
TECH TITANS UNDER SCRUTINY: EVALUATING THE NEED FOR EX-ANTE REGULATION IN INDIA'S DIGITAL MARKET

Rudraaksha Sharma, Kirit P. Mehta School of Law, Navi Mumbai

ABSTRACT

Within the current legal context, there is an imperative to scrutinize major technology entities. This study conducts a thorough evaluation of the necessity for pre-emptive regulatory measures within India's digital market, given the pervasive influence of these tech titans. The swift evolution of the digital ecosystem, characterized by a limited number of dominant technology corporations, has raised concerns regarding market concentration, potential anticompetitive practices, and implications for consumer welfare. This research engages in a meticulous examination of these concerns, exploring the need for proactive, ex-ante regulatory frameworks tailored to the unique challenges posed by the digital market. The dynamics of the digital market present intricate challenges that demand a legal response attuned to its distinctive characteristics. The study delves into the multifaceted dimensions of digital competition, considering issues such as data privacy, market entry barriers, and the impact on innovation. By adopting a legal perspective, the research aims to discern the appropriateness of regulatory intervention and the formulation of ex-ante measures that can effectively address these challenges. In the context of India, a jurisdiction witnessing a surge in digital adoption and market activity, the research evaluates the existing regulatory framework and its efficacy in addressing the nuanced challenges posed by major technology players. The analysis extends beyond traditional antitrust perspectives, encompassing broader considerations of market dynamics, consumer protection, and the evolving role of technology in society. Through a nuanced examination of the evolving digital landscape, this inquiry seeks to contribute valuable insights into the deliberations surrounding the formulation of legal mechanisms. By doing so, the study aspires to provide a foundation for informed policymaking, fostering a regulatory environment that ensures fair competition, safeguards consumer interests, and promotes innovation in India's dynamic digital market.

INTRODUCTION

Ex-ante regulations, originating from the Latin term meaning "before the event," represent a proactive approach in the regulatory landscape, aiming to identify and address market issues before they occur. These regulations provide explicit directives to businesses, prescribing specific behavioural expectations and actions, in contrast to ex-post regulations that address issues retrospectively. Predominantly deployed in utility markets like electricity distribution, ex-ante obligations in utilities focus on ensuring non-discriminatory treatment, promoting interconnection, and facilitating price regulation. While these regulations offer a pre-emptive strategy, their susceptibility to regulatory biases necessitates careful oversight to strike a balance between intervention and market dynamics, ensuring fair and effective implementation. Furthermore, the repercussions of ex-ante regulations extend beyond large corporations to affect smaller Indian enterprises dependent on the products and services of larger entities, such as reliance on Google for advertising. The adverse impact may also dissuade startups from scaling up due to the additional obligations imposed upon them. Additionally, there is a lack of substantiated evidence demonstrating the efficacy of ex-ante regulations in jurisdictions where they have been implemented previously. Notably, the Internet And Mobile Association of India (IAMAI) faced criticism for opposing ex-ante regulations in its communication to the Committee on Digital Competition Law (CDCL).

India has joined the global call for ex-ante regulation, as indicated by the former chairperson of the Competition Commission of India (CCI), Ashok Kumar Gupta, who announced the establishment of a Digital Markets and Data unit within the CCI, drawing parallels with the Digital Markets Unit (DMU) in the UK's Competition and Markets Authority (CMA), although its existence is yet to be substantiated. The Standing Committee on Finance in the Indian parliament, in collaboration with the Ministry of Corporate Affairs, has issued a report addressing anti-competitive practices in digital markets, leading the Government of India to form a committee tasked with submitting a comprehensive report on the matter. The subsequent course of action is anticipated to be determined following a thorough review of the report. This subject has garnered significant attention in both mainstream media and legal spheres, with some cautioning against hastily establishing a new regulatory authority. A government report underscores the importance of approaching the creation of such an entity as a well-considered disengagement plan rather than a reactionary response to a specific situation or context, emphasizing the need for a thoughtful transition away from formulating and implementing regulations by the concerned Ministry or Department.

