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# DIGITAL MARKETS AND GAPS IN THE INDIAN COMPETITION REGIME

DIGITAL COMPETITION RESEARCH SERIES





**Working Paper**

# **DIGITAL MARKETS AND GAPS IN THE INDIAN COMPETITION REGIME**

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**Suggested Citation**

*Malik, S., & Agarwal, B. (2023). Digital Markets and Gaps in the Indian Competition Regime. The Dialogue*

**Catalogue No.**

TD/CMP/WP/0523/01

**Publication Date**

May 22, 2023

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# ACKNOWLEDGEMENTS

We would like to thank Mr. Kazim Rizvi, Founding Director, The Dialogue for his valuable comments and continued guidance and support towards the completion of this research. We also extend our gratitude to Mr. Abhijeet Lenka for the research assistance, Ms. Akriti Jayant for providing editing support and Ms. Diksha Kumari for her design support for the report.



# ABBREVIATIONS

ACCC	Australian Competition and Consumer Commission
ACPs	Anti-Competitive Practices
CCI	Competition Commission of India
CDCL	Committee on Digital Competition Law
CLRC Committee	Competition Law Review Committee
CMA	Competition and Markets Authority
DCA	Digital Competition Act
DMA	Digital Markets Act
DMCC Bill	Digital Markets, Competition and Consumers Bill
DMU	Digital Markets Unit
DVT	Deal Value Threshold
EC	European Commission
EU	European Union
FY	Financial Year
MCA	Ministry of Corporate Affairs
NCLAT	National Company Law Appellate Tribunal
PSC	Parliamentary Standing Committee on Finance
S&C	Settlements & Commitments
SC	Supreme Court
SIDIs	Systemically Important Digital Intermediaries
SMS	Strategic Market Status
UK	United Kingdom
USA	United States of America





# INTRODUCTION

The last decade has been marked by rapid digitalization, leading to the emergence of novel business models that have garnered increased scrutiny from regulators across the world. The increasing significance of digital platforms prompted the Parliamentary Standing Committee on Finance (**PSC/Committee**) to take up a review of potential anti-competitive practices prevalent in digital markets. The PSC tabled its report on 'Anti-Competitive Practices<sup>1</sup> by Big Tech Companies' in December 2022, delineating ten anti-competitive practices (**ACPs**) with a recommendation to explore framing a 'Digital Competition Act' (**DCA**) – which could potentially contain a set of ex-ante obligations and prohibitions for players that it termed as 'systemically important digital intermediaries' (**SIDIs**).<sup>2</sup>

Subsequently, the Ministry of Corporate Affairs (**MCA**) constituted the Committee on Digital Competition Law (**CDCL**) with the mandate to assess the need and feasibility of an ex-ante framework and come up with a draft DCA. This working paper discusses the rationales given by the PSC and the competition authorities across the globe for recommending an ex-ante framework and evaluates the need for a DCA in light of these reasons. The working paper also looks at the adequacy of the current competition law framework which includes the major amendments made by the Parliament in 2023 to address competition concerns in the digital market.

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<sup>1</sup> Standing Committee on Finance, Seventeenth Lok Sabha, Anti Competitive Practices by Big Tech Companies, Fifty Third Report [December 2022] [https://loksabhadocs.nic.in/lssccommittee/Finance/17\\_Finance\\_53.pdf](https://loksabhadocs.nic.in/lssccommittee/Finance/17_Finance_53.pdf)

<sup>2</sup> PSC recommended identifying a small number of the leading players that can negatively influence competitive conduct in the digital market. Such players identified as 'Systematically Important Digital Intermediaries' ("SIDI"), were recommended to be defined on the basis of revenue, market capitalisation, number of active businesses and end users. This is essentially a designation mechanism similar to that adopted by EU's identification of 'gatekeepers' under the Digital Markets Act [*The Digital Markets Act: ensuring fair and open digital markets*, European Commission [https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets\\_en](https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en)].





## NEED FOR A NEW LEGAL FRAMEWORK

The major motivation underlying recommendations for an ex-ante framework is the prevalence of gaps in existing competition policy regimes that are arguably unable to deal with the peculiarities of digital markets. In India, the Committee differentiated between traditional markets and digital markets and observed that, unlike traditional markets, digital markets operate differently, driven by increasing returns to size economies and network effects. These factors result in winner-take-all outcomes and limited fair competition in digital markets, thus potentially leading to lower innovation, lower profitability for emerging companies and higher prices for consumers in the longer run.

However, India is not the only country that has found existing policy frameworks to be inadequate. Several countries as detailed below have identified gaps in their current policy and enforcement framework and have consequently come up with an ex-ante framework or are currently in the process of introducing one. Some of the common reasons given by countries for introducing ex-ante frameworks include:

**a. Slow ex-post enforcement of existing laws:** The dynamic and fast-moving nature of digital markets has proved it difficult for countries around the world to ensure rectification of anti-competitive concerns in a timely manner. The United Kingdom (UK) highlighted this concern in its consultation paper on 'A new pro-competitive regime for digital markets' (UK consultation paper).<sup>3</sup> The paper stated that the competition enforcement proceedings move slowly and can take several years to conclude. Therefore, by the time competition issues are identified and addressed, the market dominance of digital enterprises gets further solidified in areas that are quickly changing thus causing irreparable economic harm.

