

# **Fair and Competitive E-marketplaces (F.A.C.E.) | The Business Users' Narrative**

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# Preface

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One of the most significant developments in the global economy over the last two decades has been the emergence of digital platforms.<sup>1</sup> The COVID-19 pandemic has further cemented our reliance on digital platforms for buying goods and services, meeting people, accessing information and working amidst lockdowns and social distancing rules. This Working Paper centers on certain attributes of digital platforms that serve as E-marketplaces. E-marketplace platforms essentially act as facilitators of online connections between buyers and sellers of goods and services. As the facilitator, the platform decides the rules for the market on which buyers and sellers operate. Resultantly, by design, the platform occupies a more advantageous position than its users, who in effect might only accept the terms pre-formulated by the platform.<sup>2</sup> Therefore, contrary to the pre-platform era where buyer-seller relationships were bipartite, there is now a need to acknowledge the all-important gatekeeper role played by platforms transforming commerce to a tripartite arrangement.

This paper examines contestability in the market for e-commerce platforms and fairness in the relationship between these platforms and their business users/sellers. As these platforms have prospered in market share, they have struggled to keep up with the initial promise of growth for their business users. Consequently, most business users and trade bodies in the country today are highly ambivalent towards digital platforms.<sup>3</sup> Sporadic efforts have been attempted to address concerns raised by business users of digital platforms via the consolidated Foreign Direct Investment Policy, the Draft E-commerce Policy, 2019, the Consumer Protection (E-commerce) Rules, 2020, the Information Technology (Intermediary Guidelines And Digital Media Ethics Code) Rules, 2021, and the Competition Act, 2002 (each of these is discussed in detail in Chapter III of the Working Paper). But none of these regulatory instruments have truly yielded results particularly, in terms of improving platform to business user ('P2B') relationships and contestability of the e-commerce market in India.

This Working Paper endeavours to contribute to the legal discourse on regulation of P2B relationships and restoring contestability in e-commerce markets by providing a detailed assessment of existing as well as proposed P2B competition regulation in seven international jurisdictions which lead the way in global regulatory response. What emerges is an interesting consensus on the immediate need to develop complementary *ex-ante* regulatory tools to identify and selectively regulate platforms with gatekeeper status in their respective markets, without burdening smaller platforms with the same rigour of regulation.

The above trend must not be ignored by lawmakers because the counterfactual - allowing privately owned, democratic legitimacy lacking digital platforms<sup>4</sup> to set the rules of Indian e-commerce, without identifying and mitigating the long-term risks and the economic harm they can cause<sup>5</sup> - is a scenario which we cannot afford.

Moreover, done rightly, E-marketplaces promise tremendous potential for consumers as well as sellers. Therefore, regulatory efforts must focus on developing an ecosystem that can nurture sustainable E-marketplaces.

<sup>1</sup>Mark Fenwick & Erik P. M. Vermeulen, 'A Sustainable Platform Economy & the Future of Corporate Governance' (2019) ECGI Working Paper Series in Law 441/2019 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3331508](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3331508)> accessed 1 July 2021; Annabelle Gawer & Nick Srnicek, *Online Platforms: Economic And Societal Effects* (European Parliament, 2021) <[https://www.europarl.europa.eu/RegData/etudes/STUD/2021/656336/EPRS\\_STU\(2021\)656336\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/656336/EPRS_STU(2021)656336_EN.pdf)> accessed 1 July 2021.

<sup>2</sup> Hans Schulte-Nolke, and others, *The legal framework for e-commerce in the Internal Market* (European Parliament, 2020) <[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652707/IPOL\\_STU\(2020\)652707\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652707/IPOL_STU(2020)652707_EN.pdf)> accessed 1 July 2021.

<sup>3</sup> Madhurima Nandy, 'Amazon, Flipkart to be probed for abuse of competition law', *Mint*, (13 January 2020) <<https://www.livemint.com/companies/news/amazon-flipkart-to-be-probed-for-abuse-of-competition-law-11578937148007.html>> accessed 1 July 2021.

<sup>4</sup>Hans Schulte-Nolke, and others, *The legal framework for e-commerce in the Internal Market*, (European Parliament, 2020) <[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652707/IPOL\\_STU\(2020\)652707\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652707/IPOL_STU(2020)652707_EN.pdf)> accessed 1 July 2021.

<sup>5</sup> Lina M. Khan, 'The separation of Platforms and Commerce' (2021) 119(4) *Columbia Law Review* <<https://columbialawreview.org/content/the-separation-of-platforms-and-commerce/>> accessed 1 July 2021.

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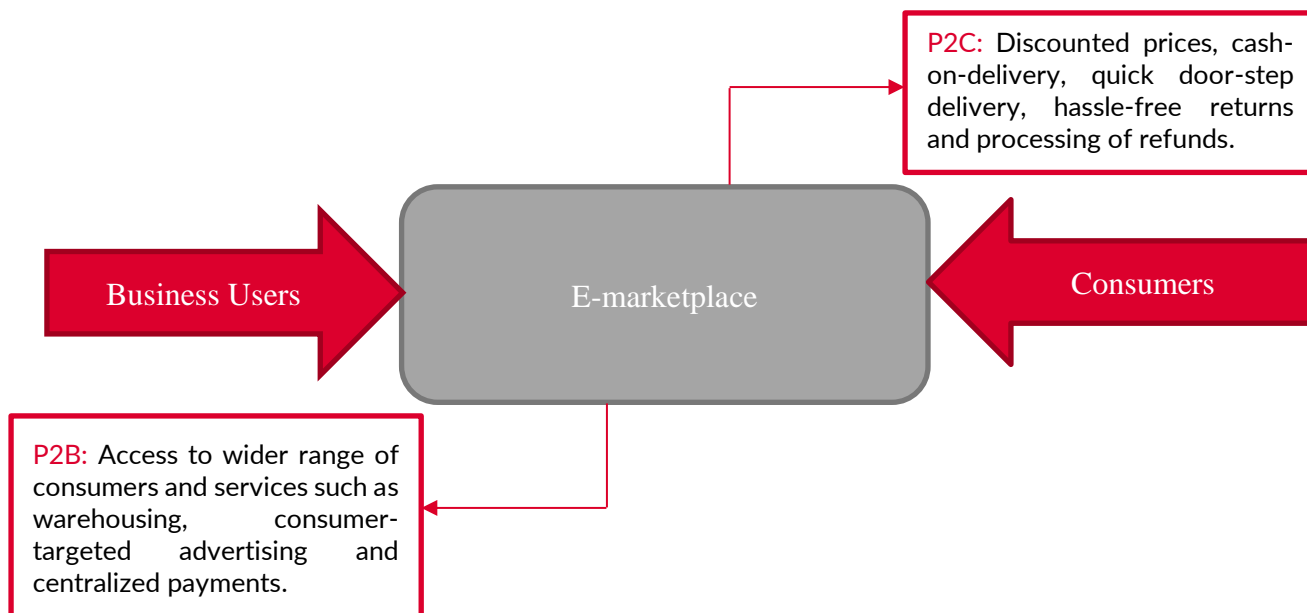
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# I. Setting the context: Indian e-commerce and the competition problem

E-commerce – broadly, buying and selling online- is at the forefront of the digital revolution in India. With the fastest growing e-commerce market in the world,<sup>6</sup> India is pacing itself to become a global hub of e-commerce owing to a multitude of factors fuelling it, such as increased smartphone penetration and data access, seamless integration with digital payments, availability of cash on delivery and a large consumer base.<sup>7</sup>

Notably, e-commerce has witnessed the emergence of online Marketplaces ('E-marketplaces'),<sup>8</sup> which have grown increasingly popular in the past decade. In fact, one definitive impact of the COVID 19 pandemic has been to accelerate transition from offline to online shopping for consumers via E-marketplaces. Reportedly, despite the retail market shrinking by 5%, the e-commerce retail segment has grown by 25% to reach a whopping USD 38 billion in FY 2020-21.<sup>9</sup>

E-marketplaces assume centre stage in e-commerce as they provide the digital platform that serves as an infrastructure upon which 'business users/sellers'<sup>10</sup> operate upon in order to reach 'consumers'.<sup>11</sup> Their business models rely on connecting these distinct user groups on different sides of the platform, making the platform 'multi-sided'. In India, E-marketplaces are predominantly found in consumer goods (mobiles, lifestyle, electrical & electronic appliances, and grocery), food delivery and hotel booking services markets. Popular E-marketplaces in India include Flipkart, Amazon, Swiggy, Zomato, BigBasket, Nykaa and MakeMyTrip.



<sup>6</sup> The Competition Commission of India, *Market Study on E-commerce in India: Key Findings and Observations (CCI E-commerce Market Study)* (8 January 2020) page 5 <[https://www.cci.gov.in/sites/default/files/whats\\_newdocument/Market-study-on-e-Commerce-in-India.pdf](https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf)> accessed 1 July 2021.

<sup>7</sup> CCI E-commerce Market Study, page 5.

<sup>8</sup> In this Working Paper, the term 'E-marketplace' is used to refer to platforms that primarily offer intermediation services to business users and consumers. They allow business users to offer goods or services to Consumers with a view to facilitating transactions between the business users and the consumers, for a monetary price. Aggregator platforms such as Ola, Uber and Urban Company are outside the purview of this Working Paper.

<sup>9</sup> Prerena Lidhoo, 'E-tail surges 25% in FY21: Bain & Co', *Fortune India* (17 August 2021) <<https://www.fortuneindia.com/technology/e-tail-surges-25-in-fy21-bain-co/105737>> accessed 19 August 2021; John Sarkar 'E-tail may beat modern trade by FY26: Report' *The Times of India* (17 August 2021)<<https://timesofindia.indiatimes.com/business/india-business/e-tail-may-beat-modern-trade-by-fy26-report/articleshow/85394641.cms>> accessed 19<sup>th</sup> August 2021.

<sup>10</sup> In this Working Paper, the term 'Business User' is used to refer to a legal or natural person who, in their commercial or professional capacity uses an E-marketplace's services to offer goods or services to Consumers.

<sup>11</sup> In this Working Paper, the term Consumer is understood in accordance with the Consumer Protection Act, 2019.

E-marketplaces offer a multiplicity of benefits to both business users and consumers. In addition to gaining access to a wider segment of consumers, business users can also purchase services from the E-marketplace such as warehousing facilities, consumer targeted promotion and advertisement and centralised payment processing.<sup>12</sup> To consumers, such E-marketplaces offer products at massively discounted rates coupled with facilities such as door-step delivery and return services, which result in high consumer satisfaction. This is however not without problems.

The e-commerce market in India exhibits a clear pattern of concentration, where very few E-marketplace giants hold control over a large part of the market,<sup>13</sup> which makes them indispensable for business users desirous of accessing their sizeable online consumer base. Lockdowns and social distancing norms imposed in the wake of the COVID-19 pandemic have further nudged business users to become all the more reliant upon E-marketplaces to reach consumers.<sup>14</sup> Consequently, dealing with E-marketplaces has become unavoidable for many business users and has arguably led to such giants strategically positioning themselves as 'gatekeepers' wherein they control the entry points to and subsequently the manner in which business users transact in the e-commerce market.

However, as the proverbial saying goes "*power corrupts; absolute power corrupts absolutely*". In this vein, increasingly vociferous allegations of E-marketplaces indulging in unfair practices such as self-preferencing, deep discounting, anti-competitive leveraging and imposition of unfair and discriminatory usage terms upon their business users have come to the fore. Trade organizations and unions have on multiple occasions approached the Competition Commission of India ('the CCI') and the Ministry of Commerce and Industry to alleviate their concerns.<sup>15</sup> Despite these outcries, e-commerce competition regulation, particularly from the viewpoint of business users and their relationships with online platforms ('**Platform-to-Business relationships**'/ '**P2B relationships**'), leaves much to be desired.

Notably, pursuing a light touch approach in regulating P2B relationships and promoting contestability in the market for e-commerce may prove to be short-sighted even from a consumer welfare standard. Unfairness in P2B relations stands to ultimately impact consumers in the form of reduced options due to the shrinking pool of sellers and resultant lack of competition, as well as the risk of platforms flexing their newly acquired market power by increasing prices directly or indirectly (for example, in the form of invasive collection and use of consumer data). Reduced contestability in the market for e-commerce may, among other things, prevent emergence of new innovative companies which could offer cheaper or better goods and services to consumers.

In this backdrop, this Working Paper seeks to initiate a discussion on effective regulatory tools to address competition law concerns in P2B relationships. It provides an overview of the global response to competition issues in P2B relationships. The underlying aim is to leapfrog in the right direction by adapting emerging global best practice to P2B competition issues prevalent in the Indian e-commerce market. Having briefly outlined the significance of E-marketplaces in India and their attendant competition concerns in this chapter, the remainder of the Working Paper is structured as follows: In **Chapter II**, we discuss in detail the *modus operandi* of platforms

<sup>12</sup> CCI E-commerce Market Study, page 10.

<sup>13</sup> CCI E-commerce Market Study, paras 49 and 50; The e-commerce retail market predominantly has two players, Amazon and Flipkart, competing toe-to-toe, with a combined market share of about 63% (as of October 2020) - Gabriela Barkho, 'How the pandemic strengthened Walmart-owned Flipkart's marketshare' *Modern Retail*, (13 May 2021) <<https://www.modernretail.co/platforms/how-the-pandemic-strengthened-walmart-owned-flipkarts-marketshare/>> accessed 1 July 2021; Zomato and Swiggy enjoy a lion's share of the Indian online food service market with a combined market share of above 80% as of February, 2021 - Manish Singh, 'India's Zomato valued at \$5.4 billion in new \$250 million investment' *Techcrunch*, (22 February 2021) <<https://techcrunch.com/2021/02/22/indian-food-delivery-startup-zomato-valued-at-5-4-billion-in-new-250-million-investment/>> accessed 1 July 2021. As for the online travel agency platforms, MakeMyTrip (along with its subsidiary Goibibo) enjoys a market share of a whopping 60% (as of April, 2021) - Ananya Bhattacharya, 'Cleartrip is just the first pandemic casualty among India's online travel agencies' *Quartz India* (18 April 2021) <<https://qz.com/india/1996948/cleartrip-deal-raises-flags-about-makemytrip-and-easemytrip/>> accessed 1 July 2021; As of 2019, Cleartrip had a market share of about 20% - 'Cleartrip Limited Unlisted Shares' *Unlisted Zone* <<https://unlistedzone.com/shares/cleartrip-limited-unlisted-shares/>> accessed 1 July 2021. Reportedly, in light of the Covid-19 pandemic affecting Cleartrip's business, it is proposed to be acquired by Flipkart, another E-marketplace giant - 'Flipkart acquires Cleartrip as part of its diversification drive' *The Economic Times* (15 April 2021) <<https://economictimes.indiatimes.com/tech/startups/flipkart-acquires-cleartrip-as-part-of-its-diversification-drive/articleshow/82082840.cms?from=mdr>> accessed 1 July 2021.

<sup>14</sup> Vikas Kathuria, 'A Legal Toolkit for Fair and Competitive Digital Markets in India' (2021) Observer Research Foundation Occasional Paper No. 307 <<https://www.orfonline.org/research/a-legal-toolkit-for-fair-and-competitive-digital-markets-in-india/>> accessed 1 July 2021.

<sup>15</sup> Peerzada Abrar, 'Top Retailer Body moves against Amazon-Flipkart festive Sales' *Business Standard* (19 October 2020) <[https://www.business-standard.com/article/companies/top-trader-retailer-body-moves-govt-against-amazon-flipkart-festive-sales-120101901249\\_1.html](https://www.business-standard.com/article/companies/top-trader-retailer-body-moves-govt-against-amazon-flipkart-festive-sales-120101901249_1.html)> accessed 1 July 2021; Asit Ranjan Mishra, 'Amazon, Flipkart execs meet DPIIT officials over deep discounting allegations' *Mint* (10 October 2019) <<https://www.livemint.com/companies/news/amazon-flipkart-execs-meet-dpiit-officials-over-deep-discounting-allegations-11570726960739.html>> accessed 1 July 2021; S. Shanthi. S, 'Traders body takes on ecommerce giants a timeline of CAIT vs Amazon Flipkart and Co' *Inc42* (25 October 2019) <<https://inc42.com/buzz/traders-body-takes-on-ecommerce-giants-a-timeline-of-cait-vs-amazon-flipkart-and-co/>> accessed 1 July 2021.



and the competition law challenges they pose especially to business users reliant on them. In **Chapter III** of this Working Paper, we provide an overview of the statutory instruments applicable to P2B relationships in India. The objective of this chapter is to highlight the extant gap in regulation of competition issues arising in P2B relationships. In **Chapter IV**, we present the *ex-ante* competition law framework adopted by or proposed to be adopted by seven global jurisdictions with a view to improve regulation of P2B dynamics. This chapter divulges an international trend to adopt *ex-ante* competition law tools to ensure that E-marketplaces remain fair and contestable. In **Chapter V**, we make a case for strengthening *ex-ante* tools to effectively regulate P2B competition issues in India. Finally in **Chapter VI**, with a view to facilitate effective stakeholder discussion, we provide suggestions for as well as raise questions on the nature and design of regulatory responses required in the Indian context.

# II. Decoding P2B competition issues in E-marketplaces

It is well studied that the competition dynamics at play in E-marketplaces are notably different from traditional brick-and-mortar retail competition.<sup>16</sup> This chapter illustrates the characteristic features of multi-sided platforms as applicable to E-marketplaces, and the impact of these features on competition. Lastly, this chapter encapsulates the key competition issues prevalent in P2B relationships in the Indian e-commerce market.

## Unique features of multi-sided platforms

### *Data as an economic resource*

The business model of digital platforms such as E-marketplaces is based on users' personal data, and flow of this data from one side to another.<sup>17</sup> Such platforms collect, store, and use large amounts of data, derived from consumers that transact upon them.<sup>18</sup> This accumulated consumer data is a veritable goldmine for E-marketplaces. They can use these large data samples to study consumption trends and monetize this knowledge in various ways including to compete against their business users by internally developing products and services for which there is demonstrated consumer appetite.<sup>19</sup> For instance, the E-marketplace giant Amazon's entry into retail through Amazon Basics<sup>20</sup> and Flipkart's entry into the furniture segment through Perfect Homes are examples of the consequential vertical integration due to data. By one of their own admissions, being in the e-commerce business, they possess consumer data "in reams and reams. Sifting through that data..." enables them to tailor their products to consumer preferences.<sup>21</sup> There is fear that once such platforms enter adjacent markets, aggregated data at their disposal will result in foreclosure of new entrants who then cannot compete as efficiently without access to this critical input.<sup>22</sup>

Additionally, singular access to aggregated data can present a form of competitive advantage.<sup>23</sup> A data-rich incumbent is able to further bolster its market position through an effect known as the 'feedback loop'. Feedback loops manifest in two ways: A 'user feedback loop' where an entity with a large user base is able to collect more data to improve the quality of its service and thereby acquire new users, and a 'monetization feedback loop' where platforms are able to cash in on the aggregated user data to improve targeted advertisement, which in turn brings in more revenue to invest in the quality of the platform service thereby attracting more users.<sup>24</sup> Such feedback loops reinforce the strength of an incumbent giant in the market, and therefore constitute a formidable barrier to entry for emerging E-marketplaces to effectively compete with incumbent giants.

### *Network effects*

<sup>16</sup> Organisation for Economic Co-operation and Development, 'Implications of E-commerce for Competition Policy - Background Note' (2019) DAF/COMP(2018)3 <[https://one.oecd.org/document/DAF/COMP\(2018\)3/en/pdf](https://one.oecd.org/document/DAF/COMP(2018)3/en/pdf)> accessed 1 July 2021.

<sup>17</sup> Ling-Chieh Kung and Guan-Yu Zhong, 'The Optimal Pricing Strategy for Two-sided Platform Delivery in the Sharing Economy' (2017) Transportation Research Part E: Logistics and Transportation Review 101(1) <<https://scholars.lib.ntu.edu.tw/bitstream/123456789/455958/1/SSRN-id2931383.pdf>> accessed 1 July 2021

<sup>18</sup> Cassandra Liem and Georgios Petropoulos, 'The economic value of personal data for online platforms, firms and consumers' (LSE Business Review, 19 January 2016) <<https://blogs.lse.ac.uk/businessreview/2016/01/19/the-economic-value-of-personal-data-for-online-platforms-firms-and-consumers/>> accessed 1 July 2021.

<sup>19</sup> Lina Khan, 'Amazon's Antitrust Paradox' (2018) 126(3) Yale Law Journal <<https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5785&context=yjlj>> accessed 1 July 2021.

<sup>20</sup> Reportedly, in May 2022, Amazon will end its joint venture with the company that controls Cloutail, one of the biggest sellers on Amazon India. 'Amazon, Top Indian Seller Cloutail End Deal Amid Anti-Trust Probe' NDTV Profit (9 August 2021) <<https://www.ndtv.com/business/amazon-to-end-joint-venture-with-narayana-murthys-catamaran-2506532>> accessed 1 July 2021.

<sup>21</sup> Vishnu Sreekumar, 'Quality First: How Flipkart's Private Brands Bring Trust and Affordability to the Indian Market' Flipkart Stories (25 April 2019) <<https://stories.flipkart.com/flipkart-private-brands-trust-affordability/>> accessed 1 July 2021.

<sup>22</sup> European Round Table for Industrialists, 'Shaping Competition Policy in the Era of Digitisation' (2018) <[https://ec.europa.eu/competition/information/digitisation\\_2018/contributions/ert.pdf](https://ec.europa.eu/competition/information/digitisation_2018/contributions/ert.pdf)> accessed 1 July 2021.

<sup>23</sup> Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition Policy for the Digital Era' (2019) European Commission Report, <<https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>>

<sup>24</sup> Organisation for Economic Co-operation and Development, 'Big Data: Bringing Competition Policy To The Digital Era' (2016) DAF/COMP(2016)14 <[https://one.oecd.org/document/DAF/COMP\(2016\)14/en/pdf#\\_ga=2.106957570.1680213474.1559388897-1619135612.1554836539](https://one.oecd.org/document/DAF/COMP(2016)14/en/pdf#_ga=2.106957570.1680213474.1559388897-1619135612.1554836539)> accessed 1 July 2021.

'Network effects' refer to increased utility that a user derives from a service, when the number of other users consuming the service increases.<sup>25</sup> For instance, the utility of a marketplace, increases for a consumer with the number of sellers on the marketplace and *vice versa*. Therefore, a competitive lead in such markets is self-reinforcing. This creates an effect where not only the product, but also the network of its users bears utility to the user. The greater the popularity of a digital platform, the harder it becomes to create an equally or more attractive competitor. This grants an incumbent an enormous beginner's move advantage.<sup>26</sup> Consequently, for a new entrant seeking to compete with an incumbent, not only does the entrant have to offer a better-quality product, but also convince users to migrate to the new platform by breaking the 'lock-in effect' created by the incumbent. This self-reinforcing mechanism also presents itself as a competitive advantage to incumbent giants.

## ***Economies of scale***

Economies of scale refers to a situation where the *per-capita* cost of production of a good or service decreases with the increase in the number of goods or services produced. While this generally holds true for all markets, the way this phenomenon plays out is far more extreme in case of digital platforms.<sup>27</sup> The increment in the cost of production of service to a new consumer acquired is almost negligible in case of a platform. For instance, every consumer that gets on a platform pays a price for the same, without the platform incurring almost any additional cost towards the provision of good or service to the consumer. This peculiarity also results in pre-existing dominant players having a huge competitive advantage over new entrants in terms of the price at which the service of the platform is offered. Additionally, in order to grow in size with the ultimate goal of reaping benefits of economies of scale, large platforms (which may not necessarily be dominant in a given market), defer their profits indefinitely by running at losses.

These features have arguably led to a diverse range of problems as we shall see below, peculiar to digital platform markets including E-marketplaces.<sup>28</sup> These problems have challenged modern competition law which presupposes that the goal of any private entity is maximizing profits. The business model of platforms, however, prioritizes the expansion of their user-base as opposed to profit maximization.<sup>29</sup> This significantly alters conventionally assumed incentives that platforms such as E-marketplaces have in the medium to short term. Therefore, analysing their behaviour and resultant competition issues requires a departure from the extant frame of reference.

## **Competition issues in the P2B equation**

As stated earlier, the focus of this Working Paper is on analysing competition issues in e-commerce markets from a business user's standpoint. Earlier in the day, e-commerce regulation in India was subject to a light touch approach as it was considered a nascent sector which required regulatory leeway to thrive. When the need for regulation was felt it was mostly from the lens of consumer protection as consumers ostensibly appeared to be the most affected stakeholders. It is only very recently that serious consideration has been given to statutory protection of the rights of business users of e-commerce platforms. Towards this end, the CCI, published a market study in January 2020 which looked into three major e-commerce markets namely accommodation, food and consumer goods.<sup>30</sup> We discuss below the most significant competition concerns in the context of P2B relationships including those highlighted in CCI's market study:

- *Lack of platform neutrality*: Often E-marketplaces use their platform to sell their own goods or services to consumers, directly or indirectly. This practice unarguably provides the E-marketplace an economic incentive and the ability to use its control over the platform to provide technical or economic advantages to its own offering which it could deny to competing business users.<sup>31</sup> For example, CCI's market study

<sup>25</sup> United Nations Conference on Trade and Development, 'Competition issues in the digital economy' (2019) TD/B/C.I/CLP/54 <[https://unctad.org/system/files/official-document/ciclpd54\\_en.pdf](https://unctad.org/system/files/official-document/ciclpd54_en.pdf)> accessed 1 July 2021.