Surprisingly, there has been a notable absence of discourse on the subject among both current and former sectoral regulators. India boasts a diverse array of regulators overseeing various sectors, with entities like the Securities and Exchange Board of India (SEBI) and the Telecom Regulatory Authority of India (TRAI) frequently occupying the spotlight due to their involvement in price regulation and management of technical concerns. Additionally, there exists a central electricity regulator (CCEA), complemented by individual state electricity regulators. However, the efficacy of state electricity commissions has been questionable, given the persistent political volatility surrounding power-related matters. On the other hand, regulators such as the Tariff Authority of Major Ports (TAMP) and the Insurance Regulatory and Development Authority of India (IRDAI) seldom find themselves in the public eye. SEBI has garnered recent attention due to challenges faced by the Adani group, prompting reflections on the role of judicial intervention in the regulatory process, a topic that will be explored in subsequent discussions.

L.III STATEMENT OF PURPOSE

In light of the escalating discourse surrounding digital competition and potential anti-competitive practices in India's evolving digital markets, my primary objective is to undertake a comprehensive and meticulous examination of the proposed ex-ante regulations. Fuelled by the establishment of a Digital Markets and Data unit within the Competition Commission of India (CCI) and the proactive engagement of parliamentary committees and the Ministry of Corporate Affairs on anti-competitive issues in digital markets, this research aspires to offer a nuanced understanding of the regulatory landscape. Delving into the global context, particularly the Digital Markets Unit (DMU) within the UK's Competition and Markets Authority (CMA), will enable a comparative analysis to draw insights and lessons applicable to the Indian scenario. The examination will extend to scrutinizing the potential ramifications on entities of varying scales, including large corporations, smaller businesses reliant on digital giants, and burgeoning start-ups that contribute to India's vibrant digital ecosystem. Additionally, the study aims to critically evaluate the concerns raised against the proposed regulations, including their efficacy based on experiences in other jurisdictions. This research endeavours to contribute meaningfully to the ongoing dialogue in legal and regulatory circles, ensuring a well-informed and deliberative approach to the prospective implementation of ex-ante regulations in India's digital markets.

I.III RESEARCH OBJECTIVES

1. **Global Regulatory Overview:** Explore existing ex-ante regulations globally, focusing on models like the UK's Digital Markets Unit, to understand their effectiveness in addressing digital market challenges.
2. **Analysis of Indian Regulatory Framework:** Evaluate the adequacy of India's current regulatory environment, specifically within the Competition Commission of India (CCI), in addressing issues posed by digital platforms.
3. **Impact Assessment on Market Participants:** Assess potential impacts of proposed regulations on various stakeholders, including large tech corporations, smaller businesses, and startups, considering both positive and adverse effects.
4. **Legal and Ethical Implications:** Examine legal and ethical considerations associated with proposed regulations, encompassing fairness, competition, consumer protection, and privacy in the digital market.
5. **Efficacy Evaluation:** Critically evaluate the effectiveness of ex-ante regulations, drawing insights from global experiences and empirical evidence, emphasizing lessons learned and best practices.
6. **Stakeholder Perspectives Analysis:** Investigate diverse stakeholder viewpoints, including industry experts, legal professionals, policymakers, and consumer advocacy groups, to understand varied opinions on regulatory measures.
7. **Challenges Identification and Solutions:** Identify challenges in implementing ex-ante regulations in India and propose practical solutions to address these challenges.
8. **Policy Contribution:** Provide insights and recommendations contributing to informed policy-making, aligning with the goal of fostering healthy competition and innovation in India's digital markets.

I.IV RESEARCH QUESTION

What is the efficacy of implementing ex-ante regulations in India's digital market, and how do these regulations impact the competitive landscape, business environment, and overall innovation, considering global regulatory models and the unique characteristics of India's digital economy?

HISTORICAL CONTEXT

The Hon'ble Parliamentary Standing Committee of Finance initiated an inquiry into anti-competitive practices by major technology corporations on April 28, 2022. Subsequently, the committee presented the Big Tech Report on Anti-competitive Practices by Big Tech Companies in December 2022. The Big Tech Report advocated for key measures, including the introduction of a new Digital Competition Act (DCA), establishment of a specialized Digital Markets Unit (DMU) within the Competition Commission of India (CCI), and the adoption of an ex-ante framework for designated 'big tech' companies. These recommendations stemmed from the acknowledgment of the rapid dynamics of 'fast moving' markets, necessitating the evaluation of their conduct before irreversible damage occurs.

Moreover, the Big Tech Report outlined a foundational structure for ex-ante regulation. According to this framework, certain dominant market players exercising 'significant influence over competition in the digital ecosystem' would be identified as 'Systemically Important Digital Intermediaries' (SIDI). Once designated, these SIDIs would be obligated to adhere to a predefined set of responsibilities and restrictions, encompassing compliance with a mandatory code of conduct, heightened regulatory intervention, detailed disclosure requirements, among other stipulations.

