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Optics Matter – The Impact of the Ripple Effect on Legal Analysis in Antitrust Inquiries in India

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When Europe sneezes…India catches a cold

Investigations against big tech in Europe and U.S. have created a ripple effect all over the world, including India. The impact of worldwide investigations against big tech has intensified the sentiment of mistrust towards digital moguls. In this environment, it is only natural to make conclusions about the course of the market on an instinct. It is time courts and regulators should resist this impulse.

Feasibly, the impact of the ripple effect on the mind is most profound when analyzing claims against platform economies of distorting competition by playing referee for their own cause. There have been concerns that as the hosts of the walled garden ecosystem, tech companies have the ability and incentive to indulge in exclusionary and preferential treatment. Investigations against Amazon's use of third-party seller data[1], Google's search services[2] and agreements setting licensing conditions for its applications on Android phones[3] are all illustrative of the reference player dichotomy.

The walled garden feature of these platform economies makes it seem logical to define markets by excluding competitive constraints from outside.[4] For instance[5], it may seem logical to conclude from a review of cases in other jurisdictions that markets for digital advertising do not compete with traditional advertising. This seems to imply that traditional advertising forms never compete with digital advertising forms and constitute a separate market. By contrast, grouping all advertising services implies that all forms are in perfect competition with each other. This may also not reflect market realities. This is an excellent example reflecting that factual questions like market definition can be transformed into questions of law.

Once markets are defined to include only the defendant's platform, it leads to the irresistible conclusion that any preferential or self-dealing conduct will distort competition within the relevant market. To put it more emphatically, we accept the notion that the platform mogul as the gatekeeper of the relevant market can offer diminished quality products and exclude able rivals without any consequences.[6]. Yet, history has shown us that at times when firms leverage profits from the markets they dominate to subsidize entry into other markets, they intensify competition.[7] Ideas stating that self-dealing or preferential treatment by firms are always anti-competitive have the effect of creating legal presumptions beyond the boundaries of the statute.

This discussion is especially relevant for India. This is because one interpretation of the unilateral conduct provisions (Section 4) of the Competition Act, 2002 (**Competition Act**) imposes a *per se* violation for any exploitative conduct by dominant firms. Section 4 of the Competition Act includes both exploitative and exclusionary conduct. This is a peculiar problem in the digital economy where the outcry is focused on the unequal bargaining power leveraged by big tech. Should the Competition Commission of India ("**CCI**") choose to adopt the *per se* interpretation, it is relatively easier for the CCI to establish a case of abuse of dominance against an incumbent just based on a claim of exploitation. The is because in case of exploitative conduct, the CCI can declare a violation if the following is satisfied (a) the incumbent is dominant within the relevant market and (b) indulges in arbitrary or discriminatory conduct. For instance, as the dissenting Commissioner in *Matrimony.com v. Google* pointed out, the majority found that Google had violated Section 4 of the Competition Act, without demonstrating harm to competition in India.[8]

Against this background, it's worth making a case for the CCI to keep its eye out for missing pieces (factual analysis of the market) in its decisions.

Missing pieces in the CCI's inquiry

The CCI in an action against Uber has noted that mere investigation of anticompetitive conduct against a company would not warrant an investigation in India.[9] That said, the CCI's investigations into Google's search, online advertising services[10] and Android[11] succeeded actions by the European Commission against Google. While this does not establish a trend, it does indicate that actions by other regulators increase the chances of CCI commencing an action.

The likelihood of a domino effect is greater in India because of the low threshold required to initiate proceedings. For instance, the CCI launched investigations against Uber and Google based on complaints filed by unaffected lawyers and research scholars.[12] In *Samir Agarwal v. CCI**[13]***, the National Company Law Appellate Tribunal[14] took note of the fact that the CCI proceeded with an inquiry based on a complaint filed by an unaffected lawyer, presumably with no locus. This was yet again dealt by CCI recently clarifying that the scheme of the Competition Act allows unaggrieved parties to file complaints.[15]