<sup>26</sup> Andrei Hagiu and Julian Wright, 'When Data Creates Competitive Advantage' (*Harvard Business Review*, February 2020) <<https://hbr.org/2020/01/when-data-creates-competitive-advantage>> accessed 1 July 2021.

<sup>27</sup> Richard A. Posner, 'Antitrust in the New Economy' (2000) John M. Olin Program in Law and Economics Working Paper No. 106/2000 <[https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1057&context=law\\_and\\_economics](https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1057&context=law_and_economics)> accessed 1 July 2021.

<sup>28</sup> United Nations Conference on Trade and Development, 'Competition law, policy and regulation in the digital era' (2021) TD/B/C.I/CLP/57 <[https://unctad.org/system/files/official-document/cidpd57\\_en.pdf](https://unctad.org/system/files/official-document/cidpd57_en.pdf)> accessed 1 July 2021.

<sup>29</sup> Lina Khan, 'Amazon's Antitrust Paradox' (2018) 126(3) *Yale Law Journal* <<https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5785&context=yjlj>> accessed 1 July 2021.

<sup>30</sup> CCI E-commerce Market Study.

<sup>31</sup> Council Regulation 2019/1150 of 20<sup>th</sup> June 2019 on promoting fairness and transparency for business users of online intermediation services (EU P2B Regulations) [2019] OJ L186/57 para 30 <<https://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32019R1150&from=EN>> 1 July 2021.

notes that access to competitively sensitive data such as price and quantities sold for each product, seller and geography enables a platform to use such data to introduce its own competing private label and promote sales of such privately owned labels or those of its preferred sellers. Similarly, control over algorithms that determine ranking of products and services on the platform, allows the platform to manipulate rankings to the advantage of its own labels or those of its preferred sellers.<sup>32</sup> In this regard, the CCI's market study concludes that several business users report a lack of neutrality by E-marketplaces towards them.<sup>33</sup> Business users have alleged that preferential treatment is granted by platforms to their own/affiliated products or to some preferred sellers, and such discrimination acts as a barrier to market access for business users operating on such a platform.<sup>34</sup>

- *Lack of transparency in search rankings and user review policy:* Often E-marketplaces are vertically integrated and directly or indirectly sell their own private labels to consumers, creating a conflict of interest. They may also charge a commission from business users ostensibly for legitimate purposes but with an underlying promise to give preference to business users who pay the commission. Given its control on important parameters of the digital infrastructure such as search rankings and user reviews, the E-marketplace has the ability to undermine the contestability for products or services offered internally (or by commission paying business users) to the detriment of third party business users, for example by giving prominence to its own products in search rankings.<sup>35</sup> The CCI market study notes that the lack of transparency in the mechanism governing such search rankings and user reviews has reportedly impeded with the ability of business users to compete effectively with the platform's preferred sellers or other vertically integrated units.<sup>36</sup>
- *Unfair contract terms:* The CCI market study reports alleged imposition of unfair terms such as arbitrary discounting policies and tying/bundling<sup>37</sup> of products by platforms, as business users do not possess the bargaining power to negotiate.<sup>38</sup> Additionally, business users have also reported that platforms unilaterally revise contract terms for their own benefit<sup>39</sup> and relegate the appearance of certain businesses in search results *in lieu* of lower commission rates paid by such businesses to the platform.<sup>40</sup>
- *Lack of transparency regarding the usage of aggregated consumer data:* As discussed earlier, the ability to access and use data plays a central role in value creation in the online platform economy. An E-marketplace that also directly or indirectly acts as an online retailer on its own platform can take advantage of its dual role to use data, generated from transactions by its business users using its platform, for the purpose of developing its own products or services which are similar to those offered by its business users.<sup>41</sup> For example, the CCI's market study highlights that business users in India have alleged that platforms withhold critical information regarding consumer preference, while selectively using such data to enhance their own products.<sup>42</sup>
- *Deep discounting:* The CCI market study notes that several large platforms engage in price distortion by providing additional discounts on the price set by the sellers of a product or service to widen their customer base.<sup>43</sup> As such, business users effectively lose their control over the final price of a product.<sup>44</sup> Since customers prefer to avail the same service at a cheaper price, such deep discounting has also restricted business users from making the product available through other offline channels at a price higher than the discounted price set by digital platforms.<sup>45</sup>
- *Platform Parity Clauses:* These are also referred to as MFN/Most-favoured-nation clauses. Using MFN clauses, platforms restrict the ability of business users to offer goods or services to consumers under more favourable conditions through other means than through their platform.<sup>46</sup> The CCI market study

<sup>32</sup> CCI E-commerce Market Study, page 21

<sup>33</sup> CCI E-commerce Market Study, page 20

<sup>34</sup> CCI E-commerce Market Study, page 20.

<sup>35</sup> European Commission (EC), 'Proposal for a Regulation on contestable and fair markets in the digital sector' (DMA) COM (2020) 842 final, <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0842&from=en>> accessed 1 July 2021

<sup>36</sup> CCI E-commerce Market Study, page 21

<sup>37</sup> CCI E-commerce Market Study, page 24

<sup>38</sup> CCI E-commerce Market Study, pages 22- 23

<sup>39</sup> CCI E-commerce Market Study, page 23

<sup>40</sup> CCI E-commerce Market Study, page 23

<sup>41</sup> DMA, para 43.

<sup>42</sup> CCI E-commerce Market Study, page 25

<sup>43</sup> CCI E-commerce Market Study, pages 26-27

<sup>44</sup> CCI E-commerce Market Study, page 27

<sup>45</sup> CCI E-commerce Market Study, page 27

<sup>46</sup> EU P2B Regulations.

notes the alleged prevalence of restrictions imposed by E-marketplaces upon business users from charging a lower price on other platforms or even on their own websites.<sup>47</sup> Such terms of contract restrict independent economic growth of business users outside the ecosystem of the E-marketplace. They also harm the consumer by fixing a floor price as well as limiting inter-platform contestability, which in turn limits the choice of alternative digital and physical channels, for consumers.<sup>48</sup>

- *Exclusive agreements:* Business users surveyed by the CCI have also raised concerns in regard to exclusive agreements wherein a particular product, through an agreement, is to be launched exclusively on one platform.<sup>49</sup> In some cases, products of a business user get delisted as a consequence of agreements which make a platform list only one brand in a certain product category.<sup>50</sup> The study notes that such exclusive agreements may result in anti-competitive foreclosure.

The competition concerns discussed above may be attributed to a variety of factors including the role of E-marketplaces as both an infrastructure facility provider to and a competitor with business users. The dual role assumed by E-marketplaces has serious bearings on *inter alia*, the perceived neutrality of the E-marketplace, the lack of transparency in search rankings, user review policy and storage and use of data. Moreover, the fact that presence of business users on leading E-marketplaces has become vital for business users' survival is exploited by E-marketplaces to unilaterally impose terms of contract that are disadvantageous for its business users.

In the next chapter, we aim to discuss in detail the statutory instruments applicable to such P2B relationships in India with a view to demonstrate a gap in regulatory tools available to address the aforementioned issues.

<sup>47</sup> CCI E-commerce Market Study, page 25

<sup>48</sup> DMA, para 37.

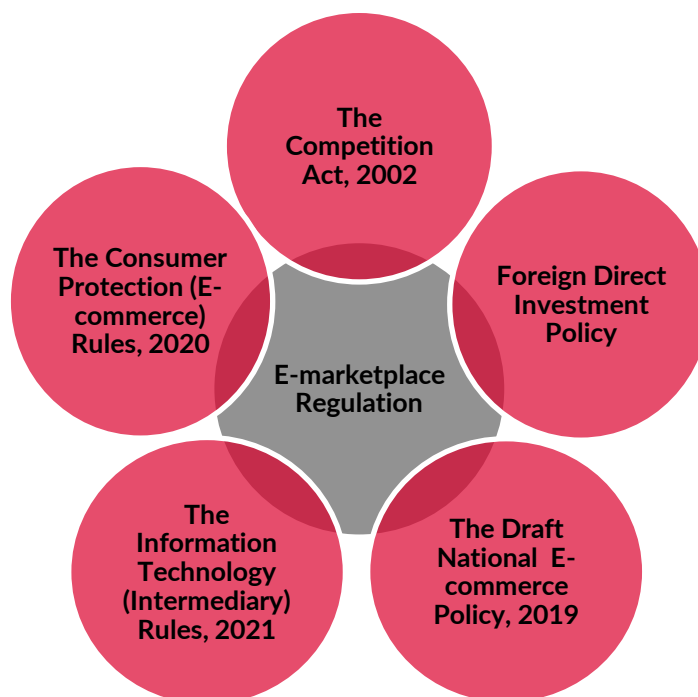
<sup>49</sup> CCI E-commerce Market Study, page 26

<sup>50</sup> CCI E-commerce Market Study, page 26

# III. Regulatory landscape applicable to E-marketplaces in India

The regulation of e-commerce, and resultantly of competition issues concerning E-marketplaces, is largely amorphous and fragmented despite its increasing relevance to the Indian economy. Arguably such a fragmented approach involving a multitude of regulators and their laws is inevitable considering that ‘e-commerce’ refers to a business model i.e., the buying and selling of good and services electronically,<sup>51</sup> and not a sector *per se*. While some laws apply uniformly to all e-commerce businesses<sup>52</sup> the exact scope of regulatory scrutiny depends upon a variety of factors including the nature of the goods and services transacted and the jurisdiction of operation of the given e-commerce entity.<sup>53</sup>

In the specific context of the regulatory landscape governing P2B competition issues in E-marketplaces, the Competition Act, 2002, the consolidated Foreign Direct Investment Policy, the Draft E-commerce Policy 2019, the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 and the Consumer Protection (E-commerce) Rules, 2020 are noteworthy.



<sup>51</sup> Section 2(44), the Central Goods and Services Tax Act, 2017; The Draft E-commerce Policy also embodies a similar definition- “e-Commerce includes buying, selling, marketing or distribution of (i) goods, including digital products and (ii) services; through electronic network. Delivery of goods, including digital products, and services may be online or through traditional mode of physical delivery. Similarly, payments against such goods and services may be made online or through traditional banking channels i.e. cheques, demand drafts or through cash.”The Draft E-commerce Policy also contains an annexure of that tables the definition of E-commerce as has been defined in various Indian statutes: Draft National E-Commerce Policy: India’s Data for India’s Development, 2019, (Draft E-commerce Policy) pages 38-41 <[https://dipp.gov.in/sites/default/files/DraftNational\\_e-commerce\\_Policy\\_23February2019.pdf](https://dipp.gov.in/sites/default/files/DraftNational_e-commerce_Policy_23February2019.pdf)> accessed 1 July 2021.

<sup>52</sup> The statutory instruments applicable to E-commerce include the Information and Technology Act, 2000; Payment and Settlement Systems Act, 2007; Legal Metrology Act, 2009 read with Legal Metrology (Packaged Commodity) Rules, 2011; Sale of Goods Act, 1930; Competition Act, 2002 (the Competition Act); Consumer Protection Act, 2019; the Draft E-commerce Policy; the Foreign Direct Investment Policy under the Foreign Exchange Management Act, 1999; the Central Goods and Services Tax Act, 2017 and the applicable rules and regulations framed thereunder. Additionally, intellectual property rights laws such as the Patents Act, 1970; the Copyright Act, 1957; and the Trademark Act, 1999 are also applicable.

<sup>53</sup> Other business/sector specific statutory instruments include the Food Safety and Standards Act, 2006, Drugs and Cosmetics Act, 1940 and the Motor Vehicles Act, 1998. Additionally, several state-specific laws are applicable such as the Karnataka On-demand Transportation Technology Aggregators Rules, 2016 and the Maharashtra City Taxi Rules 2017 are applicable to cab aggregators in the respective states.

The aforementioned statutory instruments collectively regulate several aspects pertaining to the P2B equation in E-marketplaces. While the Competition Act, 2002, primarily follows an *ex-post* model of regulation, i.e., regulation that is applied *retrospectively* once the conduct has already occurred, the other instruments apply *ex-ante*, i.e., they apply *prospectively* to regulate future conduct of E-marketplaces.

The following section contains a brief overview of these laws and policies as applicable to E-marketplaces, and their relevance in regulating P2B relationships.

## The Competition Act, 2002

Competition on and amongst E-marketplaces is regulated under the Competition Act, 2002 ('**Competition Act**'), whose enforcement is entrusted with the CCI. As discussed previously, the Competition Act follows an *ex-post* model of regulating anti-competitive conduct wherein the CCI intervenes when contraventions in section 3 or section 4 occur.<sup>54</sup> While section 3 sets out a prohibition on anti-competitive *agreements*,<sup>55</sup> section 4 deals with the regulation of unilateral anti-competitive conduct by *dominant* entities.<sup>56</sup>

Combinations are however regulated *ex-ante*,<sup>57</sup> wherein parties intending to enter into a combination are required to notify and seek approval from the CCI prior to consummation of the transaction if the thresholds in section 5 of the Competition Act are triggered.<sup>58</sup>

Anti-competitive practices pertaining to e-commerce thus far have been subject to the CCI's scrutiny both under sections 3<sup>59</sup> and 4<sup>60</sup> of the Competition Act. As previously elaborated, prevalent anti-competitive conduct on E-marketplaces may take the shape of various anti-competitive practices such as biased search rankings, reviews and rating mechanisms, obscure policies on collection and usage of aggregated data, unilateral revision of P2B contact terms, exclusive agreements with certain preferred sellers or private labels, and imposition of unfair price parity clauses and discount policies.<sup>61</sup>

In regulating the aforementioned anti-competitive practices, section 3 may only potentially cover limited types of practices that involve two or more parties to an agreement, such as exclusive agreements, imposition of parity clauses through agreements and other contractual obligations which may have an anti-competitive effect.<sup>62</sup> Moreover, presently while determining whether an agreement has an appreciable adverse effect on competition ('**AAEC**') under section 3, the CCI is required to consider a limited set of factors laid out in section 19(3) of the Competition Act. These factors were formulated over two decades ago and may not always account for considerations that are unique to the platform economy. To address this issue, the Competition Law Review Committee ('**CLRC**') constituted by the Ministry of Corporate Affairs, in its 2019 Report<sup>63</sup> has recommended widening section 19(3) to make it an inclusive provision with a view to allowing newer considerations which may be relevant for digital markets to be factored in while assessing AAEC of an agreement.<sup>64</sup> However, recommendations of the CLRC are yet to be codified.

Section 4 deals with the regulation of unilateral anti-competitive conduct by prohibiting *dominant* entities from abusing their position.<sup>65</sup> Resultantly, unfair practices related to search results, rankings, ratings, collection and

<sup>54</sup> Section 19(1), the Competition Act

<sup>55</sup> Section 3, the Competition Act

<sup>56</sup> Section 4, the Competition Act

<sup>57</sup> Sections 5 and 6, the Competition Act

<sup>58</sup> Section 5 and 6 of the Competition Act

<sup>59</sup> *Delhi Vyapar Mahasangh v. Flipkart and Ors.* 2020 SCC OnLine CCI 3; *Ashish Ahuja v. SnapDeal and Others* 2014 SCC OnLine CCI 67; *Lifestyle Equities C.V. and another v. Amazon Seller Services Private Ltd. and Ors* 2020 SCC OnLine CCI 33

<sup>60</sup> *All India Vendors Association v. Flipkart* 2018 SCC OnLine CCI 97; *Prachi Agarwal v. Swiggy* 2020 SCC OnLine CCI 22; *Fast Track Call Cab Private Limited v. ANI Technologies Pvt. Ltd.* 2017 SCC OnLine CCI 36.

<sup>61</sup> CCI E-commerce Market Study

<sup>62</sup> It must also be noted that the Competition Law Review Committee (**CLRC**) has highlighted the need to understand "agreements" under section 3 in an expansive manner, particularly in digital markets: Ministry of Corporate Affairs, 'Report Of Competition Law Review Committee' (**CLRC Report**) (2019) <<https://ies.gov.in/pdfs/Report-Competition-CLRC.pdf>> accessed 1 July 2021.

Accordingly, the Competition Bill, 2020 has sought to amend section 3(4) of the Act to cover agreements that are neither strictly horizontal nor vertical, in order to broaden the scope for intervention by the CCI. The Bill may be accessed at: The Competition (Amendment) Bill, 2020 <[https://www.taxmanagementindia.com/file\\_folder/folder\\_5/Draft\\_Competition\\_Amendment\\_Bill\\_2020.pdf](https://www.taxmanagementindia.com/file_folder/folder_5/Draft_Competition_Amendment_Bill_2020.pdf)> accessed 1 July 2021.

<sup>63</sup> Vidhi provided research and drafting assistance to the CLRC in preparation of the CLRC Report.

<sup>64</sup> CLRC Report, page 68.

<sup>65</sup> Section 2, the Competition Act.

usage of aggregated data, unilateral revision of contract terms and discount policies may potentially be regulated under section 4 of the Competition Act if the E-marketplace in question is *dominant*. Therefore, establishing 'dominance' is a pre-condition for assessing whether a certain practice is abusive under section 4 of the Competition Act.

'Dominance' is defined as a position of market strength enjoyed by an enterprise in its *relevant market* that allows it to operate independently of competitive forces prevailing in its relevant market or affect its competitors or consumers or its relevant market in its favour.<sup>66</sup> Therefore, while assessing dominance, the first step for the CCI is to delineate the 'relevant market' within which the strength of the entity is examined.<sup>67</sup> Following this, the CCI assesses whether the entity enjoys dominance in the defined 'relevant market' by accounting for factors enumerated in section 19(4) of the Competition Act.<sup>68</sup> This exercise is carried out for each case individually as there is no statutory bright line test for dominance<sup>69</sup> under the Competition Act. Such an assessment of dominance for E-marketplaces has arguably given rise to two key issues:

## ***The delineation of relevant market***

The delineation of relevant market is an evidence-based exercise wherein the CCI scopes the strength of an E-marketplace by assessing the availability of substitutes to the E-marketplace's services in a given geographical area.<sup>70</sup> The purpose of such an assessment is to evaluate the entity's market strength *relative* to its competitors operating in the same relevant market. Therefore, it often follows that in a narrowly defined relevant market the market strength of an entity is more readily apparent, while in a widely defined relevant market, the market strength tends to appear diluted.<sup>71</sup> Consequently, the wider the relevant market, the tougher the assessment of the entity's dominance becomes. In this context, it is of note that the CCI's approach to the delineation of relevant market has evolved through the years. In 2014, in the early days of the advent of e-commerce in India, the CCI in its order *Ashish Ahuja v. Snapdeal and Ors*<sup>72</sup> considered online and offline markets as separate channels of distribution of the same 'relevant market'. However, in its more recent cases such as *All India Vendors Association v. Flipkart*<sup>73</sup> and *Lifestyle Equities C.V. and another v. Amazon Seller Services Private Ltd. And Ors*<sup>74</sup>, the CCI has considered delineating E-marketplaces as a separate 'relevant market' entirely, owing to the distinctive features at play.

Further, E-marketplaces are 'multi-sided' and provide distinct yet interrelated services to both consumers and business users. As such, the assessment of what constitutes a 'relevant market' for the purposes of an E-marketplace that is operational on multiple sides of the platform in a given transaction, is arguably a complex exercise.<sup>75</sup> Resultantly, it has been argued that many tools that are traditionally used in the assessment of relevant market may not adequately capture features such as the impact of direct and indirect network effects on prices,<sup>76</sup> the presence of interconnected but distinct markets on different sides of the platform,<sup>77</sup> and the implicit price of data paid by a consumer.<sup>78</sup> Notably, as a step in the right direction, the CLRC Report recommended widening the scope of delineation of relevant markets under sections 19(6) and 19(7) of the

<sup>66</sup> Explanation (a) to section 4, the Competition Act.

<sup>67</sup> Section 19(5), the Competition Act.

<sup>68</sup> Section 19(4), the Competition Act.

<sup>69</sup> *Mr. Ramakant Kini v. Dr. L.H. Hiranandani Hospital, Powai, Mumbai* 2014 SCC OnLine CCI 17

<sup>70</sup> Sections 19(5), 2(r), 2(t), the Competition Act

<sup>71</sup> Organisation for Economic Co-operation and Development, 'Market definition in multi-sided markets' (2017) DAF/COMP/WD(2017)33/FINAL <<https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD%282017%2933/FINAL&docLanguage=En#:~:text=As%20multi%2Dided%20markets%20involve,important%20in%20multi%2Dided%20markets>> accessed 1 July 2021.

<sup>72</sup> *Ashish Ahuja v. Snapdeal and Ors*, 2014 SCC OnLine CCI 67, para 16.

<sup>73</sup> *All India Vendors Association v. Flipkart* 2018 SCC OnLine CCI 97, para 27 - In this case the CCI did not conclusively determine that E-marketplaces constitute a separate relevant market since the question was redundant in the circumstances of the case. However, it noted the distinct features of platforms and recognized the possibility of delineating E-marketplaces as a separate "relevant market".

<sup>74</sup> *Lifestyle Equities C.V. and another v. Amazon Seller Services Private Ltd. and Ors*, 2020 SCC OnLine CCI 33, para 23.

<sup>75</sup> Organisation for Economic Co-operation and Development, 'Market definition in multi-sided markets' (2017) DAF/COMP/WD(2017)27/FINAL <[https://one.oecd.org/document/DAF/COMP/WD\(2017\)27/FINAL/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2017)27/FINAL/en/pdf)> accessed 1 July 2021; Daniel Mandrescu, 'Market definition for two-(or multi) sided platforms – Demand interdependence and substitution as guiding principles', *Lexxion* (18 September 2018) <<https://www.lexxion.eu/en/coreblogpost/market-definition-for-two-or-multi-sided-platforms-demand-interdependence-and-substitution-as-guiding-principles/>> accessed 1 July 2021.

<sup>76</sup> Sung Yoon Yang, 'Rethinking Modes of Market Definition for multi-Sided Platforms' (2018) 9(4) *International Journal of Trade, Economics and Finance* <<http://www.ijtef.org/vol9/608-AEB3004.pdf>> accessed 1 July 2021.

<sup>77</sup> Organisation for Economic Co-operation and Development, 'Market definition in multi-sided markets' (2017) DAF/COMP/WD(2017)33/FINAL <<https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD%282017%2933/FINAL&docLanguage=En#:~:text=As%20multi%2Dided%20markets%20involve,important%20in%20multi%2Dided%20markets>> accessed 1 July 2021.

<sup>78</sup> Magali Eben, 'Market Definition and Free Online Services: The Prospect of Personal Data as Price' (2018) 14(2) *I/S: A Journal of Law and Policy for the Information Society* <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3207201](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3207201)> accessed 1 July 2021.



Competition Act to accommodate for factors that may apply to new-age digital markets.<sup>79</sup> Further, while the CLRC Report concluded that non-monetary considerations such as data may be captured in the definition of 'price' as per the Competition Act,<sup>80</sup> a comprehensive legal assessment that captures such nuances of 'E-marketplaces' is yet to be examined by the CCI in practice.<sup>81</sup>

## ***Assessing 'dominance' within the relevant market***

Upon the delineation of the relevant market, the CCI then proceeds to assess the dominance of an entity in accordance with the factors enumerated in section 19(4) of the Competition Act, which include *inter alia* market share, size and resources of the enterprise and barriers to entry for competitors.<sup>82</sup>

As elaborated previously, characteristic features of platform markets, such as access to data, network-effects and economies of scale pivot the market in favour of an incumbent entity and present as novel barriers to new entrants. Notably, the CLRC Report acknowledges that access to data and network-effects are important considerations while determining dominance and has concluded that the inclusive nature of section 19(4) of the Competition Act enables the CCI to consider such factors while assessing dominance.<sup>83</sup>

Further, given the extreme nature of economies of scope and scale in such markets, business models of platforms, prioritize growth over profits, i.e. expansion of their user-base as opposed to profit maximization.<sup>84</sup> As such, they do not compete *in* the market, but compete *for* the market because such markets typically demonstrate a winner-takes-all effect.<sup>85</sup>

Arguably, such markets are not designed to support multiple firms competing on quality or price, and therefore, a traditional assessment using statutory metrics such as market share does not serve as a useful proxy for dominance.<sup>86</sup> Further, the conjoint effect of a beginner's move advantage of an incumbent platform which is amplified by data-driven feedback loops and network effects,<sup>87</sup> present exponentially laborious barriers of entry to competitors. To fully account for the magnitude of these novel factors within the contours of the present framework for dominance, the CCI will have to adopt a highly nuanced understanding of E-marketplaces and their growth strategy. Firstly, gatekeeper E-marketplaces may not always be dominant and secondly abuse of dominance provisions under the Competition Act may not capture malpractices by gatekeeper E-marketplaces if there is no demonstrable anti-competitive effect within clearly defined relevant markets. This may result in situations where a gatekeeper E-marketplace may behave abusively and influence markets in ways that dominant entities do, without triggering action under statutory abuse of dominance provisions.