India has a protracted history of regulation marked by the absence of independent regulatory authorities (IRAs). Since gaining independence in 1947, the country has witnessed extensive regulation, including the nationalization of pivotal industries and stringent controls in non-nationalized sectors. Regulatory mechanisms involved licensing for industry entry, expansion, and foreign exchange utilization. The Monopolies and Restrictive Trade Practices Act (MRTP) of 1969 aimed to curb the concentration of economic power. The initiation of India's liberalization program in the 1990s ushered in an era of IRA experimentation, resulting in the establishment of regulatory bodies like SEBI, TRAI, CERC, IRDAI, CCI, and AERA. The recent proposal for the Higher Education Commission of India indicates ongoing efforts in this direction. These regulatory agencies, strategically located outside Delhi, were conceived to be independent, providing decisions grounded in economic and technical considerations. The challenges faced by regulatory bodies, using TRAI's experiences as an example, underscore the complexities associated with policy limitations and concerns related to the delegation of sovereign functions. The establishment of the Telecom Dispute Settlement Appellate Tribunal (TDSAT) aimed to address issues of legitimacy and accountability, particularly regarding the

combination of administrative and judicial functions within these regulatory bodies. Despite regulatory interventions, such as in the telecom sector, India has experienced both growth and challenges, including license fee defaults and terminations. The limited powers of regulatory bodies, like the TRAI, have primarily focused on price and interconnection rate regulations, with activities predominantly centered on technical domains. Potential jurisdictional conflicts between regulatory bodies, exemplified by clashes between the TRAI and the CCI, serve as cautionary indicators for the establishment of an ex-ante regulator in digital markets. The inaugural establishment constituting an independent regulatory authority (IRA) within the paradigm of liberalization was the Securities and Exchange Board of India (SEBI) in 1992. Subsequently, the Telecom Regulatory Authority of India (TRAI), Telecom Dispute Settlement Appellate Tribunal (TDSAT), Central Electricity Regulatory Commission (CERC), and the Insurance Regulatory and Development Authority of India (IRDAI) were promulgated in 1997, 1998, and 1999, respectively. Further IRAs, including the Competition Commission of India (CCI) and the Airports Economic Regulatory Authority (AERA), were enacted during the 2000s, aligning with the evolving priorities of the government. Significantly, SEBI, TDSAT, and IRDA are singular regulatory agencies headquartered beyond Delhi, the nation's capital. Examining the nascent challenges confronted by these regulatory entities, the instance of TRAI offers an illustrative example. During its inception, the telecom sector encountered formidable circumstances, with telephones being perceived as a luxury and minimal government attention devoted to their development. The Department of Telecommunications (DOT) assumed dual roles as both regulator and service provider, sustaining artificially suppressed local call prices cross-subsidized by exorbitant long-distance and international call charges. Waiting periods for connections extended up to seven years. Early endeavors by the government aimed at sectoral liberalization involved the compartmentalization of service provision into entities such as Bharat Sanchar Nigam Limited (BSNL), Mahanagar Telephone Nigam Limited (MTNL), and Videsh Sanchar Nigam Limited (VSNL). Despite their transformation into corporate entities, these remained under DOT governance, yielding marginal improvements in the sector's operational landscape (Ghosh & Gupta 2023)¹.

EX ANTE REGULATION IN INDIA PERTAINING TO DIGITAL COMPETITION

Governments have exhibited a hesitancy to delegate substantial authority to Independent Regulatory Authorities (IRAs). This reluctance may stem from concerns about establishing

¹ Gaurav Somenath Ghosh & Subhashish Gupta, *Ex-ante Regulation in Digital Markets in India: Some Practical Considerations*, 2023 SSRN Electronic Journal, XXXX, <https://doi.org/10.2139/ssrn.4492393>.

regulatory institutions that diminish the authority of ministers. Alternatively, it could be a manifestation of bureaucrats aiming to safeguard their domains. Consequently, Indian regulators have not enjoyed a high degree of independence, either by deliberate institutional design or owing to their reliance on the government for financial sustenance.

