Trust Agencies) and sectoral regulators.

4. This paper seeks to focus on the potential legal questions that may arise from implementation of such measures from the perspective of Indian anti-trust regulatory architecture, judicial pronouncements and recent public policy developments.

### 2. Comity of Regulators (statutory architecture & judicial pronouncements)

5. Data portability and interoperability may potentially throw-up issues of regulatory coordination, comity and harmony owing to the fact that Competition Commission of India (CCI) has an overarching and cross-cutting role across the various sectors of the economy that may also have sectoral regulators already working in their assigned respective fields.

#### 2.1. Statutory Architecture on inter-regulatory consultation and coordination

6. The [Indian] Competition Act, 2002 ('the Competition Act') provides for a robust architecture for inter-regulatory consultation and coordination through the twin mirror reflection provisions provided in Sections 21 and 21A of the Competition Act.

7. Section 21 of the Competition Act provides that where in the course of a proceeding before any statutory authority an issue is raised by any party that any decision which such statutory authority has taken or proposes to take is or would be, contrary to any of the provisions of the Competition Act, then such statutory authority may make a reference in

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<sup>1</sup> <https://www.oecd.org/daf/competition/data-portability-interoperability-and-competition.htm>.

<sup>2</sup> *Ibid*

respect of such issue to CCI. On receipt of a reference, CCI is required to give its opinion, within sixty days of receipt of such reference, to such statutory authority which shall consider the opinion of CCI and thereafter, give its findings recording reasons therefor on the issues referred to in the said opinion. It is also provided that any statutory authority, may, *suo motu*, make such a reference to CCI.

8. Similarly and analogously, Section 21A of the Competition Act provides that where in the course of a proceeding before CCI an issue is raised by any party that any decision which, CCI has taken during such proceeding or proposes to take, is or would be contrary to any provision of an Act whose implementation is entrusted to a statutory authority, then CCI may make a reference in respect of such issue to the statutory authority. On receipt of a reference, the statutory authority shall give its opinion, within sixty days of receipt of such reference, to CCI which shall consider the opinion of the statutory authority, and thereafter give its findings recording reasons therefor on the issues referred to in the said opinion. Further, it is also provided that CCI, may, *suo motu*, make such a reference to the statutory authority.

9. It is, thus, manifest that the legislature has provided a very robust and harmonious working of CCI *vis-à-vis* sectoral regulators and this arrangement has helped develop comity amongst the regulators and a *modus vivendi* which is so imperative for efficient working of markets, obviates regulatory arbitrage and unnecessary compliance burden upon the stakeholders. Through such mechanism and dispensation, sectoral regulators and market regulator (CCI) can draw upon each other's expertise from their respective domains, while exercising their respective jurisdictions.

10. The Competition Law Review Committee<sup>3</sup> further made recommendations to broaden the scope of inter-regulatory consultations by seeking to expand the scope of the mechanism beyond the absence of contradictions or conflicts, by proposing such consultations even otherwise. The relevant recommendation of the Committee is excerpted below:

*.....Presently, under Sections 21 and 21A of the Competition Act, a reference lies only when a potential or past decision of the CCI or a sectoral regulator contradicts with the other's governing statute. However, in several cases, the CCI or sectoral regulators may want to consider and refer issues that are pending for consideration even otherwise. The need to wait till the time the regulator reaches or is about to reach a final decision only increases uncertainty. It was also suggested that the scope of such consultation be broadened so that it refers not just to a proceeding but includes any inquiry or investigation for which such reference may be required. It was also agreed that the scope for inter-regulatory consultations can be bolstered by allowing regulators to enter into Memorandums of Understanding with each other. Having considered the above, the Committee recommended that necessary revisions may be made to Sections 21 and 21A of the Competition Act so that the CCI and sectoral regulators may make references whenever an issue of competition law or other relevant matter is raised before each other, and not only in respect of*

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<sup>3</sup> In 2018, the Government of India set up Competition Law Review Committee (CLRC) (i) to review the Competition Act/ Rules/ Regulations, in view of changing business environment and bring necessary changes, if required; (ii) To look into international best practices in the competition fields, especially anti-trust laws, merger guidelines and handling cross border competition issues; (iii) To study other regulatory regimes/ institutional mechanisms/ government policies which overlap with the Competition Act; and (iv) any other matters related to competition issue and considered necessary by the Committee.

The CLRC submitted its Report in July, 2019.

