
AN EXPLORATORY STUDY ON THE NEXUS BETWEEN COMPETITION LAW AND E-COMMERCE IN INDIA

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ABSTRACT

Scholars and regulatory agencies around the world have expressed concern about just how ecommerce continues to pose a severe threat to the current competition law framework, and the idea of utilising technology to prompt or support tacit collusion has surfaced as a serious problem. As digital algorithms fix the price without any communication between the top management of the companies, it has become difficult to demonstrate the establishment of any unfair competitive arrangement or anticompetitive disposition on the part of the entities. The Indian competition act, like the legislation in the EU or the US, requires some human aspect in the form of a contract in order to hold the organisations liable for trying to engage in collective agreement. The ongoing CCI investigation into claims of predictive price-fixing in the aviation industry had also necessitated the need to determine if collusion using machine learning can be put on trial under the country's current laws, even though this topic has not received much discussion in the Indian legal setting. This study examines the India's current legal system is efficacious and assesses whether Indian government has sufficient measures in place to regulate the competition in the digital economy.

Keywords: competition, e-commerce, digital, India, economy

Introduction

The impact of the digital economy on human activities is very significant. It has had a significant effect on our economic and social activity. Don Tapscott first used the term "Digital Economy" in his best-selling book "The Digital Economy: Promise and Peril in the Age of Networked Intelligence" (1995).¹ Markets that prioritise digital technologies are referred to as being part of the "digital economy," which is an umbrella phrase. Usually, it involves the exchange of data, services, or products using an electronic commerce platform.²

The last few years have seen significant economic growth due to the rise of this industry, and technical change has had an impact on markets that goes well beyond the digitalization context. Additionally, thanks to mobile devices, internet accessibility has grown over time. As a result, this industry has experienced an explosive rise due to the growing popularity of the digital economy.

The traditional economy's major sectors have undergone a digitalization that has drastically changed how they operate, as well as the markets that they serve. The digital and traditional markets diverge significantly. First off, a significant portion of the digital economy depends on the movement of users' personal data through one system to another.

Therefore, it is uncommon to see the traditional market units of exchange—price and money paid.³ A firm's revenue, for instance, is a key indicator of the size of its market. However, a digital platform may deal with many sides of an economic zone, where first side is supported by the other, meaning a zero-priced market.

Second, there is a wide range in the factors that affect the market. In contrast to the conventional market, the market's demand is not solely determined by pricing structures. As a result, the interaction of different network effects⁴ determine and support market concentration. The digital economy is a lot more dynamic than the conventional one. The economic power of any

¹ Kosha Gada, The Digital Economy In 5 Minutes, Forbes (Jun. 16, 2016),

<<https://www.forbes.com/sites/koshagada/2016/06/16/what-is-the-digital-economy/#1d2103f17628>>

² Organisation of Economic Co-operation and Development (OECD), The Digital Economy (Feb. 7, 2013), <<http://www.oecd.org/daf/competition/The-Digital-Economy-2012.pdf>>

³ Cassandra Liem & Georgios Petropoulos, The economic value of personal data for online platforms, firms and consumers, Bruegel (Jan. 14, 2016), <<http://bruegel.org/2016/01/the-economic-value-of-personal-data-for-online-platforms-firms-and-consumers/>>

⁴ Carl Shapiro & Hal R. Varian, Information Rules: A Strategic Guide to the Network Economy (Harvard Business School Press, 1998).

company can easily be contested due to the abundance of ways to supply digital services to end users, and even the tiniest and most recent market entry could pose a threat to an incumbent's operations.