In light of the extant regulations established by the Competition Commission of India (CCI), there has been a recognized necessity to assess competition within digital markets in an ex-ante manner, given the rapid expansion of digital businesses. In response, the Parliamentary Standing Committee on Finance (Standing Committee) issued its 53rd Report concerning 'Anti-competitive Practices by Big Tech Companies' in December 2022. The Report advocated for the implementation of a new legislative framework, denoted as the 'Digital Competition Act' (DCA), aimed at fostering a fair, transparent, and competitive digital ecosystem in India. The primary objectives of the proposed DCA are as follows: (a) identification of 'market winners' or 'Systemically Important Digital Intermediaries' (SIDIs) based on criteria such as revenue, market capitalization, and the number of active business and end users; (b) imposition of ex-ante obligations on SIDIs to discourage practices such as selfpreferencing, deep discounting, anti-steering, exclusive tie-ups, and bundling and tying of services; and (c) facilitation of scrutiny over potential mergers and acquisitions involving SIDIs, as well as the regulation of their internal advertising, data, and search policies.

The objective enshrined in the preamble of the Competition Act, which aims "to prevent practices having adverse effects on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India," remains pertinent and applicable, even in the context of digital markets. The fundamental framework of the Competition Act, encompassing Sections 3 (pertaining to anti-competitive agreements), Section 4² (addressing abuse of dominant position), and Section 5 (pertaining to combinations), establishes a comprehensive foundation for dealing with competition-related issues in digital markets, as identified by the Standing Committee (refer to the table below). Notably, the Competition Law Review Committee (CLRC), operating at a high level, conducted thorough consultations and reviews, concluding that the existing statutory provisions are adequate for addressing enforcement challenges in digital markets.

² Competition Act 2013, § 4

Major Findings of CLRC as per (Chopra & Verma 2023)³ are as follows:-

Issues at Hand	Remedy
Practices related to "anti-steering," wherein a platform inhibits its business users from directing consumers to offerings outside the platform, which may include options that are more cost-effective or otherwise deemed attractive alternatives.	<ul style="list-style-type: none"> - Section 4(2)(a)⁴ (Imposing unfair or discriminatory conditions or prices) - Section 4(2)(c)⁵ (Denial of market access)
Practices related to "data usage," encompassing instances where dominant platforms utilize their position to exploit consumer preference	<ul style="list-style-type: none"> - Section 4(2)(a)⁶ - Section 4(2)(c)⁷ - Section 4(2)(e)⁸
Activities related to "bundling and tying," wherein developers are compelled to procure all services exclusively from app store operators, resulting in the elimination of competition from the market.	<ul style="list-style-type: none"> - Section 4(2)(a)⁹: <ul style="list-style-type: none"> o This pertains to Section 4(2)(a) of the Competition Act, dealing with the abuse of dominant position. - Section 4(2)(d)¹⁰:

³ Chopra, N.S. and Verma, Y. (2023) Does India require ex-ante competition regulation in digital markets?, Shardul Amarchand Mangaldas & Co. Available at: <https://www.amsshardul.com/insight/does-india-require-ex-ante-competition-regulation-in-digitalmarkets/> (Accessed: 14 December 2023).

⁴ Competition Act 2013, § 4(2)(a)

⁵ Competition Act 2013, § 4(2)(c)

⁶ Competition Act 2013, § 4(2)(a)

⁷ Competition Act 2013, § 4(2)(c)

⁸ Competition Act 2013, § 4(2)(e)

⁹ Competition Act 2013, § 4(2)(a)

¹⁰ Competition Act 2013, § 4(2)(d)

	<ul style="list-style-type: none"> o This relates to Section 4(2)(d) of the Competition Act, addressing the abuse of dominant position. - Section 3(4)(a)¹¹: <ul style="list-style-type: none"> o This corresponds to Section 3(4)(a) of the Competition Act, concerning anti-competitive agreements.
<p>The practice of "self-preferencing" or "platform neutrality," denoting instances where a platform exhibits a preference for its own services or those of its subsidiaries, either directly or indirectly. This occurs particularly in situations where the platform assumes a dual role of providing the platform infrastructure and simultaneously competing on the same platform.</p>	<ul style="list-style-type: none"> - Section 4(2)(a)¹²: - <ul style="list-style-type: none"> o Refers to Section 4(2)(a) of the Competition Act, dealing with the abuse of dominant position. Section 4(2)(e)¹³: <ul style="list-style-type: none"> o Pertains to Section 4(2)(e) of the Competition Act, addressing the abuse of dominant position. Specifically, it involves using a dominant position in one relevant market to enter into or protect another relevant market. - Section 3(4)¹⁴: <ul style="list-style-type: none"> o Corresponds to Section 3(4) of the Competition Act, focusing on vertical anticompetitive agreements.

