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The Evolving Concept of Market Power in the Digital Economy – Note by India

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1. Introduction:

1. The growth of the digital market and related technological innovation has been a major driver of increased commerce across a wide range of markets, and has in many cases resulted in significant benefits for consumers in terms of lower prices and wider choices of goods and services, as well as greater innovation. This rise of digital markets has been further accelerated manifold due to the pandemic-induced lockdown in several countries. However, this digitalization of the economy has brought up slew of novel questions and concerns for competition authorities. The unique characteristic of digitalization of the economy and the resulting business models make it difficult to apply conventional competition law framework and tools, thus, calling for a calibrated approach.

2. Concerns surrounding the conduct of large digital players have been at the forefront of the debate as to the suitability of existing competition law frameworks for the digital era. While digital platforms may provide significant benefits to consumers, the ‘winner takes all’ (or highly concentrated) nature of competition in many platform-based markets tends to result in a small number of platforms with significant degree of market power, with high barriers to entry due to data-driven network effects, economies of scale and scope, and control of user data. The potential for anticompetitive behaviour in such circumstances is apparent.

3. The experience of CCI shows that the assessment of market power in digital markets broadly follows similar principles as applicable to the traditional markets; however, with appropriate changes necessitated by the unique features of the digital markets. Market shares continues to play a limited role in assessment of market power rather a more restricted role vis-à-vis traditional markets. Certain market features viz. network effects, economies of scope, access to data operating as entry barrier, ability of multi-homing by the user groups, multi-sided nature of markets and the resultant interdependencies, *etc.* influence the market power assessment in digital markets. The CCI has examined these features in various cases involving digital markets while assessing market power.

4. In the aforesaid backdrop, the focus of this brief is on assessment of market power in digital economy in the context of Indian anti-trust law. This brief provides a background of the Indian statutory framework as laid down [Competition Act, 2002 (the ‘Act’)] for assessment of market power along with the evolution of the approach adopted by CCI to ascertain such market power in cases concerning digital platforms.

2. Role and Relevance of ascertaining Market Power

5. Unlike other jurisdictions, the digital market cases in India have been or are being examined either under Section 4 of the Act (for abuse of dominant position) or Section 3(4) of the Act (for vertical agreement/restraint). In cases involving abuse of dominant position under Section 4 of the Act, the platform player is statutorily required to hold a dominant position [a high degree of market power enabling the entity/platform to operate independent of the market forces] as a starting step in the assessment framework. In cases where

contravention of Section 3(4)¹ is alleged, determination of the appreciable adverse effect on competition (AAEC) is required to establish contravention. The market power of the platform player is one of the primary factors to gauge the extent of AAEC which is the deciding criteria for rule of reason analysis under that provision.

3. Approach to delineation of Relevant Market

6. The assessment of market power, as traditionally understood for dominance assessment, begins with the delineation of the relevant market. In other words, delineation of the relevant market wherein the concerned entity operates becomes the starting step of the assessment of the market power of the said entity.

7. In digital markets cases for alleged abuse of dominant position, however, this starting step itself poses significant challenges. 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 initial years, in the e-retail segment exemplifies the dynamic approach adopted by it. While initially (in 2014), in some cases, the CCI considered online and offline markets to be different channels of distribution of the same product and not as two different relevant markets [*Ashish Ahuja v. Snapdeal.com and SanDisk Corporation*²], in the immediately subsequent case received by the Commission [*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, CCI observed that “[i]rrespective 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”. In most of the cases thereafter, the Commission considered e-marketplaces to be falling in a separate market, distinct from the offline marketplaces.

8. CCI had the occasion to examine relevant markets in its order dated 08.02.2018 in *Matrimony.com Limited & CUTS v. Google LLC & Others*⁴, wherein it, *inter alia*, observed that online general web search services cannot be substituted with direct search option by typing the URL of websites in internet browsers, and accordingly, search engines become the first port of call for a user looking for information online. Further, in relation to the market for online search advertising services, CCI, *inter alia*, observed that online and offline advertising services are not comparable, and the characteristics, intended use and price of search and non-search advertising are different from one another. Accordingly, CCI held that the market for online general web search services as well as the market for online search advertising services to be distinct relevant product markets.