The Australian Competition and Consumer Commission (ACCC) also points out that the large digital platforms' enormous size and financial power can make it difficult to enforce traditional laws through the courts, leading to drawn-out legal battles with lengthy conclusions.<sup>4</sup> The PSC's report also notes the MCA's submissions stating that the requirement to collect sufficient evidence and ensure procedural fairness during investigations and adjudications, coupled with the possibility of judicial review, leads to a lengthy pathway for regulatory interventions in markets. In rapidly evolving digital markets, this can result in expensive and potentially ineffective delays in taking action.<sup>5</sup>

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<sup>3</sup> UK Government, A new pro-competition regime for digital markets (July, 2021);

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1003913/Digital\\_Competition\\_Consultation\\_v2.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1003913/Digital_Competition_Consultation_v2.pdf)

<sup>4</sup> Australian Competition & Consumer Commission, Digital platform services inquiry report no. 5 (September, 2022) (hereinafter '**ACCC Report**'); <https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20September%202022%20interim%20report.pdf>

<sup>5</sup> Standing Committee on Finance, Seventeenth Lok Sabha, Page 27, PSC Report, Anti Competitive Practices by Big Tech Companies, Fifty Third Report [December 2022] [https://loksabhadocs.nic.in/lsscommittee/Finance/17\\_Finance\\_53.pdf](https://loksabhadocs.nic.in/lsscommittee/Finance/17_Finance_53.pdf)

**b. Ineffective enforcement by the regulator:** Current legal framework in most countries arguably might not adequately equip the market regulator with the tools necessary to take effective action against anti-competitive misconduct. For instance, the USA Subcommittee on Antitrust in its report on ‘Investigation of competition in digital markets’ (**USA Subcommittee Report**) highlights the ineffective enforcement by the American antitrust agencies and their failure to prevent dominant entities from entrenching their market power further over the past decades.<sup>6</sup> The ACCC’s Report on digital platforms further points out that the case-by-case approach of traditional laws may not be well suited to address the broad nature of systemic misconduct being carried out by a single digital platform across multiple interconnected services.

For instance, in the ad tech sector, misconduct may be occurring at different stages of the ad tech supply chain. In such cases, a single remedy prescribed by way of a court order, or the Competition Commission of India’s order (**CCI**) in India, might not be adequate to address the broad misconduct in the longer run. Further, in several cases, in spite of imposition of fine, the regulator fails to prevent continuation of the misconduct by digital platforms.<sup>7</sup> Often, the misconduct itself goes unnoticed and evades the scrutiny of antitrust agencies. This might be attributed to the complexity of dynamic markets, the insufficient institutional capacity of the regulator or the cross-jurisdictional nature of digital markets that allow for gaps in the detection of anti-competitive behaviour. Here, the need is to address the underlying structural issues including the insufficient resources with the regulator.

**c. Gaps in current laws:** Different countries have realized and acknowledged the lacunae in their existing laws and have subsequently taken steps to strengthen their existing frameworks. For instance, the PSC highlighted the inability of the current framework to prevent attempts to monopolize markets. The USA Subcommittee Report highlighted the fact that the adoption of the ‘consumer welfare’ standard as the sole goal of antitrust laws has considerably narrowed the scope of the law thus not allowing for effective redressal of anti-competitive concerns in digital markets.<sup>8</sup> To address these gaps, the committee makes a slew of recommendations to update the existing laws including codifying rules on structural presumptions in concentrated markets and strengthening vertical merger doctrine.

Several countries have already updated their existing laws to accommodate digital markets. For example, Canada introduced a set of amendments in 2022 to reform the existing competition law. These reforms include broadening the definition of the ‘anti-competitive act’ and empowering the Competition Tribunal to consider features peculiar to the digital economy, for instance, network effects.<sup>9</sup> India has also kept pace with other countries in updating its competition laws. Not only is the country currently deliberating an ex-ante framework but has also amended the extant framework to introduce provisions on Deal Value Threshold (**DVT**) and hub & spoke cartels to adequately deal with the digital markets.