The objectives of ex-ante regulations encompass fairness, contestability, innovation, and transparency, yet their implementation presents challenges. Definitions of fairness are subject to debate, and contestability depends on contextual resources, impacting the freedom to

¹¹ Competition Act 2013, § 3(4)(a)

¹² Competition Act 2013, § 4(2)(a)

¹³ Competition Act 2013, § 4(2)(e)

¹⁴ Competition Act 2013, § 3(4)

compete. The relationship between innovation, market structure, and transparency lacks conclusive clarity. Practices to be regulated primarily focus on gatekeepers, proscribing self-preferencing, tying and bundling, Most Favoured Nation (MFN) clauses, and platform parity agreements. Three proposed regulatory structures involve empowering competition authorities, establishing a separate regulator as in the EU under the Digital Markets Act (DMA), and adopting a hybrid approach with an independent unit within the competition authority. Evaluation requires context-specific considerations.

Specific to India, concerns outlined in a market study by the Competition Commission of India (CCI 2022) on ecommerce include platform neutrality, transparency, platform-to-business contract terms, platform parity clauses, exclusive agreements, and deep discounts. While some align with global concerns, the applicability of others to antitrust issues is debated. A report by the Parliamentary Standing Committee on Finance on Anti-Competitive Practices by Big Tech companies shares similar concerns, proposing a Digital Competition Act and revamping the CCI without specifying directions.

Challenges in ex-ante regulation in India arise from differences in digital and offline market dynamics. Competition among taxi aggregators, such as Uber, Ola, and regional entrants, varies across regions, necessitating sensitivity to local conditions. While GAFAM dominates in India, their dominance manifests differently, as seen in Amazon's competition with Flipkart and a weak presence in the online grocery market.

Fairness and self-referencing are key concerns in ex-ante regulation, with accusations against Amazon for the latter. Emotive fairness issues in India, marked by socio-economic disparities, extend to healthcare. Health aggregators providing lower-cost services raise questions of regulation affecting service quality. Anticipated issues of buying out or extinguishing rivals in digital markets may be premature concerns without concrete evidence of such occurrences in Indian firms. Regulatory challenges in India include potential government interference and turf wars with the CCI, necessitating clearly defined regulatory powers. Instances where the CCI investigates firms not addressed by the ex-ante regulator may pose conflicts, emphasizing the need for delineating regulatory subjects.

LEGAL CASE LAWS¹⁵

IV.I MOHIT MANGLANI VS M/S FLIPKART INDIA PRIVATE LIMITED &

¹⁵ Gaurav Somenath Ghosh & Subhashish Gupta, *Ex-ante Regulation in Digital Markets in India: Some Practical Considerations*, 2023 SSRN Electronic Journal, XXXX, <https://doi.org/10.2139/ssrn.4492393>.

OTHERS, 2015¹⁶

In a legal proceeding implicating Flipkart, Snapdeal, Amazon, and other e-commerce platforms, Mohit Manglani assumed the role of the Informant, while Flipkart and its counterparts were designated as the Opposite Parties ("OPs").

This litigation surfaced shortly following Amazon's ingress into the Indian market. The accusations encompassed:

1. Exclusive Agreements:

- o Pertained to contractual arrangements between e-commerce platforms and vendors, particularly those conferring exclusivity for online sales.

2. Hoarding:

- o Entailed the intentional creation of artificial scarcity with the objective of generating heightened product demand.

3. Restraint of Trade:

- o Alleged the curtailment of commercial freedom, positing that consumers were ostensibly precluded from negotiating essential elements of online transactions such as pricing and delivery.

During this period, e-commerce platforms commonly engaged in exclusivity pacts with manufacturers, affording them exclusive rights for online retail of specific products. For instance, Flipkart secured an exclusive agreement with Rupa Publications for the online distribution of the literary work "Half Girlfriend" by Chetan Bhagat. The Informant proposed the definition of the relevant market at the individual product level, contending that "Half Girlfriend" constituted a distinct market, ostensibly endowing Flipkart with a virtual monopoly in the online retail of the mentioned book.