E-commerce in the Competition Regime

The existence of digitalized/digital markets has an impact on all sectors of the economy, not just a small portion of it. New technologies are also working to fundamentally alter the way all other markets operate. After the popularity of the digital marketplaces, e-commerce, also known as e-retail, saw a tremendous change. Online retail in India is anticipated to catch up to Indian physical retail outlets in the next five years because to quicker, more dependable telecom network speeds, ease, and higher internet service usage.⁵ According to a European survey, cross-channel retail sales will have a significant impact on the web for about 53% of all retail sales in Europe.⁶ Online marketplaces and e-commerce can be categorised into four groups both in India and abroad.⁷ Products that are delivered in digital form to an end user fall under the first category. Some websites that offer these services include Amazon Prime Video, Netflix and YouTube Red. Companies like Flipkart, Amazon, and eBay fall under the second category since they merely make it easier to find and buy products. The second group also includes hotel search and reservation services like Expedia and MakeMyTrip. The wholesale level of digital markets is another type of e-commerce. These are the ones where business-tobusiness transactions are made. Some of these markets, which aim to make commerce between companies easier, don't even use the internet; instead, they may use other internal electronic systems. In India, one such portal is Reliance e-biz. The fourth category, which includes auction platforms, can be seen of as an alternative to online retail. Since decades, eBay has dominated the industry for online auctions.

India's internet retail businesses receive less scrutiny because there are always new competitors entering this market. Flipkart established itself as the market leader by being the first \$1 billion

⁵ Retail Industry in India, India Brand Equity Foundation (Sep. 2017), <<https://www.ibef.org/industry/retailindia.aspx>>

⁶ Web to influence more than half-or-€947 billion-of European Retail sales by 2020, Forrester (Jul. 28, 2015), <<https://www.forrester.com/Web+To+Influence+More+Than+Half+Or+947+Billion+Of+European+Retail+Sales+By+2020/-/E-PRE8284>>

⁷ Nikolaos Vettas, Competition And Regulation In Markets For Goods And Services: A Survey With Emphasis On Digital Markets (Athens University of Economics and Business and CEPR, 2015).

company in this industry. Amazon and Alibaba of China may follow.⁸ Anti-competitive practises in this industry are currently improbable. However, companies like Amazon might have an advantage due to their international asset accumulation. Any abuse of its market position, however, has not yet been investigated. By encouraging innovation, competition law is designed to benefit the final customer.⁹ Any anti-competitive behaviour is improbable as long as there is market innovation, consumer multi-home capability, and freedom of entry for new businesses.¹⁰

Regarding e-auction systems, where eBay has long been regarded as the industry leader globally, the situation is different. Due to switching costs, indirect network effects, and consumers' limited ability to multi-home on one side of the system due to their slow-building personal reputations. The lock-in impact on eBay is very considerable.¹¹ When doing an analysis, it is crucial to take into account the possibility that this scenario may also apply to certain other businesses in the online marketplace.

Governmental Interventions

Through a technological and regulatory framework known as Open Network for Digital Commerce, the Indian government has made an effort to promote competition in the eCommerce sector (ONDC).

Built upon Digital Public Goods (DPGs), this "network" promotes interoperability in the ecosystem of e-commerce. In order to close the "channel gap," the eCommerce ecosystem proposes itself as a replacement for platforms.

Given the magnitude and significance of the modern economy, one may anticipate that the Indian government will adopt ex-ante laws similar to those of countries like the EU¹² and Germany¹³. As an intriguing contrast, the Open Network for Digital Commerce (abbreviated

⁸ Sohini Mitter, How Alibaba is slowly yet surely expanding its footprint in India, BGR (Jun. 12, 2017), <<http://www.bgr.in/news/how-alibaba-is-slowly-yet-surely-expanding-its-footprint-in-india/>>

⁹ The Competition Act, Preamble (2002).

¹⁰ Id at 5.

¹¹ Id.

¹² Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on contestable and fair markets in the digital sector (Digital Markets Act) COM/2020/842 final.

¹³ 10th amendment to the GWB.

as ONDC) is a techno-legal architecture that the Indian government has used to try to promote competition in the e-commerce market. This strategy appears to be the very first of its kind.