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<sup>6</sup> Sub-Committee on Antitrust, Commercial & Administrative Law; Investigation of Competition in Digital markets; Page 339: <https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf>

<sup>7</sup> Australian Competition & Consumer Commission: Digital platform services inquiry report no. 5; Page 50: (September, 2022); <https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20September%202022%20interim%20report.pdf>

<sup>8</sup> Sub-Committee on Antitrust, Commercial & Administrative Law: Investigation of competition in digital markets; (July, 2022); <https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf>

<sup>9</sup> Parliament of Canada, Bill C-19: <https://www.parl.ca/DocumentViewer/en/44-1/bill/C-19/royal-assent>





# ANALYSIS OF THE GAPS IN THE INDIAN CONTEXT

In its Report, the PSC highlighted the above-discussed reasons and recognised that digital markets differ significantly from traditional markets. Among other factors, these reasons formed the basis for the Committee's recommendation in favour of an ex-ante regulatory framework. In the parts below, we analyse these factors in further detail:

**a. Timely intervention:** The PSC Report states that the traditional framework consumes a lot more time & resources than a potential ex-ante framework.<sup>10</sup> The primary reason for this is that in an ex-post evaluation of conduct, the investigation is initiated only after the conduct has been carried out & the effect of such conduct has taken place on the market. However, it is imperative to note that the time taken by the Indian regulator i.e., the CCI to adjudicate a case is comparatively lesser than its international counterparts. It must also be noted that there is no evidence to suggest that the implementation of an ex-ante framework would result in a drastic reduction in the time taken by antitrust regulators to reach a final decision.

Under the traditional framework of the UK, between 2009 and 2019, it took an average of over 20 months from an application being filed at the Competition and Markets Authority (CMA) to a judgment being given.<sup>11</sup> On the other hand, under the new Digital Markets, Competition and Consumers Bill (DMCC Bill) published by the UK government, Section 14(2)<sup>12</sup> provides for a timeframe of 9 months as a period for the investigation to determine whether an undertaking can be designated as an enterprise with Strategic Market Status (SMS) or not which is further extendable by a period of 3 months. Therefore, the process of designating an enterprise as one with an SMS itself consumes a period of 12 months. Furthermore, under Section 30(2) of the DMCC Bill,<sup>13</sup> a 6-month period has been prescribed to complete a conduct investigation against a designated firm. Therefore, it can be inferred that the total timeframe for an enterprise to be designated as an SMS enterprise as well as the completion of an investigation into the conduct of the enterprise could amount to a period of 18 months. The time taken under the ex-ante framework is almost the same as the time taken under the traditional framework i.e., 20 months. Therefore, there might not necessarily be a significant difference in the amount of time consumed to reach a final decision under both frameworks.

Similarly, with regard to the EU, the timelines under the Digital Market Act (DMA) indicate that it may take anywhere between 21 to 50 months on average for the European Commission (EC)

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<sup>10</sup> Standing Committee on Finance, Seventeenth Lok Sabha, Anti Competitive Practices by Big Tech Companies, Fifty Third Report [December 2022] [https://loksabhadocs.nic.in/lssccommittee/Finance/17\\_Finance\\_53.pdf](https://loksabhadocs.nic.in/lssccommittee/Finance/17_Finance_53.pdf)

<sup>11</sup>UK Government, Strengthening consumer enforcement & dispute resolution: Policy Summary Briefing (April 25, 2023) <https://www.gov.uk/government/publications/digital-markets-competition-and-consumers-bill-supporting-documentation/strengthening-consumer-enforcement-and-dispute-resolution-policy-summary-briefing>

<sup>12</sup> UK Parliament, The Digital Markets, Competition and Consumers Bill; <https://publications.parliament.uk/pa/bills/cbill/58-03/0294/220294.pdf>

<sup>13</sup> *Ibid.*

to designate enterprises as ‘gatekeepers’ and complete proceedings against non-compliant ‘gatekeepers’. This is again close to the time taken by the EC in recent years while dealing with digital market cases. The ACCC Report has also recognised the time-consuming nature of proceedings initiated by the EC.<sup>14</sup> For instance, the timeframe taken to reach a decision in the Google Android case<sup>15</sup> from the initiation of proceedings was a period of 5 years & 3 months. Similarly, in the Qualcomm (Exclusivity payments) case<sup>16</sup>, the time taken from the initiation of proceedings to the announcement of the judgment was a period of 3 years. As a result, it may be argued that the majority of the proceedings initiated by the EC under the traditional framework have been concluded well within the timeframe established under the EU Digital Market Act.

In contrast, the average time taken by the CCI to resolve cases i.e. 1,074 days/35 months<sup>17</sup> is comparable to the ex-post intervention in the EU and the UK. The setting up of a settlements and commitments framework as well as leniency plus regime through the Competition (Amendment) Act, 2023, is anticipated to further shorten the period taken for effective redressal of anti-competitive conduct. An ex-ante regime in India, therefore, may be prudent only if it is able to significantly reduce the time taken from 35 months while also balancing it with principles of natural justice and the right to be heard by the parties.

