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

Recommendations | December 2021

V | D H | Centre for Legal Policy

RECOMMENDATIONS

Vidhi's Working Paper '**F.A.C.E | The Business Users' Narrative**' ("**the Working Paper**") authored by Vedika Mittal Kumar and Manjushree RM was released in September 2021. The Working Paper studies the extant regulatory framework governing E-marketplaces in India and highlights a gap in the framework with respect to Platform-to-Business ("**P2B**") regulation. It also undertakes a detailed scrutiny of emerging international practices in P2B regulation in the European Union ("**EU**"), the United Kingdom ("**UK**"), Germany, Australia, Japan, the United States of America ("**USA**") and China.

In order to provide actionable and pragmatic recommendations for India, the Working Paper identifies a set of issues for discussion. These issues were deliberated upon by us extensively with numerous experts and stakeholders including regulators, platform owners, business users of platforms, academicians, policy analysts, and practitioners of competition law. For a complete list of stakeholders and experts consulted, prior to as well as post the release of the Working Paper, please see **Annexure-A**. Based on our research and pursuant to our consultations with stakeholders, we propose the following recommendations with a view to ensure fair and competitive E-marketplaces in India.[1]

Our recommendations are broadly divided into two categories:

- **Step 1 – Maximising effective use of existing legal tools and building capacity**
- **Step 2 - Introduction of new legal tools for P2B regulation**

Step 1 - Maximising effective use of existing legal tools and building capacity

A. Creation of a Digital Markets Division within the Competition Commission of India

Absence of a clear mandate to oversee digital markets has resulted in a play of musical chairs among various ministries and regulators trying to do their bit. The lack of clarity has spurred fragmented and sporadic action as well as inaction. While certain private market players may have thrived amidst the chaos in the past, as our digital markets mature, there is a need for the legal landscape to follow suit. Therefore, the first step is to pin accountability to a single identifiable authority to ensure the basics – that digital markets remain fair and contestable.

Our research signals a clear trend towards the creation of an expert division dedicated to digital markets within existing competition regulators. Functions of this division must include:

- To conduct investigations into specific digital market players *suo moto* as well as on complaints received from stakeholders and take appropriate enforcement action.
- To conduct market studies on targeted issues such as (a) business model in a specific digital market e.g. search engine, mobile operating systems (OS), app stores on mobile operating systems, e-marketplaces, social media companies acting as e-marketplaces, news aggregators and so on (b) specific competition law

[1] Given that our Working Paper focused on E-marketplaces, our recommendations must be read exclusively in the context of E-marketplaces. However, certain recommendations such as the one on creation of a Digital Markets Division within the CCI, designation of 'gatekeeper' digital platforms, tailoring codes of conduct for 'gatekeeper' platforms is meant to benefit digital markets in general and is not limited in its relevance to only E-marketplaces.

issues including identification of market power in multi-sided markets, the impact of data on competitiveness, implication of asymmetrical regulation on market structure and so on.

- To identify competition concerns in digital markets that cannot be addressed within the existing legal framework so that either the Competition Act, 2002 ("**Competition Act**") or other relevant statute can be amended/formulated in line with market realities.
- To serve as an ombudsman for broader digital markets monitoring including proactive engagement with all stakeholders.
- To coordinate policy and enforcement action that may impact competition in digital markets across ministries and regulators. If the above mentioned actions are positively undertaken by the dedicated Digital Markets Division within the Competition Commission of India ("**CCI**"), then stakeholders as well as other ministries and regulators are more likely to recognise the value proposition in allowing this division to take the lead when it comes to competition concerns in digital markets.

Most of the functions stated above can be carried out in varying degrees by the CCI within its existing mandate under the Competition Act. However, in the long run wider acceptance and deference to the Digital Markets Division will require specific statutory backing of its powers and functions. While examining statutory revision, the regulatory architecture of this division merits special attention as digital markets require an extremely agile and facilitative legal ecosystem which can keep pace with market innovations.

B. Bolstering the use of existing laws and their enforcement in relation to E-marketplaces

The Competition Act

Anti-competitive agreements

Section 3(4) of the Competition Act prohibits anti-competitive agreements entered into by entities that are not at the same level of a production chain. Such agreements under the Competition Act need not always be formal written agreements that are intended to be enforceable by legal proceedings. They could also be in the form of a tacit understanding between two entities.

