

PLATFORM MARKETS: THE ANTITRUST CHALLENGE IN INDIA



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Universality of antitrust abuse is discernable in decisions of Competition Commission of India “abuse of dominance” of Google and global giants of platform markets. The decisions leave me with a sense of unease. Diversity of an economy and more important of consumers and consumption patterns are lost if reliance is placed on decisions of European Commission or of FTC/ DOJ. This note explores if behavioral economics of Indian consumers and consumer centric innovations visible in the splurge in apps and smart phones the digital mobile system in India. A different perspective of competition in digital markets emerge.

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I. INTRODUCTION

The fundamental question for any competition authority in its assessment of a market is: “What to regulate”? To address this question, the law identifies possible abuses in which an enterprise or firm could potentially engage. Any follow-up action is then defined by how and when to regulate. The economics of defining and measuring the market power of dominant enterprises are well-honed and tested in mature competition regimes such as the U.S. and Europe. Competition agencies in new market regimes lean heavily on the structure of these laws and the decisions of these two jurisdictions. In India, the bias tends to be more European. Case references and arguments used by lawyers before the Competition Commission of India (“CCI”) typically refer to decisions of the EU Commission with occasional reference to the U.S. FTC/DOJ. Interestingly several of the cases filed with the CCI were replicas of cases filed in the EU, albeit with an Indian flavor, a trend that is growing in digital markets.

Several cases recently analyzed by the CCI, concerning Google, Amazon, Flipkart, and Facebook, reflect concerns identified in Europe. As global giants, the normal expectation is that allegations of anti-competitive abuse against these companies would be similar worldwide. My unease with the universality of these antitrust abuses is that the diversity of economic systems, and, more importantly, the diversity of consumers and consumption patterns, risk being painted with an overly broad brush. This unease, which began with the first CCI Order in the Google case in 2017, continues to apply in relation to current competition issues in platform markets.² The Indian way of doing business, and the behavior of Indian consumers need individualized analysis, in the form of market studies relating to business practices and consumption patterns. The diversity of customs, habits, income distribution, and consumption patterns remain unaddressed by CCI in assessing competition.

Platform markets are inherently consumer-centric in their approach to attracting business.³ The economics of competition in traditional markets were not necessarily consumer-centric. In platform markets, antitrust assessment remains inadequate and incomplete. This short note is an initial exploration of my unease with antitrust analysis in ignoring the behavioral economics of Indian consumers and emergent innovations that propel the Indian mobile ecosystem. A broad, homogenous definition of “consumer,” without reference to innovations in the next layer of the e-commerce markets for certain goods and services (e.g. the numerous mobile apps in the mobile ecosystem in India) is a perspective on competitive constraints, on access to data and on market responses that mainstream antitrust literature has ignored.

II. PRODUCT MARKET DEFINITION AND PLATFORMS

David Evans, as a moderator of a Competition Policy International discussion on APAC, posed the following question to me: “Are there general principles that you think regulators, everywhere,

should apply when devising policies towards the digital economy?” The question clearly concerns antitrust abuses in traditional markets as opposed to platform markets, but it also raises the question of the homogeneity of the concepts underlying antitrust abuses in the two types of markets. Indeed, the distinction in terms of the structure of markets and of socio-cultural diversities between countries is brought into sharper focus in platform markets.⁴

A product market which consists of buyers (consumers) and sellers (producers, enterprises, firms) forms the basic underlying structure of any competition law analysis. Differences in market structures can raise issues in defining competition and in the dynamics of firms restraining each other from exerting market power. In a traditional product market, a number of firms are characteristic of competitive markets. In markets dominated by a single firm or enterprise, competitive constraints arise either from firms within the market (even if limited in number), or from the threat of entry. Antitrust economists value “effective competition,” and deem intervention by competition authorities necessary only if there is harm to consumers. Attention does not focus on the mere number of firms in a market, but rather the presence of effective competitive constraints, assessed in terms of consumer harm. The notion of a “consumer,” however, remains undefined, as does the notion of harm to consumers. It bears repeating that the basic goal of antitrust law is to benefit consumers.