**b. Effective redressal:** The perceived challenge faced by antitrust regulators is their limited ability to effectively address competition concerns specific to digital markets. This is primarily attributed to the unique characteristics of digital markets, which in turn affect the enforcement of regulations by regulators across different jurisdictions. However, within the current legal framework, the CCI has successfully identified and intervened to investigate competition concerns relating to digital markets. Some instances of CCI’s interventions undertaken u/s 27 of the Competition Act, 2002 are highlighted in the following cases:

**i. Matrimony v. Google LLC<sup>18</sup>:** The case primarily dealt with the unfair advertising policies which also form part of the PSC’s report. The CCI assessed Google’s act of prominently placing ads of its own verticals on its search result page and held it to be an abuse of dominant position. It also emphasized Google’s responsibilities as a dominant player in the digital market, where innovation and network effects are crucial. The CCI demonstrated a nuanced approach to digital markets by laying down a high standard for antitrust intervention in the digital markets, observing that any intervention must be targeted and proportionate to balance the twin goals of nurturing innovation and addressing consumer harm.

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<sup>14</sup> Australian Competition & Consumer Commission: Digital platform services inquiry report no. 5; Page 49: (September, 2022); <https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20September%202022%20interim%20report.pdf>

<sup>15</sup> Case At. 40099; Google Android Case: [https://ec.europa.eu/competition/antitrust/cases/dec\\_docs/40099/40099\\_9993\\_3.pdf](https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf)

<sup>16</sup> Case At. 40220; Qualcomm (Exclusivity payments): [https://ec.europa.eu/competition/antitrust/cases/dec\\_docs/40220/40220\\_2702\\_4.pdf](https://ec.europa.eu/competition/antitrust/cases/dec_docs/40220/40220_2702_4.pdf)

<sup>17</sup> Primer: 53rd Report of the Standing Committee on Finance and a potential ex-ante competition law regime, The Dialogue (February 2023); <https://thedialogue.co/wp-content/uploads/2023/03/Primer-53rd-Report-of-the-Standing-Committee-on-Finance-and-a-Potential-Ex-Ante-Competition-Law-Regime.pdf>

<sup>18</sup> Matrimony.com Limited v Google LLC and Ors [Case No. 07 of 2012], Consumer Unity & Trust Society (CUTS) v Google LLC and Ors [Case No. 30 of 2012] <https://www.cci.gov.in/images/antitrustorder/en/07-and-3020121652434133.pdf>

ii. **Makemytrip case**<sup>19</sup>: The PSC's report discussed the need to regulate exclusive tie-ups and price parity clauses which was done in this case as well. The CCI assessed unfair contractual terms resulting in the delisting of hotels and in a first of its kind order, also passed interim relief by directing relisting of hotels keeping in mind the importance of time in the digital economy. The CCI recognized that the vertical agreement between the hotels and imposition of price parity clauses was causing an appreciable adverse effect on competition & held such agreement to be violative of Section 3(4) of the Competition Act. This case presents CCI's first major enforcement action in the online travel services market, wherein the CCI imposed a monetary penalty alongside behavioral remedies (i.e., directions to remedy the wrong by making suitable changes to business practice/conduct), which demonstrates the sufficiency of CCI's enforcement actions and powers in correcting anti-competitive effects in digital markets.

iii. **Google Android case**:<sup>20</sup> The Commission found Google guilty of tying up Play Store with Google search, Chrome and YouTube thus restricting competition in the relevant markets by foreclosing distribution channels for rivals and thus directed Google to cease and desist from indulging in these anti-competitive practices and imposed a provisional penalty on Google of Rs. 1337.76 crores. The anti-competitive practices such as tying and restricting third-party applications that have also been identified by the PSC in the report have already been dealt with under this case. The case demonstrates the CCI's ability to effectively intervene into issues that have been specifically identified in the PSC's Report.

iv. **Google In-app billing case**:<sup>21</sup> The Commission found that the payment policy of Google required app developers to use GPBS mandatorily thus reducing the ability of app developers to choose alternate services or develop their own in-app payment system. The Commission also found Google guilty of exercising significant control over data generated by apps listed on Play Store. The CCI considered a variety of factors while arriving at its conclusions relating to Google's market position. These include aspects such as ownership of IPR, the role of network effects, user dependency on Google's services, etc., in addition to factoring Google's market share. The practices dealt with under this case including anti-steering clauses and data usage practices have also been highlighted by the PSC's report.

In addition to the CCI's proactive approach in addressing anti-competitive concerns, the appellate bodies including the National Company Law Appellate Tribunal (**NCLAT**) and the Supreme Court (**SC**) have shown an ardent approach while adjudicating appeals resulting from the CCI's orders. For instance, in the Google in-app billing case, the NCLAT took less than 3 months to reach an order.<sup>22</sup> However, this is not to dismiss the several gaps that exist in the current enforcement practice. Often, parties misuse appellate mechanisms to delay the compliance process resulting in unrecovered penalties.<sup>23</sup> Between 2009-10 to 2019-20, almost

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<sup>19</sup>Federation of Hotel & Restaurant Associations of India (FHRAI) and another Vs. MakeMyTrip India Pvt. Ltd. (MMT) and others with Rubtub Solutions Pvt. Ltd. Vs. MakeMyTrip India Pvt. Ltd. (MMT) and others [Case No. 14 of 2019 & 01 of 2020] <https://www.cci.gov.in/antitrust/orders/details/1069/0>