The OPs contested the allegations, underscoring the concept of substitutability in defining relevant markets. They argued against a categorical separation of online and offline sales as distinct markets, highlighting the relatively low percentage of online retail within India. The OPs asserted that exclusivity arrangements were confined to online sales, emphasizing the accessibility of the goods through physical retail outlets. The Competition Commission of India (CCI), while acknowledging the legal permissibility of exclusivity agreements, mandated

¹⁶ *Mohit Manglani v. M/S Flipkart India Private Limited & Others*, 4 CCI CK 10 (2015).

a demonstration of their Adverse Effect on Competition (AAEC). This necessitated a comprehensive assessment of factors including entry and exit barriers, exclusionary practices against competitors, harm to consumers, and other pertinent considerations.

Following a thorough examination, the CCI determined that vertical exclusivity agreements did not manifest an AAEC. Disagreeing with the Informant's proposition of market definition at the product level, the CCI did not ascertain the OPs as wielding dominance, ultimately concluding the absence of any contravention of the provisions delineated in the Competition Act.

Consequently, the legal challenge against e-commerce practices was dismissed by the CCI. However, it was underscored that the challenge lacked a nuanced legal foundation, exhibiting a deficiency in a profound comprehension of industrial organization theory or the operative business models of e-commerce platforms.

IV.II DELHI VYAPAR MAHASANGH VS FLIPKART & AMAZON, 2020¹⁷

The Delhi Vyapar Mahasangh ("DVM"), a traders' association, initiated legal proceedings against Flipkart and Amazon before the Competition Commission of India (CCI) in 2019. In this case, DVM served as the Informant, and Amazon and Flipkart, along with their respective related parties, were designated as the Opposite Parties ("OPs"). The essence of DVM's complaint bore resemblance to that of AIOVA and incorporated elements from the case of Mohit Manglani vs. M/s Flipkart India Private Limited & Others (2015).

Similar to AIOVA vs. Flipkart (2018), the focal point of the dispute was the vertical arrangement between ecommerce marketplaces and their favored sellers. This arrangement involved the OPs supplying discounted goods and inventory (in the form of private labels) to their preferred sellers for resale on the ecommerce platforms at reduced prices. DVM contended that this vertical arrangement resulted in the exclusion of third-party sellers from these marketplaces.

The contentious aspects of the vertical arrangements, as highlighted by DVM, included:

1. **Deep Discounting:** Examples includes Flipkart to Omnitech Retail and Amazon to Cloudtail India and Appario Retail.

¹⁷ *Delhi Vyapar Mahasangh v. Flipkart & Amazon*, Case No. 40/2019 (2020).

2. **Preferential Listing of Preferred Sellers:** Where the goods of preferred sellers appeared earlier in search results.
3. **Identification of Preferred Sellers:** Through labels like "Assured Seller" (Flipkart) or "fulfilled" (Amazon).
4. **Private Labels:** Routed through preferred sellers.
5. **Exclusive Agreements:** Between ecommerce marketplaces and sellers of popular goods, such as smartphones.

DVM asserted that these practices amounted to an abuse of dominance due to the collective market power of Flipkart and Amazon, asserting a joint market share of 89 percent. These practices were deemed as restraints of trade, hindering competitors from establishing their own marketplaces, and the combined market power made sales through alternative online distribution channels challenging.

While acknowledging that the Competition Act does not explicitly authorize investigations into collective or joint dominance, the CCI identified grounds for further examination into whether Amazon and Flipkart engaged in anti-competitive behavior. The key elements of the CCI's rationale included:

1. **Network Effects:**

Recognizing the substantial benefits derived by large ecommerce marketplaces from strong network effects, creating challenges for new entrants to competitively constrain incumbents.

2. **Preferred Sellers as Proxies:**

Allegations that preferred sellers, though third parties in terms of ownership, function as "proxies" of the marketplaces, being effectively locked into the ecommerce business model.

3. **Exclusive Tie-ups:**

The significance of exclusive partnerships between phone companies and ecommerce marketplaces, exemplified by the substantial number of mobile phone launches by Flipkart and Amazon in 2018.

4. **Funding of Deep Discounts:**

Especially in conjunction with exclusive tie-ups, warranting further investigation, given instances where online phone launch prices were markedly lower than offline prices.

5. Preferential Listing Concerns:

Alongside deep discounts and exclusive tie-ups, warranting additional scrutiny on grounds of restraint of trade.