Participants in e-commerce would connect to the ONDC network using open protocols. This government project appears to have been made with the wisdom of levelling the balance of power by bridging the medium divide through a "network" rather than a platform. When local businesses were unable to take advantage of digital inclusion because to the Covid-19 outbreak, the need for a "network" rather than a new platform became even more apparent.¹⁴

Consequently, the ONDC protocol is a public benefit that aims to "unbundle" the e-commerce ecosystem.¹⁵

India has a solid track record of employing digital public goods to successfully market items like AADHAR¹⁶, UPI¹⁷, and DEPA¹⁸. The utilization of techno-legal infrastructure is somewhat novel as a method to foster competitiveness in the e-commerce marketplaces, which are infamously well-known for "winner-takes-most" outcomes. Interoperability mandates have actually been suggested by academics as a substitute for regulation.¹⁹ But this is the first time this theory has been applied.

Open Network for Digital Commerce (ONDC)

The public domain communication protocols make digital public goods (or DPGs) nonrivalrous and non-exclusive.²⁰ According to the United Nations, DPGs are essential to accomplishing SDGs. DPGs have traditionally been used to operationalize payment, facilitate data transmission, and verify identities (IDs).²¹ India is conducting a previously unheard-of

¹⁴ ONDC Strategy Paper, January 2022

<https://res.cloudinary.com/daea2fs3n/image/upload/v1659889490/ondcwebsite/files/ONDCStrategyPaper_ucvfjm.pdf>

¹⁵ For detailed background see the ONDC, Strategy Paper.

¹⁶ Aadhar is the Unique Identification (UID) number issued to all residents of India that serves as proof of identity and proof of address.

¹⁷ Unified Payments Interface (UPI) is an instant payment system developed by the National Payments Corporation of India (NPCI), an RBI-regulated entity. UPI is built over the IMPS infrastructure and allows users to instantly transfer money between any two parties' bank accounts.

¹⁸ It stands for Data Empowerment and Protection Architecture. It is a techno-legal architecture that gives users control over their data and provides for seamless data sharing.

¹⁹ Ian Brown, "Interoperability as a Tool for Competition Regulation", Open Forum Academy, November 2020 ; see also, Mike Masnick, "Protocols, Not Platforms: A Technological Approach to Free Speech" 21 August 2019, < <https://knightcolumbia.org/content/protocols-not-platforms-a-technological-approach-to-free-speech>>

²⁰ Digital Public Goods include open-source software, open data, open artificial intelligence models, open standards and open content, see <https://www.un.org/techenvoy/content/digital-public-goods>.

²¹ Liv Marte Nordhaug and Lucy Harris, "Digital public goods: Enablers of digital sovereignty", OECD Library.

experimentation with DPGs to promote competition and restore stability to the eCommerce sector. The main goal of ONDC is to promote competition and innovation in the e-commerce market by establishing an open platform of various ecosystem players. These people will converse with use the open protocols created by the Beckn Protocol²², to one another. The ONDC develops open protocols for vendor matching, pricing discovery, and cataloguing in its capacity as a neutral network. The ONDC is a network that includes travel, food delivery, mobility etc. among other things in addition to retail. The provider and the customer are not need to use the same platform in order to perform execution, ordering, discovery, fulfilment, and post-fulfilment thanks to the open protocol.

Emphasis on Big Data

Big data analytics is essential to today's enterprises. Platforms can optimise their operations and enhance the products they offer. Amazon's automated suggestions to customers are one illustration of big data analytics. Such recommendations frequently help consumers by lowering the cost of their search. In this way, Amazon effectively connects producers with prospective consumers. According to a study, product recommendations based on these algorithms are the source of 35% of Amazon purchases and 75% of Netflix viewing.²³ Analysing big data can assist platforms in making recommendations to sellers regarding the addition of new products and the appropriate level of inventory for a given product.²⁴

As a marketplace, Amazon routinely adjusts product prices based on a variety of variables, such as a customer's propensity to purchase. A user's actions, such as lingering the mouse over a product or placing one in the shopping basket, can be used to obtain this information.