The CCI's dynamically evolving understanding of competition issues in regards to E-marketplace giants in its orders in cases such as *Ashish Ahuja v. SnapDeal and Others*<sup>88</sup>, *Mohit Manglani v. M/s Flipkart India Private Limited & Ors*<sup>89</sup>, *All India Online Vendors Association v. Flipkart India Private Limited & Ors*<sup>90</sup>, *Delhi Vyapar Mahasangh v. Flipkart and Ors*<sup>91</sup> and *Lifestyle Equities C.V. and another v. Amazon Seller Services Private Ltd. and Ors*<sup>92</sup> and its

<sup>79</sup> CLRC Report, pages 70-72.

<sup>80</sup> CLRC Report, page 152

<sup>81</sup> While a legal assessment in the specific context of E-marketplaces is yet to be undertaken, in the recent CCI *suo motu* order in *In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users 2021* SCC OnLine CCI 19, para 32, the CCI has clearly spelt out that non-price-based parameters such as control of consumers' personal data, are equally, if not more important than price in today's new-age markets. Therefore, even though it is evident that the CCI's jurisprudence on 'price' is evolving, a concrete example as to the inclusion of non-price-based parameters in the delineation of relevant markets in the specific context of E-marketplaces is yet to be seen

<sup>82</sup> Section 19(4), the Competition Act.

<sup>83</sup> While the CLRC Report acknowledged the importance of data and network-effects in assessment of dominance, it did not specifically recommend an amendment to section 19(4) to add these factors for the following reasons – 1) clause (b) of section 19(4) refers to 'resources of the enterprise' which may include data 2) section 19(4) is inclusive and therefore CCI may rely on factors such as 'network-effects' which are not mentioned in section 19(4) while inquiring whether an enterprise enjoys a dominant position or not under section 4- CLRC Report, pages 156-158.

<sup>84</sup> Lina Khan, 'Amazon's Antitrust Paradox' (2018) 126(3) Yale Law Journal, page 710 <<https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5785&context=yjlj>> accessed 1 July 2021.

<sup>85</sup> Lina Khan, 'Amazon's Antitrust Paradox' (2018) 126(3) Yale Law Journal, page 785 <<https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5785&context=yjlj>> accessed 1 July 2021.

<sup>86</sup> Maxwell Meadows, 'The Essential Facilities Doctrine in Information Economies: Illustrating Why the Antitrust Duty to Deal is Still Necessary in the New Economy', (2015) 25 Fordham Intellectual Property, Media & Entertainment Law Journal, <<https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1608&context=iplj>> accessed 1 July 2021.

<sup>87</sup> CLRC Report, pages 156-157

<sup>88</sup> *Ashish Ahuja v. SnapDeal and Others* 2014 SCC OnLine CCI 67

<sup>89</sup> *Mohit Manglani v. M/s Flipkart India Private Limited & Ors* 2015 SCC OnLine CCI 66

<sup>90</sup> *All India Online Vendors Association v. Flipkart India Private Limited & Ors* 2018 SCC OnLine CCI 97

<sup>91</sup> *Delhi Vyapar Mahasangh v. Flipkart and Ors* 2020 SCC OnLine CCI 3.

<sup>92</sup> *Lifestyle Equities C.V. and another v. Amazon Seller Services Private Ltd. and Ors* 2020 SCC OnLine CCI 33

market study on e-commerce in India<sup>93</sup>, reflects that regulating gatekeeper platforms is an extremely complex task. For example, in the *Ashish Ahuja* case of 2014 where the issue of deep-discounting of goods on E-marketplaces was in question, the CCI observed that the e-commerce industry “thrives on special discounts and deals” (emphasis supplied).<sup>94</sup> However, in its 2020 market study, the CCI exhibited a more nuanced approach when it observed that it is “not clear that these discounts are efficiency based competition on the merits” while also raising concerns regarding the impact of deep discounts on diminishing competitive efficacy of sellers.<sup>95</sup>

Given the complexity in platform regulation confounding regulators across the globe, even in India despite several allegations of anti-competitive practices being levelled against E-marketplaces,<sup>96</sup> effective regulatory intervention has been elusive.<sup>97</sup> As a step in the right direction, the CCI by its market study on e-commerce<sup>98</sup> has nudged E-marketplaces to adopt best practices such as platform neutrality,<sup>99</sup> clear pricing policies<sup>100</sup> and non-discriminatory P2B contract terms<sup>101</sup> in order to promote contestability of services offered by E-marketplaces as well as information symmetry and transparency for both business users and consumers.<sup>102</sup> The CCI’s observations in its market study largely mirror the European Union’s Regulation on Promoting Fairness and Transparency for Business Users of Online Intermediation Services (“**EU P2B Regulations**”).<sup>103</sup> However, given that the CCI’s observations are in the nature of policy prescriptions, their scope for enforceability under the Competition Act remains dubious.

Similarly, even though the CLRC in its 2019 Report acknowledged that critical combinations in digital markets may be escaping scrutiny of the CCI owing to the present combination notification thresholds based on ‘turnover’ and ‘assets’ of the parties involved and recommended introduction of additional notification thresholds, its recommendations are far from acquiring the force of law.<sup>104</sup>

## The Foreign Direct Investment Policy

India’s Foreign Direct Investment (“**FDI**”) policy which is notified by the Department of Promotion for Industry and Internal Trade (“**DPIIT**”), Ministry of Commerce and Industry serves as an important source of obligations for foreign-funded E-marketplaces in India.<sup>105</sup> The significant attributes of the FDI policy for E-marketplaces include the following:

- *Structural intervention* - The policy permits FDI backed e-commerce entities to only operate as a ‘marketplace’ i.e., where it facilitates buying and selling of goods and services between sellers/business users and consumers on its platform.<sup>106</sup> The policy expressly prohibits FDI backed e-commerce entities

<sup>93</sup> CCI E-commerce Market Study

<sup>94</sup> *Ashish Ahuja v. SnapDeal and Others* 2014 SCC OnLine CCI 67, para 21.

<sup>95</sup> CCI E-commerce Market Study, para 108

<sup>96</sup> Peerzada Abrar, ‘Top Retailer Body moves against Amazon-Flipkart festive Sales’, *Business Standard* (19 October 2020) <[https://www.business-standard.com/article/companies/top-trader-retailer-body-moves-govt-against-amazon-flipkart-festive-sales-120101901249\\_1.html](https://www.business-standard.com/article/companies/top-trader-retailer-body-moves-govt-against-amazon-flipkart-festive-sales-120101901249_1.html)> accessed 1 July 2021; Asit Ranjan Mishra, ‘Amazon, Flipkart execs meet DPIIT officials over deep discounting allegations’, *Mint* (10 October 2019) <<https://www.livemint.com/companies/news/amazon-flipkart-execs-meet-dpiit-officials-over-deep-discounting-allegations-11570726960739.html>> accessed 1 July 2021; Shanthi S. ‘Traders body takes on ecommerce giants a timeline of CAIT vs-Amazon Flipkart and Co’, *Inc42* (25 October 2019) <<https://inc42.com/buzz/traders-body-takes-on-ecommerce-giants-a-timeline-of-cait-vs-amazon-flipkart-and-co/>> accessed 1 July 2021.

<sup>97</sup> *Delhi Vyapar Mahasangh v. Flipkart and Ors* 2020 SCC OnLine CCI 3; *Lifestyle Equities C.V. and another v. Amazon Seller Services Private Ltd. and Ors* 2020 SCC OnLine CCI 33; *Mohit Manglani v. M/s Flipkart India Private Limited & Ors* 2015 SCC OnLine CCI 66; *All India Online Vendors Association v. Flipkart India Private Limited & Ors* 2018 SCC OnLine CCI 97

<sup>98</sup> CCI E-commerce Market Study

<sup>99</sup> CCI E-commerce Market Study, page 29

<sup>100</sup> CCI E-commerce Market Study, page 33

<sup>101</sup> CCI E-commerce Market study, pages 30-31

<sup>102</sup> CCI E-commerce Market Study page 35

<sup>103</sup> Nisha Kaur Uberoi, Akshay Nanda and Tanveer Verma, ‘India’ (*Global Competition Review*, 3 December 2020) <<https://globalcompetitionreview.com/guide/e-commerce-competition-enforcement-guide/third-edition/article/india>> accessed 1 July 2021.

<sup>104</sup> Section 5, the Competition Act; CCI, ‘Frequently Asked Questions’ <[http://www.cci.gov.in/sites/default/files/whats\\_newdocument/FAQ%27s\\_Combinations.pdf](http://www.cci.gov.in/sites/default/files/whats_newdocument/FAQ%27s_Combinations.pdf)> accessed 1 July 2021; CLRC Report, pages 128-133.

<sup>105</sup> In India, the Department for Promotion of Industry and Internal Trade (“**DPIIT**”), which falls under the Ministry of Commerce & Industry, makes policy pronouncements on India’s Foreign Direct Investment (**FDI**) through the Consolidated FDI Policy Circular, Press Notes and Press Releases which are notified by the Department of Economic Affairs, Ministry of Finance, as amendments to the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 under the Foreign Exchange Management Act, 1999 (42 of 1999)(**FEMA**). The extant policy allows 100% foreign investment under the automatic route for e-commerce entities using the “Marketplace Model”. No foreign investment is permitted in the inventory-based model of e-commerce: The Consolidated FDI Policy, 2020 (**The Consolidated FDI Policy**) <[https://dipp.gov.in/sites/default/files/FDI-PolicyCircular-2020-29October2020\\_0.pdf](https://dipp.gov.in/sites/default/files/FDI-PolicyCircular-2020-29October2020_0.pdf)> accessed 1 July 2021.

<sup>106</sup> The Consolidated FDI Policy, page 49.

from operating as an inventory-based model,<sup>107</sup> wherein the E-marketplace has ownership or control<sup>108</sup> over the goods and services which it directly sells to consumers. The policy states that for FDI backed E-marketplaces, inventory of a vendor will be deemed to be controlled by the E-marketplace if more than 25% of purchases of a vendor are from the E-marketplace entity or its group companies.<sup>109</sup> In fact, the FDI policy goes as far as prohibiting any “entity having equity participation by e-commerce marketplace entity or its group companies, or having control on its inventory by e-commerce marketplace entity or its group companies” .... from “sell(ing) its products on the platform run by such marketplace entity.” (emphasis supplied).<sup>110</sup> The intent of the policy is unequivocally to prevent E-marketplaces from acting in a dual capacity as a seller on the platform and as well as the platform provider, thereby minimizing the plausibility of self-preferencing. Interestingly the policy prohibits E-marketplaces with FDI from undertaking Multi-Brand Retail.<sup>111</sup>

- *Maintenance of neutrality of platforms* - The policy permits E-marketplaces to provide support services to their business users including warehousing, logistics, order fulfillment and payment collection.<sup>112</sup> However, it mandates that e-commerce platforms provide such services to their business users on an arms-length basis, and in a fair and non-discriminatory manner.<sup>113</sup> The FDI policy in effect requires E-marketplace platforms to be neutral in their dealings with their business users.
- *Prohibiting deep discounting, preferential treatment of certain business users and exclusive agreements* - The FDI policy also places an obligation upon E-marketplaces to maintain a level playing field, specifically by refraining from directly or indirectly influencing the sale price of goods or services sold on its platform.<sup>114</sup> It further mandates parity between contracts and offers such as cash backs to be made available to all sellers indiscriminately.<sup>115</sup> Additionally, the policy also prohibits e-commerce marketplace entities from mandating any business user to sell any product exclusively on its platform.<sup>116</sup> The FDI policy therefore aims to curb practices of exclusive agreements, preferential treatment extended to certain sellers and private labels and deep discounting.

It is evident that the extant FDI policy attempts to promote contestability in services offered by E-marketplaces and fairness in P2B relationships by targeting a number of anti-competitive practices such as self-preferencing, lack of platform neutrality, deep discounting, exclusive agreements and preferential treatment to selected sellers. However, the usage of the FDI policy as an *ex-ante* competition enforcement tool for E-marketplaces bears serious limitations as discussed below:

- First, as the FDI policy applies only to foreign-funded e-commerce entities, domestically funded e-commerce entities will potentially escape the obligations under the FDI policy, leading to a *lacuna* in *ex-ante* regulation of P2B relationships for such platforms.<sup>117</sup> Further, this may also create a discriminatory environment in favour of domestic players, thereby holding the potential to distort competition, and risk harming consumer welfare in the long run.<sup>118</sup>
- Second, the fact that obligations under the FDI policy are formulated and notified by the DPIIT but enforced by the Enforcement Directorate has reportedly led to confusion and dissatisfaction amongst several trader organizations regarding its enforcement efficacy.<sup>119</sup> Additionally, many market players

<sup>107</sup> The Consolidated FDI Policy, pages 49-50.

<sup>108</sup> The policy presumes that inventory of a business user is controlled by an E-marketplace if more than 25% of a business user's sales are from the E-marketplace entity or its group companies. - The Consolidated FDI Policy, 2020, para (iv), page 50.

<sup>109</sup> The Consolidated FDI Policy, page 50.

<sup>110</sup> The Consolidated FDI Policy, page 50.

<sup>111</sup> The Consolidated FDI Policy, para (ix), page 55.

<sup>112</sup> The Consolidated FDI Policy, para (iii), page 50.

<sup>113</sup> The Consolidated FDI Policy, para (ix), page 50-51

<sup>114</sup> The Consolidated FDI Policy, para (ix), page 50-51.

<sup>115</sup> The Consolidated FDI Policy, para (ix), page 50-51.

<sup>116</sup> The Consolidated FDI Policy, para (ix), pages 50-51.

<sup>117</sup> Cyril Amarchand Mangaldas, 'FDI Policy on E-Commerce Retail: Time Ripe For A Reworking?' *BloombergQuint* (23 February 2020) <<https://www.bloombergquint.com/law-and-policy/fdi-policy-on-e-commerce-retail-time-ripe-for-a-reworking>> accessed 1 July 2021; Pooja Patel & Siddharth Anand, 'India's Foreign Investment Policy on E-commerce Retail: Is the time ripe for a reworking?' (Cyril Amarchand Mangaldas India Corporate Law, 13 February 2020) <<https://corporate.cyrilamarchandblogs.com/2020/02/indias-foreign-investment-policy-on-e-commerce-retail/>> accessed 1 July 2021.

<sup>118</sup> IANS, 'Domestic, foreign e-commerce players should be treated alike: Cuts International' *Business Standard* (6 January 2019) <[https://www.business-standard.com/article/news-ians/domestic-foreign-e-commerce-players-should-be-treated-alike-cuts-international-119010600451\\_1.html](https://www.business-standard.com/article/news-ians/domestic-foreign-e-commerce-players-should-be-treated-alike-cuts-international-119010600451_1.html)> accessed 1 July 2021.

<sup>119</sup> FF Bureau, 'DIPP formulates policies on FDI, but can't enforce them' *Financial Express* (12 May 2016) <<https://www.financialexpress.com/economy/dipp-formulates-policies-on-fdi-but-cant-enforce-them/253327/>> accessed 1 July 2021; Meenakshi Verma Ambwani & Amiti Sen, 'E-comm players seek stable FDI rules, policy to check violation' *Hindu BusinessLine*, (25 March

have also alleged that uncertainty around the FDI policy given its frequent revisions that require expensive internal restructuring, reduce the ease of doing business<sup>120</sup>.

- Finally, it is important to note that the FDI policy does not engage with the relevance of competitively sensitive data aggregated by E-marketplaces - its collection, storage, usage and right of business users to access such data. The debate surrounding the use and abuse of competitively sensitive data has been at the forefront of antitrust enforcement in other jurisdictions.<sup>121</sup> At present, India does not have any enforceable statutory instruments that governs collection and usage of competitively sensitive data.<sup>122</sup>

In light of the above, it is apparent that the FDI policy may not be sufficient to promote fair play in P2B relationships or improve contestability of services offered by incumbent E-marketplaces.

## The Draft National E-commerce Policy, 2019

In order to streamline e-commerce regulation in India, the DPIIT has attempted to put in place a centralized policy framework for e-commerce, and accordingly has proposed a Draft National E-commerce Policy ('**Draft E-commerce Policy**') in 2019. The stated aim of the policy is to create a regulatory environment that promotes competition, entrepreneurship and innovation in Indian e-commerce.<sup>123</sup> It takes note of issues such as consumer protection, privacy and anti-competitive behaviour which require redressal while maintaining the growth momentum of the e-commerce industry.<sup>124</sup>

The avenues that the Draft E-commerce Policy puts forth in the specific context of regulating P2B relationships are limited. While the policy elaborately discusses the relevance of E-marketplaces and makes suggestions to place certain obligations upon them,<sup>125</sup> they are largely consumer welfare centric, aimed at tackling issues such as counterfeiting<sup>126</sup>, piracy,<sup>127</sup> and improving consumer related services.<sup>128</sup> The policy also suggests that E-marketplaces must only publish those reviews and ratings that are authentic and verified in a transparent and non-discriminate manner, which may purportedly satisfy the twin goal of ensuring platform neutrality and transparency for consumers.<sup>129</sup> Barring this, the policy merely comments on the role of the FDI policy in promoting fairness and non-discrimination for business users of platforms and does not directly contribute towards improving P2B regulation.

Further, the Draft E-commerce Policy also entails a detailed discussion on the role and strategic importance of aggregated consumer data for e-commerce businesses.<sup>130</sup> However, it does not make any actionable suggestions that are aimed at data sharing between E-marketplaces and business users.

While the policy awaits finalization, numerous experts and media houses who claim to have reviewed an unofficial draft of the updated policy as recently as March 2021, have reported a complete overhaul of the Draft

2021) <<https://www.thehindubusinessline.com/economy/policy/e-comm-players-seek-stable-fdi-rules-policy-to-check-violation/article34163130.ece>> accessed 1 July 2021; 'CAIT alleges violation of FDI policy by Flipkart, Amazon; companies reject' *The Economic Times*, (11 October 2019) <<https://economictimes.indiatimes.com/small-biz/startups/newsbuzz/cait-alleges-violation-of-fdi-policy-by-flipkart-amazon-companies-reject/articleshow/71545578.cms?from=mdr>> accessed 1 July 2021; IANS, 'Amazon, Flipkart are violating investment rules: Govt to ED, RBI' *Business Standard* (31 December 2020) <[https://www.business-standard.com/article/companies/amazon-flipkart-are-violating-investment-rules-govt-tells-ed-rbi-120123100581\\_1.html](https://www.business-standard.com/article/companies/amazon-flipkart-are-violating-investment-rules-govt-tells-ed-rbi-120123100581_1.html)> accessed 1 July 2021; 'RBI, ED asked to take 'necessary action' on FDI rule breach allegations against e-tailers' *CNBC TV18* (1 January 2021) <<https://www.cnbctv18.com/retail/rbi-ed-asked-to-take-necessary-action-on-fdi-rule-breach-allegations-against-e-tailers-7877121.html>> accessed 1 July 2021. At present, the DPIIT formulates the FDI policy, and any breaches of the same are investigated under FEMA, by the Enforcement Directorate and Reserve Bank of India.

<sup>120</sup> Sandeep Soni, 'Amazon sees "uncertainty" in impact on e-commerce sector with revised FDI norms' *Financial Express* (3 February 2019) <<https://www.financialexpress.com/industry/sme/amazon-sees-uncertainty-in-impact-on-e-commerce-sector-with-revised-fdi-norms/1474321/>> accessed 1 July 2021.

<sup>121</sup> Chapter IV of this Working Paper surveys the regulatory response of seven jurisdictions in relation to the competition regulation of 'data' in the context of P2B regulation.

<sup>122</sup> The Personal Data Protection Bill, 2019 is currently pending before the Parliament of India. The Draft E-commerce Policy, which contained several provisions on the use of competitively sensitive data is reportedly undergoing several changes. Additionally, the Report by the Committee of Experts on Non-Personal Data Governance Framework recommends the setting of a separate Non-Personal Data Authority.

<sup>123</sup> Draft E-commerce Policy, page 9.

<sup>124</sup> Draft E-commerce Policy, page 10.

<sup>125</sup> Draft E-commerce Policy, pages 19-23.

<sup>126</sup> Draft E-commerce Policy, page 21.

<sup>127</sup> Draft E-commerce Policy, page 22.

<sup>128</sup> Draft E-commerce Policy, page 23.

<sup>129</sup> Draft E-commerce Policy, page 23.

<sup>130</sup> Draft E-commerce Policy, pages 11-17.

E-commerce Policy.<sup>131</sup> Reportedly, the updated Draft E-commerce Policy seeks to formulate a code for fair play<sup>132</sup> that *inter alia* promotes transparency between e-commerce giants and its business users, particularly with regard to discount offerings and participation by vendors in various schemes.<sup>133</sup> The particulars of the updated policy and the proposed manner of its enforcement remain to be seen.

## The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021

Amidst growing concerns of lack of transparency and accountability towards users of digital media including digital social media, the Ministry of Electronics and Information Technology ('MeitY') notified the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 ('IT Intermediary Rules')<sup>134</sup> in February 2021.<sup>135</sup> The IT Intermediary Rules are jointly administered by MeitY and the Ministry of Information and Broadcasting.<sup>136</sup>

While the Information Technology Act, 2000, defines 'intermediaries' to include 'online-market places'<sup>137</sup>, a perusal of the nature of obligations imposed under the IT Intermediary Rules reveals that the rules are targeted at regulating social media intermediaries, significant social media intermediaries, news publishers and aggregators and publishers of online curated content.

Further, the obligations placed upon the above categories of intermediaries under the scheme of the IT Intermediary Rules are aimed at protecting privacy and promoting transparency and overall safety in information dissemination on the internet. The obligations include mandatory display of privacy policy<sup>138</sup> and other terms of use,<sup>139</sup> duty to remove certain information such as fake news and obscene content,<sup>140</sup> setting up of a grievance redressal mechanism<sup>141</sup>, and duty to enable identification of first originator information.<sup>142</sup> Further, the rules contain a detailed 'Code of Ethics' and a three-tiered grievance redressal mechanism for regulating content on

<sup>131</sup> Ganesh Prasad, Arun Scaria, B N Vivek and Rudra Pratap Tripathi, 'E-commerce: Fair Play Code Proposed' *Khaitan & Co. ERGO* (19 March 2021) <[https://www.khaitanco.com/sites/default/files/2021-03/E-Commerce%20Fair%20Play%20Code%20Proposed\\_Ergo\\_19032021\\_1.pdf](https://www.khaitanco.com/sites/default/files/2021-03/E-Commerce%20Fair%20Play%20Code%20Proposed_Ergo_19032021_1.pdf)> accessed 1 July 2021; Alnoor Peermohamed, 'India's new draft e-commerce policy to rein in related parties' *The Economic Times* (22 March 2021) <<https://economictimes.indiatimes.com/tech/tech-bytes/indias-new-draft-e-commerce-policy-to-rein-in-related-parties/articleshow/81502310.cms?from=mdr>> accessed 1 July 2021; Priyanka Sahay, 'Explained: India's new draft e-commerce policy and how it will impact the e-tail space' *Moneycontrol* (16 March, 2021) <<https://www.moneycontrol.com/news/business/explained-indias-new-draft-e-commerce-policy-6648901.html>> accessed 1 July 2021; Tarush Bhalla, 'New Draft Policy widens scope of e-commerce business' *Mint* (15 March 2021) <<https://www.livemint.com/news/new-draft-policy-increases-the-scope-of-ecommerce-11615711774647.html>> accessed 1 July 2021.

<sup>132</sup> Ganesh Prasad, Arun Scaria & Rudra Pratap Tripathi, 'E-Commerce: Fair Play Code Proposed' (*Lexology*, 22 March 2021) <<https://www.lexology.com/library/detail.aspx?g=2b7a88e3-76a0-4cf5-a2d4-1a6fc08e7fe2#:~:text=The%202021%20Draft%20Policy%20emphasises,Prevention%20of%20counterfeit%20and%20piracy>> accessed 1 July 2021.

<sup>133</sup> Ganesh Prasad, Arun Scaria, B N Vivek & Rudra Pratap Tripathi, 'E-commerce: Fair Play Code Proposed' *Khaitan & Co. ERGO* (19 March 2021) page 2 <[https://www.khaitanco.com/sites/default/files/2021-03/E-Commerce%20Fair%20Play%20Code%20Proposed\\_Ergo\\_19032021\\_1.pdf](https://www.khaitanco.com/sites/default/files/2021-03/E-Commerce%20Fair%20Play%20Code%20Proposed_Ergo_19032021_1.pdf)> accessed 1 July 2021.

<sup>134</sup> Ministry of Electronics & Information Technology, 'Government notifies Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021' (*Press Release*, February 2021) Press Information Bureau, Government of India <<https://pib.gov.in/PressReleaseDetail.aspx?PRID=1700749>> accessed 1 July 2021; The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, ('IT Intermediary Rules') <[https://www.meity.gov.in/writereaddata/files/Intermediary\\_Guidelines\\_and\\_Digital\\_Media\\_Ethics\\_Code\\_Rules-2021.pdf](https://www.meity.gov.in/writereaddata/files/Intermediary_Guidelines_and_Digital_Media_Ethics_Code_Rules-2021.pdf)> accessed 1 July 2021.

<sup>135</sup> The IT Intermediary Rules have been issued pursuant to the Central Government's rule making powers under section 87 of the Information Technology Act, 2000 ('IT Act, 2000') and supersede the erstwhile Information Technology (Intermediary Guidelines) Rules, 2011 – IT Intermediary Rules, page 19.