Defining the “consumer” is much more difficult in the case of platform markets. Platform markets are, almost by definition, two-sided. As an aggregator of markets, all actions by platforms are defined in terms of generating network effects. Platforms negotiate this equation from the perspective of consumers. To marketing strategists, this may seem a trivial distinction. To a competition regulator, however, customer-centric innovation within the multiple layers of digital ecosystems is crucial. Spaces are created by platforms, where interfaces between markets create depth (net-

2 Case No 7 and 30 of 2017, Matrimony.com and Consumer Unity Trust of India, Competition Commission of India, New Delhi.

3 Competition Commission of India., MARKET STUDY ON E-COMMERCE IN INDIA Key Findings and Observations August 1, 2020, Geeta Gouri & M. Salinger, “Protecting Competition v/s Protecting Competitor: Assessing the Antitrust Complaints against Google,” co-authored with M. Salinger, The Criterion Journal of Innovation, Vol 2, 2017, p 531-558, also at <http://ssrn.com/abstract=2787343>.

4 *Ibid.*

work effects) and attract consumers. Digital markets are shaped by technology and consumer centric innovation.

The digital ecosystem has two layers. First, there has been the explosion of apps and smartphones in the mobile ecosystem in India. Second, there is the diversity of consumers, their preferences and choices, as captured in these apps. A nuanced approach to platform markets would stand in contrast to a homogenous concept of abuse. The mobile app system factored in competition analysis of global platforms in digital markets perhaps reveal perspectives hitherto unexplored.

III. MOBILE ECOSYSTEM – THE MOBILE APP SYSTEM

The amazing growth in the use of the internet on inexpensive smartphones in India is remarkable. There are 775 million users of such devices, and maybe more, as each could well have multi-users. Perhaps COVID-19 gave a push to the usage of these devices, given the country-wide lockdown. Apps are often multilingual, and are used for almost all consumer needs, including purchases of groceries, health advice, and education. The diversity of apps has seen growing usage in both rural and urban areas. As competition heats up, different business models are discernible. This takes the form both of the entry of global players such as Amazon, Uber, Airbnb, Coursera, Foodpanda, OLX, and PayU, and the emergence of new local players. These start-ups will continue to evolve. M&A activity is growing, as exemplified by moves such as Flipkart's acquisition of Myntra, and the merger between Amazon and Flipkart. Google and Amazon are also investing in Reliance Jio, a new platform market. The Mobile App ecosystem is an innovative arena in India.

How is this business model to be viewed through the lens of competition? Most Indian app developers prefer Google's Android and its Play store. A key element relates to the cost of operating systems. Android can be used on inexpensive phones, and not just Apple iPhones, as in the case iOS. This clearly indicates that Indian consumers are motivated by cost. Further, cases filed with the CCI are invariably made by the competitors of successful rivals, even in the ecommerce domain.

IV. ASSESSMENT AND EVIDENCE

The Competition Act, 2002 defines a "consumer" as:

"any person who—

- a. buys any goods for a consideration which has been paid or promised or partly paid and partly promised

- b. hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised

"Goods" means goods as defined in the Sale of Goods Act, 1930 (8 of 1930) and includes—

- A. products manufactured, processed or mined;
- B. debentures, stocks and shares after allotment;
- C. in relation to goods supplied, distributed or controlled in India, goods imported into India;

"Service" means service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement.