Dynamic pricing is thought to have increased Amazon's earnings by an average of 25%.²⁵ Data analytics is providing advantages for competition in modern times.²⁶ Amazon was capable of dominating online retailing and earn a profit despite significant investments in infrastructure and growth, according to Devenport's 2006 observation.²⁷

²² Beckn <<https://becknprotocol.io/>>

²³ Ian MacKenzie, Chris Meyer and Steve Noble, How retailers can keep up with consumers, October 1, 2013, McKinsey & Company.

²⁴ Ann, How Amazon Uses Its Own Cloud to Process Vast, Multidimensional Datasets, 26 January 2016, DZone.

²⁵ 25 Id.

²⁶ Thomas H. Davenport, "Competing on Analytics" (January 2006) Harvard Business Review.

²⁷ Id.

An essential source of innovation is the data that different participants generate on an ecommerce platform. A platform can innovate because of its size and data scope. Transaction data is unlikely to be stored or viewed by the ONDC network. Only the purchaser and vendor applications will have access to it.²⁸ A single-brand salesperson in a network cannot provide recommendations that result in purchases because she has insufficient knowledge of the user. A chance to add the system's value may be lost if a disintegrating system like ONDC loses this data resource. ONDC ought to make an effort to gain from data analytics. Data generated on ONDC won't produce any efficiency in its current state, neither for the network nor for end users. Furthermore, it would be challenging to determine who was at blame in order to resolve culpability, and this would call for a channel champ with sufficient resources. Even though it is a positive experiment, ONDC cannot replace ex ante regulation.

The shares of the market of a relevant enterprise are the most important measure of market power for the conventional single-sided market. Competition authorities, in practice, often rely heavily on this knowledge because it is the only reliable and conveniently accessible data. Therefore, in the majority of cases, a clear market definition is required in order to estimate the shares of the market of a particular endeavour. Nevertheless, there are two main issues with multi-sided marketplaces. First off, because of their structural properties, such as network effects, feedback loops, and the multi-homing of their client groups, multi-sided marketplaces are rather difficult to define. Second, determining shares of the market in multi-sided marketplaces is difficult since it is frequently ambiguous how shares should be determined to account for the market's multi-sidedness. Therefore, basing your assessment of market dominance exclusively on market shares could be misleading.

Conclusion

The three main faces of any data-driven economy are social networks, search engines, and ecommerce. In the present era, it is clear that a few number of businesses control all these sectors of the digitalized economy. In this environment, there is considerable mistrust among competition authorities worldwide over the strategies and tactics used by the major companies to maintain their dominant positions in the economy. However, there are a few problems and

²⁸ ONDC, Strategy Paper, p. 18.

difficulties that come up when trying to analyse these companies, problems and difficulties that seem to be outside the purview of the current modes and procedures for market analysis.

In India, the laws governing competition have only recently been implemented. This makes it clear that there could be a lot of trials and testing in this field of law. India is a major contributor to the global market for the digitalized economy, which is still relatively young. Due to its rapid growth, this sector of the Indian economy needs ongoing checks and balances. Additionally, the likelihood of businesses engaging in anti-competitive behaviour in the digitalized economy is on par with that of the traditional or brick and mortar economies. The benchmark tests and methodologies established for the traditional economy do not hold true in the contemporary digital economy. Numerous variables, including the market's dynamism, unintended network effects, a multi-sided economy, and zero-priced goods, have contributed to this. A numerical evaluation of the market is made more difficult as a result of these elements, among others, and the scope of market assessment is significantly expanded. This presents numerous difficulties and necessitates a change in the methods and strategies employed by competition authorities around the world.

However, neither the repeal of the current laws nor any significant revisions to the laws themselves are necessary. However, the competition authorities must alter the way they handle matters involving the digitalized economy. It is advised to take a more cognitive approach in such situations. To ascertain the manner of profits for the companies being scrutinised, the focus should be turned to business models. The current threshold for notifications may also be changed. Additionally, many important components of the measures and processes performed by international competition regulators can be adapted with a few modifications and applied to the Indian markets. When the suggested adjustments are implemented, more difficulties and changes will undoubtedly be noticed. The transition to a dynamic, digitalized economy is a complex undertaking that will require modification as the economy changes in a dynamic way.