<sup>136</sup> Trilegal, 'Information Technology (Guidelines For Intermediaries And Digital Media Ethics Code) Rules, 2021' (*Mondaq*, 6 March 2021) <<https://www.mondaq.com/india/social-media/1043676/information-technology-guidelines-for-intermediaries-and-digital-media-ethics-code-rules-2021>> accessed 1 July 2021.

<sup>137</sup> Section 2(w) of the IT Act, 2000- "*intermediary, with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes;*" (emphasis supplied).

<sup>138</sup> Rule 3 (1)(a) of IT Intermediary Rules.

<sup>139</sup> Rule 3(1) (a) of IT Intermediary Rules.

<sup>140</sup> Rule 3(1) (b) of IT Intermediary Rules.

<sup>141</sup> Rule 3 (2) of IT Intermediary Rules.

<sup>142</sup> Rule 4(2) of IT Intermediary Rules- It is of note that the obligation stipulated in rule 4(2) is applicable only to "*significant social media intermediary providing services primarily in the nature of messaging*".

digital media.<sup>143</sup> With respect to obligations of E-marketplace platforms, it may be argued that at best the IT Intermediary Rules cover issues such as disclosure of terms of use including privacy policy of the E-marketplace<sup>144</sup>, preventing the sale of counterfeit products by sellers on E-marketplaces<sup>145</sup> and setting up of grievance redressal mechanisms<sup>146</sup> by E-marketplaces.

Therefore, it is evident that the intended scope of the IT Intermediary Rules does not extend to regulation of P2B competition issues arising in E-marketplaces. These rules were a culmination of growing litigation around the use and misuse digital media including digital social media<sup>147</sup> and a need to effectively regulate the role of intermediaries in such information dissemination.<sup>148</sup> As such, its relevance in regulating E-marketplaces and competition issues in their P2B relationships is limited.

## The Consumer Protection (E-Commerce) Rules, 2020

In July 2020, the Ministry of Consumer Affairs, Food and Public Distribution notified the Consumer Protection (E-Commerce) Rules, 2020 ('E-commerce Rules') under the Consumer Protection Act, 2019.<sup>149</sup> The E-commerce Rules are applicable to all goods and services bought or sold over digital or electronic networks, across all models of e-commerce and electronic retail.<sup>150</sup>

In accordance with its stated purpose of ensuring consumer welfare, the Consumer Protection Act, 2019 defines 'consumer' to only include those persons who buy, hire or avail goods or services for personal consumption,<sup>151</sup> and categorically excludes those who buy, hire or avail goods or services for "commercial purposes".<sup>152</sup> Resultantly, business users that avail the services of e-commerce platforms in the course of their trade are outside the Act's purview. While the E-commerce Rules employ the same definition of 'consumer' as the Consumer Protection Act, 2019, the rules also contains a definition of 'user' to mean "any person who accesses or avails any computer resource of an e-commerce entity",<sup>153</sup> which, while ambiguous, may potentially cover business users.<sup>154</sup> However, the E-commerce Rules do not contain specific provisions for the protection of such 'users', but merely prescribe certain obligations that an e-commerce entity is expected to adhere to in order to provide adequate information and disclosures to all its 'users'.

Further, it is evident that the obligations imposed by the E-commerce Rules have been formulated with an intent to prevent unfair practices and to promote transparency and information symmetry between e-commerce

<sup>143</sup> Part III of the IT Intermediary Rules.

<sup>144</sup> Rule 3(1)(a) of the IT Intermediary Rules.

<sup>145</sup> Rules 3(1)(b)(i) and (iv) of the IT Intermediary Rules.

<sup>146</sup> Rule 3(2) of the IT Intermediary Rules.

<sup>147</sup> *Subhranshu Rout v. State of Odisha* 2020 SCC OnLine Ori 878 and *Justice K.S. Puttaswamy v. Union of India* 2017 SCC OnLine SC 996

<sup>148</sup> *Facebook v. Union of India* 2019 SCC OnLine SC 1264.

<sup>149</sup> The Consumer Protection (E-commerce) Rules, 2020 ('E-commerce Rules'), <<https://consumeraffairs.nic.in/sites/default/files/E%20commerce%20rules.pdf>> accessed 1 July 2021.

<sup>150</sup> Rule 2(1) of the E-Commerce Rules.

<sup>151</sup> Section 2(7), Consumer Protection Act, 2019

"consumer" means any person who—

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment, when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or

(ii) hires or avails of any service for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such service other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person, but does not include a person who avails of such service for any commercial purpose.

Explanation.—For the purposes of this clause,—

(a) the expression "commercial purpose" does not include use by a person of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment;

(b) the expressions "buys any goods" and "hires or avails any services" includes offline or online transactions through electronic means or by teleshopping or direct selling or multi-level marketing;" (emphasis supplied)

<sup>152</sup> This position has been reiterated most recently in the case of *Freight System (India) Private Limited v Omkar Realtors and Developers Private Limited and Another* 2021 SCC OnLine NCDRC 19.

<sup>153</sup> Rule 3(1)(l), E-commerce Rules.

<sup>154</sup> Trilegal, 'India: Consumer Protection (E-Commerce) Rules, 2020' *Mondaq*, (8 September 2020)

<<https://www.mondaq.com/india/dodd-frank-consumer-protection-act/980140/consumer-protection-e-commerce-rules-2020>> accessed 1 July 2021.

entities and consumers.<sup>155</sup> These obligations include maintaining transparency in pricing,<sup>156</sup> refunds<sup>157</sup> and cancellation charges,<sup>158</sup> and setting up an effective grievance redressal mechanism for consumers.<sup>159</sup> In addition to the above, liabilities specific to E-marketplaces include the due diligence requirements prescribed under the Intermediary Rules,<sup>160</sup> mandatory display of information about the seller<sup>161</sup>, information relating to available methods of payment, returns and refunds, exchanges, warranties, delivery and shipment,<sup>162</sup> and disclosures regarding the key search ranking parameters and their relative importance in determining ranking of sellers or their goods on the platform<sup>163</sup>, and any differential treatment meted out to sellers or goods of the same category.<sup>164</sup>

As is evident from the above, the E-commerce Rules are consumer welfare centric, primarily aimed at prescribing disclosure and due diligence obligations of e-commerce entities in order protect the rights and interest of consumers. As 'business users' do not fall under the purview of 'consumer', the applicability of E-Commerce Rules in the specific context regulating P2B relationships is limited.

In June 2021, the Ministry of Consumer Affairs, Food and Public Distribution published draft amendments<sup>165</sup> to the E-commerce Rules ('**Draft Amendment E-commerce Rules**') that seek to propose additional accountability and transparency enabling obligations upon e-commerce entities.<sup>166</sup> In the specific context of P2B relationships, the Draft Amendment E-commerce Rules seek to: place a ban on E-marketplaces from organising certain types of discount sales called 'flash sales' which only benefit private labels directly or indirectly controlled by the E-marketplace, prohibit companies providing logistic services for E-marketplaces from discriminating between sellers of the same category<sup>167</sup>, prohibit E-marketplaces from using data aggregated on their platform to gain any unfair advantage<sup>168</sup>, prohibit selling of goods and services using the brand name or any other association with the E-marketplace<sup>169</sup>, prohibit profiling of consumers to promote private labels<sup>170</sup> and prohibit any related or associated parties of the E-marketplace from listing themselves as a seller on its platform.<sup>171</sup> While the Draft Amendment E-commerce Rules await finalization, it is of note that they have garnered considerable criticism for placing onerous and ambiguous obligations upon all e-commerce entities without distinction in their scale or size<sup>172</sup> and for creating overlaps with the mandate of the CCI.<sup>173</sup>

<sup>155</sup> Rajya Sabha Committee on Subordinate Legislation, 'Two Hundred Forty Fifth Report: The Consumer Protection E-commerce Rules, 2020' (24 March 2021) page 6 <[https://rajyasabha.nic.in/rsnew/Committee\\_site/Committee\\_File/ReportFile/12/131/245\\_2021\\_3\\_17.pdf](https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/ReportFile/12/131/245_2021_3_17.pdf)> accessed 1 July 2021.

<sup>156</sup> Rule 4(11)(a), E-commerce Rules.

<sup>157</sup> Rule 4(10) E-commerce Rules.

<sup>158</sup> Rule 4(8) E-commerce Rules.

<sup>159</sup> Rule 4(4) E-commerce Rules.

<sup>160</sup> Rule 5(1) E-commerce Rules.

<sup>161</sup> Rule 5(3)(a) E-commerce Rules.

<sup>162</sup> Rule 5(3)(c) E-commerce Rules.

<sup>163</sup> Rule 5(3)(f) E-commerce Rules.

<sup>164</sup> Rule 5(4)E-commerce Rules.

<sup>165</sup> Draft amendments to the E-commerce Rules, (**Draft Amendment E-commerce Rules**) Ministry of Consumer Affairs, Food & Public Distribution <[https://consumeraffairs.nic.in/sites/default/files/file-uploads/latestnews/Comments\\_eCommerce\\_Rules2020.pdf](https://consumeraffairs.nic.in/sites/default/files/file-uploads/latestnews/Comments_eCommerce_Rules2020.pdf)> accessed 1 July 2021.

<sup>166</sup> Vedika Mittal & Manjushree RM, 'Comments on the Proposed Amendments to the Consumer Protection (E-Commerce) Rules, 2020' (Vidhi Centre for legal Policy, 6 July 2021) <<https://vidhilegalpolicy.in/research/comments-on-the-proposed-amendments-to-the-consumer-protection-e-commerce-rules-2020/>> accessed 1 July 2021.

<sup>167</sup> Draft Rules 6(5), Draft Amendment E-commerce Rules.

<sup>168</sup> Draft Rules 6(6), Draft Amendment E-commerce Rules.

<sup>169</sup> Rule 5(14), Draft Amendment E-commerce Rules.

<sup>170</sup> Rule 5(14), Draft Amendment E-commerce Rules.

<sup>171</sup> Draft Rules 6(6) [https://consumeraffairs.nic.in/sites/default/files/file-uploads/latestnews/Comments\\_eCommerce\\_Rules2020.pdf](https://consumeraffairs.nic.in/sites/default/files/file-uploads/latestnews/Comments_eCommerce_Rules2020.pdf)

<sup>172</sup> Shreya Sircar & Sanjukta Roy, 'New E-Commerce Rules Are Ambiguous, Onerous and Invite Unwarranted Regulatory Intervention' *The Wire* (5 July 2021) <<https://thewire.in/business/new-e-commerce-rules-are-ambiguous-onerous-and-invite-unwarranted-regulatory-intervention>> accessed 10 July 2021; Sandeep Soni, 'Flash sale ban, DPIIT registration, other proposed amendments in E-commerce Rules to hit MSMEs: Experts' *Financial Express* (20 July 2021) <<https://www.financialexpress.com/industry/sme/msme-eodb-flash-sale-ban-dpiit-registration-other-proposed-amendments-in-e-commerce-rules-to-hit-msmes-experts/2294327/>> accessed 21 July 2021; Arvind Singhal, 'Proposed amendments to consumer protection rules will harm consumer interest, hurt the growth e-commerce sector' *The Financial Times*, (26 June 2021) <<https://economictimes.indiatimes.com/small-biz/policy-trends/proposed-amendments-to-consumer-protection-rules-will-harm-consumer-interest-hurt-the-growth-e-commerce-sector/articleshow/83865642.cms?from=mdr>> accessed 1 July 2021; Vedika Mittal & Manjushree RM, 'Comments on the Proposed Amendments to the Consumer Protection (E-Commerce) Rules, 2020', (Vidhi Centre for legal Policy, 6 July 2021) <<https://vidhilegalpolicy.in/research/comments-on-the-proposed-amendments-to-the-consumer-protection-e-commerce-rules-2020/>> accessed 10 July 2021.

<sup>173</sup> Neelambara Sandeepan, 'Draft E-commerce Rules: Blurring the lines between Consumer Protection and Competition Law' (Lakshmi Kumar & Sridharan Attorneys, 27 July 2021) <<https://www.lakshmisri.com/insights/articles/draft-e-commerce-rules-blurring-the-lines-between-consumer-protection-and-competition-law/#>> accessed 10 August 2021

From our discussion above on the regulatory landscape governing E-marketplaces in India, it is clear that the P2B competition issues discussed in Chapter II, are primarily under the prerogative of *ex-post* regulation under the Competition Act. With the limited exception of the FDI policy which seeks to regulate a handful of P2B competition issues in foreign funded E-marketplaces, none of the *ex-ante* instruments discussed above comprehensively address P2B competition issues *ex-ante*. The blind spot in the Indian regulatory framework for E-marketplaces in regard to P2B competition regulation is therefore evident.



# IV. International regulatory response to P2B competition issues arising in E-marketplaces

The regulatory vacuum as far as fairness in P2B relationships and contestability of services provided by E-marketplaces are concerned is not exclusive to India. The world has only very recently taken serious cognisance of this issue. And now most jurisdictions are racing against time to devise regulatory tools to address unfairness and reduced contestability of services provided by gatekeeper platforms. In this chapter, we take stock of regulatory measures adopted or proposed in the European Union ('EU'), United Kingdom ('UK'), Germany, Australia, Japan, the United States of America ('US') and China. These countries have in a certain sense emerged as torchbearers of regulatory response designed to foster growth of e-commerce markets in a fair and competitive manner. Our aim is to inform the legal discourse on the way forward for shaping effective regulatory response to the prevalent P2B competition issues and lack of overall competitiveness in services provided by E-marketplaces in India.

## The EU

The EU has been at the forefront of regulating the digital economy since the past two decades when it formulated the E-Commerce Directive of 2000 (**EC Directive**) to prevent fragmentation of rules applicable to e-commerce businesses across the EU and create an *enabling* framework for these businesses to thrive.<sup>174</sup>

With a view to speed up market integration within the EU, the EC Directive sought to reduce legal uncertainty by measures such as limiting the liability of digital service providers including platforms<sup>175</sup>, providing them access to the market *without* prior authorisation and so on.<sup>176</sup> However, the EC Directive was not formulated with the platform economy of today in mind<sup>177</sup> and it loosely covered a broad array of digital businesses.

In addition to the EC Directive, e-commerce companies in the EU are governed by general competition law applicable in the EU. The primary law (other than merger control) is provided in article 101 (concerted practices that restrict competition) and article 102 (abuse of dominant position) of the Treaty on the Functioning of the European Union. Articles 101 and 102 correspond broadly to sections 3 and 4 of the Indian Competition Act.

Apart from general competition law, the legislative framework for e-commerce platforms complementing the EC Directive comprises a number of instruments including:

- the General Data Protection Regulation, which covers the free movement and processing of personal data, while ensuring protection of personal data as a fundamental right;

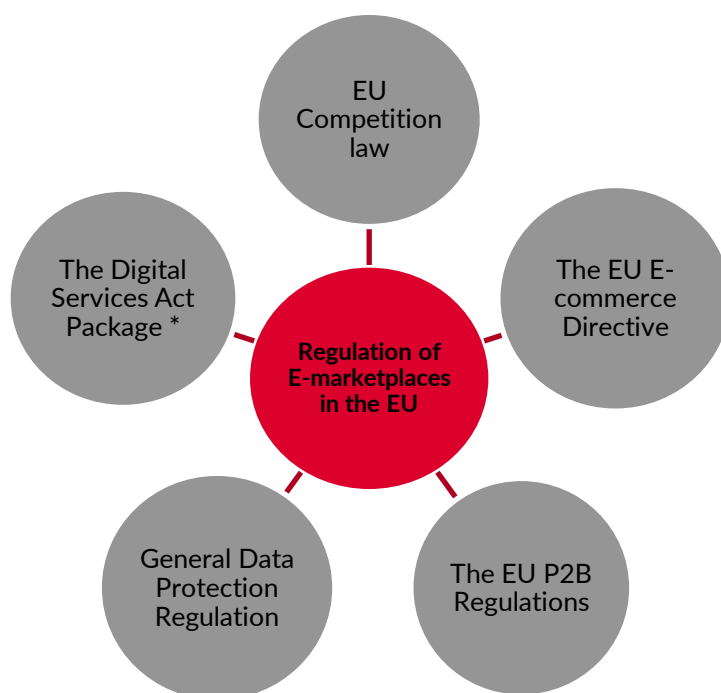
<sup>174</sup> Article 1, Council Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (**EC Directive**) [2000] OJ L178/8 <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0031&from=EN>> accessed 1 July 2021.

<sup>175</sup> The EC Directive classifies a wide variety of digital service providers including platforms as "Information society services" which are understood as services normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services – Article 2, EC Directive.

<sup>176</sup> Apart from limiting liability of intermediaries, the EC Directive lays down a broad non-intrusive framework governing requirements for electronic communication, requirements for contracts concluded electronically, access to basic information regarding the service provider to recipients of services and so on – Article 1, EC Directive, art 1; Hans Schulte-Nolke, and others, *The legal framework for e-commerce in the Internal Market* (European Parliament, 2020) <[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652707/IPOL\\_STU\(2020\)652707\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652707/IPOL_STU(2020)652707_EN.pdf)> accessed 1 July 2021.

<sup>177</sup> Now with the benefit of hindsight, the EC Directive has been criticised for containing gaps regarding the liability regime for platform operators, leading to a lack of protection of fundamental human rights- Hans Schulte-Nolke, and others, *The legal framework for e-commerce in the Internal Market* (European Parliament, 2020) <[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652707/IPOL\\_STU\(2020\)652707\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652707/IPOL_STU(2020)652707_EN.pdf)> accessed 1 July 2021.

- the EU P2B Regulations, which impose obligations on platforms that take on the role of an intermediary. Pursuant to the EU P2B Regulations, the EC has also published non-binding guidelines for online platforms on how to improve transparency of their ranking parameters.<sup>178</sup>



\* The Digital Services Act Package has been proposed by the EC in February 2020. It is not an enforceable legislation at present.

## ***EU P2B Regulations***

For the purposes of the present Paper, the EU P2B Regulations which came in to force in July 2020 are directly relevant.<sup>179</sup> These regulations embody regulatory recognition of the increasingly important role digital platforms occupy in today's economy. The change in regulatory mindset from the year 2000 (when the EC Directive came into force) to 2019 is also evident from the European Commission's ('EC') choice of legal instrument in the form of a Regulation (which is a binding legislative act that must be applied as it is) versus a Directive (which only sets out a broad goal for EU Member States to achieve but allows them to devise their own laws on how to reach these goals).<sup>180</sup>

However, in spite of recognising the need for nuanced regulations to govern P2B relationships, the EU P2B Regulations tread with caution and in essence tantamount to increased disclosure and transparency obligations without any concrete restrictions on the actions of digital platforms. Perhaps because it was a first mover in the uncharted territory of platform regulation, the EU preferred to adopt a light touch approach. The main features of the EU P2B Regulations in the specific context of E-marketplaces are as follows:

**Applicability** – Given the global reach of digital platforms, the Regulation applies regardless of whether a platform is established within the EU or outside the EU, provided that two cumulative conditions are met. Firstly, the business users should be established in the EU. Secondly, business users of the platform should offer their goods

<sup>178</sup> Other relevant legal instruments include - the Geo Blocking Regulation, aiming to remove the barriers created by unjustified Geo Blocking; the Audiovisual Media Service Directive, which strives to protect media consumers from harmful content; the Copyright in the Digital Single Market Directive, addressing copyright protection in digital and cross-border environments; the Digital Content Directive, which aims to ensure better access to and supply of digital content and digital services - Hans Schulte-Nolke, and others, *The legal framework for e-commerce in the Internal Market* (European Parliament, 2020) <[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652707/IPOL\\_STU\(2020\)652707\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652707/IPOL_STU(2020)652707_EN.pdf)> accessed 1 July 2021.

<sup>179</sup> Article 19, EU P2B Regulations.

<sup>180</sup> European Union, 'Regulations, Directives, and other acts' <[https://europa.eu/european-union/law/legal-acts\\_en](https://europa.eu/european-union/law/legal-acts_en)> accessed 5th August 2021.

or services to consumers located in the EU at least for part of the transaction.<sup>181</sup> Notably, the EU P2B Regulations apply in addition to the laws otherwise applicable to the contract between the business user and the platform.<sup>182</sup>

*Self-preferencing* – The regulations recognise that if the platform directly or indirectly competes with independent business users using its services, it has the ability as well as monetary incentive to discriminate to the disadvantage of independent business users of its platform.<sup>183</sup> Therefore, in such situations, the platform is required to provide in its terms and conditions of use for business users, an appropriate description of, and set out the considerations for any differentiated treatment, whether through legal, commercial or technical means that it might accord to goods or services it offers itself. The description must particularly cover any differential treatment in *inter alia*, access to data, search rankings and commissions and fees charged.<sup>184</sup>

*Access to and Use of Data* – The regulations mandate that platforms include in their terms and conditions of contract with business users a clear description of access to and use of data by both, the platform as well as business users.<sup>185</sup> Such data could include ratings and reviews accumulated by business users on the platform.<sup>186</sup> It mandates that the description should be provided in a manner that enables business users to determine if they can use the data to enhance value creation. Moreover, platforms are required to inform business users of any sharing of data with third parties. If such sharing of data occurs for purposes which are not necessary for the proper functioning of the platform, the platform must provide reasons for sharing of the data.

*Ancillary goods and services* - Ancillary goods and services are explained to be goods and services offered to the consumer immediately prior to the completion of a transaction initiated on a platform to complement the primary good or service being offered by the business user.<sup>187</sup> Examples of ancillary services include repair services and financial products such as car rental insurance offered with a primary service such as rental of a car. Article 6 of the EU P2B Regulations mandates platforms offering ancillary goods or services to set out in their terms and conditions a description of the type of ancillary goods and services being offered including whether and under what conditions a business user is allowed to offer its own ancillary good or service.<sup>188</sup>

*Platform parity/ Most-Favoured Nation Clause* - If a platform restricts the ability of business users to offer the same goods and services to consumers under different conditions through other means, it is required to state the grounds for such restriction in its terms and conditions and make those grounds available to the public as well.<sup>189</sup>

*Internal Complaint Handling System and Mediation* – Platforms are required to establish a free-of-cost internal complaint handling system which provides redress to business users in a transparent and timely manner<sup>190</sup> as well as a provision for mediation. The platform is required to bear a reasonable proportion of the cost of mediation. Relief from the provisions regarding an internal-complaints handling system as well as mediation are envisaged for smaller platforms.<sup>191</sup>

*Code of conduct* – Platforms, organisations and associations representing them, together with business users, including SMEs and their representative organisations are encouraged to formulate codes of conduct taking account of the specific features of the various sectors in which platform services are provided, as well as of the specific characteristics of SMEs.<sup>192</sup>

*Enforcement* – The obligation to ensure effective enforcement of the EU P2B Regulations is on individual Member States in the EU. Accordingly, each Member State is required to frame its own rules setting out the consequences of infringing the EU P2B Regulations.<sup>193</sup>

<sup>181</sup> Article 1, EU P2B Regulations.

<sup>182</sup> Article 1, EU P2B Regulations.

<sup>183</sup> EU P2B Regulations, para 30.

<sup>184</sup> Article 7, EU P2B Regulations.

<sup>185</sup> Article 9, EU P2B Regulations.

<sup>186</sup> EU P2B Regulations, para 30.

<sup>187</sup> EU P2B Regulations, para 29.

<sup>188</sup> Article 6, EU P2B Regulations.

<sup>189</sup> This requirement is limited to disclosure of such restriction and does not change the legality of such restrictions under EU law or the domestic law of Member States of the EU - Article 10, EU P2B Regulations.

<sup>190</sup> Article 11 and 12 of the EU P2B regulations.

<sup>191</sup> Para 38, EU P2B Regulations.

<sup>192</sup> Article 17, EU P2B Regulations.

<sup>193</sup> Article 15, EU P2B Regulations

*Monitoring and Review* - The onus for monitoring the effect of the EU P2B Regulations on the relationship between business users and platforms is on both the EC as well as Member States.<sup>194</sup> Additionally, a three-yearly review of the EU P2B Regulations is envisaged.<sup>195</sup>

While the EU P2B Regulations seek to address the imbalance in power between platforms and their business users by improving the position of the business users, it assumes a somewhat guarded outlook.<sup>196</sup> In the absence of any actual practical experience with the EU P2B Regulations, some critics have raised concerns as to whether the extensive notification obligations imposed on platforms will result in fairer treatment of business users of platforms.<sup>197</sup>

## *The Digital Services Act Package*

Admirably, the EC's efforts to regulate the digital economy have continued in full steam even post the EU P2B Regulations. In its February 2020 Communication – Shaping Europe's Digital Future<sup>198</sup>, the EC recognised the significant network effects created by large platforms, and proposed the Digital Services Act Package ('DSAP') with an aim to ensure that the market environment remains fair for all market actors.<sup>199</sup> While it is only a proposal at this stage and it may take a while before the DSAP becomes an enforceable legislation<sup>200</sup>, it is a significant step forward and demonstrates growing consensus among regulators worldwide to check the swathing power wielded by certain platforms.

The DSAP comprises of the Digital Services Act ('DSA') and the Digital Markets Act ('DMA'). The DSA focusses on issues such as liability of platforms for third party content, safety of users online, asymmetric due diligence obligations for different platforms depending on the nature of the societal risks services provided by it represent.<sup>201</sup> Whereas the DMA deals with economic imbalances, unfair business practices by gatekeepers and their negative consequences, such as weakened contestability of platform markets.<sup>202</sup>

<sup>194</sup> Article 16, EU P2B Regulations.