*a proceeding. Such a reference should be allowed even in the absence of any contradiction or conflict between the ambit of the CCI and the sectoral regulators.*

11. The Government of India is seized of the recommendations and appropriate legislative action was initiated and a draft of Competition (Amendment) Bill, 2020 was put up in public domain for consultations.

## 2.2. Judicial Pronouncements

12. CCI, being the market regulator for competition regulation, has jurisdiction cutting across all the sectors of the economy. Section 60 of the Competition Act states that the provisions of this law shall have overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. At the same time, sectoral regulators also while regulating the respective sector which they govern, ensure competition in the sector. As a result, when CCI considers cases pertaining to such regulated sectors, the orders are sometimes challenged in judicial review citing lack of jurisdiction.

13. The issue of jurisdictional overlaps between sectoral regulators and CCI was comprehensively dealt with by the Hon'ble Supreme Court of India in December 2018 while giving its decision in *Competition Commission of India v. Bharti Airtel* wherein the Hon'ble Court highlighted that comity between the sectoral regulator (*i.e.* Telecom Regulatory Authority of India/ TRAI) and the market regulator (*i.e.* CCI) is to be maintained.

14. In this case, CCI had ordered an investigation into the alleged cartelization between various telecom service providers and Cellular Operators Association of India ('COAI'). CCI found that there existed a *prima facie* case of contravention of the provisions of the Competition Act which deal with anti-competitive agreements including cartels, as Bharti Airtel Limited, Vodafone India Limited and Idea Cellular Limited ('Incumbent Dominant Operators'/ IDOs) appeared to have entered into an agreement amongst themselves, through the platform of COAI, to deny points of interconnection ('POIs') to a new entrant in the market *i.e.* Reliance Jio Infocomm Limited ('RJIL'). Denial of mobile number portability to existing customers of IDOs, seen in conjunction with the concerted behaviour of refusing/delay in POIs to RJIL, was also noted as *prima facie* contravening the provisions of the law.

15. Upon challenge in judicial review, the Hon'ble High Court of Bombay set aside the direction of CCI ordering investigation on jurisdictional grounds by holding that the Competition Act and the Telecom Regulatory Authority of India, Act 1997 ('TRAI Act') are independent statutes. There is no conflict of the jurisdiction to be exercised by them. But the Competition Act itself is not sufficient to decide and deal with the issues arising out of the provisions of the TRAI Act and the contract conditions, under the Regulations. The Court also observed that all aspects of development of telecommunication market are to be regulated and controlled by the concerned Department/Government, based upon the policy so declared from time to time, keeping in mind the need and the technology, under the TRAI Act. Therefore, the Competition Act cannot be used and utilized to interpret the contract conditions/policies of telecom Sector/Industry/Market, arising out of the Telegraph Act and the TRAI Act.

16. On appeal, the Supreme Court noted that the unique feature of CCI is that it is not sector based body but has the jurisdiction across which transcends sectoral boundaries, thereby covering all the industries, with focus on the object and purpose behind the Competition Act. It is only the CCI which is empowered to deal with the anti-competitive act from the lens of the Competition Act. It is within the exclusive domain of the CCI to

find out as to whether a particular agreement will have appreciable adverse effect on competition within the relevant market in India. It was noted that CCI is the experienced body in conducting competition analysis and is more likely to opt for structural remedies which would lead the sector to evolve a point where sufficient new entry is induced thereby promoting genuine competition. The Court concluded that TRAI as an expert regulatory body once has adjudicated on the jurisdictional aspects which leads to a *prima facie* conclusion that the telecom operators have indulged in anti-competitive practices, CCI can go into the question as to whether violation of the provisions of TRAI Act amounts to ‘abuse of dominance’ or ‘anti-competitive agreements’ going by the criteria laid down in the relevant provisions of the Competition Act.

17. While so holding, the Supreme Court acknowledged that a sectoral regulator, may not have an overall view of the economy as a whole, which the CCI is able to fathom. Accordingly, it was added that the judgment would not bar the jurisdiction of CCI altogether but only pushes it to a later stage, after the TRAI has undertaken necessary exercise in the first place, which it is more suitable to carry out.

