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# FUTURE OF COMPETITION POLICY IN DIGITAL MARKETS

»»» Event Report

# Future Of Competition Policy In Digital Markets

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**Suggested Citation**

Suggested Citation: Malik, S., & Agarwal, B. (2023). Future of Competition Policy in Digital Markets. The Dialogue™

**Catalogue No.**

TD/CDM/ER/0323/01

**Publication Date**

March 21, 2023

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## EVENT REPORT: FUTURE OF COMPETITION POLICY IN DIGITAL MARKETS

Aiming to add to the ongoing discourse on policy and regulatory approaches to addressing competition issues in digital markets, The Dialogue hosted a virtual roundtable discussion titled, 'Future of Competition Policy in Digital Markets' on March 10, 2023.

The roundtable opened with a panel discussion featuring **Dr. Amar Patnaik**, Member of Parliament, Rajya Sabha, **Dr. Aurelien Portuese**, Director of The Schumpeter Project on Competition Policy, and **Ms. Shruti Aji Murali**, Counsel at Axiom5 Law Chambers, as speakers, and **Dr. Frédéric Jenny**, Chairman of the OECD Competition Committee as the moderator.

The latter half of the roundtable consisted of an interaction between the panelists and the participants. The session was attended by a diverse group of stakeholders including industry bodies, civil society, academicians, and government bodies. More than 80 people participated in the discussion.

A few clear recommendations emerged from the discussions. These recommendations are likely to benefit policy makers, including the CDCL, which is currently tasked with evaluating Indian digital markets and charting out the future of regulatory and policy interventions in the space.

### KEY RECOMMENDATIONS

- Proposed competition frameworks, including ex-ante regimes, should focus on achieving a balance between the interests of consumers, innovators and small players in the markets.
- Any ex-ante framework introduced should align with existing competition frameworks and seek to complement them, rather than contradicting or complicating them. Further, to prevent regulatory arbitrage and potential litigation, regulations related to digital platforms in India should be harmonized.
- Revamping the CCI to make it more effective in enforcing current competition laws in digital markets, should equally serve the objectives sought to be achieved through ex-ante frameworks. A new unit could be established within the CCI to regulate the digital market effectively without hindering the fast-paced growth of Indian startups.
- Engaging with companies through participatory antitrust measures should be prioritized. Companies should be actively involved in the implementation of antitrust measures such as settlements or consent decrees to ensure compliance and effectiveness.
- Ex-ante regulations may have unintended negative consequences, especially in India's booming startup ecosystem. These regulations could potentially hinder foreign investment and stifle innovation. Therefore, regulations, if any, should encourage competitiveness and foreign investment.
- Instead of borrowing from the DMA, a careful study of different kinds of ex-ante frameworks existing in different jurisdictions should be undertaken and the model best suited to Indian markets should be adopted.

### DISCUSSION POINTS

The speakers and participants weighed-in on the context and implications of the recommendations of India's Parliamentary Standing Committee on Finance which suggested an ex-ante framework for regulating the conduct of what it termed "systematically important digital intermediaries".

The discussions also extended to general concerns around the suitability of ex-ante regimes for addressing competition issues in Indian markets, the regulatory design choices that exist before the Committee on Digital Competition Law (CDCL), and the lessons India can learn from the experiences of other countries. Kindly note that the views summarized in this report are personal and do not represent views of the speakers' organization or of The Dialogue.

## **I. NEED FOR AN EX-ANTE FRAMEWORK**

Dr. Jenny kicked off the discussion, by asking Dr. Amar Patnaik to share his views on why the Parliamentary Standing Committee on Finance, of which Dr. Patnaik was a member, chose to recommend ex-ante regulatory measures. Dr. Patnaik emphasized that the objective of the Committee's recommendations was not to target dominance in and as of itself, but rather target abuse of dominant position by companies.

Dr. Patnaik also highlighted that while the Competition (Amendment) Bill 2022 (the Bill), which was designed keeping in mind the intricacies of digital markets, is already in the process of being introduced, the proposed ex-ante regulations are intended to go beyond this Bill to ensure abuse of dominance does not occur. Stressing on the fact that a cut and paste solution from other jurisdictions should not be adopted, Dr. Patnaik added that regulations would need to consider the unique context of India's economy and protect the interest of small sellers.