<sup>195</sup> Article 18, EU P2B Regulations.

<sup>196</sup> Hans Schulte-Nolke, and others, *The legal framework for e-commerce in the Internal Market* (European Parliament, 2020) <[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652707/IPOL\\_STU\(2020\)652707\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652707/IPOL_STU(2020)652707_EN.pdf)> accessed 1 July 2021.

<sup>197</sup> Hans Schulte-Nolke, and others, *The legal framework for e-commerce in the Internal Market* (European Parliament, 2020) <[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652707/IPOL\\_STU\(2020\)652707\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652707/IPOL_STU(2020)652707_EN.pdf)> accessed 1 July 2021.

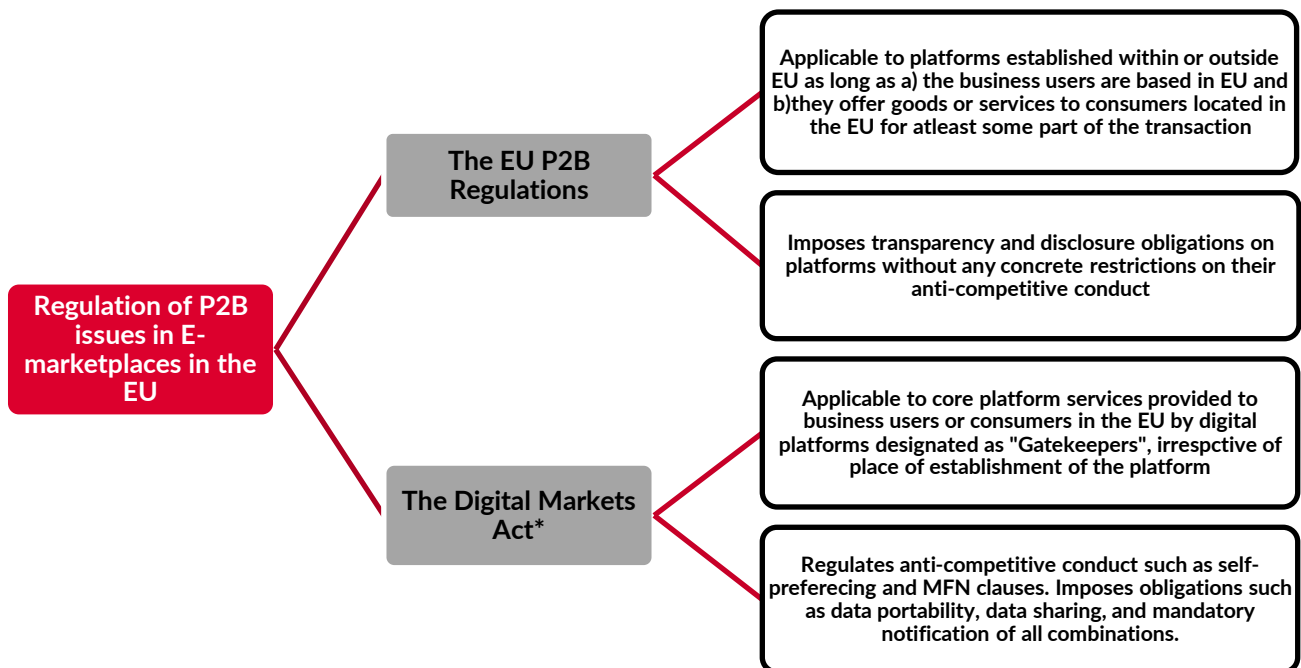
<sup>198</sup> European Commission, 'Shaping Europe's Digital Future' (2020) <[https://ec.europa.eu/info/sites/info/files/communication-shaping-europes-digital-future-feb2020\\_en\\_4.pdf](https://ec.europa.eu/info/sites/info/files/communication-shaping-europes-digital-future-feb2020_en_4.pdf)> accessed 1 July 2021

<sup>199</sup> The DSAP is proposed to apply alongside the E-Commerce Directive and replace some of its provisions.

<sup>200</sup> "The proposals will be discussed by the European Parliament and the EU Member States via the Council of the European Union. The European Parliament and the Council will first agree on their own versions of the DSA and the DMA. The European Commission, the European Parliament and the Council of the EU will then need to reach an agreement on a final text before the regulations will be adopted. It may take a number of years before the rules are adopted, implemented and become enforceable." - Allen and Overy, 'The Digital Services Act package is here' (Allen and Overy Publications, 16 December 2020) <<https://www.allenoverly.com/en-gb/global/news-and-insights/publications/the-digital-services-act-package-is-here>> accessed 1 June 2020

<sup>201</sup> The objectives of the DSA are beyond the scope of our research and are therefore not discussed further in this Working Paper. For example, proposed obligations, such as the requirement for E-marketplaces to conduct due diligence of sellers it hosts, which are targeted at protecting consumers are outside the purview of this Working Paper. However, while devising the statutory final list of obligations, such obligations must be studied and incorporated as may be required.

<sup>202</sup> DMA, page 3.



\*The Digital Markets Act is part of the Digital Services Act Package proposed by the EC in February 2020. It is not an enforceable legislation at present.

For the purposes of this Working Paper, we will focus on the DMA since the main aim of the proposed regulation is to increase contestability and fairness of markets in which gatekeeper platforms operate. In the context of this Paper, some of the most important provisions of the DMA are as follows:

**Applicability** - The DMA applies only to those platforms that meet clearly defined criteria for qualifying as a 'gatekeeper'. It applies to 'core platform services' provided by a gatekeeper to business users or end users in the EU, irrespective of the place of establishment or residence of the gatekeeper.<sup>203</sup> Services provided by E-marketplaces are recognised as 'core platform services' in terms of article 2(2) of the DMA read with article 2(3) of the EU P2B Regulations.

**Designation as a 'gatekeeper'** - The following qualitative criteria have been proposed for a provider of core platform services to be designated as a gatekeeper:

- it has a significant impact on the internal market;
- it operates a core platform service which serves as an important gateway for business users to reach end users; and
- it enjoys an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future.<sup>204</sup>

There is a rebuttable presumption of fulfilment of the above criteria if certain quantitative thresholds based on turnover, market capitalisation or its equivalent fair market value and number of active users are met.<sup>205</sup> The DMA sets out criteria that must be considered by the EC while assessing arguments to rebut the presumption

<sup>203</sup> Article 1(2), DMA.

<sup>204</sup> Article 3(2)(c), DMA.

<sup>205</sup> Article 3(2), DMA - the requirement in point (a) where the undertaking to which it belongs achieves an annual EEA turnover equal to or above EUR 6.5 billion in the last three financial years, or where the average market capitalisation or the equivalent fair market value of the undertaking to which it belongs amounted to at least EUR 65 billion in the last financial year, and it provides a core platform service in at least three Member States.

-the requirement in point (b) where it provides a core platform service that has more than 45 million monthly active end users established or located in the Union and more than 10,000 yearly active business users established in the Union in the last financial year.

-the requirement in point (c) where the thresholds corresponding to point (b) were met in each of the last three financial years.

presented by a platform that crosses the thresholds. These include - entry barriers derived from network effects and data driven advantages, analytics capabilities, business user or end user lock in and the market structure.<sup>206</sup>

The onus is placed on the platform to notify the EC once it breaches the thresholds. Moreover, the EC is also permitted to designate a provider of a core platform service that does not fulfil the quantitative thresholds as a gatekeeper pursuant to its own market investigation provided such platform fulfils the qualitative criteria.<sup>207</sup>

Interestingly, a particular subset of rules are also applicable to gatekeepers providing core platform services that do not yet enjoy an entrenched and durable position but are *foreseen* to enjoy such a position in the near future.<sup>208</sup> This only includes obligations that prevent a platform from achieving an entrenched and durable position in its operations, such as provisions preventing unfair leveraging, and those that facilitate switching between and usage of different platforms.<sup>209</sup> The EC is required to regularly review whether such obligations should be maintained, suppressed or adapted.<sup>210</sup>

*Review of gatekeeper status and obligations* - The EC is empowered to *suo moto* or based on a request, review the gatekeeper designation accorded to a platform.<sup>211</sup> Such a review is mandatory every two years and the list of gatekeepers is to be published on an ongoing basis.<sup>212</sup> Further, in cognisance of the dynamic nature of digital markets the EC is permitted to assess whether the list of obligations addressing unfair practices by gatekeepers should be reviewed and additional practices should be identified.<sup>213</sup> Such assessments are to be based on market investigations to be run in an appropriate timeframe.<sup>214</sup> This approach balances the need for agility to ensure the *ex-ante* effect of the DMA with legal certainty required by businesses.

*Platform parity/ Most-Favoured Nation Clause*- The DMA proposal notes that MFN clauses have a significant deterrent effect on the business users of gatekeeper platforms in terms of their use of alternative platforms, limiting inter-platform contestability, which in turn limits choice of alternative platforms for end users. Therefore, it seeks to ensure that business users of gatekeeper platforms can freely choose alternative platforms and differentiate the conditions under which they offer their products or services to their end users.<sup>215</sup> Restriction on MFN clauses extends to any measure with equivalent effect, for example increased commission rates or delisting of the offers of business users by a platform.<sup>216</sup>

*Self-Preferencing* - E-marketplaces which also act as retailers on their own platform are specifically singled out in the proposal.<sup>217</sup> To prevent gatekeepers from unfairly benefitting from their dual role, the DMA seeks to debar them from using any data that is not publicly available to offer similar services to those of their business users.<sup>218</sup> The proposal also recognises the potential for self-preferencing by E-marketplaces which may accord their own products or services a preferred rank in search results or prominence in display on their e-shop.<sup>219</sup> The proposal notes that in such cases gatekeepers have the ability to undermine directly the contestability for third-party products or services on their platform, to the detriment of such third party business users.<sup>220</sup> Therefore it prohibits gatekeepers from engaging in any form of differentiated or preferential treatment in ranking<sup>221</sup> whether through legal, commercial or technical means, in favour of products or services it offers itself directly or indirectly.<sup>222</sup> Moreover, the conditions that apply to such ranking must also be generally fair and non-discriminatory.<sup>223</sup>

<sup>206</sup> Article 3(6), DMA.

<sup>207</sup> Article 3(6) read with Article 15, DMA.

<sup>208</sup> Article 15(4), DMA.

<sup>209</sup> Article 15(4) and para 27, pages 20-2, DMA.

<sup>210</sup> Article 15(4) and para 27, page 21, DMA.

<sup>211</sup> Article 4, DMA.

<sup>212</sup> Articles 4(2) and 4(3), DMA.

<sup>213</sup> Article 17, DMA.

<sup>214</sup> Article 17 and Article 3(6), DMA.

<sup>215</sup> Article 5, DMA.

<sup>216</sup> DMA, para 37, page 22.

<sup>217</sup> DMA, para 43, page 24.

<sup>218</sup> Article 6(1)(a), DMA.

<sup>219</sup> DMA, para 48, page 25.

<sup>220</sup> DMA, para 48, page 25.

<sup>221</sup> In terms of the DMA, 'Ranking' should in this context cover all forms of relative prominence, including display, rating, linking or voice results.

<sup>222</sup> DMA, para 49, page 26.

<sup>223</sup> Article 6(1)(D), DMA.

*Data portability* - The proposal mandates that effective portability of data generated by business users and end users through their use of the platform must be provided so that users may exercise data portability options in line with the EU General Data Protection Regulation.<sup>224</sup>

*Data sharing* - Platforms are required to share with business users all data<sup>225</sup> generated or inferred from activities of the business user on the platform. The platform must also enable the business user to seek consent, if required under law, from end users for such data sharing.<sup>226</sup>

*Mandatory pre-merger notification* - A gatekeeper platform is required to notify proposed mergers with any entity operating in the digital sector irrespective of whether it breaches merger control thresholds applicable in the EU or in individual Member States of the EU.<sup>227</sup>

*Enforcement* - Once it becomes law, compliance with obligations and procedures imposed under the DMA are enforceable by means of fines and periodic penalty payments.<sup>228</sup> In case of systemic non-compliance, the EC has the power to impose, pursuant to a market investigation, behavioural and structural remedies.<sup>229</sup> Structural remedies, such as legal, functional or structural separation, including the divestiture of a business, or parts of it, are to be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. The EC can suspend or exempt application of obligations under the DMA for certain gatekeepers under specific circumstances.<sup>230</sup>

*Interface between the DMA and competition law* - The proposal for the DMA clarifies that it addresses unfair practices by gatekeepers that either fall outside existing competition rules, or that cannot be as effectively addressed by competition rules.<sup>231</sup> The DMA proposal highlights that the law on abuse of dominance is “not sufficient to deal with all the problems associated with gatekeepers, given that a gatekeeper may not necessarily be a dominant player, and its practices may not be captured by Article 102 TFEU if there is no demonstrable effect on competition within clearly defined relevant markets.”<sup>232</sup> Another shortcoming of competition law highlighted in the proposal is that it does not always allow intervening with the speed that is necessary to address issues in digital markets in a timely manner.<sup>233</sup>

In sum, tools under the DMA are intended to complement the existing competition law and minimise the detrimental structural effects of unfair practices *ex-ante*, without limiting the ability to intervene *ex-post* under competition law.<sup>234</sup>

## The UK

The regulation of e-commerce in the UK is set out in a number of different statutory instruments. While some are specific to the nature of the online business, others apply uniformly to all online business activities.<sup>235</sup> In the specific context of E-marketplaces operating in the UK, prior to Brexit, notable statutory instruments applicable were the EC Directive and the EU P2B Regulations. Presently, their applicability is subject to modifications notified by the UK Government post Brexit.<sup>236</sup> Additionally, competition aspects in relation to E-marketplaces

<sup>224</sup> Article 6(1)(h) and para 54, page 27, DMA.

<sup>225</sup> Sharing' includes providing business users, or third parties authorised by a business user, free of charge, with effective, high-quality, continuous and real-time access and use of aggregated or non-aggregated data. - Article 6(1)(d), DMA.

<sup>226</sup> DMA, para 55, page 27.

<sup>227</sup> Article 12, DMA.

<sup>228</sup> Articles 26 and 27, the DMA.

<sup>229</sup> Article 16, DMA.

<sup>230</sup> Articles 8 and 9, the DMA.

<sup>231</sup> DMA, page 3.

<sup>232</sup> DMA, page 8.

<sup>233</sup> DMA, page 8.

<sup>234</sup> DMA, page 3.

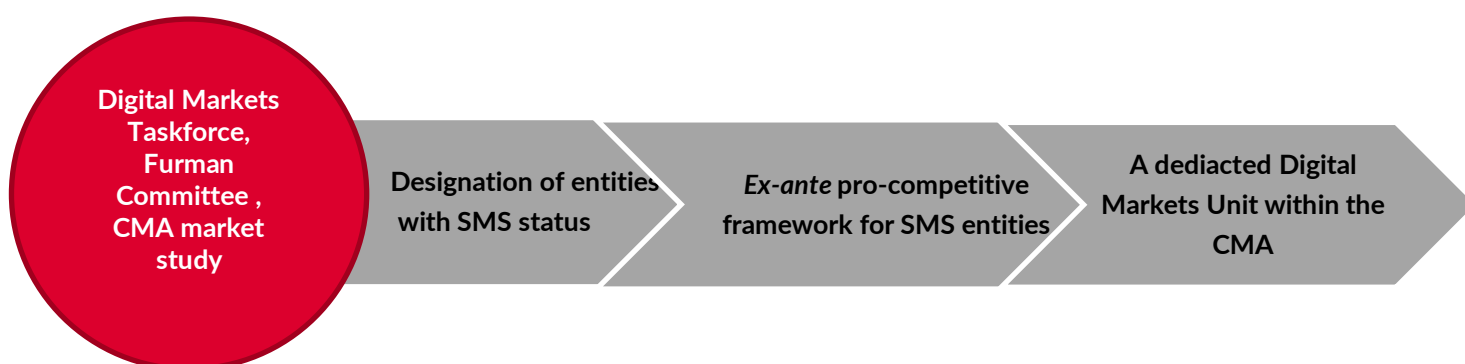
<sup>235</sup> Some of the important statutory instruments governing e-commerce in the UK are - The E-Commerce Regulations 2002, the Consumer Rights Act, 2015, the Consumer Contracts Regulations, 2013, the Consumer Protection from Unfair Trading Regulations 2008, the Provision of Services Regulations 2009, and Data Protection Act, 2018, the Privacy and Electronic Communications (EC Directive) Regulations 2003.

<sup>236</sup> The UK Government has notified the EC Directive no longer applies to the UK - Department for Digital, Culture, Media and Sport, 'The eCommerce Directive and the UK' UK Government (January 2021) <<https://www.gov.uk/guidance/the-e-commerce-directive-and-the-uk>> (accessed 1 July 2021); The UK Government has notified the Online Intermediation Services for Business Users (Amendment) (EU Exit) Regulations 2020, in lieu of the EU P2B Regulations - The Online Intermediation Services for Business Users (Amendment) (EU Exit) Regulations 2020 < <https://www.legislation.gov.uk/uksi/2020/796/contents/made>> accessed 1 July 2021; It is to be noted that despite UK's exit from the EU, recognizing the importance of the EU P2B Regulations, the Digital Market Taskforce has made recommendations to the UK Government to provide for a stronger enforcement mechanism of the said P2B regulations- Competition and Markets Authority, 'A

are regulated under the UK Competition Act, 1998, whose enforcement is entrusted with the Competition and Markets Authority ('CMA').

In light of growing concerns of concentration in the digital economy, the Government of UK and the CMA have taken proactive steps towards designing a regulatory regime to effectively regulate large incumbents. Notably, in 2018, the Government of UK established an independent group of experts chaired by Jason Furman ('the Furman Committee'), to study and make recommendations towards making digital markets competitive and contestable.<sup>237</sup> This was followed by setting up of the Digital Markets Task Force ('the Taskforce')<sup>238</sup> to build on the recommendations in the Furman Committee Report and to aid in the design and implementation of a new-procompetitive regime for digital markets. The CMA also conducted a market study into online platforms and digital advertising, which culminated into a report that was released in July 2020.<sup>239</sup>

Based on the abovementioned studies on competition issues in the UK digital economy, the UK Government announced a new *ex-ante* regime for regulating incumbent technology giants to *inter alia* ensure that businesses transacting with such giants are fairly treated.<sup>240</sup> The proposed regime, which is a culmination of the recommendations of the Furman Committee, the Taskforce and the CMA, hinges on adopting a pro-competitive framework targeted specifically at entities that have attained 'Strategic Market Status' ('SMS'). Enforcement of the new regime will be entrusted to the proposed Digital Markets Unit ('DMU') within the CMA. The following sections briefly illustrate the notable features of the proposed regime.



## *Designation of SMS entities*

The proposal sets out a targeted pro-competitive framework that will be applicable to only those entities that attain the SMS threshold.<sup>241</sup> The aim of this threshold is to effectively regulate entities that are in a position to

new pro-competition regime for digital markets: Advice of the Digital Markets Taskforce' (**Taskforce Advice**) (December, 2020) page 74, <[https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital\\_Taskforce\\_-\\_Advice.pdf](https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_-_Advice.pdf) > accessed 1 July 2021.

<sup>237</sup> The Digital Competition Expert Panel, 'Unlocking Digital Competition' (2019) <<https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel>> accessed 1 July 2021.

<sup>238</sup> The Government of UK, 'Digital markets taskforce: terms of reference' (March 2020) <<https://www.gov.uk/government/publications/digital-markets-taskforce-terms-of-reference/digital-markets-taskforce-terms-of-reference--3>> accessed 1 July 2021.

<sup>239</sup> Competition and Markets Authority, *Online platforms and digital advertising market study* (UK Government, July 2020) <<https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study>> accessed 1 July 2021.

<sup>240</sup> Department for Business, Energy & Industrial Strategy, Department for Digital, Culture, Media & Sport, 'New competition regime for tech giants to give consumers more choice and control over their data, and ensure businesses are fairly treated' ( *Press Release*, 27 November 2020) <<https://www.gov.uk/government/news/new-competition-regime-for-tech-giants-to-give-consumers-more-choice-and-control-over-their-data-and-ensure-businesses-are-fairly-treated> > accessed 1 July 2021.

<sup>241</sup> Competition and Markets Authority, 'Appendix B: The SMS regime: designating SMS firms' (**Taskforce Advice Appendix B**) (December 2020) <[https://assets.publishing.service.gov.uk/media/5fce72c58fa8f54d564aefda/Appendix\\_B\\_-\\_The\\_SMS\\_regime\\_-\\_designating\\_SMS\\_firms.pdf](https://assets.publishing.service.gov.uk/media/5fce72c58fa8f54d564aefda/Appendix_B_-_The_SMS_regime_-_designating_SMS_firms.pdf)> accessed 1 July 2021.



exercise market power over a gateway or bottleneck in a digital market,<sup>242</sup> irrespective of their statutory non-dominance.

The status is to be designated by the DMU<sup>243</sup> based on a two-step assessment. First, an evidence based economic assessment of whether an entity has “*substantial and entrenched market power*” in relation to a specific digital activity<sup>244</sup> and, second, whether that power provides the entity with a strategic position.<sup>245</sup> Importantly, the Taskforce recommends E-marketplaces to be prioritised for SMS designation in the guidance by the DMU.<sup>246</sup>

In assessing whether an entity has substantial and entrenched market power, the Taskforce recommends that the DMU considers factors such as the availability of alternatives, scope for entry and expansion of new players, degree of innovation in the market and the ease of switching for consumers.<sup>247</sup> It is important to note that both the CMA and the Taskforce have recommended against the delineation of relevant market in such assessment as it does little to recognize the interconnected nature of digital markets.<sup>248</sup> The Taskforce instead recommends focussing on specific activities undertaken by the entity that have a similar function or which, in combination, fulfil a specific function.<sup>249</sup>

For the purposes of assessing whether an entity has a ‘strategic position’, the Taskforce sets out a list of non-exhaustive factors to be evaluated which includes the entity’s size and scale, its bargaining power in a specific market segment, its gatekeeping function, its ability to define the rules of the game within its own ecosystem and also in practice for a wider range of market participants, and the extent to which the entity can leverage its market position from one market segment to another through the development of an ecosystem of services.<sup>250</sup>

Interestingly, more than one activity provided by an SMS entity can be recognised as a ‘designated activity’, so that a single SMS entity could have multiple designated activities.<sup>251</sup> While the proposed code of conduct and pro-competitive interventions will apply to only the specific designated activity, the mandatory merger notification requirement will apply to the SMS entity as a whole.<sup>252</sup>

## *An ex-ante pro-competitive framework*

Substantively, the proposed regime counts on a robust *ex-ante* pro-competitive framework to be made applicable to SMS entities only.<sup>253</sup> The framework is focussed on preventing anti-competitive harms as opposed to the extant framework that primarily relies *ex-post* remedying. This framework is envisaged to have three pillars: an enforceable code of conduct that SMS entities are to abide by,<sup>254</sup> empowering the DMU to make pro-competitive interventions in order to impose structural<sup>255</sup> and behavioural changes upon SMS entities;<sup>256</sup> and mandatory pre-merger notification for qualifying mergers involving SMS entities.<sup>257</sup>

### **Code of Conduct**

The proposed regime seeks to put in place a legally enforceable code of conduct that clearly sets out the ‘rules of the game’ for SMS designated entities.<sup>258</sup> Such a code of conduct is expected to achieve the twin goal of clarifying principally acceptable behaviour for SMS entities thereby preventing them from engaging in behaviour which could undermine fair competition.<sup>259</sup>

<sup>242</sup>The Digital Competition Expert Panel, ‘Unlocking Digital Competition’ (2019) page 55 <<https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel>> accessed 1 July 2021.

<sup>243</sup> Notably, the Taskforce Advice highlights that it is “*important this decision is made by an independent regulator and that it is an expert regulatory judgement...*” - Taskforce Advice, page 28.

<sup>244</sup> Taskforce Advice, page 5.

<sup>245</sup> Taskforce Advice, page 5.

<sup>246</sup> Taskforce Advice, page 32.

<sup>247</sup> Taskforce Advice Appendix B, pages B8 and B9.

<sup>248</sup> Taskforce Advice Appendix B, page B11.

<sup>249</sup> Taskforce Advice Appendix B, pages B4-B6.

<sup>250</sup> Taskforce Advice Appendix B, b12-b19.

<sup>251</sup> Taskforce Advice, page 31.

<sup>252</sup> Taskforce Advice, page 34.

<sup>253</sup> Taskforce Advice, page 26.

<sup>254</sup> Taskforce Advice, pages 34-41.

<sup>255</sup> Full ownership separation will be outside the purview of the DMU. It may, however, order operational and functional separation – Taskforce Advice, pages 43 and 44.

<sup>256</sup> Taskforce Advice, page 41.

<sup>257</sup> Taskforce Advice, pages 55-65

<sup>258</sup> Taskforce Advice, pages 34-41.

<sup>259</sup> Taskforce Advice, page 34.

The Taskforce has acknowledged the tactical significance of prescribing *ex-ante* rules in fast-paced digital markets. Such rules are expected to influence SMS entities' decision-making upfront and consequently shape their behaviour proactively.<sup>260</sup> Additionally, a clear code of conduct will also enable behaviour by SMS entities to be challenged and remedied more swiftly than is possible through existing laws.