<sup>20</sup> Umar Javed and Ors vs. Google LLC and Ors., Case No.39 of 2018; <https://www.cci.gov.in/antitrust/orders/details/1070/0>

<sup>21</sup> XYZ (Confidential) Vs. Alphabet Inc. and Others, Match Group, Inc. vs. Alphabet Inc. and Others, Alliance of Digital India Foundation vs. Alphabet Inc. and Others [Case No. 07 of 2020 with 14 of 2021 with 35 of 2021]

<https://www.cci.gov.in/antitrust/orders/details/1072/0>

<sup>22</sup> Alphabet Inc. & Ors. vs. Competition Commission of India & Ors.; (Comp. Appeal no. 04 of 2023) [https://nclat.nic.in/display-board/view\\_order](https://nclat.nic.in/display-board/view_order)

<sup>23</sup> S Murlidharan, View: Why CCI's massive penalties are yielding nothing for the exchequer, CNBC TV18 [February 3, 2022]

33 percent of the CCI's orders were appealed before the NCLAT/COMPAT<sup>24</sup> and as of March 2022, almost 285 appeals had been pending before the NCLAT.<sup>25</sup> Furthermore, it can often become a hassle to ensure compliance with CCI's orders. In the past, the CCI had even initiated criminal proceedings against parties for continuous non-compliance of the order.<sup>26</sup> The massive penalties that have been imposed by the CCI haven't really translated into any revenue for the Consolidated Fund of India. As per Annual Report 2021-22 released by the CCI, it can be ascertained that from 2019-2022, a total of Rs 1786 Cr. has been imposed as fines on enterprises out of which only Rs. 130 Cr. has been recovered, leaving the recovery rate at an underwhelming 13.7%.<sup>27</sup>

### **c. Effective identification: section 26(1) and (2) orders**

It is important to acknowledge the fact that effective identification of cases is crucial to effective enforcement by antitrust regulators around the world. The primary instance of ineffective enforcement of legislation takes place when certain anti-competitive conduct goes under the radar of the respective regulator, especially in digital markets owing to the fast-paced and complex nature of such markets. Although, this may be the situation in certain jurisdictions, it is pertinent to note that the experience in India has not quite been similar to those of other jurisdictions. In addition to proactive enforcement under section 27 of the Act, the CCI has done a commendable job in timely identifying potential anti-competitive concerns under sections 26(1) and (2) of the Competition Act, 2002.

The CCI takes cognizance of cases under section 26 either on its own initiative, i.e., suo motu or as a result of receiving certain information and upon the receipt of a complaint based on that information. The difference between Section 26(1) & Section 26(2) cases is that in section 26(1) cases, the CCI forms an opinion that there exists a prima facie case and then directs for further investigation to be conducted, while, under section 26(2) cases, the CCI looks into the facts of the complaint and forms an opinion that there exists no prima facie case and proceeds to dispose off the complaint/information. In the past, the CCI has taken suo moto cognizance and ordered detailed investigation in several cases indicating its proactive approach in timely preventing competition disruptions in digital market. In its orders, the CCI has considered novel harm theories, issues relating to cross-sectoral overlaps of jurisdiction and have factored in data as an indicator of market power. For instance, in WhatsApp privacy policy case,<sup>28</sup> the CCI observed that in a data-driven ecosystem, it is necessary to investigate if excessive data collection and its use or sharing have anti-competitive implications that require scrutiny. Some

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<https://www.cnbctv18.com/business/companies/view-why-ccis-massive-penalties-are-yielding-nothing-for-the-exchequer-12351402.htm>

<sup>24</sup> Abhishek Raj et. al, Analysis of NCLAT's Functioning as Competition Law Appellate Tribunal; Competition Commission of India Journal on Competition Law and Policy, vol. 2, pp 71-96 (December 2021)

<https://ccijournal.in/index.php/ccijoclp/article/view/36/36>

<sup>25</sup> CCI Annual Report 2021-22; Competition Commission of India <https://www.cci.gov.in/public/images/annualreport/en/annual-report-2021-221671704224.pdf>

<sup>26</sup> See M/S Rajasthan Cylinders and Containers Ltd. v CCI CrI. M.C. 4363/2018., Shri Jose C. Mundadan v. State and Anr.CrI..M.C. 5324/2018 and Jose C. Mundadan v. Government of NCT of Delhi and Anr CrI. M.C. 5371/2018;

<https://www.cci.gov.in/images/legalframeworkjudgement/en/16-rajasthan-cylinder-21652251031.pdf>

<sup>27</sup> CCI Annual Report 2021-22; Competition Commission of India (Pg. 20)

<https://www.cci.gov.in/public/images/annualreport/en/annual-report-2021-221671704224.pdf>

<sup>28</sup> In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users [Suo Moto Case No. 01 of 2021] <https://www.cci.gov.in/antitrust/orders/details/100/0>

of the cases pertaining to digital markets where the CCI identified anti-competitive concerns are mapped below:

S. No.	CASE NAME	ACPs ADDRESSED	PROVISION	ORDER
1.	WhatsApp Privacy Policy Case <sup>29</sup> (Suo Motu; Case no. 01 of 2021)	Data Usage	Section 4(2)(c) & 4(2)(e) of the Act	Section 26(1)
2.	Digital News Publishers Association vs. Alphabet Inc. & Ors. <sup>30</sup> (Case no. 41 of 2021)	Advertising Policies	Section 4(2)(a), 4(2)(b)(ii), 4(2)(c) & 4(2)(e) of the Act.	Section 26(1)
3.	Harshita Chawla Vs. WhatsApp Inc. and others [Case No. 15 of 2020] (WhatsApp pay case) <sup>31</sup> (Section 26(2) order)	Tying & Bundling	Section 4(2)(a)(i), 4(2)(d), 4(2)(b)(ii), 4(2)(c) & 4(2)(e)	Section 26(2)
4.	Meru Travel Solutions Pvt. Ltd. Vs. M/s ANI Technologies Pvt. Ltd. & Others. <sup>32</sup> (Case no. 25, 26, 27 & 28 of 2017)	Algorithmic pricing	Section 4(2)(a)(ii) and Section 3(4) read with Section 3(1) of the Act.	Section 26(2)
5.	Kshitiz Arya and another vs Google LLC and others [Case No. 19 of 2020] (Google TV OS case) <sup>33</sup>	Anti-Steering & Bundling	Section 3(4) r/w Section 3(1), Section 4(2)(b) & 4(2)(c) of the Act.	Section 26(1)
6.	Baglekar Akash Kumar Vs. Google LLC and another [Case No. 39 of 2020] (Gmail and Google Meet case) <sup>34</sup>	Bundling	Section 4(2)(d) & Section 4(2)(e) of the Act.	Section 26(2)
7.	National Restaurant Association of India ('NRAI') Vs. Zomato Limited ('Zomato') & Others [Case No. 16 of 2021] <sup>35</sup>	Self-preferencing, platform neutrality & deep discounting.	Section 3(4)(d) r/w Section 3(1) of the Act.	Section 26(1)
8.	Lifestyle Equities C.V. and another Vs. Amazon Seller Services Private Limited and others [Case No. 09 of 2020] <sup>36</sup>	Deep discounting, Preferential Agreements & Exclusive Arrangements.	Section 3(4) r/w Section 3(1) & Section 4(2) of the Act.	Section 26(2)
9.	In Re: Delhi Vyapar Mahasangh and Flipkart Internet Private Limited and ors. [Case No. 40 of 2019]	Deep-Discounting, Preferential Agreements & Exclusive Tie-Ups.	Section 3(4) r/w Section 3(1) & Section 4(2) of the Act.	Section 26(1)

<sup>29</sup> In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users; Suo Motu; Case no. 01 of 2021

<https://www.cci.gov.in/antitrust/orders/details/100/0>

<sup>30</sup> Digital News Publishers Association vs. Alphabet Inc. & Ors.# (Case no. 41 of 2021)

<https://www.cci.gov.in/antitrust/orders/details/11/0>

<sup>31</sup> Harshita Chawla Vs. WhatsApp Inc. and others [Case No. 15 of 2020] <https://www.cci.gov.in/antitrust/orders/details/118/0>

<sup>32</sup> Meru Travel Solutions Pvt. Ltd. Vs. M/s ANI Technologies Pvt. Ltd. & Others; (Case no. 25, 26, 27 & 28 of 2017)

<https://www.cci.gov.in/antitrust/orders/details/272/0>

<sup>33</sup> Kshitiz Arya and another vs Google LLC and others [Case No. 19 of 2020] <https://www.cci.gov.in/antitrust/orders/details/38/0>

<sup>34</sup> Baglekar Akash Kumar Vs. Google LLC and another [Case No. 39 of 2020] <https://www.cci.gov.in/antitrust/orders/details/85/0>

<sup>35</sup> National Restaurant Association of India ('NRAI') Vs. Zomato Limited ('Zomato') & Others [Case No. 16 of 2021];

<https://www.cci.gov.in/antitrust/orders/details/6/0>

<sup>36</sup> Lifestyle Equities C.V. and another Vs. Amazon Seller Services Private Limited and others [Case No. 9 of 2020];

<https://www.cci.gov.in/antitrust/orders/details/103/0>

	(Delhi Vyapar Mahasangh case) <sup>37</sup>			
10.	Mr. Mohit Manglani vs. M/s Flipkart India Pvt. Limited & Ors. (Case No. 80 of 2014) <sup>38</sup>	Exclusive Arrangements	Section 3(1), 3(4)(b), 3(4)(c), 4(a)(i), 4(b)(i) & 4(b)(ii) of the Act.	Section 26(2)
11.	Federation of Hotel & Restaurant Associations of India (FHRAI) vs. MakeMyTrip India Pvt. Ltd. (MMT) & Others. (Case no. 14 of 2019) <sup>39</sup>	Deep Discounting/Predatory Pricing	Section 3(4) & Section 4 of the Act.	Section 26(1)

**d. Gaps in the statute in light of digital markets:** It is important to recognize the inherent distinction between technology markets and traditional markets. Digital platforms are often multi-sided. Multi-sided markets are characterized by the creation of separate market segments for two or more distinct customer groups. There are also other elements to consider in technology markets, such as network effects which refer to the phenomena in which platforms gain more value as their user base develops, hence increasing the value of their product or service. Additionally, the existence of zero-price markets where firms tend to sell their products & services at no cost further accentuates the differentiation between technology markets & traditional markets.