¹ Section 3(4) of the Competition Act, 2002, falls under broader umbrella of anti-competitive agreements and specifically deals with Vertical Agreements/Arrangements.

² Case No. 17 of 2014, available at <https://cci.gov.in/antitrust/orders/details/422/0>.

³ Case No. 80 of 2014, available at <https://cci.gov.in/antitrust/orders/details/600/0>.

⁴ Case Nos. 07 and 30 of 2012, available at <https://cci.gov.in/antitrust/orders/details/746/0>.

9. In *Umar Javeed and others v. Google LLC & Ors.*⁵, CCI opined in its *prima facie* order dated 16.04.2019 that the primary relevant product market to be “market for licensable smart mobile device operating systems in India”. CCI observed that

“ Each mobile manufacturer designs the device as per the operating system it is going to use on it. Thus, the mobile operating system differs in terms of characteristics and use from the computer operating systems. From the Original Equipment Manufacturers (OEMs)’ perspective, only such operating systems are accessible to them which are licensed by the developers. Thus, the non-licensable operating systems such as iOS do not appear to be part of the same market since they are not available for license by third party OEMs. Thus, the primary relevant product market in this case appears to be the market for licensable smart mobile operating systems and for the purpose of the instant analysis, the relevant geographic market will be considered as the whole of India as conditions of competition are homogeneous. Thus, the primary relevant market for this *prima facie* assessment will be “market for licensable smart mobile device operating systems in India”.

10. Further, apart from the above delineated primary relevant market, CCI observed that it was necessary to determine some associated relevant markets to examine the impugned conduct and, accordingly, *prima facie* noted that the relevant market for app stores for android mobile operating systems is appropriate and necessary for the assessment of the impugned conduct.

11. The allegation of the Informant in *Digital News Publishers Association v Alphabet Inc. and Others*⁶ (Case No. 41 of 2021) was *inter alia* related to the conduct of Google which resulted in denial of fair share in the digital advertising revenue to news publishers and disclosure of inadequate information to reach a fair settlement. The Information highlights the alleged bargaining power imbalance that flows from the alleged position enjoyed by Google as a necessary trading partner for digital news publishers in accessing online audience as well as in generating digital ad revenue. The CCI, *vide* its *prima facie* order dated 07.01.2022 directed the Director General to cause an investigation into the matter. In the said *prima facie* order, while referring to its order dated 08.02.2018 passed in Case Nos. 07 and 30 of 2012 (*Google Search Bias* case), CCI, *inter alia*, observed that online and offline advertising services were not comparable, and the characteristics, intended use and price of search and non-search advertising were different from one another. Accordingly, CCI held that the ‘market for online general web search services’ as well as the ‘market for online search advertising services’ were distinct relevant product markets.

12. In *Kshitiz Arya and another v. Google LLC and others*⁷, Informants alleged that Google imposed several restrictions upon smart TV OEMs by virtue of the agreements entered into with them which tantamount to abuse of its dominant position by Google. The CCI, in its *prima facie* order dated 22.06.2021 while directing an investigation by the DG in to this mater, was of the view that from the OEMs perspective, only those operating systems which are accessible to them through licensing form part of the relevant market. Therefore, non-licensable operating systems did not appear to be part of the same market. Further, the relevant geographic market was taken as whole of India as conditions of competition were homogeneous. Thus, the primary relevant market for the *prima facie*

⁵ Case No. 39 of 2018, available at <https://cci.gov.in/antitrust/orders/details/138/0>.

⁶ Case No. 41 of 2021, available at <https://cci.gov.in/antitrust/orders/details/11/0>.