Complaints filed by unrelated third parties are often based on suspicions and assumptions about the market. Investigations triggered by such complaints lack the factual data that should be ordinarily required before CCI's time and resources can be called to action. This also leads to the factual considerations like market definitions being treated like questions of law, thus leaving the option to CCI to pull market definitions from foreign regulators. For instance, in the CCI orders initiating inquiries against Android and Google Pay, findings on market definition and dominance were based on the European Commission's press release in the Android investigation and a report on Google's market share in India.[16] In the Google Pay initiation order, the CCI also found that UPI and other digital payment are part of two different markets because of the uptick in the number of UPI transactions.[17] It is unclear how an increase in the number of UPI transactions is indicative of no competition between UPI and other digital payment modes. Similarly, in a complaint involving WhatsApp, the CCI held that market share and subjective popularity can be treated as a proxy for dominance.[18] For completeness, barring the WhatsApp example, the other examples are from administrative orders initiating inquiries. The CCI may offer a more detailed analysis in the final orders. There are good grounds to believe so. The CCI's earlier decisions in *Meru v.*

*Uber**[19]*** and *Confederation of Real Estate Brokers v. Magicbricks.com**[20]*** were grounded in a remarkable appreciation of market realities. In *Meru v. Uber*, the CCI noted that commuter behaviour in Kolkata was reflective of the fact that radio taxies competed with the traditional yellow cabs.[21] Similarly, in Magicbricks, the CCI conducted a factual analysis on whether online and offline channels exercised competitive constraints on each other.[22] Notably, the CCI undertook this market analysis at the *prima facie* stage and decided not to order a detailed investigation.

As the CCI investigates the question of whether default apps on smartphones are sticky, the hope is that analysis would focus on empirical evidence of the effect of these practices on competition in India.[23] This should include, *inter alia* (a) an empirical assessment of whether pre-installed apps dissuade users from downloading rival apps, (b) efficiencies and cost benefits of exclusive agreements[24] and (c) review of its initial conclusions on the market definition that tease out the underlying market realities.

Where do we go from here?

The CCI's reflex to spur into action comes from a genuine place of acting as the protector of competition in a growing economy. This task would understandably arduous for a regulator that has been in existence for just over a decade. The CCI does not have the benefit of looking back at a documented history of litigation and its effect on durable monopolies like its counterparts in Europe and the U.S. Historical perspective demonstrates that even the most durable monopolies wane overtime.[25] Kodak was simply unable to foresee the promise of digital technology and was ultimately taken over by it.[26] Microsoft's exclusive agreements favouring Internet Explorer were intended to suppress Netscape, but ultimately proliferated browsers like Chrome and Firefox.[27]

That said, market definition and effects analysis are factual assessments that the CCI is equally capable of undertaking. In this saga of defaults and preferential treatments by platforms, consumers will be the empirical turning point. Some say that switching from defaults is too technical for consumers. Others maintain that as long as switching costs are low, search bias would lead to consumers switching in search of superior search services. Ultimately, whether consumers can and do switch is a question of fact and should not be presumed. Numbers will speak, and the story may very well play out differently around the world.

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[1] Antitrust: Amazon, , https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077 (last visited Nov 14, 2020).

[2] Case search – Competition – European Commission, , https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39740 (last visited Nov 14, 2020).

[3] Antitrust, *Justice Department Sues Monopolist Google For Violating Antitrust Laws: Google Complaint , , https://www.justice.gov/opa/press-release/file/1328941/download.*

[4] Herbert Hovenkamp, *Antitrust and Platform Monopoly*, SSRN Electron. J. (2020), https://papers.ssrn.com/abstract=3639142 (last visited Nov 10, 2020).

[5] *Id.*

[6] Thank You Google for Subsidizing my iPhone – Economic Forces, , https://pricetheory.substack.com/p/thank-you-google-for-subsidizing?utm_campaign=post&utm_medium=email&utm_source=copy (last visited Nov 13, 2020).