These are broad definitions which allow considerable discretion to CCI in defining consumers, products, goods or services. The definition of the relevant market strengthens this flexibility

- r) "relevant market" means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets;
- s) "relevant geographic market" means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services, are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas;
- t) "relevant product market" means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use;

The first Indian case on platform markets⁵ related to the Google Search Engine (Cases No. 07 and 30 of 2012, Order dated: August 2, 2018) filed by Matrimony.com and Consumer Unity & Trusts Society CUTS. Matrimony.com is an internet based matrimonial site and in the ranking of sites affects advertisers and consumers. CUTS is a non-profit organization "working on

5 Op. cit, The MCX-SX-NSE case No, CASE NO. 13/2009 Information filed on 16.11.2009 In continuation of order dated 25.05.2011 Date of order under section 27 of the Competition Act, 2002: 23.6.2011 Informant: MCX Stock Exchange Ltd v. 1. National Stock Exchange of India Ltd. 2. DotEx International Ltd. had the beginnings of a platform market.

public interest including those related to *consumer interests and protections*” (Order).

The Order (190 pages long), passed by a majority of five members with a dissent from two. The dissent raises several unaddressed issues that raise questions under the Competition Act. The Order defines two relevant markets – the market for general web search and the market for online advertisements. In both markets, the definition of “consumer” as per Section 2(t) is not taken into account. As stated above, that Section refers to consumers’ preferences for products or services that are interchangeable as setting the boundaries of the relevant market. To date, none of these cases define the relevant market with respect to Section 2(r).

The central allegation in the Google Search Engine case revolved around the ranking of “verticals” and websites influencing consumer choice.⁶ The Order relied on “heat map” tests and expected “eyeballs” and clicks to establish an abuse, in a manner similar to the equivalent EU case. The dissent Order did not find sufficient evidence of Google supposedly favoring a few travel firms to accept the allegation of anti-competitive behavior in terms of creating entry barriers.⁷ Google’s ranking of web sites (in this case travel firms) did not translate into substantive business for these firms. The “heat map” or “eyeballs” only on ranked verticals is of little consequence to the Indian consumer, whose only consideration is the cost of tickets and finding cheap flights. Indian surfers typically go to each site in order to find the cheapest product, in this case flight tickets.

In a two-sided platform market, consumer preferences are presumably captured through data analysis where there is easy access to consumer data. As a search engine, data analysis of Google India is similar to any data-based business experimenting with data and profiles of consumers and their preferences. Large global companies are known to fail despite the resources to experiment that smaller companies arguably do not have. Large amounts of data often lead to white noise. Successful companies often proceed on hunches perhaps backed only by limited consumer surveys.

Reluctance of global giants to share data cited as a major entry barrier maybe overstated. Apps and mobile ecosystem instead, suggest entrepreneurial alertness (CCI, 2020)⁸

Discriminatory pricing or discriminatory treatment has long been a common antitrust allegation. In platform markets, cases on discriminatory practices reference is to allegations of exclusive agreements and unfair agreements of sellers with platforms. The allegation in the *Google Search Engine* case concerned discrimination in the ranking of verticals. Arguments on discriminatory policies by big platform market firms are common (Case No. 80 of 2014, Case No. 22 of 2017, Case No 20 of 2018, etc.).

In an early case (No. 80 of 2014)⁹ the allegation against Flipkart and Amazon was of engaging in anticompetitive practices in the nature of “exclusive agreements” with sellers of goods/services. The argument was that neither the consumer had a choice on the price she could pay, nor had the sellers on the platforms any choice to opt out of the terms and conditions dictated by global platforms, and that this was clearly anti-competitive. The agreements in this case fall under Section 3(4) on vertical restraints. The Commission, on examining the factors listed under Section 19(3), found no evidence that the exclusive agreements resulted in an AAEC or in creating entry barriers. The Order states:

“It seems very unlikely that an exclusive arrangement between a manufacturer and an e-portal will create any entry barrier as most of the products which are illustrated in the information to be sold through exclusive e-partners (OPs) face competitive constraints.”

In *All India Vendors Association v. Flipkart* (Case No. 20 of 2018) the allegation was on discriminatory pricing. The complaint was based on a newspaper article (Economic Times, 07.04.2018) that small vendors prefer selling to Flipkart and Amazon on favorable discount rates rather than directly to consumers on online marketplace sites found no favor with CCI observing: *“Recognizing the growth potential as well as the efficiencies and consumer benefits that such markets can provide, the Commission is of the considered opinion that any intervention in such markets needs to be carefully crafted lest it stifles innovation.”*

The Order was not acceptable to the traders and a fresh case on similar lines has been filed.