Additional information on the case is not publicly available, presumably indicating its ongoing investigative status. While anticompetitive concerns were akin to those raised in prior cases, the allowance for this case to proceed suggests a shift in the CCI's perspective regarding the operations and impacts of ecommerce marketplaces. Noteworthy is the inclusion of network effects, a facet absent in earlier judgments.

IV.III TOGETHER WE FIGHT SOCIETY VS APPLE INC. & APPLE DISTRIBUTION INTERNATIONAL LIMITED (2021)¹⁸

The accusations in this case closely resemble those made against Google in XYZ (Confidential) vs Google LLC & 4 more OPs (2022) and Apple in Epic Games, Inc., vs Apple, Inc. (2023).

The key allegations include:

1. App store review guidelines: The accused parties present these guidelines to app developers as nonnegotiable contracts, applying them arbitrarily and in a discriminatory manner.
2. Tying payments with App store access: Apple, the accused, mandates that all payments within its App store, including app purchases and in-app content, must be processed exclusively through its payment processor, In-App Purchase (“IAP”).
3. High commissions: Purchases made through IAP typically attract a 30 percent commission, potentially reduced to 15 percent in certain cases.
4. Anti-steering: Apple utilizes anti-steering provisions to prevent app developers from directing customers to payment processing options beyond Apple's control.

In response, Apple argues that it lacks dominance in the relevant market (smartphones), holding a 0-5 percent market share in India. It justifies its business model of providing an integrated hardware and software ecosystem within a walled garden, asserting that the operation of the App store aligns with its obligations. Apple defends its commission structure,

¹⁸ Gaurav Somenath Ghosh & Subhashish Gupta, *Ex-ante Regulation in Digital Markets in India: Some Practical Considerations*, 2023 SSRN Electronic Journal, XXXX, <https://doi.org/10.2139/ssrn.4492393>.

claiming its necessity for maintaining the walled garden and highlighting that most developers pay no commission or a reduced 15 percent. Apple also points to the Epic Games, Inc., vs Apple, Inc., (2023) case, decided in its favor, except for the anti-steering clause.

In its initial analysis, the Competition Commission of India (CCI) defines the relevant market as the app stores for iOS in India, rejecting Apple's assertion that it should be all smartphones. The CCI argues that iOS app developers have no viable alternatives, establishing a monopoly for Apple in the app store market for iOS in India. The CCI identifies prima facie evidence of anticompetitive behavior, particularly in anti-steering provisions and tying App store access to IAP. The lack of competitive alternatives in app distribution is deemed to impact negotiations between Apple and app developers. Additionally, exceptions for certain app categories raise concerns about discriminatory behavior.

Overall, the CCI finds sufficient prima facie evidence of anticompetitive conduct by Apple, prompting further investigation, which is currently ongoing according to the public record.

FINAL WORDS & CONCLUSION

In culmination, the research endeavors to holistically examine the imperative subject matter encapsulated in the research paper titled "Tech Titans under Scrutiny: Evaluating the Need for Ex-Ante Regulation in India's Digital Market." The comprehensive exploration traversed a multifaceted terrain, scrutinizing the evolving landscape of India's digital market through the lens of burgeoning technological behemoths. The research discerns an emergent trend wherein regulatory mechanisms, particularly ex-ante regulations, have become a focal point of deliberation. The discernment emanates from a backdrop where the dynamic nature of digital markets necessitates a proactive regulatory paradigm to preclude potential detriments to competition and innovation. This is exemplified by the deliberations and initiatives spearheaded by entities such as the Competition Commission of India (CCI), notably the formation of a Digital Markets and Data unit mirroring the UK's Digital Markets Unit (DMU).

A pivotal facet of the research inquiry involves a meticulous examination of the historical trajectory of regulatory frameworks in India, tracing the evolution from a highly regulated post-independence economy to the advent of Independent Regulatory Authorities (IRAs) in the wake of the 1990s liberalization wave. This historical context underscores the significance of adapting regulatory frameworks to the evolving contours of the digital sphere. The research delves into the recent endeavors of the Hon'ble Parliamentary Standing Committee of Finance, the Ministry of Corporate Affairs, and the Government of India, as manifested in the insightful

report on anticompetitive practices in digital markets. The recommendations articulated in the report, namely the proposal for a Digital Competition Act (DCA) and the establishment of a specialized Digital Markets Unit within the CCI, epitomize a discernible trajectory toward envisaging a regulatory framework aligned with contemporary challenges.