The CCI has in its Market Study on E-commerce in India (January, 2020) endorsed the use of section 3(4) in ascertaining anti-competitiveness of certain agreements between platforms and their private labels/preferred sellers that have anti-competitive effects on independent business users. Given that establishing dominance is not a prerequisite under section 3(4), the expansive scope of this section allows the CCI to creatively intervene and scrutinize any agreement entered into by an E-marketplace that has anti-competitive effects on business users and potentially harms competition, regardless of the E-marketplace's size. As a step forward, the CCI has initiated an inquiry against certain E-marketplaces based on section 3(4) of the Competition Act in the *Delhi Vyapar Mahasangh* v. *Flipkart and Amazon* (Case 40 of 2019). Relying on the restriction on anti-competitive vertical agreements to scrutinize arrangements between E-marketplaces and their preferred sellers and/or private labels is an ingenious albeit unconventional route to examine potentially anti-competitive practices adopted by E-marketplaces.

Abuse of dominance

The Competition Act in section 4 states that no dominant entity must abuse its dominance. Section 19(4) lays down a list of factors to be considered by the CCI while ascertaining dominance of an entity. Noting the unique features of digital markets such as network effects and the criticality of access to data, the Competition Law Review Committee ("**CLRC**") constituted by the Ministry of Corporate Affairs in 2018, examined the scope of section 19(4) to assess if network effects and access to data must be added as factors to be considered while determining 'dominance' under section 19(4) of the Competition Act. Arguably, concerns prevalent in the P2B equation such as unilateral bargaining power, network effects of data rich incumbents and oligopolistic concentration may be examined under the existing factors in section 19(4) such as countervailing buying power,

size and resources of the enterprise, and market structure, respectively. Additionally, it is of note that section 19(4) contains a residuary sub-clause (m) that enables the CCI to account for any other factors that are not expressly enumerated or within scope of section 19(4). In a similar vein, the CLRC opined that the extant nature of section 19(4) is broad enough to account for the peculiarities posed by digital markets while assessing dominance.

However, even if one accounts for unique features of digital markets, establishing the high threshold of dominance of a particular E-marketplace may not be a simple exercise within the contours of the existing jurisprudence on dominance. It may require departure from the existing jurisprudence on dominance. A similar evolution, in tandem with market realities, is observable in the assessment of 'relevant market' in CCI's recent orders such as *All India Vendors Association* v. *Flipkart* (2018) and *Lifestyle Equities C.V. and another* v. *Amazon Seller Services Private Ltd. And Ors* (2020), where the CCI understood online and offline markets as separate markets in contrast to CCI's earlier order in *Ashish Ahuja* v. *Snapdeal and Ors* (2014) where online and offline markets were understood as a part of the same relevant market.

Technically, within the framework of the Competition Act, the CCI can adopt a differentiated standard for ascertaining dominance in digital markets, given that dominance is assessed on a case-by-case basis. Guidance elaborating on the different dominance standard for digital markets may be issued by the CCI pursuant to adequate public consultation. Such guidance will not only provide certainty to stakeholders but also have a far reaching signalling effect on all market players.

Combination assessment

In regard to regulation of combinations, the extant framework under sections 5 and 6 of the Competition Act stipulates mandatory notification of all combinations qualifying prescribed thresholds of asset value or turnover to the CCI. A qualifying transaction cannot be consummated till the CCI approves it. The CCI does not have any residuary power to examine transactions which do not meet the asset value or turnover based thresholds prescribed in the Competition Act.

Globally, including in the EU, Germany and UK, competition regulators are increasingly recognizing that significant transactions in digital markets may escape the traditional thresholds of asset value and turnover. Taking note of this issue and based on past experiences of the CCI, the CLRC has recommended the inclusion of additional notification thresholds that may empower the CCI to scrutinize such transactions. Accordingly, the Draft Competition (Amendment) Bill, 2020 incorporates a *proviso* that empowers the Central Government to notify additional criteria to widen the ambit of merger scrutiny. Upon enforcement, the provision may be aptly used by the CCI to ensure that the market for E-marketplaces remains contestable and does not undergo structural changes that cannot be undone. Given that the CCI is currently only equipped to examine transactions based on asset value and turnover, the enactment of the Draft Competition (Amendment) Bill, 2020 is the need of the hour to prohibit E-marketplace giants from engaging in anti-competitive transactions that may irremediably tip the Indian e-commerce market.