While the exact nature of activities that are permissible and prohibited are to be drawn up by the DMU as a 'code of conduct', customized for the SMS entity in question<sup>261</sup>, the Taskforce has recommended that the code be a three-tiered structure consisting of: Objectives, Principles and Guidance.<sup>262</sup> While the objectives will be statutorily prescribed in the code, the principles and guidance will be drawn up by the DMU. The 'objectives' will set out the intended purpose the code aims to achieve, 'principles' are expected to set the standards of behaviour for SMS entities in order to achieve the objectives and 'guidance' is expected to provide clarity to SMS entities on the interpretation of principles.<sup>263</sup> The three tiered structure is intended to balance the need for certainty for SMS entities and flexibility for the DMU to quickly react to any unforeseen issues that may arise.<sup>264</sup>

### **Pro-competitive interventions ('PCIs')**

Another *ex-ante* tool under the proposed regime to regulate SMS entities involves empowering the DMU to impose remedies that promote dynamic competition and innovation but fall outside the scope of the code of conduct.<sup>265</sup> In practice, PCIs and the code of conduct are expected to complement each other. As the remedies under the code may be inherently limited to only require entities to change their behaviour such that they are no longer in breach of the code, PCIs may be used to impose a wider range of remedies which may go beyond scope of the code.<sup>266</sup>

Resultantly, specific remedies pertaining to personal data mobility, data access and interoperability that may not otherwise be achieved through the code but are critical in driving greater competition and innovation, may be imposed through PCIs.<sup>267</sup> In the specific context of e-commerce, PCIs may be advantageous in imposing obligations that compel E-marketplaces and aggregators to provide access to businesses on fair and reasonable terms.<sup>268</sup>

### **Tighter scrutiny of mergers involving SMS entities**

The UK merger control regime is currently based on a voluntary notification system and the CMA can intervene only if the prescribed turnover or share of supply thresholds are met.<sup>269</sup> In light of growing evidence that suggests that the above thresholds may not be particularly reliable in digital markets,<sup>270</sup> the Taskforce has proposed a change of approach for certain transactions involving entities with SMS status.<sup>271</sup> Accordingly, the proposed regime requires SMS entities to report all its transactions to the CMA and imposes a mandatory pre-merger notification for transactions that qualify certain clear-cut thresholds.<sup>272</sup> The consummation of mergers qualifying for mandatory notification is sought to be prohibited prior to clearance.<sup>273</sup> Additionally, the Taskforce also recommends the assessment of mergers by SMS entities be cautiously subject to a lower standard of proof of consumer harm to minimize the risk of under enforcement.<sup>274</sup>

<sup>260</sup> Taskforce Advice, page 40.

<sup>261</sup> Taskforce Advice, page 34.

<sup>262</sup> Competition and Markets Authority, 'Appendix C: The SMS regime: the code of conduct'(Taskforce Advice Appendix C) (December 2020) page C4 <[https://assets.publishing.service.gov.uk/media/5fce73098fa8f54d608789eb/Appendix\\_C\\_-\\_The\\_code\\_of\\_conduct\\_.pdf](https://assets.publishing.service.gov.uk/media/5fce73098fa8f54d608789eb/Appendix_C_-_The_code_of_conduct_.pdf)> accessed 1 July 2021.

<sup>263</sup> Taskforce Advice Appendix C, page C4; Taskforce Advice, pages 35-36.

<sup>264</sup> Taskforce Advice, page 35.

<sup>265</sup> Taskforce Advice, page 41.

<sup>266</sup> Taskforce Advice, pages 41-45.

<sup>267</sup> The Advice of the Task force sets out the nature and range of interventions that the DMU may require. With the exception of full ownership separation, the Taskforce recommends that the DMU be empowered to impose structural remedies. It also recommends that the remedies under PCI for the DMU should not be restricted to a set but rather has the flexibility to adapt in line with the market- Competition and Markets Authority, 'Appendix D: The SMS regime: pro-competitive interventions' (December 2020) <[https://assets.publishing.service.gov.uk/media/5fce70118fa8f54d58640c7f/Appendix\\_D\\_-\\_The\\_pro-competition\\_interventions\\_.pdf](https://assets.publishing.service.gov.uk/media/5fce70118fa8f54d58640c7f/Appendix_D_-_The_pro-competition_interventions_.pdf)> accessed 1 July 2021.

<sup>268</sup> Taskforce Advice, page 43.

<sup>269</sup> Taskforce Advice, pages 56-57.

<sup>270</sup> Taskforce Advice, pages 55-56.

<sup>271</sup> Taskforce Advice pages 54-67.

<sup>272</sup> Taskforce Advice, page 59.

<sup>273</sup> Competition and Markets Authority, 'Appendix F: The SMS regime: a distinct merger control regime for firms with SMS ' <[https://assets.publishing.service.gov.uk/media/5fce706ee90e07562d20986f/Appendix\\_F\\_-\\_The\\_SMS\\_regime\\_-\\_a\\_distinct\\_merger\\_control\\_regime\\_for\\_firms\\_with\\_SMS\\_-\\_web\\_.pdf](https://assets.publishing.service.gov.uk/media/5fce706ee90e07562d20986f/Appendix_F_-_The_SMS_regime_-_a_distinct_merger_control_regime_for_firms_with_SMS_-_web_.pdf)> accessed 1 July 2021

<sup>274</sup> Taskforce Advice, pages 62-64.

## The establishment of the DMU

The proposed regime envisages the establishment of a unit dedicated to digital markets within the CMA – the DMU.<sup>275</sup> This unit shall be responsible for enforcing the new regime swiftly and in a time-bound manner, given the pace of digital markets.<sup>276</sup> It is expected to establish itself as a centre of expertise for digital markets with the capability to understand the business models of digital entities, including the role of data and the incentives driving how these entities operate.<sup>277</sup> Apart from designating SMS entities and enforcing the code of conduct, the role of the DMU will also extend to monitoring ongoing market trends, proactively engaging with competition regulators in other jurisdiction to facilitate better monitoring of SMS entities<sup>278</sup> and working closely with stakeholders.<sup>279</sup>

The Taskforce, noting the multiplicity of statutory instruments and regulators at play in regulating digital markets, has highlighted the compelling need to weave together a coherent regulatory landscape for digital markets, one that avoids duplicity of efforts between regulators and facilitates the sharing of expertise across regulators.<sup>280</sup> To this end, the Taskforce has recommended that the DMU work closely with other regulators such as the Financial Conduct Authority and bodies such as the Digital Regulation Co-operation Forum which comprises of the CMA, the telecom regulator Ofcom and the Information Commissioner's Office.<sup>281</sup>

## Germany

The regulation of e-commerce in Germany is set out both under German and EU laws.<sup>282</sup> In the specific context of E-marketplaces, notable laws include the Telemedia Act, 2007, the EC Directive and the EU P2B Regulations. Additionally, aspects pertaining to competition and consumer protection are domestically regulated under the Act Against Unfair Competition, 2004,<sup>283</sup> and the Act Against Restraint of Competition, 1958 ('ARC'). The enforcement of the ARC is entrusted to the *Bundeskartellamt*, also known as the Federal Cartel Office ('FCO').

Germany has been active in recognizing the challenges that the digital economy poses to small players and merchants, both at the enforcement<sup>284</sup> and legislative/policy levels.<sup>285</sup> In line with its commitment to preserve a competitive process and create a level playing field for small businesses operating on E-marketplace platforms, the German parliament in January 2021 passed the 10<sup>th</sup> amendment to the ARC ('the Amendment'), which particularly targets the regulation of large platforms.<sup>286</sup> The Amendment, also referred to as the 'Digitization Act'

<sup>275</sup> Competition and Markets Authority, 'The CMA's Digital Markets Strategy: February 2021 refresh' (UK Government, February 2021) <<https://www.gov.uk/government/publications/competition-and-markets-authoritys-digital-markets-strategy/the-cmas-digital-markets-strategy-february-2021-refresh>> accessed 1 July 2021.

<sup>276</sup> Taskforce Advice, pages 24-25.

<sup>277</sup> Taskforce Advice, pages 22-23.

<sup>278</sup> Taskforce Advice, page 79.

<sup>279</sup> Taskforce Advice, pages 47, 51 and 52.

<sup>280</sup> Taskforce Advice, pages 22-23.

<sup>281</sup> The Competition and Markets Authority, 'Digital Regulation Cooperation Forum' (UK Government, July 2020) <<https://www.gov.uk/government/publications/digital-regulation-cooperation-forum>> accessed 1 July 2021.

<sup>282</sup> The statutory instruments include the German Civil Code, 1900, the German Trust Services Act, the Act Against Unfair Competition, the General Data Protection Regulation and Data Protection Act 2018, the Privacy and Electronic Communications (EC Directive) Regulations 2003.

<sup>283</sup> Act against Unfair Competition, 2004 <[https://www.gesetze-im-internet.de/englisch\\_uwg/englisch\\_uwg.html](https://www.gesetze-im-internet.de/englisch_uwg/englisch_uwg.html)> accessed 1 July 2021

<sup>284</sup> The FCO's decisions involving platforms in cases such as Amazon, Facebook and Booking.com are examples of its proactive intervention and enforcement practice- *Bundeskartellamt Amazon* B2-88/18 (2019)

<[https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B2-88-18.html;jsessionid=E9C10C4038E5703A96233DDDDA3B8EB5.2\\_cid381?nn=10321672](https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B2-88-18.html;jsessionid=E9C10C4038E5703A96233DDDDA3B8EB5.2_cid381?nn=10321672)> accessed 1 July 2021; *Bundeskartellamt Facebook* B6-22/16 (2019)

<[https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.html;jsessionid=E9C10C4038E5703A96233DDDDA3B8EB5.2\\_cid381?nn=10321672](https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.html;jsessionid=E9C10C4038E5703A96233DDDDA3B8EB5.2_cid381?nn=10321672)> accessed 1 July 2021; *Bundeskartellamt 'Narrow 'best price' clauses of Booking also anticompetitive'* (2015)

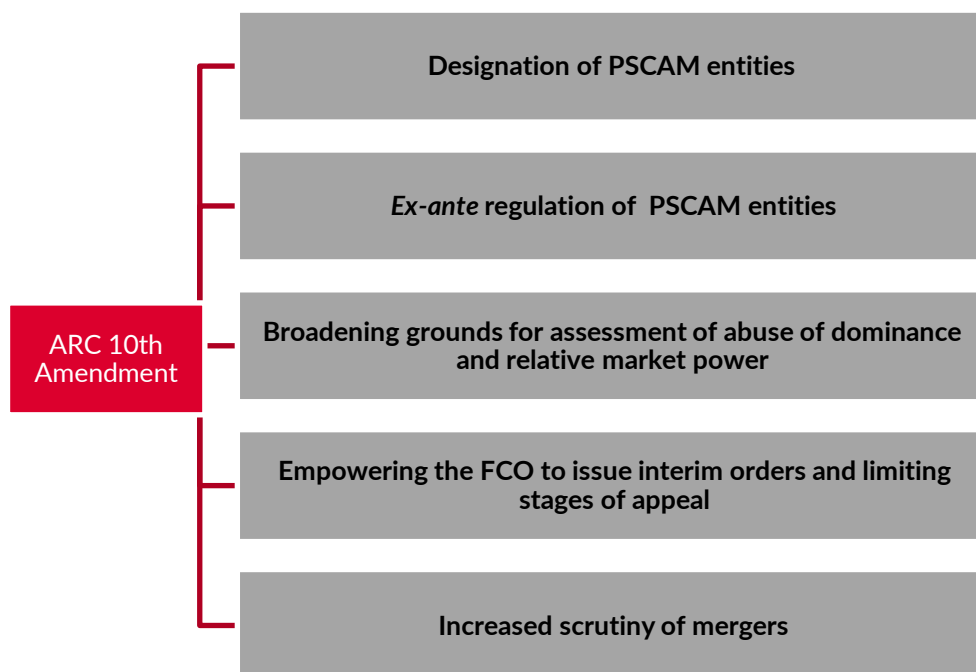
<[https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/23\\_12\\_2015\\_Booking.com.html;jsessionid=E9C10C4038E5703A96233DDDDA3B8EB5.2\\_cid381?nn=10321672](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/23_12_2015_Booking.com.html;jsessionid=E9C10C4038E5703A96233DDDDA3B8EB5.2_cid381?nn=10321672)> accessed 1 July 2021.

<sup>285</sup> The FCO has released a plethora of working paper series and reports that have shaped German competition enforcement in digital markets. Additionally, both the 9<sup>th</sup> and 10<sup>th</sup> amendments to the ARC have been targeted at effectively regulating digital markets. Through the 9<sup>th</sup> amendment to the ARC, it was expressly clarified that transactions where no monetary consideration is paid in a market are also subject to competition law. Further, aspects that are critical for the market power of platforms and networks (such as network effects and access to data) have been introduced into the law as new criteria for determining market power. The 9<sup>th</sup> amendment also provides for notification of mergers based on the value of transactions, thus enabling high value digital transactions to be covered within the regulatory scrutiny of the FCO - *Bundeskartellamt, 'Digital Economy'* <[https://www.bundeskartellamt.de/EN/Economicsectors/Digital\\_economy/digital\\_economy\\_node.html](https://www.bundeskartellamt.de/EN/Economicsectors/Digital_economy/digital_economy_node.html)> accessed 1 July 2021.

<sup>286</sup> *Bundeskartellamt 'Amendment of the German Act against Restraints of Competition' (Press Release, 19 January 2021) (FCO Press Release the 10<sup>th</sup> Amendment)*

is a culmination of the recommendations of the 'Competition Law 4.0' commission which was set up by the German Federal Ministry for Economic Affairs and Energy to draw up key action points for German competition law in light of the rapidly evolving digital economy.<sup>287</sup>

At present, the Amendment along with the EU P2B Regulations is expected to effectively promote fair play between large e-commerce platforms and businesses that operate upon them. In the particular context of regulating P2B relationships, the Amendment seeks to empower the FCO to enhance its scrutiny of certain designated large digital platforms,<sup>288</sup> as illustrated in the following sections.



## ***Designation and targeted regulation of entities with Paramount Significance for Competition Across Markets ('PSCAM')***

The Amendment through the addition of section 19a to the ARC has created a new label for large platforms that connect distinct user bases and are consequently active on multiple sides of a given market.<sup>289</sup> Given their role as infrastructural facility and their strategic position in the digital ecosystem, the Amendment considers undertakings that fulfil the criteria under sections 18 (3a) and 19a (1) to have paramount significance in preserving competition.<sup>290</sup> Indicators of undertakings with PSCAM include a dominant position in one or more markets, access to data, financial strength, vertical integration and position of a company in related markets, a company's role in facilitating third parties' access to supply and sales markets and its related influence on the business activities of third parties.<sup>291</sup> Section 19a of the ARC adopts a calibrated approach, making it clear that

<[https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2021/19\\_01\\_2021\\_GWB\\_Novelle.pdf?\\_\\_blob=publicationFile&v=2](https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2021/19_01_2021_GWB_Novelle.pdf?__blob=publicationFile&v=2)> accessed 1 July 2021; 'Altmaier: With the GWB Digitization Act, we are creating modern competition law for the digital age' Federal Ministry for Economic Affairs and Energy (Press Release, 18 January 2021)

<<https://www.bmwi.de/Redaktion/DE/Pressemitteilungen/2021/01/20210118-altmaier-mit-dem-gwb-digitalisierungsgesetz-schaffen-wir-ein-modernes-wettbewerbsrecht-fuer-das-digitale-zeitalter.html>> accessed 1 July 2021.

<sup>287</sup> Federal Ministry for Economic Affairs and Energy, 'A new competition framework for the digital economy' (September 2019) [https://www.bmwi.de/Redaktion/EN/Publikationen/Wirtschaft/a-new-competition-framework-for-the-digital-economy.pdf?\\_\\_blob=publicationFile&v=3](https://www.bmwi.de/Redaktion/EN/Publikationen/Wirtschaft/a-new-competition-framework-for-the-digital-economy.pdf?__blob=publicationFile&v=3) accessed 1 July 2021.

<sup>288</sup> FCO Press Release on the 10<sup>th</sup> Amendment.

<sup>289</sup> FCO Press Release on the 10<sup>th</sup> Amendment.

<sup>290</sup> Section 19a (1), Act against Restraints of Competition, 1958 (ARC) <[https://www.gesetze-im-internet.de/englisch\\_gwb/englisch\\_gwb.pdf](https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.pdf)>; FCO press Release on the 10<sup>th</sup> Amendment.

<sup>291</sup> Section 19a (1), the ARC.

the legislature's intent is to regulate only the most powerful and large entities.<sup>292</sup> Notably, the term PSCAM is similar to how a gatekeeper is defined in the DMA.<sup>293</sup>

The PSCAM status is to be designated through a declaratory order, and such PSCAM entities shall in turn be subject to increased scrutiny under the ARC for up to five years as elaborated further in the forthcoming sections.<sup>294</sup> Such a designation is particularly important as it empowers the FCO to carry out *ex-ante* regulation by making timely interventions<sup>295</sup> and pass prohibition orders against certain practices of such entities<sup>296</sup> without formally establishing 'dominance'.<sup>297</sup>

## ***Enumeration of prohibited conduct by PSCAM entities***

In order to clarify the type of behaviour that is unacceptable by large platforms, the Amendment has inserted section 19a(2) to the ARC enumerating the types of conduct that the FCO can prohibit PSCAM entities from engaging in.<sup>298</sup> Conducts that may be specifically prohibited owing to the entity's strategic importance and resources include self-preferencing, anti-competitive tying and bundling, unfair terms and conditions that act as barriers to entry for other competitors including anti-competitive processing of data and refusal of interoperability and data portability.<sup>299</sup> The prohibited conduct is largely similar to the obligations proposed under the DMA.<sup>300</sup>

It is to be noted that a rebuttable presumption operates against the prohibited conduct unless the PSCAM entity concerned objectively justifies its conduct to the FCO under section 19a of the ARC.<sup>301</sup> In effect, the 19a(2) acts as 'blacklist' of prohibited conduct unless proven otherwise by the PSCAM entity in question.<sup>302</sup>

## ***Abuse of dominance and relevant market power***

Unilateral anti-competitive behaviour is governed by sections 18, 19, 20<sup>303</sup> and the newly introduced 19a of ARC. Section 19 prohibits an entity from abusing its dominance either singularly or collectively with other entities. Additionally, in line with Germany's commitment to ordoliberalism, protection of small market players assumes primary importance<sup>304</sup> and so the ARC also prohibits the abuse of 'relative market power' under section 20 of the ARC.<sup>305</sup> An entity is understood to have relative or superior market power if other players in the market are dependent upon the entity either as supplier or consumer without adequate alternatives.<sup>306</sup> Entities with such superior market power are subject to certain specific obligations that apply to dominant entities as laid

<sup>292</sup> FCO Press Release on the 10<sup>th</sup> Amendment.

<sup>293</sup> Nicolas Kredel, Christian Burnholt and Jan Kresken, 'Germany: New German Competition Law Takes Effect', *Baker McKenzie Global Compliance News*, (February 2021) <<https://www.globalcompliancencnews.com/2021/02/07/germany-new-german-competition-law-takes-effect200121/>> accessed 1 July 2021.

<sup>294</sup> Section 19a, the ARC; FCO Press Release on the 10<sup>th</sup> Amendment.

<sup>295</sup> FCO Press Release on the 10<sup>th</sup> Amendment.

<sup>296</sup> Anne-Kathrine Lauer, Julian Urban, & Florier von Schreitter, 'First mover advantage? Reform of abuse control in German competition law' Hogan Lovells, *JDSupra*, (January 2021) <<https://www.jdsupra.com/legalnews/first-mover-advantage-reform-of-abuse-4625807/>> accessed 1 July 2021.

<sup>297</sup> Uta Itzen, Peter Niggemann, Timo Angerbauer, Moritz Dastner, Ilka Mauelshagen, & Ole Schley, 'Passed after all: The German Competition Digitisation Act is enacted' Freshfields Bruckhaus Deringer LLP, *Lexology*, (January 2021) <<https://www.lexology.com/library/detail.aspx?g=d540089d-8d8a-48e5-9553-1d7d855ad1ca>> accessed 1 July 2021.

<sup>298</sup> Section 19a (2), the ARC; FCO Press Release on the 10<sup>th</sup> Amendment.

<sup>299</sup> Section 19a (2), the ARC.

<sup>300</sup> Nicolas Kredel, Christian Burnholt and Jan Kresken, 'Germany: New German Competition Law Takes Effect' *Baker McKenzie Global Compliance News*, (February 2021) <<https://www.globalcompliancencnews.com/2021/02/07/germany-new-german-competition-law-takes-effect200121/>> accessed 1 July 2021.

<sup>301</sup> Section 19a, the ARC; Latham and Watkins Antitrust and Competition Practice, 'The New German Digitalization Act: An Overview', *Latham & Watkins Client Alert News Flash* 2849, (January 2021) < <https://www.lw.com/thoughtLeadership/the-new-german-digitalization-act-an-overview> > accessed 1 July 2021.

<sup>302</sup> Latham and Watkins Antitrust and Competition Practice, 'The New German Digitalization Act: An Overview', *Latham and Watkins Client Alert News Flash* 2849, (January 2021) < <https://www.lw.com/thoughtLeadership/the-new-german-digitalization-act-an-overview> > accessed 1 July 2021; Anne-Kathrine Lauer, Julian Urban, and Florier von Schreitter, 'First mover advantage? Reform of abuse control in German competition law' Hogan Lovells, *JDSupra*, (January 2021) <<https://www.jdsupra.com/legalnews/first-mover-advantage-reform-of-abuse-4625807/>> accessed 1 July 2021.

<sup>303</sup> Sections 18, 19 and 20, the ARC.

<sup>304</sup> Reform of German Competition Act adopted. Overview on main amendments and outlook on new reforms' *Linklaters* (April 2017) <[https://www.linklaters.com/pdfs/mkt/frankfurt/170404\\_9GWB\\_Novelle\\_Alert2\\_EN.pdf](https://www.linklaters.com/pdfs/mkt/frankfurt/170404_9GWB_Novelle_Alert2_EN.pdf)> ; Organisation for Economic Co-operation and Development, 'Germany - The Role of Competition Policy in Regulatory Reform' (2004) <<https://www.oecd.org/germany/33841373.pdf>> accessed 1 July 2021.

<sup>305</sup> Section 20, the ARC.

<sup>306</sup> Section 20(1), the ARC; ; Patrick Bock, Kenneth Reinker & David R Little, 'Dominance 2019', (2019) XV *Lexology Getting the Deal Through* < <https://www.cleargottlieb.com/-/media/files/getting-the-deal-through/getting-the-deal-throughs-2019-guide--dominance--germany-pdf.pdf>> accessed 1 July 2021.

down under section 20(3) of the ARC,<sup>307</sup> thereby enabling the FCO to effectively regulate gatekeepers despite their statutory non-dominance.

The Amendment further broadens the scope of assessing market power of an entity by including factors such as network effects, possession of competitively sensitive data and switching costs while determining market power in multi-sided markets.<sup>308</sup> Similarly, the Amendment also allows the FCO to consider the importance of the intermediary services provided by the entity in the downstream and upstream markets while assessing the market position of an undertaking acting as an intermediary in multi-sided markets.<sup>309</sup> The Amendment also expands the scope of protection for entities that transact with entities which are not dominant but possess 'relative market power'.<sup>310</sup> Prior to the Amendment, protection against entities with 'relative market power' was only available to small and medium-sized companies. Lastly, the Amendment empowers the FCO to mandate access to data to dependent companies for adequate compensation<sup>311</sup> and to proactively intervene when the behaviour of large platforms makes the market prone to 'tipping'.<sup>312</sup>

## ***Procedural amendments***

Underscoring the importance of agility in regulatory action in new age markets, the Amendment also lowers the threshold for the FCO to issue 'interim orders'.<sup>313</sup> Interim orders can be especially helpful in preventing PSCAM entities from carrying out potentially anti-competitive conduct resulting in irreparable harm, before the FCO reaches a final decision on the permissibility of such conduct. However, such interim measures shall not apply in case PSCAM entities can prove that the order would cause "unfair hardships not justified by overriding public interests".<sup>314</sup>

Additionally, the Amendment provides for speedier disposal of cases in relation to PSCAM entities' conduct. Per the Amendment, appeals against decisions issued by FCO under section 19a of the ARC will be directly brought before the Federal Court of Justice, Germany's highest antitrust court,<sup>315</sup> thus enabling the by-passing of all intermediate stages.<sup>316</sup>

## ***Increased scrutiny of concentrations***

The insertion of section 39a of the ARC<sup>317</sup> through the Amendment has empowered the FCO to demand a notification for every concentration by certain large undertakings<sup>318</sup> in specific sectors even if such concentrations do not meet the notifiability thresholds under section 37 of the ARC.

Prior to making a notification demand, the FCO is obligated to conduct an inquiry in the sector the undertaking belongs to in accordance with section 32e of ARC and it may thereafter pass a formal order, valid for up to three years, demanding notices of future concentrations from the undertaking.<sup>319</sup> The newly inserted section 39a may

<sup>307</sup> Silke Heinz, 'Germany publishes report on modernizing the law on abuse of market power in the digital economy', (*Kluwer Competition Law Blog*, October 2018) <<http://competitionlawblog.kluwercompetitionlaw.com/2018/10/08/germany-publishes-report-modernizing-law-abuse-market-power-digital-economy/>> accessed 1 July 2021.