At every stage of the trend analysis, there are still difficulties and issues. All of the difficulties clearly show that business models should be the primary focus of market study in this industry. The concept of shifting the main emphasis from what serves as a replacement for the end user to all of the extrinsic components and inter - dependencies of the systems in this economy is a good one. The primary objective of the competition commission should be to examine how the

company generates profits and revenue. The parties and competitors who could steal business from the incumbents should be of particular concern to the competition authorities.²⁹

Regarding the problem of market definition, it is necessary to abandon the reasonable substitutability³⁰ strategy in situations involving the digital economy. It is recommended that the competent authorities take a far more behavioural approach when determining the relevant market.

In order to measure the impact of any actions made on a multi-sided platform on all associated markets, it is also necessary to take into account all the affected marketplaces. For instance, in addition to its other functions, Google, the search engine, also functions as an advertising organisation.³¹ Due to the associated indirect consequences, every choice that increases Google Inc.'s user base for searches is likely to grow the user base for its advertisers as well. Competition regulators should analyse all pertinent factors in situations involving companies like Google Inc. Failure to do so will probably lead to erroneous approvals or denials, which could have detrimental impacts on market competition and innovation.

Suggestions

A Schumpeterian economy is the one that exists today. The digital economy was accurately described by Schumpeter's theory of perpetual gales of inventive destruction³² decades ago. The experiences of Yahoo!, MySpace, Orkut, and Nokia clearly demonstrate that even while a company may achieve a dominant position in the digital economy, this position of such enterprises tends to be transient, and the winner of the race is typically the one who fosters the greatest competition and innovation. Although there may be a strategy outside the fundamentals of competition law to cope with the digitalized economy, less interference from the competition commission is thought to be the best method to let this economy operate as Schumpeter intended. It is obvious that there would be strong arguments against a firm's dominance in the market based on the incentives for innovation. Therefore, with the adoption of a more behaviourist perspective by the competition commission, there is less need for the competition authorities to intervene in comparable contestable markets as long as dominant

²⁹ EU – Challenges of a Digital Economy, *supra* note 45.

³⁰ Roger D. Blair & Jill Boylston Herndon, Market Definition: An Introduction, 28 J. REPRINTS ANTITRUST L. & ECON. 3, 12 (1998).

³¹ Evans & Noel, *supra* note 33.

³² Joseph A. Schumpeter, *Capitalism, Socialism And Democracy* 81 (3rd ed., 1950).

firms' methodologies do not impose obstacles on market entry of firms, do not result in a decrease in competition, and are countered by low costs of switching and multi-homing.

Although adjustments must be made in line with the characteristics of Indian Economic and Policies, a launching point for doing so can be drawing inspiration from international competition laws and acting according to what other regulatory agencies may be implementing. Trials and errors will be necessary to implement these reforms as the Indian government becomes used to them over time.

Indian policymakers can draw inspiration from the German Bundestag, which revised the Act against restraints of competition after realising the potential for a company selling zero-priced goods with small sales.³³ This amendment recognised the necessity of taking the intentions of incumbent firms when acquiring a smaller firm. As a result, a new limit for merger notification was established, requiring notification for mergers involving a purchase cost and assumed liabilities totaling well over 400 million Euros.³⁴ Collaboration with other authorities around the world to share solutions and engage in discussions will be extremely helpful in developing techniques in the evolving economic environment.

³³ Rahul Goel, *Emerging Trends in Market Power: An Update*, Competition Law: A Cyril Amarchand Mangaldas Blog (July 25, 2017).

³⁴ Bryan Cave LLP, *Significant Changes in German Competition Law*, Lexology (Aug. 16, 2017).