[7] Structural Separation and Self-Preferencing: What are the Right Lessons of History? – Pro Market, , https://promarket.org/2020/10/08/structural-separation-self-preferencing-ibm-house-antitrust-report/ (last visited Nov 10, 2020). "*IBM's entry into the (personal computer) market completely altered the trajectory of that market. IBM's entry validated the market. Its sale of personal computers soared, and eventually the IBM PC became a platform on which the industry was based. As clones emerged, that market got away from IBM and it would never lead it again, but the actions of IBM built the market.*"

[8] *Matrimony.com v. Google*, Case Nos. 7&30 of 2012, , https://www.cci.gov.in/sites/default/files/07%20&%20%2030%20of%202012.pdf

[9] *Samir Agarwal v. Uber*, Case No. 37 of 2018,, http://www.cci.gov.in/sites/default/files/37of2018.pdf.

[10] *Matrimony.com v. Google, Supra Note* 8.

[11] *Umar Javeed v. Google*, Case No. 39 of 2018, , https://www.cci.gov.in/sites/default/files/39-of-2018.pdf.

[12] *Samir Agarwal v. Uber*, Case No. 37 of 2018,, http://www.cci.gov.in/sites/default/files/37of2018.pdf; *Umar Javeed v. Google, Supra Note* 11.

[13] *Samir Agarwal v. Competition Commission of India* [Competition Appeal (AT) No.11 of 2019,, https://images.assettype.com/barandbench/2020-06/54c266ed-44b6-4aca-8206-304ee83ba08d/Samir_Agrawal_vs_CCI__Ola_uber.pdf

[14] The appellate body with the jurisdiction to review CCI decisions.

[15] *XYZ v. Alphabet*, Case No. 7 of 2020, , http://cci.gov.in/sites/default/files/07-of-2020.pdf

[16] Para 32, *Supra Note* 15.

[17] Para 38, *Supra Note* 15.

[18] *Harshita Chawala v. WhatsApp*, Case No. 15 of 2020, https://www.cci.gov.in/sites/default/files/15-of-2020.pdf. "*…in the absence of concrete data/information available in the Indian context other than the subjective information on popularity of WhatsApp, the Commission is of the view that these trends and results can be used as a proxy. More so, these trends appear to be intuitively in sync with the information available in public domain, which though does not confirm market share/strength of WhatsApp in any quantitative terms, nevertheless point towards its dominance.*"

[19] *Meru v. Uber* Case No. 81 of 2015, , https://www.cci.gov.in/sites/default/files/812015.pdf.

[20] *Confederation of Real Estate Brokers v. Magicbricks.com* Case No. 23 of 2016,, https://www.cci.gov.in/sites/default/files/26%282%29%20Order%20in%20Case%20No.%2023%20of%202016.pdf

[21] *Meru v. Uber, Supra Note* 19*; "commuters in Kolkata rely on the yellow taxis for their day to day travelling/transportation requirements owing to their ease in booking, predictability in terms of availability, low pricing etc. Therefore, the Commission notes that Kolkata is a peculiar market in itself. The active presence of yellow taxis and the continuous reliance of commuters on such taxis indicate that yellow taxis provides a viable alternative, in effect posing a significant competitive constraint on the radio taxi operators. In such a scenario, it may be appropriate to include yellow taxis within the relevant product market as both these types of taxis seem to be posing competitive pressure on each other in Kolkata.*"

[22] *Confederation of Real Estate Brokers v. Magicbricks.com, Supra Note* 20. "*However, the Commission has considered the relevant market as 'the services of real estate brokers/ agents in India', which is different and broader than the relevant market conceived by the Informant. The Commission observes that in the said market, there are large number of players operating, both through online and off-line channels. It is so because presently, in India, no licence or registration is required to undertake the brokerage business in real estate sector. Thus, the presence of a large number of listing sites and traditional brokers in the said relevant market pose competitive restraint on each other and hence no specific player can act independently of the market forces and affect the consumers or other players in its favour.*"

[23] *Supra* Note 15. The CCI's Google Pay initiation order also relied on EC's concerns regarding Apple's ability to distort competition by charging a mandatory commission to list apps on the app store.

[24] Thank You Google for Subsidizing my iPhone – Economic Forces, *supra* note 6. As this commentator has pointed out, defaults can be good for competition, both in the long term and short term.

[25] Structural Separation and Self-Preferencing: What are the Right Lessons of History? – Pro Market, *supra* note 7.Hovenkamp, *supra* note 4.

[26] Hovenkamp, *supra* note 4.

[27] *Id.*

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