⁷ Case No. 19 of 2020, available at <https://cci.gov.in/antitrust/orders/details/38/0>.

assessment was determined to be ‘*market for licensable smart TV device operating systems in India*’. Further, the Commission was also of the *prima facie* view that in smart TV ecosystem, it is appropriate to delineate an associated relevant market for app store for Android smart TV operating systems in India to assess the impugned conduct. The CCI noted that it is critical for the OEMs to offer an app store along with smart TV to meet the dynamic needs of the users. Therefore, the contention of Google that app store is not an important consideration for users/OEMs, *prima facie* does not appear to be true rather the same appears to be a “must-have” app for OEMs to offer.

13. CCI’s experience in dealing with the cases related to digital markets demonstrated that because of their distinct characteristics, delineation in such markets requires a dynamic approach. One of the distinguishing characteristics of the digital market platforms is that businesses usually perform their activities in the form of multisided platforms, where they offer multiple distinct products or services for different groups of customers, which are interconnected through the direct or indirect network effects. The challenge in those cases is to appropriately define the relevant market so as to capture the market dynamics of the various sides such platform being interdependent.

14. Further, delineation of relevant market is essentially a question of demand-side substitutability and such substitutability for different sides is a matter of fact which has to be seen on a case-by-case basis. In one of the cases where the CCI was *prima facie* examining abuse of dominant position by an online travel intermediation service provider⁸, the CCI observed that ‘*in case of platform markets, where the platforms may be serving many sets of consumers and may be having multitude of relationships with these consumers, the consumer-side for which the relevant market is being defined needs to be identified. Since the allegations in the present case are primarily with regard to the hoteliers, the relevant market analysis needs to be carried out from the perspective of hoteliers i.e. the relevant product market should include all alternatives available with such hotels and the competitive constraints faced by the focal product i.e. the service provided by the Opposite Parties in the present matter.*’ The parties in that matter alleged that the online intermediation service provider was facing competitive pressures from various sources, including direct booking, offline booking through travel agents etc. The CCI, however, *prima facie* observed that given the market realities, ‘*for a hotel, all the three booking channels, i.e. direct booking, offline booking through travel agents and booking through online travel agents are used simultaneously and not as substitutes to each other. [...] Moreover, the online mode of distribution through third party platforms, which provide the facility to search, compare and book at the same place, is characteristically distinct from the services that the offline mode such as travel agents provide*’. The predominant nature of their services being that of intermediation, the CCI defined the relevant market as ‘*market for online intermediation services for booking of hotels in India*’. In this market, the online travel intermediation service provider was *prima facie* found to be dominant.

15. In further indicating the dynamic nature of assessment in digital platform cases, CCI recently in its decision directing investigation against Apple’s App Store policies examined the role of app stores in smartphone ecosystems. The Commission in its *prima facie* order *inter alia* noted that there are two distinct smart device ecosystems *i.e.*, iOS and Android, wherein consumer generally do not multi-home due to switching costs associated with porting to another ecosystem. Further, app stores have become a crucial component of each of these ecosystems, as the consumer downloads apps on their smart devices from app stores, to access content and services on the internet. Moreover, recognizing the cross-side network effects, app developers have to develop and innovate for each of the

⁸ Case No. 14 of 2019, available at <https://cci.gov.in/antitrust/orders/details/113/0>.

ecosystem to be able to maximize their revenue and provide a wider consumer choice. The Commission also noted that Apple's App Store is the only means for app developers to distribute their apps to consumers using Apple's smart mobile devices and thus, Apple acts as a gateway between users and app developers.

16. Besides, in case falling under Section 3(4) of the Act, alleging vertical restraints by digital economy players, delineation of relevant market is statutorily not required. However, the said provision of the Act envisages that the alleged conduct should lead to AAEC, which amongst other things depends upon the market power held by the digital platforms. CCI has done such assessment based on an overall assessment of facts and market realities. For example, in a recent case [*NRAI v. Zomato and Anr.*⁹] concerning allegations against two online food delivery apps, the CCI *prima facie* observed that since the allegations are made under Section 3(4) of the Act, there is no need to go into precise relevant market delineation, *suffice to say that Zomato and Swiggy are prominent online food delivery platforms and operate as online intermediaries for food ordering and delivery*. Thereafter, while looking at the effect of their alleged conduct, CCI further observed that *'both Swiggy and Zomato operate as major intermediary platforms in the food delivery space, underscoring their market power and ability to adversely as well as appreciably affect the level playing field'*.