The ever-evolving nature of tech markets is believed to also mean that a digital market has the potential to tip in favour of one of two players in a market resulting in monopolization of those players in that market. However, it must be acknowledged that such tipping occurs in every market and is not only limited to digital markets. It is also worth noting that reaching a network tipping point, where the magnitude of a network becomes more beneficial to its participants than any competing network, can be a difficult process. This is due to the fact that network externalities, depending on other measures such as product quality, can either boost or weaken the network size.

For example, Yahoo's dominance in the market prior to losing its position to Google was due to Yahoo's excessive advertising, which degraded its quality of user experience and caused it to lose its audience to Google. From being the most visited site globally, and once worth \$125 billion to being acquired by Verizon for less than 4% of that amount, i.e., \$4.48 billion is another indication of the fact that the nature of tipping markets is such that a few companies may be favoured initially owing to their scale & innovation but in such moving tech markets, competitors in the market are continuously innovating & introducing multiple features to make their platform attractive enough for consumers to shift to. Another recent example is that of the cab aggregator market<sup>40</sup> where new mobility companies such as BluSmart, inDrive & Rapido are cornering market share from leaders, owing to sub-optimal experiences faced by users and drivers of Ola & Uber.

<sup>37</sup> In Re: Delhi Vyapar Mahasangh and Flipkart Internet Private Limited and ors. [Case No. 40 of 2019]; <https://www.cci.gov.in/antitrust/orders/details/110/0>

<sup>38</sup> Mr. Mohit Manglani vs. M/s Flipkart India Pvt. Limited & Ors. (Case No. 80 of 2014) <https://cci.gov.in/antitrust/orders/details/600/0>

<sup>39</sup> Federation of Hotel & Restaurant Associations of India (FHRAI) vs. MakeMyTrip India Pvt. Ltd. (MMT) & Others (Case 14 of 2019); <https://www.cci.gov.in/antitrust/orders/details/113/0>

<sup>40</sup> Ride Hailing: New mobility companies seek to disrupt Ola & Uber; Auto Economic Times [July 25, 2022] <https://auto.economicstimes.indiatimes.com/news/aftermarket/new-mobility-companies-seek-to-disrupt-ola-uber/93100943>

Therefore, network effects which relate to platforms obtaining greater value as their user base grows may not always result in a winner-take-all result. Poor user experience or a lack of innovative options & timely developments may result in negative network externalities that restrict businesses from scaling up. It cannot be denied that the tipping effect might sometimes lead to few platforms emerging as dominant in the short run subsequently leading to concentration of power.

However, it is pertinent to note that although markets are constantly evolving, perceived threats such as tipping must be looked at from a rational perspective before enacting a new legislation around it. The existence of phenomena like tipping and network effects could be looked at from a rule of reason approach which the current statute allows for. Simultaneously, it is important to acknowledge that India has consistently addressed the evolving nature of markets by implementing new frameworks. The Competition (Amendment) Act, 2023 achieves this through several key provisions including the expansion of the scope of Section 3 to encompass all kinds of agreements, inclusion of hub and spoke cartels and introduction of DVT criteria. Further, as early as in 2019, the CLRC committee's report recognised the network effects and multi-sided nature of digital markets and recommended several changes to strengthen the extant framework. Thus, the Indian competition policy landscape has witnessed active efforts to reform the competition law to respond to the changing dynamics of digital markets. India has shown both forwardness and restraint in ensuring that the current framework is evolved to keep pace with the rapid growth in the tech markets but in such a manner that the growth & innovation by such enterprises are not hampered.





# IV. CONCLUSION

In light of the above discussion, it becomes imperative for policymakers to give careful consideration to the reasons that prompted the need for an ex-ante framework. Extant provisions of the Act, coupled with CCI's own demonstrated enforcement agility, and recently introduced amendments (which amongst other changes, introduce mechanisms for quicker interventions through settlements and commitments (**S&C**)) may provide indications for the extent of the sufficiency of the current framework in regulating digital markets. A careful analysis of the existing regime may be needed to ensure that a new regime is tackling actual challenges that have been evidenced in the market and for which efficient mechanisms do not exist.