However, some of the panelists expressed concern over the idea of introducing an ex-ante framework in India. Dr. Portuese noted that while such regulations have been proposed in Europe under the guise of digital sovereignty, the situation in India is more complex as there is not a track record of systemic anti-competitive abuse to justify ex-ante regulations. He suggested that more enforcement experience is needed before such regulations can be put in place. Dr. Portuese also expressed skepticism about the success of ex-ante regulations as the regulations could lead to protracted litigation, which could undermine their effectiveness. Further, Dr. Jenny suggested engaging with companies in participatory antitrust measures, for instance, settlements or consent decrees might be a better alternative for quick intervention in the market to address anti-competitive behavior. Dr. Portuese also suggested that instead of relying on new and untested regulations, a revamp of the Competition Commission of India ('CCI') and strengthening the enforcement of current competition laws could be more effective in achieving the Commission's objectives.

## **II. COMPLEMENTARITY BETWEEN AN EX-ANTE FRAMEWORK AND THE EXTANT COMPETITION LAW**

Taking note of the proposed amendments to the Competition Act, Dr. Jenny sought Ms. Murali's views about the sufficiency of the proposed amendments and how an ex-ante framework would complement the amended law. Highlighting the need for ensuring harmony between the existing and proposed competition statute and an ex-ante framework, Ms. Murali, noted that the Bill aims to enhance the powers and procedures of the CCI to address market failures more efficiently.

Elaborating further, she explained that the Bill introduces provisions on settlement and commitment procedures and the deal value threshold, an ex-ante framework would allow the CCI to intervene in individual markets in a preventative manner to address problems before they arise. The digital market has been a focus for the CCI, and any new framework will need to work in lockstep with the existing law and the anticipated amendments, in order to ensure a consistent framework for the digital economy. She added that a possible way to do this would be to integrate the new regulations into the current framework without creating a completely new and potentially conflicting system.

Reflecting on the observations, Dr. Jenny pointed to the existing lack of clarity in this aspect in the EU. The

complementarity between the Digital Markets Act ('DMA') and competition law has been a topic of debate in Europe as the DMA has a different purpose but also prohibits practices that are prohibited under the extant competition law framework. Therefore, it's unclear if the DMA will complement or substitute competition law.

### **III. EFFECT OF EX-ANTE REGULATIONS ON THE STARTUP ECOSYSTEM AND ECONOMIC GROWTH**

Dr. Jenny invited the panel to share their views on the potential effects of an ex-ante instruments on investment and innovation by the startup ecosystem. Dr. Patnaik pointed out the objective behind introducing an ex-ante regulation i.e., to have a fine balance between protecting the consumer and fostering innovation while ensuring protection for small businesses. The panelists concurred that the context of India's booming startup ecosystem has to be considered when creating legislation, otherwise, over-regulation or upfront compliance costs could harm the startup ecosystem.

Dr. Patnaik also highlighted the importance of facilitating access to data for startups, in order to enable them to build network effects and grow in scale. Ms. Murali intervened to appreciate recent efforts by the government and the CCI to conduct extensive stakeholder consultations, giving due weightage to start-up viewpoints, and ensuring that start-ups are not overburdened by regulations. Dr. Portuese discussed the potential adverse impacts of an ex-ante regulation, especially in India, which, in the current geopolitical scenario, has a massive opportunity to attract foreign investment and grow its startup economy, as countries are choosing to diversify their trade and investment relationships beyond China.

Panelists also stressed upon the importance of enabling digital products and services to scale-up through easy access to capital. Referring to the example of proposed e-commerce regulations, which sought to protect small businesses by preventing corporations from undertaking pro-consumer measures such as offering discounts, the panelists noted that if upcoming competition reforms in India pursue protectionist objectives, it could hinder both foreign investments and Indian consumers' interests. Dr. Portuese noted that market tipping is a natural consequence of innovation and an ex-ante framework aimed towards preventing market tipping could deter innovative efforts and entrepreneurial rewards that create new markets. He highlighted the importance of balancing the need for competition with the need for competitiveness and foreign investment to incentivize innovation and enable Indian startups to succeed.