17. Thus, as is apparent from its decisional practice, CCI has adopted an evolving approach to assessment of market power in digital market cases, without being over influenced with traditional market assessment framework.

4. Approach to assessment of Market Power

18. The statutory framework guiding CCI's assessment, provides for various factors which can be looked into while assessing an entity's position in the relevant market [Section 19(4) of the Act]. Such factors include market share, the size and resources of the enterprise; size and importance of competitors; economic power of the enterprise; vertical integration; dependence of consumers on the enterprise; extent of entry and exit barriers in the market; countervailing buying power; market structure and size of the market; source of dominant position *viz.* whether obtained due to statute *etc.*; social costs and obligations and contribution of enterprise enjoying dominant position to economic development *etc.* Besides, CCI is also empowered to take into account any other factor which it may consider relevant for the determination of dominance.

19. In traditional market cases, calculation of market shares has often been relied upon as a good proxy for market power. However, in digital market cases, CCI has been categorical that 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. While assessing the dominance of a cab aggregator, CCI applied a nuanced approach considering the challenges posed by application of traditional antitrust tools and approaches in digital market cases. CCI disregarded the high market share held by the cab aggregator, realizing that over-reliance on market shares in the assessment of such cases may lead to absurd outcomes. CCI noted that market share is but one of the indicators for assessing dominance, and the same cannot be seen in isolation to give a conclusive finding. Though market share can be an important indicator for lack of competitive constraints, there cannot be any set

⁹ Case No. 16 of 2021, available at <https://cci.gov.in/antitrust/orders/details/6/0>.

guideline and criteria for determining uniform market share thresholds and a standard time-period to apply in all cases. 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. CCI also recognized the limitation of market shares as an indicator of market power in case of new market economy cases. Rather CCI relied on factors such as strength of network effect, entry barriers, and assessment of strategies adopted by the players to assess dominance. Based on these factors, CCI found that the said cab aggregator (namely, OLA) did not hold the position of dominance in the relevant market as it was not able to act independent of the competitive forces in the market.

20. CCI also noted that in two-sided markets, network effects may enable a large platform/network to assume significant market power or become dominant and insulate itself from potential competition as entrants may find it difficult to challenge the large incumbent. However, there can be certain countervailing market forces that reduce the ability of even a very large platform to insulate itself from competition. CCI noted that despite OLA having the largest network, the network effect was not strong enough to deter entry and rapid expansion of other big competitor ‘UBER’ who was competing fiercely with OLA. Further, there were no significant costs preventing consumers from switching between different radio taxi apps. The radio taxi apps are offered for free and can be easily downloaded on smartphones and can coexist on the same handset, thus, multi-homing was found to be possible for both drivers and riders. The CCI also noted that the competition in the relevant market was still unfolding and decided not to interfere in a market which is yet to fully evolve. This decision was given by CCI in the year 2017, and since then there has been a further evolution in its approach with various cases from different digital market sectors being reported for anti-competitive conduct and practices.

21. In the case of *Harshita Chawla vs. WhatsApp* [Case No. 15 of 2020¹⁰], the Commission relied upon factors such as direct network effects, popularity and user base of WhatsApp, dependence of consumers on the enterprise and countervailing buyer power, lack of interoperability between platforms, psychological barriers to switching to an alternative platform *etc.* In this matter, though WhatsApp was found to be dominant, CCI did not find the conduct to be abusive.