18. From the above, it is obvious that the Supreme Court has sought to build comity amongst the regulators by drawing upon their respective expertise. The decision was given in the context where sectoral regulator was seized of facts which needed to be straightened and answered by the TRAI in the first instance which would bring on record findings on the aforesaid aspects whereafter CCI may proceed to determine as to whether such conduct was a result of any concerted agreement between the IDOs and COAI supported the IDOs in that endeavour. It was added that at that stage the CCI can go into the question as to whether violation of the provisions of TRAI Act amounted to ‘abuse of dominance’ or ‘anti-competitive agreements’.

### 3. Competition Regulation v. Data Protection/Privacy/IPR

#### 3.1. Data Protection, Privacy and Competition

19. Competition Agencies have an important role in data regulation. Online businesses have been able to amass large amounts of data. Access to data enables such businesses to engage in data-driven innovations. This in turn helps them to better assess consumer demands, habits, needs and preferences. Access to data can therefore represent a form of competitive advantage. A data-rich incumbent is able to strengthen its position in the market by improving its service and making it more targeted for users. A company with a large user base is able to collect more data to improve the quality of its service and thereby acquire new users. Additionally, companies are able to explore user data to improve targeted advertisement and monetise their services, obtaining additional funds to invest in the quality of the service and attracting again more users - known as the ‘monetisation feedback loop’. Such feedback loops have the potential to turn access to data into a barrier to entry in digital markets. Thus, the anti-trust law framework is an important regulatory tool to address the exploitative and exclusionary behaviour arising out of data accumulation by the entities commanding market power<sup>4</sup>.

20. Similarly, Market Study Report on the Telecom Sector in India released by CCI in January, 2021 brought out interplay between data privacy and competition regulation. The Report *inter alia* examined the aspect of data in the context of competition in digital

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<sup>4</sup> *Supra* Note 3.

communications market *i.e.* the conflict between allowing access and protecting consumer privacy.

21. In this regard, the Report highlighted that privacy can take the form of non-price competition. In the era of data aggregation, competition analysis must also focus on the extent to which a consumer can ‘freely consent’ to action by a dominant player. Abuse of dominance can take the form of lowering the privacy protection and therefore fall within the ambit of antitrust as low privacy standard implies lack of consumer welfare. Privacy degradation can lead to an objective detriment to consumers. Lower data protection can also lead to the standard legal category of exclusionary behaviour which undermines the competitive process. Tying with other digital products will further strengthen the data advantage enjoyed by the dominant incumbent by cross-linking the data collected across services, creating a vicious circle. Thus, the *extant* anti-trust law framework was noted as broad enough to address the exploitative and exclusionary behaviour arising out of privacy standards, of entities commanding market power.

22. Pertinently, the Report highlighted the interplay between various regulators governing some or other aspect of telecommunications industry and the relevant para is quoted below:

*Telecommunications industry has evolved from being a rudimentary voice service to being a complex data-centric converged service. Going forward, formal and informal lines of communication between DoT, TRAI, CCI and the envisaged Data Protection Authority will be important to ensure that regulatory decisions are robust and consistent. There could be potential abuse of dominance cases, which might also involve a breach of data protection rules. While overlapping jurisdiction between institutions cannot be completely eliminated, it ought to be harmonised through better regulatory design and improved lines of communication. The inter-regulatory consultation mechanism as provided in Sections 21 and 21A of the Competition Act, 2002 allows for formal lines of communication between the CCI and other relevant regulators, which going forward will be extremely important. The CCI will remain the body to resolve antitrust and competition related issues.*

### 3.2. Personal Data Protection Bill

23. It may also be mentioned that the Personal Data Protection Bill, 2019 was recently introduced in the Parliament. The Bill has been referred to a Joint Parliamentary Committee for detailed examination, and the Report is awaited. The Bill seeks to provide for protection of personal data of individuals, create a framework for processing such personal data, and establishes a Data Protection Authority for the purpose. To ensure compliance with the provisions of the Bill, and provide for further regulations with respect to processing of personal data of individuals, the Bill proposes to set up a Data Protection Authority.

### 3.3. Non-Personal Data (Community Data) Bill

24. In September 2019, the Ministry of Electronics and Information Technology (MeitY) appointed a committee of experts to recommend a framework to regulate non-personal data (NPD/ Community Data) in India. The Committee had released the first version of its report in July 2020, and invited comments from stakeholders. Based on the feedback received from the stakeholders, the Committee released a revised version of its report. In the New Report, the Committee has limited the scope and the purpose of the NPD subject to mandatory sharing. Only data that is necessary for creation of ‘high value datasets’ (HVD) will be subject to mandatory sharing requirements, for limited ‘public good’ purposes. Data processors are also excluded from the sharing obligations while

proprietary information and trade secrets will not be subject to mandatory sharing obligations. The Committee has also recommended deleting references to NPD from the Personal Data Protection Bill, 2019, in order to avoid regulatory overlaps<sup>5</sup>.