Importantly, sufficient attention needs to be given to the commendable work done by the CCI till date. In addition to the enforcement activities noted above, the Commission has been proactive in understanding technology markets. CCI's proactive and efficient role in regulating technology markets is also evidenced by its advocacy initiatives, including its e-commerce market study<sup>41</sup> where it expressed concerns over potentially problematic conduct relating to issues such as platform neutrality and exclusivity agreements, among other things. Similar reports such as that concerning the telecom sector<sup>42</sup> is another example showing CCI's efforts to develop a better understanding of competitive conditions in different markets. These reports form a useful basis for competition advocacy by CCI. The proactive enforcement coupled with participatory advocacy initiatives has facilitated capacity building and strengthened the Indian competition policy landscape.

One of the motivations behind a proposed DCA is to ensure that concerns arising in the digital sphere are resolved in a timely manner. Thus, it would be of utmost importance that the timelines prescribed under the DCA are relatively short enough so as to warrant an effective implementation of the Act. It would also be imperative to balance such shorter timelines with provisions for procedural fairness & a proper opportunity for hearing being provided to the concerned parties. To ensure quicker resolution of cases and anti-competitive conduct, policymakers may also have to look at the institutional and financial capacity of the regulator.

The CCI is in the process of setting up a Digital Market Unit<sup>43</sup> (**DMU**) with the intention of enforcing the proposed DCA. However, the DMU will only function effectively if the institutional and financial bandwidth of the CCI is enhanced. For FY 2019-20, the CCI was allocated Rs. 55 crores which came down to Rs. 46 crores for FY 2020-21 and stayed the same for FY 2021-

<sup>41</sup> Market Study on E-Commerce In India- Key Findings and Observations, Competition Commission of India [2020] <https://www.cci.gov.in/economics-research/market-studies/details/18/6>

<sup>42</sup> Competition Commission of India: Market Study on the Telecom Sector in India. [2021] <https://www.cci.gov.in/economics-research/market-studies/details/20/1>

<sup>43</sup> Sourabh Lele, CCI to set up in-house digital mkt data unit for regulating tech platforms, Business Standard (March 22, 2023) [https://www.business-standard.com/article/companies/cci-to-set-up-in-house-digital-mkt-data-unit-for-regulating-tech-platforms-123032200133\\_1.html](https://www.business-standard.com/article/companies/cci-to-set-up-in-house-digital-mkt-data-unit-for-regulating-tech-platforms-123032200133_1.html)

22.<sup>44</sup> Further, as of March 2022, out of the 195 staff members allowed, 69 positions were unfilled.<sup>45</sup> In order to address the gap pertaining to ineffective enforcement, and to ensure effective implementation of the DCA, it would be of utmost importance to ensure that the CCI's financial and institutional capacity is given a significant boost, especially considering the possibility that the DMU might form the part of the CCI only.

Additionally, the enforcement in digital market cases can also be improved by hiring persons with expertise in technology and digital markets. The Competition (Amendment) Act, 2023 requires the CCI to have members with expertise in technology. The selection process for two member positions in the CCI is currently underway. It may be prudent to consider hiring a member who is an expert in tech markets considering the newly introduced amendment. While the DCA might be able to address gaps in the Indian competition regime, it would also be important to prioritise the effective enforcement of the recent Competition (Amendment) Act, 2023 as well as the making of delegated legislation under the Act.

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<sup>44</sup> Competition Commission of India, Annual Report 2021-22, <https://www.cci.gov.in/public/images/annualreport/en/annual-report-2021-221671704224.pdf> ; Competition Commission of India, Annual Report 2020-21, <https://www.cci.gov.in/public/images/annualreport/en/20-211665122051.pdf> ; Commission of India, Annual Report 2019-20, <https://www.cci.gov.in/public/images/annualreport/en/annual-report-2019-201665121534.pdf>

<sup>45</sup> Competition Commission of India, Annual Report 2021-22, <https://www.cci.gov.in/public/images/annualreport/en/annual-report-2021-221671704224.pdf>

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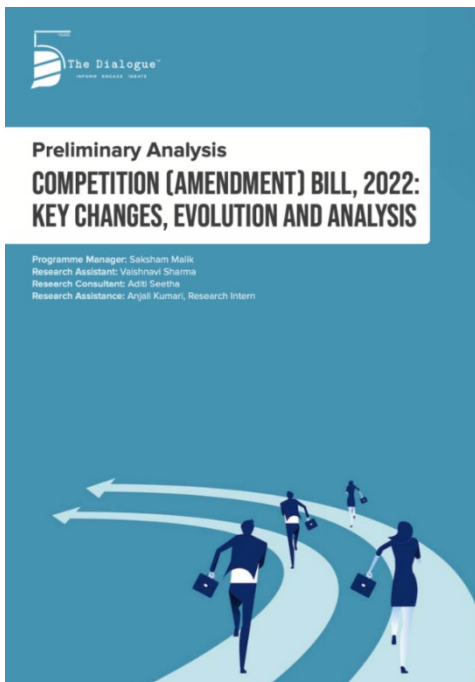
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