<sup>308</sup> Sec 18(3a), the ARC.

<sup>309</sup> Sec 18(3b), the ARC.

<sup>310</sup> Section 20(1) of the ARC; FCO Press Release on the 10<sup>th</sup> Amendment; Anne-Kathrine Lauer, Julian Urban, and Florier von Schreitter, 'First mover advantage? Reform of abuse control in German competition law' Hogan Lovells, *JDSupra*, (January 2021) <<https://www.jdsupra.com/legalnews/first-mover-advantage-reform-of-abuse-4625807/>> accessed 1 July 2021.

<sup>311</sup> Section 20(1a), the ARC; FCO Press Release on the 10<sup>th</sup> Amendment.

<sup>312</sup> Section 20(3a), the ARC; FCO Press Release on the 10<sup>th</sup> Amendment; Latham and Watkins, 'The New German Digitalization Act: An Overview', *Latham & Watkins Client Alert News Flash* 2849, (January 2021) <<https://www.lw.com/thoughtLeadership/the-new-german-digitalization-act-an-overview>> accessed 1 July 2021.

<sup>313</sup> Section 32a, the ARC; FCO Press Release on the 10<sup>th</sup> Amendment.

<sup>314</sup> Section 32a, the ARC.

<sup>315</sup> <https://www.natlawreview.com/article/germany-s-highest-antitrust-court-published-detailed-written-statement-reasons-its>

<sup>316</sup> Section 73(5), the ARC, FCO Press release on the 10<sup>th</sup> Amendment.

<sup>317</sup> Section 39a, the ARC.

<sup>318</sup> Section 39a (1) of the ARC lays down the characteristics of the undertaking whose concentrations are sought to be scrutinized.

"(1) The Bundeskartellamt may order by formal decision that an undertaking is to notify every concentration with other undertakings in one or several specific sectors of the economy if

1. the worldwide turnover of the undertaking concerned was more than EUR 500 million in the last business year,
2. there are objectively verifiable indications that future concentrations could substantially impede effective competition in Germany in the sectors of the economy specified, and
3. in Germany, the undertaking supplies or procures at least 15 per cent of the goods or services in the sectors of the economy specified."

<sup>319</sup> Section 39a, the ARC.

be particularly instrumental for the FCO to capture deals perceived as potential 'killer acquisitions' in the future.<sup>320</sup>

## Australia

Australian competition and consumer protection laws are jointly governed under the Competition and Consumer Act, 2010,<sup>321</sup> ('CCA, 2010') whose enforcement is entrusted with the Australian Competition and Consumer Commission ('ACCC').<sup>322</sup> In 2019, the ACCC concluded its two year-inquiry into the impact of digital platforms on competition and consumer welfare in Australia<sup>323</sup> and released the Digital Platforms Inquiry Report ('ACCC Report'),<sup>324</sup> which makes recommendations towards amending the CCA, 2010 and the Privacy Act, 1998,<sup>325</sup> in order to safeguard the interest of both consumers and business users.

The primary focus of the inquiry was to study the impact of digital platforms such as online search engines, social media and digital content aggregators on competition in the media and advertising services markets.<sup>326</sup> While the ACCC Report does not specifically examine issues pertaining to E-marketplaces,<sup>327</sup> the observations of the ACCC are nonetheless significant in identifying the issues prevalent in P2B relationships. Particularly, the report takes note of the inevitable dependence<sup>328</sup> of small businesses upon platforms to reach a major segment of consumers,<sup>329</sup> thus making such platforms a 'gateway'<sup>330</sup> for business users to carry out trade. Additionally, the ACCC acknowledges the asymmetry in bargaining powers between large platforms and small businesses.<sup>331</sup> It notes that a superior bargaining position has encouraged platforms to be less transparent about their offerings, particularly with respect to issues of pricing and data collection, and conversely notes how the lack of such negotiating power of business users has the potential to lead to unfair contract terms,<sup>332</sup> as business users would likely continue to use their services despite these issues due to the lack of viable alternatives.<sup>333</sup>

In addition to the above, given Australia's voluntary merger notification regime, the ACCC Report recommends that large digital platforms intending to acquire any business with activities in Australia, must give advance notice of the same to the ACCC and allow it sufficient time to review the proposed acquisition.<sup>334</sup> The report also recommends the establishment of a dedicated branch within the ACCC to build expertise in digital markets regulation.<sup>335</sup>

Taking cognizance of the recommendations made in the ACCC Report,<sup>336</sup> in February 2021, the Australian Government passed an amendment to the CCA, 2010, through the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill, 2021 ('Bargaining Code').<sup>337</sup> The code is intended to address perceived bargaining power imbalances between news service providers and large platforms by setting certain minimum standards<sup>338</sup> that such platforms are expected to adhere to and by enabling news services to

<sup>320</sup> Michael Holzhauser, '10th amendment to Germany's Competition Act', *Ashurst Competition Law Newsletter* (February 2020) <<https://www.ashurst.com/en/news-and-insights/legal-updates/competition-law-newsletter-february-2020/cn08-10th-amendment-to-germanys-competition-act>> accessed 1 July 2021.

<sup>321</sup> Competition and Consumer Act, 2010 (CCA, 2010) <<https://www.legislation.gov.au/Details/C2021C00010>> accessed 1 July 2021. It is of note that the term 'consumer' as defined under the CCA, 2010, potentially covers business users and therefore statutory protection such as guarantees and warranties, unfair contract terms, misleading or deceptive conduct and making false or misleading representations about goods/services, extends to such business users - Hamish Fraser, 'Regulating Online Marketplaces - The Australian Position' (*Lexology*, 2020) <<https://www.lexology.com/library/detail.aspx?g=b2482b5a-5209-4423-b2b9-04d145174242>> accessed 1 July 2021.

<sup>322</sup> Section 6A, the CCA 2010.

<sup>323</sup> Australian Competition and Consumer Commission, 'Digital Platforms Inquiry: Final Report' (ACCC Report) (2019) <<https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>> accessed 1 July 2021.

<sup>324</sup> ACCC Report.

<sup>325</sup> The Privacy Act, 1988 <<https://www.legislation.gov.au/Details/C2021C00139>> accessed 1 July 2021.

<sup>326</sup> ACCC Report.

<sup>327</sup> The ACCC Report specifically excluded E-marketplaces such as Amazon and Ebay from its scope- ACCC Report, page 41.

<sup>328</sup> ACCC Report, page 132.

<sup>329</sup> ACCC Report, page 132.

<sup>330</sup> ACCC Report, page 1.

<sup>331</sup> ACCC Report, pages 162-164.

<sup>332</sup> ACCC Report, pages 497-501.

<sup>333</sup> ACCC Report, page 162-164.

<sup>334</sup> ACCC Report, page 109.

<sup>335</sup> ACCC Report, pages 140-142.

<sup>336</sup> ACCC Report, pages 32, 255-257

<sup>337</sup> Treasury Laws Amendment (News Media and Digital Platforms Bargaining Code) Bill, 2021, <<https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code/final-legislation>> accessed 1 July 2021.

<sup>338</sup> Australian Competition and Consumer Commission, 'Draft news media bargaining code' (July 2020) <<https://www.accc.gov.au/focus-areas/digital-platforms/draft-news-media-bargaining-code>> accessed 1 July 2021.

collectively negotiate and secure a fair price for their news content.<sup>339</sup> At present, the Bargaining Code is specifically made applicable to Google and Facebook which have been assessed to have substantial market power,<sup>340</sup> the equivalent of dominance, under the CCA, 2010.

Although the Bargaining Code does not apply to P2B relationships in the context of e-commerce, it nonetheless marks an important step in promoting fair play between business users and incumbent platform giants through *ex-ante* regulatory instruments.

## Japan

Competition law in Japan is governed under the Anti-Monopoly Act, 1947 ('**AMA, 1947**') enforced by the Japan Fair Trade Commission ('**JFTC**').<sup>341</sup> The JFTC has been proactive in monitoring the impact of digital platforms to the Japanese economy<sup>342</sup> and studying the corresponding regulatory developments required.<sup>343</sup> In February 2021, the Japanese Ministry of Economy, Trade and Industry ('**METI**') enacted the Improvement of Transparency and Fairness of Digital Platforms Act, 2021 ('**TFDPA**'), which specifically aims to take measures for securing transparency and fairness in trading on digital platforms.

In line with its international counterparts, the TFDPA also relies on *ex-ante* monitoring of 'Specified Digital Platforms' ('**SDPs**'), expected to be designated based on their size and the nature of service provided.<sup>344</sup> Such SDPs are in turn bound by certain obligations that govern their transactions with business users including transparency regarding the sharing of aggregated consumer data with business users, the particulars of differential treatment as extended to affiliated business users,<sup>345</sup> and the primary factors used to determine search ranking.<sup>346</sup> The SDPs are to also carry out periodical self-assessment of their business practices<sup>347</sup> and submit reports to the METI. Reportedly, the TFDPA is expected to be accompanied with additional regulations and guidelines for the purposes of implementation.<sup>348</sup>

Additionally, noting the need for swifter regulatory actions, the Japanese Government has also established the Headquarters for Digital Market Competition in September, 2019<sup>349</sup> consisting of domain experts and ministry representatives.<sup>350</sup> It is evident that Japan's efforts to regulate large digital platforms involves *ex-ante* statutory instruments and a specialized digital markets body.

<sup>339</sup> Bijit Das & Meril Mathew Joy, 'Australia releases News Media Bargaining Code for Stakeholders' comments' (*Lexology*, August 2020) <<https://www.lexology.com/library/detail.aspx?g=fc3ba58b-8029-4cb6-bb14-85812bfd3661>> accessed 1 July 2021.

<sup>340</sup> ACCC Report, pages 60-105.

<sup>341</sup> Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (1947) (**AMA**) <[https://www.jftc.go.jp/en/legislation\\_gls/amended\\_ama09/index.html](https://www.jftc.go.jp/en/legislation_gls/amended_ama09/index.html)> accessed 1 July 2021.

<sup>342</sup> The JFTC has also proactively been investigating platforms such as Amazon and Airbnb- Japan Federal Trade Commission, 'Closing the Investigation on the Suspected Violation of the Antimonopoly Act by Amazon Japan G.K.' (*Press Release*, 1 June 2017)

<<https://www.jftc.go.jp/en/pressreleases/yearly-2017/June/170601.html>> accessed 1 July 2021; Competition Policy International, 'Japan: JFTC raids Airbnb over suspected antitrust practices' (November, 2017) <<https://www.competitionpolicyinternational.com/japan-regulators-raid-airbnb-over-suspected-antitrust-practices>> accessed 1 July 2021.

<sup>343</sup> Japan Fair Trade Commission, 'Final Report Regarding Digital Advertising' (*Press Release*, 17 February 2021) <<https://www.jftc.go.jp/en/pressreleases/yearly-2021/February/210217.html>> accessed 1 July 2021.

<sup>344</sup> Toshio Dokei, Hideo Nakajima and Takako Onoki, 'METI Seeking Public Comments on Proposed Regulations for Act on Improving Transparency and Fairness of the Specified Digital Platforms', *White & Case LLP* (January 2021) <<https://www.whitecase.com/publications/alert/meti-seeking-public-comments-proposed-regulations-act-improving-transparency-and>> accessed 1 July 2021; Prime Minister's Office of Japan, 'Summary of a Bill on Improving Transparency and Fairness of specified Digital Platforms' (*Headquarters for Digital Market Competition*, February, 2020) <[https://www.kantei.go.jp/jp/singi/digitalmarket/pdf\\_e/documents\\_200218.pdf](https://www.kantei.go.jp/jp/singi/digitalmarket/pdf_e/documents_200218.pdf)> accessed 1 July 2021.

<sup>345</sup> Scott W. Pink, David G. Litt and Yuko Zaha, 'New Regulation of Digital Platforms in Japan' *O'Melveny & Myers LLP*, (April 2021) <<https://www.lexology.com/library/detail.aspx?g=29fdf784-8655-4554-a239-f8de72653c6d#::~:~:text=Based%20on%20the%20results%20of,effect%20on%20February%201%2C%202021>> accessed 1 July 2021.

<sup>346</sup> Jeffrey J. Amato & Tomonori Maezawa, 'Japanese Legislature Passes Act to Regulate Big Tech Platforms', *Winston & Strawn LLP*, (December 2020) <<https://www.winston.com/en/competition-corner/japanese-legislature-passes-act-to-regulate-big-tech-platforms.html>> accessed 1 July 2021.

<sup>347</sup> Ministry of Economy, Trade and Industry 'Cabinet Decision on the Bill for the Act on Improving Transparency and Fairness of Digital Platforms' (*Press Release*, Japan February 2020) <[https://www.meti.go.jp/english/press/2020/0218\\_002.html](https://www.meti.go.jp/english/press/2020/0218_002.html)> accessed 1 July 2021.

<sup>348</sup> Toshio Dokei, Hideo Nakajima & Takako Onoki, 'METI Seeking Public Comments on Proposed Regulations for Act on Improving Transparency and Fairness of the Specified Digital Platforms', *White & Case LLP*, (January 2021) <<https://www.whitecase.com/publications/alert/meti-seeking-public-comments-proposed-regulations-act-improving-transparency-and>> accessed 1 July 2021.

<sup>349</sup> Toshio Dokei, Hideo Nakajima & Takako Onoki, 'The Government of Japan seeks Public Comment on Digital Advertising Interim Report' *White & Case LLP*, (June 2020) <<https://www.whitecase.com/publications/alert/government-japan-seeks-public-comment-digital-advertising-interim-report>> accessed 1 July 2021.

<sup>350</sup> Prime Minister's Office of Japan, 'Establishment of "Headquarters for Digital Market Competition"' (Headquarters for Digital Market Competition, September 2019) <[https://www.kantei.go.jp/jp/singi/digitalmarket/pdf\\_e/documents\\_190927.pdf](https://www.kantei.go.jp/jp/singi/digitalmarket/pdf_e/documents_190927.pdf)> accessed 1 July 2021.



# The US

The chief federal statutory instruments governing antitrust regulation in the US are the Sherman Act, 1890, ('**Sherman Act**') the Clayton Act, 1914 ('**Clayton Act**') and the Federal Trade Commission Act, 1914 ('**FTCA**').<sup>351</sup> The Sherman Act prohibits every contract, conspiracy or combination that restrains trade or commerce,<sup>352</sup> and prohibits monopolisation and any attempt to monopolise.<sup>353</sup> The Clayton Act on the other hand, prohibits and addresses any harm that could potentially arise from certain practices that are not specifically prohibited under the Sherman Act such as mergers and acquisitions<sup>354</sup> that may significantly lessen competition or tend to create a monopoly.<sup>355</sup> The FTCA regulates "*unfair methods of competition*" as well as unfair or deceptive acts or practices<sup>356</sup> and further authorises the creation and establishment of the Federal Trade Commission ('**FTC**').<sup>357</sup> The FTC and the Antitrust Division of the US Department of Justice ('**DOJ**') are jointly entrusted with the enforcement of the aforementioned laws.<sup>358</sup> Notably, although the FTC has previously claimed that the extant US antitrust laws have stood the test of time as they have been applied "*from a time of horse and buggies to the present digital age*",<sup>359</sup> from the developments discussed below it is evident that there is an admitted need to sharpen regulatory tools in the context of digital markets.

Cognizant of the rising power of digital giants, the Subcommittee on Antitrust, Commercial and Administrative Law of the House Judiciary Committee ('**the Subcommittee**') launched an investigation in 2019 in order to examine the rise and use of market power online and assess the adequacy of existing antitrust laws and current enforcement levels in digital markets.<sup>360</sup> Based on their investigation, the Subcommittee observed that certain digital platforms - Amazon, Apple, Facebook and Google - have attained a 'gatekeeper' position over key distribution channels which enables them to control access to markets and effectively choose winners and losers in that market.<sup>361</sup> The Subcommittee specifically noted that by engaging in anti-competitive practices such as self-preferencing, predatory pricing and exclusionary conduct these dominant platforms have exploited their power in order to become even more dominant.<sup>362</sup> Keeping these concerns in mind, the Subcommittee put forward certain recommendations that are aimed at restoring competition in the digital economy.<sup>363</sup> The recommendations proposed by the Subcommittee which are relevant in the context of regulating competition issues in P2B relationships on E-marketplaces include - prohibition on dominant entities from abusing their superior bargaining power,<sup>364</sup> the need to enable access to data through measures such as data interoperability

<sup>351</sup>Federal Trade Commission, 'The Antitrust Laws' <<https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws>> accessed 1 July 2021.

<sup>352</sup>Section 1, Sherman Act, 1906 (15 USC § 1) <<https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title15-section1&num=0&edition=prelim>> accessed 1 July 2021; Federal Trade Commission, 'The Antitrust Laws' <<https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws>> accessed 1 July 2021.

<sup>353</sup>Section 2, Sherman Act, 1906 (15 USC. § 2) <<https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title15-section2&num=0&edition=prelim>> accessed 1 July 2021.

<sup>354</sup>Section 7, Clayton Act, 1914 (15 USC § 18) <<https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title15-section18&num=0&edition=prelim>> accessed 1 July 2021. In 1976 the Clayton Act was amended by the Hart-Scott-Rodino Antitrust Improvements Act (HSR). Accordingly, to determine whether a pre-merger notification is required to be filed, the HSR lays down three tests - the 'commerce test', the 'size of transaction test' and the 'size of person test' - Federal Trade Commission, 'Steps for Determining Whether an HSR Filing is Required' <<https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/steps-determining-whether-hsr-filing>> accessed 1 July 2021. Further, the merger control thresholds under the HSR are adjusted every year according to the gross national product - Premerger Notification Office Staff, 'HSR threshold adjustments and reportability for 2021' (Federal Trade Commission, 17 February 2021) <<https://www.ftc.gov/news-events/blogs/competition-matters/2021/02/hsr-threshold-adjustments-reportability-2021>> accessed 1 July 2021.

<sup>355</sup> Federal Trade Commission, 'The Antitrust Laws' <<https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws>> accessed 1 July 2021.

<sup>356</sup>Section 5, Federal Trade Commission Act, 1914 (15 USC § 45) <[https://www.ftc.gov/sites/default/files/documents/statutes/federal-trade-commission-act/ftc\\_act\\_incorporatingus\\_safe\\_web\\_act.pdf](https://www.ftc.gov/sites/default/files/documents/statutes/federal-trade-commission-act/ftc_act_incorporatingus_safe_web_act.pdf)> accessed 1 July 2021.

<sup>357</sup>Section 1, Federal Trade Commission Act, 1914 (15 USC § 41) <[https://www.ftc.gov/sites/default/files/documents/statutes/federal-trade-commission-act/ftc\\_act\\_incorporatingus\\_safe\\_web\\_act.pdf](https://www.ftc.gov/sites/default/files/documents/statutes/federal-trade-commission-act/ftc_act_incorporatingus_safe_web_act.pdf)> accessed 1 July 2021.

<sup>358</sup>Federal Trade Commission, 'The Enforcers' <<https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers>> accessed 1 July 2021.

<sup>359</sup>Federal Trade Commission, 'The Antitrust Laws' <<https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws>> accessed 1 July 2021.

<sup>360</sup>Subcommittee on Antitrust, Commercial and Administrative Law of the House Committee on the Judiciary, 'Investigation of Competition in Digital Markets' (2020) (Antitrust Subcommittee Report) page 6 <[https://judiciary.house.gov/uploadedfiles/competition\\_in\\_digital\\_markets.pdf?utm\\_campaign=4493-519](https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519)> accessed 1 June 2021; House Committee on the Judiciary, 'House Judiciary Committee Launches Bipartisan Investigation into Competition in Digital Markets' (Press Release, Washington DC 3 June 2019) <<https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=2051>> accessed 1 July 2021.

<sup>361</sup> Antitrust Subcommittee Report, page 6.

<sup>362</sup> Antitrust Subcommittee Report, page 6.

<sup>363</sup>Antitrust Subcommittee Report, page 390.

<sup>364</sup> Antitrust Subcommittee Report, pages 389-390.

and portability,<sup>365</sup> introduction of non-discrimination rules to prevent self-preferencing,<sup>366</sup> and the need to implement structural separations in certain businesses to further minimize conflict of interest and predatory conduct.<sup>367</sup> Additionally, the Subcommittee has also recommended flagging any acquisition by a dominant entity as 'presumably anti-competitive' to ensure scrutiny of all mergers that run the risk of significantly lessening effective competition in the market.<sup>368</sup>

In line with the recommendations put forward by the Subcommittee, the House Judiciary Committee, on 23<sup>rd</sup> and 24<sup>th</sup> June 2021, approved six Bills aimed at sharpening the regulation of gatekeeper platforms in digital markets in the US.<sup>369</sup> The six Bills<sup>370</sup> and their relevant features are:

- **H.R. 3843, the Merger Filing Fee Modernization Act of 2021**- aimed at amending the present filing fee structure for pre-merger notification by increasing filing fees on larger transactions while reducing filing fees on smaller transactions, in order to ensure that mergers that are most likely to consume time and resources pay more than those that place less of a burden on the FTC and DOJ.<sup>371</sup>
- **H.R. 3460, the State Antitrust Enforcement Venue Act of 2021**- aimed at reducing costs and time associated with pursuing certain antitrust cases.<sup>372</sup>
- **H.R. 3849, the Augmenting Compatibility and Competition by Enabling Service Switching ('ACCESS') Act of 2021**- seeks to authorize the FTC to establish new pro-competitive rules that enable interoperability and data portability.<sup>373</sup> Importantly, these obligations are intended to be made applicable to platforms designated as 'covered platforms', by taking into account features such as the number of registered consumers and business users, market capitalization and the platform's ability to restrict or enable access to the market within which it operates.<sup>374</sup>
- **H.R. 3826, the Platform Competition and Opportunity Act of 2021**- seeks to prohibit certain acquisitions by dominant online platforms such as acquisition of companies that compete with the 'covered platform'<sup>375</sup> and potential competitors.<sup>376</sup>
- **H.R. 3816, the American Choice and Innovation Online Act**- aims to curb abusive conducts such as discriminatory and self-preferencing practices that result in unfair treatment of business users who are similarly placed.<sup>377</sup> This Bill is also sought to be made applicable to 'covered platforms', understood in accordance with the ACCESS Act.<sup>378</sup>

<sup>365</sup> Antitrust Subcommittee Report, page 384.

<sup>366</sup> Antitrust Subcommittee Report, page 382.

<sup>367</sup> Antitrust Subcommittee Report, pages 378-379.

<sup>368</sup> Antitrust Subcommittee Report, pages 387-388.

<sup>369</sup> Clifford Chance, 'House Judiciary Committee Passes Six Antitrust Bills Targeting Tech Platforms and Large Transactions, Setting Up Vote Before House of Representatives' (June 2021) page 2 <<https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2021/06/House-Judiciary-Committee-Passes-Six-Antitrust-Bills-Targeting-Tech-Platforms-and-Large-Transactions.pdf>> accessed 1 July 2021.

<sup>370</sup> House Committee on the Judiciary, 'Chairman Nadler Applauds Committee Passage of Bipartisan Tech Antitrust Legislation' (Press Release, 24 June 2021) (House Committee Press Release June 2021) <<https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=4622>> accessed 1 July 2021.

<sup>371</sup> House Committee Press Release June 2021.

<sup>372</sup> House Committee Press Release June 2021.

<sup>373</sup> House Committee Press Release June 2021.

<sup>374</sup> Clifford Chance, 'House Judiciary Committee Passes Six Antitrust Bills Targeting Tech Platforms and Large Transactions, Setting Up Vote Before House of Representatives' (June 2021) page 3 <<https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2021/06/House-Judiciary-Committee-Passes-Six-Antitrust-Bills-Targeting-Tech-Platforms-and-Large-Transactions.pdf>> accessed 1 July 2021.

<sup>375</sup> Clifford Chance, 'House Judiciary Committee Passes Six Antitrust Bills Targeting Tech Platforms and Large Transactions, Setting Up Vote Before House of Representatives' (June 2021) page 3 <<https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2021/06/House-Judiciary-Committee-Passes-Six-Antitrust-Bills-Targeting-Tech-Platforms-and-Large-Transactions.pdf>> accessed 1 July 2021.

<sup>376</sup> House Committee Press Release June 2021.

<sup>377</sup> House Committee Press Release June 2021.

<sup>378</sup> Clifford Chance, 'House Judiciary Committee Passes Six Antitrust Bills Targeting Tech Platforms and Large Transactions, Setting Up Vote Before House of Representatives' (June 2021) pages 3-4, <<https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2021/06/House-Judiciary-Committee-Passes-Six-Antitrust-Bills-Targeting-Tech-Platforms-and-Large-Transactions.pdf>> accessed 1 July 2021.