### 3.4. Competition and IPR

25. Section 3 of the Competition Act that prohibits anti-competitive agreements acknowledges the right of a person to restrain any infringement of his IPR or to impose reasonable conditions for protecting them. It recognizes that a person has a right to restrain infringement of IPR granted under the specified statutes and any agreement entered for the aforesaid purpose would fall outside rigors of Section 3 of the Competition Act. However, such rights are not unqualified. Only such agreements that are “necessary for protecting any of his rights which have been or may be conferred upon him under” the specified statutes are provided the safe harbour under Sub-section (5) of Section 3 of the Competition Act and only to such extent. This also entails right to impose reasonable conditions. Plainly, the exclusionary provision to restrain infringement cannot be read to mean a right to include unreasonable conditions that far exceed those that are necessary, for the aforesaid purpose<sup>6</sup>.

26. In the context of patents, it was held that the question whether an agreement is limited to restraining infringement of patents and includes reasonable conditions that may be necessary to protect such rights granted to a patentee, is required to be determined by the CCI. Subsection (5) of section 3 of the Competition Act does not mean that a patentee would be free to include onerous conditions under the guise of protecting its rights<sup>7</sup>.

27. The Delhi High Court has held that in cases of abuse of patent rights, CCI could directly examine the complaints without any prior determination by the Controller of Patents (the Controller). In its judgement in *Monsanto Holdings Pvt. Ltd. and Ors. v. Competition Commission of India and Ors.* decided on May 20, 2020, a Single Judge dismissing a petition challenging an investigation order by CCI re-affirmed that there is no irreconcilable repugnancy or conflict between the Competition Act, 2002 and the Patents Act, 1970.

28. Distinguishing the decision of the Supreme Court in *Bharti Airtel case (supra)*, the Ld. Single Judge noted that the Controller does not regulate the exercise of patent

29. rights in a pervasive manner. It was added that the principal function of the Controller under the Patents Act is to examine the application for grant of patents

30. and grant patents if the applicant is entitled to such rights. Although, the Controller also exercises other powers and performs other functions, including issuance of compulsory licenses in given case. But the Controller does not regulate, in a pervasive manner, the exercise of patent rights or the agreements that are entered into by patentees with third parties. The nature of the role performed by a Controller, thus, was not found to be at par with those performed by the TRAI.

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<sup>5</sup> <https://www.mondaq.com/india/data-protection/1025636/summary-of-the-revised-report-of-the-committee-of-experts-on-non-personal-data-#:~:text=In%20September%202019%2C%20the%20Ministry,and%20invited%20comments%20from%20stakeholders.>

<sup>6</sup> *Monsanto Holdings Pvt. Ltd. and Ors. v. Competition Commission of India and Ors.* decided on May 20, 2020.

<sup>7</sup> *Ibid.*

31. Specifically, the Court said that CCI has jurisdiction to entertain complaints regarding abuse of dominance in respect to patent rights, and such complaints could be examined by CCI without the requirement of reference by the Controller.

#### 4. Conclusions and Way Forward

32. Role of CCI, as a market regulator, is overarching and cuts across all the sectors of the economy including those that have sectoral regulators discharging their assigned mandate. Such architecture may require constant consultations and co-ordination between CCI and the sectoral regulators, for greater harmony in enforcing their respective mandates. The dynamic and evolving nature of markets, makes it further imperative that such co-ordination takes place in a swift manner for prompt market corrections. Such collaborative efforts will result in greater efficiency in regulatory enforcements.

33. Given the importance of data as a competition metric in gig economy, role of Competition Agencies is going to assume critical importance in maintaining and ensuring that markets remain competitive and contestable. The anti-trust law framework is an important regulatory tool to address the exploitative and exclusionary behaviour arising out of data accumulation and privacy standards by the entities commanding market power.

34. A harmonious and symbiotic relationship and *modus vivendi* between the anti-trust agencies and the sectoral regulators would be *sine qua non* for efficient working of the markets. The inter-regulatory consultative mechanism provided in the statute would go a long way in harmonious application of laws.