6 *Ibid.*

7 Convergence of competition policy, competition law and public interest in India, Russian Journal of Economics 6 (2020) 277–293 DOI 10.32609/j.ruje.6.51303 Publication date: September 25, 2020 <https://rujec.org/issue/1830/>. Geeta Gouri & Kalyani Pandya (2020): The Indian competition law experience—its history and its (digital) future, Indian Law Review, DOI: 10.1080/24730580.2020.1843316.

8 The importance of data that large platforms have access to data has not restricted the surge in apps in the Mobile ecosystem. These apps, seeks to capture the “felt needs” of consumers by sensing an opportunity. For example, COVID-19 led to an increase in apps in the health sector. The Biotechnology Industry Research Assistance Council noted that out of 1,500 proposals 1200 and odd start-up apps emerged in one year (2020) (Economic Times, Sunday Magazine January 17-23, 2021). Apps use the platform markets of Amazon and Flipkart prompting a study by CCI on e-commerce and apps in India. Consumer centric innovations of the mobile ecosystem is discernible in these apps.

9 Case No. 80 of 2014 Mr. Mohit Manglani and Flipkart, Amazon et al.

Following the Google Search Engine Order, the CCI has taken a broad view of platform markets and their benefits to consumers. These decisions however pertain to agreements and arrangements (Section 3) and not on “abuse of dominance” (Section 4). A recent complaint against Android along the lines filed in EU and by two former interns of the CCI marks a return to antitrust on dominance.¹⁰ The allegation is that Android OS and Play Store dominate the mobile ecosystem restricting the use of Android to either smart phones or smart TV and not to both.¹¹ Android an open-source mobile OS is a licensed OS. Smart phone manufacturers use Android in combination with Google Mobile Services (“GMS”) which is a collection of Google applications and Application Programming Interfaces (“APIs”) necessary for interoperability and compatibility across devices. The informant has only extended the Google Search market definition from two to four markets. Restrictions on the use of Androids or the use of alternate versions of Android (Android forks) is a perspective of restrictions on competition from startups and app developers.

While awaiting the investigation and detailed report from CCI the initial response in the *prima facie* order that Google has “reduced the ability and incentive of device manufacturers to develop and sell devices thereby limiting scientific development relating to goods or services to the prejudice of consumers” voice concerns for development of new algorithms that are data driven dependent upon queries from users. Sensitivity to consumer centric innovation of mobile ecosystem with the imperatives of knowledge-based innovations for digital India require not only understanding platform markets but of the market of licensing of patents and software. The several agreements that Google is insistent to club them as antitrust abuse of a dominant enterprise is to ignore the market for patents and of cluster of patents (Standard Essential Patents SEP).

The *prima facie* Order remains bound by the underlying product market conceptualization of the Competition Act:

The Commission is of the prima facie opinion that mandatory preinstallation of entire GMS suite under MADA amounts to imposition of unfair condition on the device manufacturers and thereby in contravention of Section 4(2)(a)(i) of the Act.

¹⁰ *Ibid.*

¹¹ Umar Javeed & Others AND Google LLC & Others bearing Case No. 39 of 2018 (Google Android Order) As per newspaper reports, by Aditi Shah, Aditya Kalram, Exclusive: Google faces new antitrust case in India over abuse in smart TVs market, Reuters, Oct. 7, 2020.

¹² Case No. 07 of 2020 In Re: XYZ Informant And 1. Alphabet Inc. Opposite Party No. 1 2. Google LLC, Opposite Party No. 2 3. Google Ireland Limited et al.