- **H.R. 3825, the Ending Platform Monopolies Act**- seeks to restrain ‘covered platforms’ from leveraging their position to disadvantage a competitor’s use of the platform.<sup>379</sup> Further, it prohibits covered platforms from requiring that a business user avails certain services or goods from it as a pre-condition for access, preferred status, or preferential placement of the business user’s products or services on the covered platform. The Bill also seeks to prohibit certain forms of discriminatory and self-preferencing practices that may be adopted by covered platforms.<sup>380</sup>

While the aforementioned Bills will have to undergo scrutiny at multiple levels before they acquire the force of law<sup>381</sup>, they demonstrate legislative recognition of the need to strengthen *ex-ante* competition law scrutiny of digital markets, and consequently of E-marketplaces. To plug this gap, the Bills recommend introduction of both substantial and procedural changes to the extant US competition law regime. In line with the global trend, the new statutory instruments sought to be introduced recognize gatekeeping platforms, their polarizing abilities and their ability to carry out novel abusive practices towards business users, and aim to selectively regulate them in order to improve contestability and bargaining asymmetries in markets where such platforms exist.

## China

Competition law in China is primarily governed under the Anti-Monopoly Law, 2008<sup>382</sup> (**‘AML’**)<sup>383</sup> enforced by the State Administration of Market Regulation (**‘SAMR’**).<sup>384</sup> The SAMR is vested with the powers to investigate, and adjudicate infringements of the AML<sup>385</sup>. The AML prohibits monopoly agreements and abuse of dominance, and regulates merger activities.<sup>386</sup>

In line with the global regulatory trend, the Anti-Monopoly Commission of the State Council has recently issued the Anti-Monopoly Guidelines for the Platform Economy, 2021(**‘AML Guidelines’**) targeted at sharpening regulation of Chinese technology giants,<sup>387</sup> including E-marketplaces. In the specific context of improving competition issues in P2B relationships, the AML Guidelines impose certain obligations upon dominant entities which includes prohibition of exclusivity obligations or restrictions precluding business users from dealing with rival platforms, personalized pricing and price discrimination, refusal to supply, tying or bundling through technical means and novel forms of abuse such as search downgrades and traffic restrictions.<sup>388</sup> It is also interesting to note that the manner in which ‘dominance’ is to be ascertained under the AML Guidelines

<sup>379</sup> Clifford Chance, ‘House Judiciary Committee Passes Six Antitrust Bills Targeting Tech Platforms and Large Transactions, Setting Up Vote Before House of Representatives’ (June 2021) page 4, <<https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2021/06/House-Judiciary-Committee-Passes-Six-Antitrust-Bills-Targeting-Tech-Platforms-and-Large-Transactions.pdf>> accessed 1 July 2021.

<sup>380</sup> Clifford Chance, ‘House Judiciary Committee Passes Six Antitrust Bills Targeting Tech Platforms and Large Transactions, Setting Up Vote Before House of Representatives’ (June 2021) page 4, <<https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2021/06/House-Judiciary-Committee-Passes-Six-Antitrust-Bills-Targeting-Tech-Platforms-and-Large-Transactions.pdf>> accessed 1 July 2021.

<sup>381</sup> Clifford Chance, ‘House Judiciary Committee Passes Six Antitrust Bills Targeting Tech Platforms and Large Transactions, Setting Up Vote Before House of Representatives’ (June 2021) page 1 <<https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2021/06/House-Judiciary-Committee-Passes-Six-Antitrust-Bills-Targeting-Tech-Platforms-and-Large-Transactions.pdf>> accessed 1 July 2021.

<sup>382</sup> Anti-monopoly Law of the People’s Republic of China, 2008 <<http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045909.shtml>> accessed 19<sup>th</sup> July 2021.

<sup>383</sup> Other legislations in force that are of relevance to competition are the Anti Unfair Competition Law, 1993 Price Law, 1997, Bidding Law, Contract Law and Foreign Trade Law remain in force- David Fleming and others, ‘Antitrust and Competition in China’, (*Global Compliance News*) <<https://www.globalcompliancencews.com/antitrust-and-competition/antitrust-and-competition-in-china/>> accessed 19 August 2021.

<sup>384</sup> Danyi Xu and Lydia Fung, ‘People’s Republic of China: Competition law fact sheet’ (*Norton Rose Fulbright*, May 2021) <<https://www.nortonrosefulbright.com/en/knowledge/publications/2a188da3/competition-law-fact-sheet-china#section1>> accessed 1 July 2021.

<sup>385</sup> Danyi Xu and Lydia Fung, ‘People’s Republic of China: Competition law fact sheet’ (*Norton Rose Fulbright*, May 2021) <<https://www.nortonrosefulbright.com/en/knowledge/publications/2a188da3/competition-law-fact-sheet-china#section1>> accessed 1 July 2021.

<sup>386</sup> Danyi Xu and Lydia Fung, ‘People’s Republic of China: Competition law fact sheet’ (*Norton Rose Fulbright*, May 2021) <<https://www.nortonrosefulbright.com/en/knowledge/publications/2a188da3/competition-law-fact-sheet-china#section1>> accessed 1 July 2021.

<sup>387</sup> Stephen Crosswell and others, ‘China issues Anti-Monopoly Guidelines for the Internet Platform Economy’ (*Lexology* 11 February 2021) <<https://www.lexology.com/library/detail.aspx?g=6faa5baf-8e9f-4bd8-89e5-9b606a2a269a>> accessed 19 August 2021. An unofficial translated version of the AML Guidelines may be accessed here- ‘Anti-Monopoly Guidelines for Platform Economy Industries’ (*Anjie*, 2021) <<http://www.anjielaw.com/en/uploads/soft/210224/1-210224112247.pdf>> accessed 19 August 2021.

<sup>388</sup> Stephen Crosswell and others, ‘China issues Anti-Monopoly Guidelines for the Internet Platform Economy’ (*Lexology* 11 February 2021) <<https://www.lexology.com/library/detail.aspx?g=6faa5baf-8e9f-4bd8-89e5-9b606a2a269a>> accessed 19 August 2021

specifically factors in the financial resources of the platform, the level of competition in the market and the degree of dependence of other users on the said platform.<sup>389</sup>

Additionally, the AML Guidelines also seek to cast a wider net in order to scrutinize certain mergers involving platforms. Particularly, the AML Guidelines seek to subject transactions involving 'variable interest entities', entities where the actual controlling party does not own shares of the operating entity, but achieves *de-facto* control of such entity through a series of agreements,<sup>390</sup> to merger scrutiny in China.<sup>391</sup> The AML Guidelines also empower the SAMR to investigate mergers below statutory turnover thresholds, notably those transactions involving acquisition of start-ups or emerging platforms.<sup>392</sup> Further, recognizing that many platforms employ business models involving zero or low priced products, the AML Guidelines lay down certain criteria in order to direct the manner in which 'revenue' is to be calculated.<sup>393</sup>

Reportedly, in August 2021, the SAMR has issued a another set of draft rules for public consultation that seek to *inter alia* ban fake reviews and unfair competition on platforms including on E-marketplaces.<sup>394</sup> These draft rules are yet to be finalized.<sup>395</sup>

In light of the changing landscape of the digital economy, the SAMR has been proactively launching investigations to scrutinize the conducts of Chinese E-marketplace giants in light of P2B competition issues.<sup>396</sup> The SAMR launched an investigation to probe the conduct of e-commerce retail giant Alibaba concerning allegations of imposition of obligations upon its business users to exclusively use Alibaba's platform to trade their products.<sup>397</sup> The SAMR imposed a record fine of USD 2.75 billion on Alibaba.<sup>398</sup> Similarly, Meituan, a food delivery platform, was reportedly fined USD 1 billion for compelling its business users to use its platform exclusively.<sup>399</sup>

From the above, it is evident that Chinese competition law and its enforcement authorities are actively taking cognisance of and responding to P2B competition issues emerging in E-marketplaces.

<sup>389</sup> Article 11, 'Anti-Monopoly Guidelines for Platform Economy Industries' (Anjie, 2021) <<http://www.anjielaw.com/en/uploads/soft/210224/1-210224112247.pdf>> accessed 19 August 2021.

<sup>390</sup> Zhong Lun Law Firm, 'China Signals VIE No Longer an Obstacle in Merger Filing' (Lexology, 29 October 2020), <<https://www.lexology.com/library/detail.aspx?g=a0a174e9-8c14-492c-b636-011a16ba0d1c>> accessed 19 August 2021.

<sup>391</sup> Stephen Crosswell and others, 'China issues Anti-Monopoly Guidelines for the Internet Platform Economy' (Lexology 11 February 2021) <<https://www.lexology.com/library/detail.aspx?g=6faa5baf-8e9f-4bd8-89e5-9b606a2a269a>> accessed 19 August 2021.

<sup>392</sup> Stephen Crosswell and others, 'China issues Anti-Monopoly Guidelines for the Internet Platform Economy' (Lexology 11 February 2021) <<https://www.lexology.com/library/detail.aspx?g=6faa5baf-8e9f-4bd8-89e5-9b606a2a269a>> accessed 19 August 2021.

<sup>393</sup> Stephen Crosswell and others, 'China issues Anti-Monopoly Guidelines for the Internet Platform Economy' (Lexology 11 February 2021) <<https://www.lexology.com/library/detail.aspx?g=6faa5baf-8e9f-4bd8-89e5-9b606a2a269a>> accessed 19 August 2021.

<sup>394</sup> 'China's new draft rules to further tighten control on tech sector' *Aljazeera* (17 August 2021), <<https://www.aljazeera.com/economy/2021/8/17/chinas-new-draft-rules-to-further-tighten-control-on-tech-sector>> accessed 19 August 2021; Josh Horwitz, 'China steps up tech scrutiny with rules over unfair competition, critical data' *Reuters* (17<sup>th</sup> August 2021), <<https://www.reuters.com/business/media-telecom/china-issues-draft-rules-banning-unfair-competition-internet-sector-2021-08-17/>> accessed 19 August 2021.

<sup>395</sup> 'China's new draft rules to further tighten control on tech sector' *Aljazeera* (17 August 2021), <<https://www.aljazeera.com/economy/2021/8/17/chinas-new-draft-rules-to-further-tighten-control-on-tech-sector>> accessed 19 August 2021.

<sup>396</sup> Fay Zhou and others, 'China: SAMR joins ranks and sends a strong signal for digital markets' (Linklaters, 7 January 2021) <<https://www.linklaters.com/en/insights/blogs/linkingcompetition/2021/january/china-samr-joins-ranks-and-sends-a-strong-signal-for-digital-markets>> accessed 1 July 2021.

<sup>397</sup> Alexandr Svetlicinii, 'China's antitrust penalty for Alibaba: reading between the lines', *Kluwer Competition Law Blog*, (14 April 2021), <<http://competitionlawblog.kluwercompetitionlaw.com/2021/04/14/chinas-antitrust-penalty-for-alibaba-reading-between-the-lines/>> accessed 19 August 2021.

<sup>398</sup> Reuters, 'China fines Alibaba record \$2.75 bn for anti-monopoly violations' *The Economic Times* (10 April 2021) <[https://economictimes.indiatimes.com/news/international/business/alibaba-fined-usd-2-8-billion-on-monopoly-charge-in-china/articleshow/81999154.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/news/international/business/alibaba-fined-usd-2-8-billion-on-monopoly-charge-in-china/articleshow/81999154.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)> accessed 19 August 2021.

<sup>399</sup> Reuters, 'China's antitrust regulator to fine Meituan about \$1 bln', *The Hindu* (6 August 2021) <<https://www.thehindu.com/sci-tech/technology/internet/chinas-antitrust-regulator-to-fine-meituan-about-1-bln/article35762721.ece>> accessed 19 August 2021.

# V. A case for strengthening *ex-ante* P2B competition regulation

As observed in Chapter III, despite the existence of numerous instruments regulating E-marketplaces in India, none of them set the rules of the game for P2B issues comprehensively, especially from a competition lens. Globally, similar regulatory gaps have been addressed or are sought to be addressed by adopting new *ex-ante* competition law tools as discussed in Chapter IV. In this Chapter, we analyse the underlying reasons as to why *ex-post* competition regulation by itself may not be adequate to ensure fairness and contestability in P2B relationships.

First, there is abundant literature that underscores the symbiotic relationship between competition authorities, and sectoral authorities who regulate their sectors *ex-ante*.<sup>400</sup> *Ex-post* competition enforcement works best when complemented with and supported by *ex-ante* regulation. Sectoral regulators, through *ex-ante* regulation, 'set the rules of the game'<sup>401</sup> and competition authorities, through *ex-post* regulation, act as 'umpires of the game'. By way of example, the Telecom Regulatory Authority of India regulates telecommunication companies *ex-ante* and the CCI regulates their anti-competitive market conduct such as predatory tariffs *ex-post*. Both regulators have convergent roles in pursuing the same goal of maximizing consumer welfare. The resultant enforcement from a combination of the two approaches effectively regulates the market and sets boundaries for players to operate within. As illustrated in Chapter III, the *ex-ante* regulation of 'E-marketplace platforms' does not fall under the purview of a specific sector or a statute, although aspects of it are regulated in a fragmented manner primarily by the MeitY, DPIIT and the Ministry of Consumer Affairs, Food and Public Distribution. Particularly, with respect to P2B competition issues, there appears to be a regulatory vacuum. Arguably, this lack of a streamlined *ex-ante* regulation has not only created a blind spot in the regulation of competition concerns in digital platforms but has also compromised the efficacy of *ex-post* regulation. For example, since there were no predetermined rules set by a specific ministry or regulatory body, developing an understanding of the nuances of working of digital platforms and what amounts to acceptable or non-acceptable, harmful or pro-competitive conduct was a time consuming process for an *ex post* regulator such as the CCI. Moreover, there appears to be a lack of clarity as to which regulator or ministry is to assume regulatory charge over anti-competitive conduct of digital platforms in India.

Second, *ex-post* enforcement does not always lead to optimal restoration of competition in evolving and fast paced markets, especially involving gatekeepers. As noted by the UK's Ofcom, *ex-ante* regulation is specifically required for those entities that act as gatekeepers but may "escape the legal/economic definition of dominance (although they have the clear potential to become dominant)" and where "end users of services faces significant switching costs in moving to another supplier or service".<sup>402</sup> Further, as evidenced by the recent US House Judiciary Committee's investigations into giants such as Apple, Google, Facebook and Amazon,<sup>403</sup> investigations into incumbent players in digital markets can be resource-intensive and time-consuming. In the meanwhile, the market may irreversibly tip in favour of the incumbent and consequently drive out competitors. The resultant harm both to the market and competitors may be irremediable.

Third, *ex-post* competition investigations are an *ad hoc* solution, as they are limited to the narrow claims made in each specific case. They may do little to address similar anti-competitive conduct arising in regard to same entity's

<sup>400</sup> John C. Hille, 'Improving Relationships Between Competition Policy and Sectoral Regulation', (2006) The Latin American Competition Forum, <<http://www.oecd.org/daf/competition/prosecutionandlawenforcement/38819635.pdf>> accessed 1 July 2021; Paul Crampton, 'Striking the Right Balance between Competition and Regulation: The Key is Learning from our Mistakes' (2002) APEC-OECD Co-operative Initiative on Regulatory Reform, <<https://www.oecd.org/regreform/2503205.pdf>> accessed July 2021 ; Gary Hewitt, 'Relationship between Regulators and Competition Authorities' (1998) Organisation for Economic Co-operation and Development, <<http://www.oecd.org/regreform/sectors/1920556.pdf>> 1 July 2021.

<sup>401</sup> Chris Decker and others, 'Assessment of The Suitability Of Different Regulatory Approaches To Economic Regulation That Could Be Applied To Payment Systems' (2014) Regulatory Policy Institute, <<https://www.fca.org.uk/publication/research/rpi-regulatory-approach-report-for-the-psr.pdf>> accessed 1 July 2021.

<sup>402</sup> Gary Hewitt, 'Relationship between Regulators and Competition Authorities' (1998) Organisation for Economic Co-operation and Development, page 22 <<http://www.oecd.org/regreform/sectors/1920556.pdf>> accessed 1 July 2021.

<sup>403</sup> As illustrated in chapter IV, the antitrust investigation into the five major big-tech companies launched by the US House Judiciary's Subcommittee spanned over a year and is an example of the time-consuming nature of such investigations. The various press releases, reports and opinions sought from experts during such investigations may be accessed here- House Committee on the Judiciary, 'Antitrust Investigation of the Rise and Use of Market Power Online and the Adequacy of Existing Antitrust Laws and Current Enforcement Levels' (2019) <<https://judiciary.house.gov/issues/issue/?IssueID=14921>> accessed 1 July 2021.

conduct in a different / associated market<sup>404</sup> or a different entity's conduct resulting in the same issues as investigated.<sup>405</sup> When an entity's behaviour or problems raised by different entities are in a recurring pattern, addressing them through *ex-ante* regulation results in significantly increased administrative efficiency.

In light of the above limitations, it is evident that maintaining status quo does not suffice as a policy response and such structurally polarized markets possess limited ability self-correct.<sup>406</sup> An obvious alternative seems to be recourse to a complementary *ex-ante* competition framework for E-marketplaces: one that sets the rules for such platforms to play by and thereby ensures that the market remains fair and contestable. As discussed in Chapter IV, this approach finds support in the developing regulatory practices of many jurisdictions which espouse the use of *ex-ante* competition intervention as a complementary tool in addition to the existing *ex-post* competition law framework, to effectively tackle anti-competitive behaviour by large incumbent platforms in digital markets.

<sup>404</sup> Google has been subject to repeated antitrust scrutiny by the CCI in different relevant markets - *Umar Javeed and Ors v. Google LLC and Ors*. 2019 SCC OnLine CCI 42, where the primary relevant market in question was the market for licensable smart mobile device operating systems in India and in - *Matrimony.com Limited and Ors. v. Google LLC* 2018 SCC OnLine CCI 1, where the relevant markets in question were the markets for online general web search and online search advertising services in India.

<sup>405</sup> The CCI has noted, for instance, that self-preferencing is a recurring concern- CCI E-commerce Market Study.

<sup>406</sup> Stigler Center for the study of Economy and the State, 'Digital Platforms and Concentration' (2018), Second Annual Antitrust and Competition Conference <<https://promarket.org/wp-content/uploads/2018/04/Digital-Platforms-and-Concentration.pdf>> accessed 1 July 2021.

# VI. The way forward: Questionnaire for recommendations

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Based on our findings in this Working Paper we believe that there is much to be gained from overhauling our regulatory approach to E-marketplaces. Increased contestability and fairer markets will not only promote innovation and encourage alternative platforms to come up but also allow small businesses and sellers to derive greater advantage from the growth potential of the platform economy. Ultimately, gains to consumers will ensue in the form of innovative and good quality products and services at cheaper prices.

With the above objective in mind, an informed discussion amongst experts and stakeholders on the questions below will provide a sound starting point to develop a regulatory framework that truly harnesses the potential of e-commerce for India:

## Assessment of the Indian e-commerce market

1. Studies and reports from several international jurisdictions as illustrated in the Working Paper highlight the limited ability of markets dominated by digital platforms to self-correct. Most of these countries are actively exploring potential changes to their existing competition law frameworks, having moved beyond the question of “if” to that of “how”.<sup>407</sup> Even in the Indian context, the CCI market study notes that there are high levels of concentration in E-marketplaces pertaining to retail goods, food services and online travel agencies. In this backdrop, it may be observed that the extant scrutiny under sections 3 and 4 of the Indian Competition Act and other extant legal instruments discussed in Chapter III of this Paper, may not be sufficient for the purposes of ensuring fairness in P2B relationships and increasing contestability in services provided by such E-marketplaces. Is this lacuna also evident in practice?

## Strengthening existing regulatory tools and adopting new approaches to regulating e-commerce markets in India

2. Given that the e-commerce market in India has characteristics of an oligopolistic concentration as opposed to dominance, the threshold of ‘dominance’, in the particular context of assessing the market power of E-marketplaces may require dilution. Should such a dilution be made through statutory amendments or is it best achieved through nuanced enforcement practices tailored for E-marketplaces? Alternatively, is it feasible to adopt a new threshold altogether? If a new threshold such as ‘Significant Market Status’, ‘Gatekeeper’ or ‘Paramount Significance for Competition Across Markets’ is adopted, how must we devise the criteria to be used to define such a threshold?
3. Globally, there is increasing consensus on the need to introduce substantive *ex-ante* competition tools to cast a wider net for entities that have not yet attained statutory dominance in order to regulate their conduct. If in line with international experience an *ex-ante* competition tool is adopted, what form must this take? Options that may be considered include:
  - a. A ‘code of conduct’ that clarifies acceptable conduct between operators of E-marketplaces (and possibly other digital platforms) on the one hand and their business users and consumers on the other. The code may comprise of a set of core principles as well as a list of hardwired do’s and don’ts. Such principle-based regulation confers flexibility to update the code of conduct in line with new and innovative business practices. The statutory list of do’s and don’ts could specifically cover practices such as self-preferencing, inclusion of unfair terms and conditions in contracts, deep

<sup>407</sup> World Economic Forum, ‘Competition Policy in a Globalized, Digitalized Economy’ (White Paper, December 2019) <[http://www3.weforum.org/docs/WEF\\_Competition\\_Policy\\_in\\_a\\_Globalized\\_Digitalized\\_Economy\\_Report.pdf](http://www3.weforum.org/docs/WEF_Competition_Policy_in_a_Globalized_Digitalized_Economy_Report.pdf)> accessed 1 July 2021.

discounts, anti-competitive tying and bundling, inclusion of wide platform parity/MFN clauses, data interoperability and portability.

- b. Alternatively, such an *ex-ante* tool can take the shape of legislative 'rules', which prescribes conduct that is prohibited and mandated for E-marketplaces (and possibly other digital platforms) and their business users as well as consumers. A rule-based approach has the added benefit of conferring certainty and foreseeability thereby enabling stakeholders to orient their business models accordingly. Moreover, for a developing country such as ours, it may be administratively easier, faster and cheaper to enforce a set of hardwired concrete rules.

If not an *ex-ante* competition framework, what other regulatory responses may be required?

4. Are the current thresholds stipulated in section 5 of the Competition Act, 2002, and the proposed amendments through the Competition Amendment Bill 2020 sufficient to check the ever-growing market power of E-marketplace giants through acquisition of existing competitors and start-ups that may emerge as potential competitors? Should acquisitions by technology giants be considered 'presumably anti-competitive' thereby placing the burden of proof on the E-marketplace to prove otherwise?
5. The regulatory scheme of e-commerce in India reveals a pattern fraught with fragmentation. Presently, E-marketplaces are regulated by multiple authorities including the CCI, the DPIIT, MeitY and the Ministry of Consumer Affairs, Food and Public Distribution. Has this overlap led to inefficient outcomes in terms of jurisdictional conflicts, forum shopping and unintended regulatory vacuums? Is the time ripe to weave together a cooperation mechanism wherein different departments, ministries and regulators are provided a platform to coordinate governance of E-marketplaces? Options that may be considered include:
  - a. Creation of a unified e-commerce regulator administering competition, commercial, economic, and technical regulation across e-commerce. This approach would augment expertise building but would render the regulator susceptible to regulatory capture given that the e-commerce sector is highly specialised and work in progress. It would also entail significant public expenditure to create a new regulator. If this approach is adopted, it may be noted that in the long term as more and more commerce moves online, the e-commerce regulator may become the *de facto* authority in charge of regulating commerce in India.
  - b. Enactment of a consolidated statute on e-commerce governance in India that provides legislative demarcation of the roles of the various existing regulators and departments of ministries in e-commerce governance. Equal or more important than empowering and demarcating responsibilities will be capacity building within existing regulators and ministries.
  - c. The creation of an empowered unit called the 'Digital Markets Division' within the CCI that interacts with other regulators that have a bearing on digital markets regulation, including e-commerce. This division may be developed as a highly specialized wing within the CCI that actively partakes in research, advocacy and enforcement pertaining to competition regulation in digital markets in India.
6. Given that the e-commerce landscape is evolving rapidly, industry participants may have a more nuanced understanding of the systemic risks and challenges posed by digital markets. They may be better placed to pre-empt and respond to new enforcement challenges in the market. In this context, should the concept of "participative antitrust"<sup>408</sup>, where technology companies, government agencies and other stakeholders work collaboratively to establish and fine-tune the rules of the game, be explored? For this purpose, is it feasible to create a Self-Regulatory Organization ('SRO'), whose agenda would be to proactively aid in framing and enforcing standards relating to the conduct of its member entities?<sup>409</sup> What are potential caveats to be kept in mind while creating such SROs as they may be prone to regulatory capture? In the specific case of competition enforcement, is there a risk that the SRO may act as a platform to promote collusion? What should be its composition and responsibilities?

<sup>408</sup> World Economic Forum, 'Competition Policy in a Globalized, Digitalized Economy' (*White Paper*, December 2019) <[http://www3.weforum.org/docs/WEF\\_Competition\\_Policy\\_in\\_a\\_Globalized\\_Digitalized\\_Economy\\_Report.pdf](http://www3.weforum.org/docs/WEF_Competition_Policy_in_a_Globalized_Digitalized_Economy_Report.pdf)> accessed 1 July 2021.

<sup>409</sup> This approach finds support in the recent proposal of the Reserve Bank of India that has floated a similar framework of governance for Digital Payments Market. Reserve Bank of India 'Framework for Recognition of a Self-Regulatory Organisation for Payment System Operators' (October 2020) RBI/2020-21/58 <<https://www.rbi.org.in/scripts/NotificationUser.aspx?Id=11986&Mode=0>> accessed 1 July 2021.





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