22. In a subsequent matter against WhatsApp, where an investigation has been ordered into its *Updated Terms of Service and Privacy Policy for WhatsApp Users* [*Suo Moto* Case No. 01 of 2021¹¹], the Commission also took into account the role of data and data analytics in the competitive performance of digital enterprises. It was observed that ‘*cross-linking and integration of user data can further strengthen data advantage besides safeguarding and reinforcing market power of dominant firms*’. Significantly, CCI also pointed that though the competitors of WhatsApp *i.e.* Signal and Telecom witnessed “*a surge in downloads after the policy announcement by WhatsApp*”, however, it apparently did not result in any significant loss of users for WhatsApp. The Commission in this matter, *prima facie* found WhatsApp to be in a dominant position in the relevant market.

23. In another recent case [*Digital News Publishers Association vs. Alphabet Inc. & Ors.*, Case No. 41 of 2021¹²], the Commission in its *prima facie* order, noted the high market shares enjoyed by Google in the relevant market. Further, it was also noted that *the*

¹⁰ Case No. 15 of 2020, available at <https://cci.gov.in/antitrust/orders/details/118/0>.

¹¹ *Suo Moto* Case No. 01 of 2021, available at <https://cci.gov.in/antitrust/orders/details/100/0>.

¹² Case No. 41 of 2021, available at <https://cci.gov.in/antitrust/orders/details/11/0>.

'market share of Google appears to be stable over a period of time, indicating the entrenched position of Google in the search engine market in India'. Apart from market share data, the Commission also took note of the detailed submissions of the Informant on the other factors given under Section 19(4) of the Act. The Commission specifically noted that the relevant markets appeared to be characterized by entry barriers resulting from significant investment required to develop sophisticated algorithm as well as to reach a sufficient scale of search queries. Further, CCI observed that these markets exhibit network effects wherein the online general web search and online search advertising are interdependent and the increase in the number of users on the search engine increases the value of search advertising offered by Google for the advertisers.

24. In another matter, while looking at the conduct of Apple Inc. [*Together We Fight Society Vs. Apple Inc. & Another*¹³], the CCI, while assessing the market power, observed that *"...The users on iOS platform do not have any other alternative app store through which they can download apps, on their iOS devices. It appears that Apple acts as a gateway between users and app developers. Given the same, the app developers appear to be dependent on the Apple's App Store to reach the app users and app users are also dependent on the App Store to download apps. Thus, the Commission is of the prima facie view that Apple holds a monopoly position in the relevant market for app stores for iOS in India. This dependence of the app developers appear to result in acceptance of Apple's mandatory and non-negotiable rules inter alia relating to distribution of apps through App Store, by the latter [...]"*.

5. Conclusion

25. The foregoing discussion has demonstrated the approach of CCI in dealing with data driven multi-sided ecosystems by taking into account the specificities of the digital market. Owing to the dynamic nature of the digital markets, the assessment of CCI has been on a case-by-case basis, having due regard to the attending circumstances.

26. Guided by such consideration, CCI has looked beyond traditional parameters to focus on how competition in digital economy is evolving around non-price parameters, including network effects (*OLA matter, Google News Publishers matter*), lack of interoperability between platforms, psychological barriers to switching to an alternative platform (*Harshita Chawla vs. WhatsApp & Anr.*), privacy (*Suo Motu WhatsApp case*), homing decisions (*Apple matter*). Thus, CCI has acted in a nimble way by suitably modifying its assessment framework while dealing with the diverse nature of products/services in the digital market. While doing so, CCI has been constantly endeavored to strike a fine balance between ensuring fair & competitive markets and preserving innovation.

27. From the Indian perspective, it can be seen that CCI has been closely watching the digital market sector and also came out with a detailed study on e-commerce space, among other initiatives. It also published a market study report in January 2020 with a view to develop better understanding of e-commerce and its implication on the economy in few sectors (*namely, e-commerce marketplace platforms in goods, online travel agencies and food delivery platforms*).

¹³ Case No. 24 of 2021, available at <https://cci.gov.in/antitrust/orders/details/32/0>.