- Competition Law and Competition Policy in India: How the Competition Commission Has Dealt with Anticompetitive Restraints by Government Entities, with Aditya Bhattacharjee & Oindrilla De, *Review of Industrial Organization*, June 2018 online released.
- “Protecting Competition v/s Protecting Competitor: Assessing the Antitrust Complaints against Google,” co-authored with M. Salinger, *The Criterion Journal of Innovation*, Vol 2, 2017, p 531-558, also at <http://ssrn.com/abstract=2787343>.

It also amounts to prima facie leveraging of Google’s dominance in Play Store to protect the relevant markets such as on-line general search in contravention of Section 4(2)(e) of the Act. Mobile search has emerged as a key gateway for users to access information and Android is a key distribution channel for mobile search engines. Search engines exhibit data-driven scale effects. Improvements in search algorithm require sufficient volume of data, which, in turn, needs sufficient volume of queries from users who are increasingly resorting to mobile search. Thus, the impugned conduct of Google may help perpetuate its dominance in the online search market while resulting in denial of market access for competing search apps in contravention of Section 4(2)(c) of the Act.

A fallback from the first decision on the Google Search Engine is noticeable, and attributable to the development of new algorithms that are data driven and dependent upon queries from users.

Software development for internet usage, and SaaS provision for web sites have to meet international standards, by way of clearances from Standard Setting Organizations. Algorithms are data driven. Firms involved in software development license their products as cluster of patents (Standard Essential Patents) that ensure interoperability and compatibility. CCI’s decisions on Android and the GMS licenses will have to be consistent on its interventions in cases against Ericsson and Qualcomm. Underlying these responses to licensing conditions of SEP firms and a detailed empirical validation of consumer profiles and of consumer harm are critical inputs.

Yet another case on the dominance of Google on the radar of CCI relates to its promotion of its Google Pay app.¹² These are cases filed by startup Fintech Apps, potential contenders to competition in the App scenario that is attracting foreign investors. The domain regulatory for Fintech Apps is the Reserve Bank of India.

V. OBSERVATIONS

The question posed earlier was as follows: Are there general principles that regulators, everywhere, should apply when devising

policies towards the digital economy? My observations in response, based on the above analysis, are the following:

1. There are some general principles that regulators need to follow in regulating the digital market and perhaps more marked than in the case of the traditional product market.
2. My experience as a regulator, and from the few cases of platform markets selected, suggests the following general principles when the CCI decides on the merits of allegations of anti-competitive conduct in the digital economy:

- a. Markets have their own logic and a regulator cannot play god – often a tempting role – especially with the revival of looking at operating systems and platforms as “essential facilities” or as natural monopolies on account of high capex. Digital protectionism for regulators is tempting and lurks high.

- b. Distinctions in market structure of product market and platform markets are the realities of large players who own spectrum spaces of hosting platforms as against markets on these platforms

- c. Digital markets are shaped by technology and innovation – it is important for a market regulator to appreciate the innovativeness with the long chain of digital market system that consists of platform markets, data markets and market for ideas. And of innovations within sub-markets.

- d. Consumer choices must be respected – which requires identification of the consumer – and related principles of welfare maximization and consequent clouding of protecting competition with protecting competitors.

Differences arise in these general principles in the implementation of competition law. The divergent approaches between two mature competition authorities (DOJ and EU) does raise discomfort in the universality of general principles.

4. The importance of consumer profiles for selling products and services on ecommerce defines the success of the platform. In this framework is it possible to build a uniform consumer profile group for a country as large and diverse as India? Are consumers one uniform group?

5. The ability to build consumer profiles by large platforms or by small apps are evenly shared. The mobile ecosystem functions on the quickness to capture changing habits and trends within the country. The splurge of apps on mobile

phones stand testimony to this capacity. The risk is higher in the case of large platforms.

6. Suggested structural remedies of data portability or data sharing, as appropriate, for reining in large global players may only be a muted intervention given the diversity of the Indian mobile ecosystem.

7. Discriminatory practices or preferential treatment as regards some sellers of access to data, or of sharing data, warrant intervention if market players create entry barriers. ■

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