Strikingly, the research discerns a conspicuous reticence among sectoral regulators, both former and present, indicating the nuanced and complex interplay between regulatory bodies operating in diverse sectors within the Indian landscape. This highlights the imperative need for cohesive and collaborative efforts among regulatory entities to address the cross-cutting challenges posed by digital markets.

The research meticulously navigates the labyrinthine facets of ex-ante regulations, elucidating their overarching objectives of ensuring fairness, contestability, innovation, and transparency. Notwithstanding the inherent complexities associated with these ideals, the research underscores the palpable need to address practices deemed deleterious, with a particular emphasis on gatekeepers engaging in self-preferencing, tying and bundling, and Most Favoured Nation (MFN) clauses.

In tandem with these explorations, the research astutely assimilates the global discourse on ex-ante regulations, drawing insightful parallels with international counterparts such as the European Union's Digital Markets Act (DMA) and the regulatory landscape in the United Kingdom. This comparative analysis facilitates a nuanced understanding of the regulatory structures, thereby informing potential frameworks for the Indian context. A salient dimension of the research pertains to the regulatory challenges posed by the intricate nature of digital markets, encapsulating the divergent competition scenarios encountered by entities like Uber in various global jurisdictions. The significance of tailoring regulatory approaches to the idiosyncrasies of the Indian digital market is underscored, emphasizing the need for sensitivity to local conditions and the diversity inherent in the Indian economic landscape.

In the context of ongoing debates surrounding fairness and self-referencing, exemplified by the Amazon case, the research invokes pertinent concerns about regulatory intervention potentially encroaching into realms fraught with fractious issues, particularly in domains like health services. This accentuates the imperativeness of clearly demarcating the subject matter within the purview of regulation to preclude inadvertent forays into contentious territories.

The research, with discerning acuity, navigates the labyrinthine complexities surrounding anticompetitive behaviour in digital markets, echoing concerns regarding the acquisition and

potential extinguishment of nascent competitors. The cautious disposition toward pre-emptive worries about such occurrences in the Indian context signifies a measured approach, emphasizing the need for empirical substantiation in regulatory endeavours.

A panoramic gaze into the realm of Indian regulatory bodies reveals a susceptibility to interference and potential turf wars, a poignant issue compelling the delineation of well-defined powers for regulators to avert government interference and minimize conflicts with established entities such as the CCI. In a pivotal alignment with contemporary developments, the research provides an insightful exposition of the antitrust implications involving Apple and its App store practices. The research dissects the intricate allegations of app store review guidelines, tying payments, high commissions, and anti-steering, juxtaposing Apple's defenses. The nuanced analysis by the Competition Commission of India (CCI), rejecting Apple's market definition and identifying prima facie evidence of anticompetitive behavior, epitomizes a tangible manifestation of the regulatory dynamics in the digital realm.

In summation, the research cogently argues for a calibrated and responsive regulatory framework tailored to the nuances of India's digital markets. It champions the cause of ex-ante regulations as a prophylactic measure against potential distortions, safeguarding competition, innovation, and fairness. The research underscores the imperative for collaborative regulatory endeavors, meticulous delineation of regulatory domains, and empirical substantiation of concerns to engender a regulatory paradigm befitting the exigencies of India's digital landscape.

BIBLIOGRAPHY & REFERENCES

1. Gaurav Somenath Ghosh & Subhashish Gupta, *Ex-ante Regulation in Digital Markets in India: Some Practical Considerations*, 2023 SSRN Electronic Journal, XXXX, <https://doi.org/10.2139/ssrn.4492393>.
2. Chopra, N.S. and Verma, Y. (2023) *Does India require ex-ante competition regulation in digital markets?*, *Shardul Amarchand Mangaldas & Co.* Available at: <https://www.amsshardul.com/insight/doesindia-require-ex-ante-competition-regulation-in-digital-markets/> (Accessed: 14 December 2023).
3. *Mohit Manglani v. M/S Flipkart India Private Limited & Others*, 4 CCI CK 10 (2015).
4. *Delhi Vyapar Mahasangh v. Flipkart & Amazon*, Case No. 40/2019 (2020).
5. Competition Act 2013, § 4
6. Competition Act 2013, § 4(2)(a)
7. Competition Act 2013, § 4(2)(c)
8. Competition Act 2013, § 4(2)(e)
9. Competition Act 2013, § 4(2)(d)
10. Competition Act 2013, § 3(4)