### **IV. CAPACITY BUILDING OF THE CCI**

In response to Dr. Patnaik's suggestion on establishing a Digital Markets Unit within the CCI, Dr. Jenny sought Ms. Murali's views on the sufficiency of resources with the CCI. Ms. Murali noted that while the CCI may not have the same budget and manpower as more established regulatory bodies like the Federal Trade Commission (FTC), the CCI has been involved in a wide range of industries over the last 12-13 years. They have also looked at several cases related to digital markets and individual practices within these markets since 2017. Ms. Murali appreciated the fact that despite an increase in caseload related to the regulation of digital markets, the CCI has shown an understanding of how these markets work and has kept pace with changes in the Indian digital economy. However, the need for the CCI to strike a balance between regulating the digital market and not hindering the fast-paced growth of the Indian startup ecosystem was also pointed out by her.

## V. PREVENTING REGULATORY ARBITRAGE

The Panel also discussed the need for harmonizing regulations related to digital platforms in India to prevent regulatory arbitrage and potential litigation. Dr. Patnaik mentioned that while the Ministry of Electronics and Information Technology ('MeitY') is working on the Digital India initiative, the MCA is also updating the Competition Act, and the Department of Consumer Affairs is undertaking work on the Consumer Protection Act, which creates a potential for regulatory overlaps and conflict. Dr. Patnaik welcomed the government's move to set up inter-ministerial groups but also noted the limited effectiveness of such groups in removing regulatory arbitrage. The importance of avoiding regulatory overreach and ensuring that different ministries work together to arrive at legislation that is not conflicting or overly protective was emphasized by him.

He also noted that the new privacy and data protection laws would be coming into effect and there needs to be a consensus on the definition of 'Systemically Important Digital Intermediaries' ('SIDIs'), and that ensuring consistency among various regulatory aspects is crucial. Dr. Jenny pointed out that an inter-regulatory approach is currently lacking in Europe but is more developed in the UK, where a body has been established to bring together all regulators dealing with data or competition to ensure coherence. It is essential to make different types of regulations with varying goals consistent with each other.

## VI. TYPE AND FORM OF EX-ANTE FRAMEWORK SUITED TO INDIA

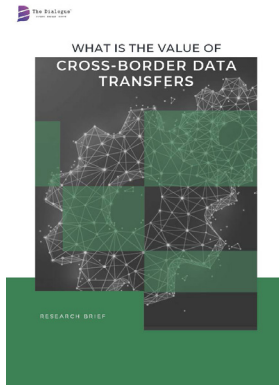
Dr. Jenny brought the panel's attention to the different types of ex-ante frameworks that currently exist, particularly the EU's Digital Markets Act (DMA) and the bespoke regulations proposed by the Competition and Markets Authority (CMA) in the UK, with the latter being more specific and providing greater legal certainty for companies. He suggested that the UK model is safer as it allows for a more in-depth examination of the situation and can tailor solutions to specific business models. This could be especially helpful in the digital sector, where competitors can have very different business models, and an across-the-board rule may not be nuanced enough to take those differences into consideration. The panel expressed skepticism on the effectiveness of copying the DMA to India, and urged for more tailored approaches to regulation in the country.

Experiences from other international jurisdictions were also highlighted by Ms. Murali. For instance, Korea and Japan are implementing targeted interventions in specific digital markets where they see problematic conduct related to in-app payments, app stores, and mobile operating systems. Taiwan conducted a market study and found strong competition in the specific sector they were looking at, so they did not need to intervene ex-ante. She also pointed to the CCI's order that found a vibrant cab aggregation market and thus declined to intervene. In this light, she suggested that one possible approach could be to look at specific markets with problems and develop rules to address those situations.

The roundtable concluded with a few key recommendations that have been provided at the beginning of the report.



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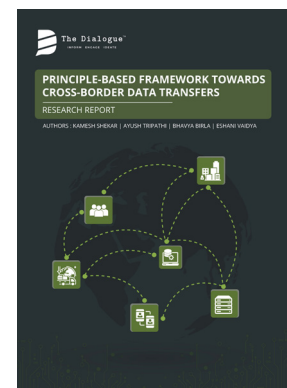
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