The Consolidated Foreign Direct Investment Policy ("FDI Policy")

The FDI Policy regulates vital aspects of P2B competition in foreign-funded E-marketplaces. For example, it prohibits E-marketplaces from adopting an inventory-based model wherein the E-marketplace has ownership or control over the goods and services sold on its platform. 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. It also requires E- marketplace platforms to be neutral in their dealings with their business users including in provision of support services such as warehousing, order fulfilment and payment collection. Additionally, the FDI Policy prohibits exclusive agreements, preferential treatment extended to certain sellers and deep discounting.

While the policy has been criticised for imposing obligations selectively on foreign funded E-marketplaces, till such time as India devises a comprehensive E-commerce regulation, the FDI Policy can be used to ensure that E-

marketplaces remain fair and competitive. In certain areas such as retail, presently it is only foreign funded E-marketplaces that have attained some form of a gatekeeper status wherein sellers are dependent on the E-marketplace for access to certain markets. Fears of favouring a national champion by enforcing the FDI Policy are factually unfounded at present. However, the government must be cognisant of the fact that in the long run, more neutral criteria such as number of active users along with a combination of other factors may be more pertinent for the purposes of identifying gatekeeper E-marketplaces. Adopting neutral criteria will be more democratic and optically appropriate with the same end goal – to ensure that Indian E-marketplaces remain fair and contestable.

Currently, effective enforcement has emerged as the biggest roadblock in relying on the FDI Policy to aid in building a fair and contestable e-commerce ecosystem. Its implementation remains complex given that the FDI Policy is drafted and enforced by different authorities, namely – the Department for Promotion of Industry and Internal Trade ("**DPIIT**") and the Enforcement Directorate ('**ED**"), respectively. It is imperative that the FDI Policy which directly regulates several P2B issues is effectively enforced as it is one of the only *ex-ante* tools to regulate E-marketplaces presently. *Ex-post* enforcement under the Competition Act as well as enactment of a comprehensive e-commerce regulation are both relatively long-term solutions. Arguably, for the FDI Policy to be used as a tool to maintain fair and competitive E-marketplaces there has to be adequate political will as well as capacity building within the ED on regulating digital markets.

C. Strengthening inter-regulatory coordination

As illustrated in Chapter III of the Working Paper, e-commerce regulation in India is highly fragmented and fraught with friction between various regulators and ministries. In the absence of a cohesive model that mandates information exchange and coordination on enforcement practices, legislation and policy making, the persisting friction is expected to continue. It is therefore recommended that the Central Government formulates a scheme whereby the CCI, other regulators and ministries such as DPIIT, the Ministry of Electronics and Information Technology, Ministry of Consumer Affairs, Food & Public Distribution, etc. that govern aspects of e-commerce in India, periodically meet and exchange information. The Digital Markets Division within the CCI could be tasked with administratively facilitating these exchanges. Various jurisdictions such as the EU and the UK are relying on coordinated policy responses by multiple agencies in order to effectively regulate digital markets. For example, recently a proposal to establish the 'Digital Regulation Co-operation Forum' has been floated in the UK to bring together all regulators that oversee digital markets such as the Information Commissioner's Office, the Office of Communications and the Financial Conduct Authority to support regulatory engagement, coordination and knowledge exchange.

Step 2 - Introduction of new legal tools for P2B regulation

In addition to the extant *ex-post* competition law framework, *ex-ante* regulatory tools that may complementarily aid in effective tackling of anti-competitive behaviour by incumbent E-marketplaces, in line with the practices in EU, UK, Japan, Germany and the USA must be seriously considered. It is of note that such *ex-ante* instruments must selectively be applied only to E-marketplaces giants that qualify a certain threshold as symmetric model of regulation, wherein the instruments are made applicable to entities of all sizes, bears the risk of increased regulatory burden upon smaller entities in their nascency while having allowed incumbent giants to flourish in a comparatively deregulated ecosystem.

Given the diversity of business models prevalent in digital markets, the *ex-ante* regulation must be designed to be malleable so that do's and don'ts can be customized based on their relevance to the 'gatekeeper' in question.

The CCI may be the best suited to helm formulation as well as enforcement of the *ex-ante* regulation for the following reasons:

- The CCI is a sector agnostic regulator, whose expertise spans across industries and sectors. Therefore, the cross-sectoral nature of digital markets coupled with the CCI's enforcement experience in dealing

with cases involving E-marketplaces, search engines and other digital market players, equips the CCI to effectively formulate as well as enforce regulation across digital markets.

- As illustrated in Chapter III of the Working Paper, other regulators and authorities such as the DPIIT, the ED and Department of Consumer Affairs that regulate certain aspects of E-marketplaces currently, are limited in their scope and/or enforcement mechanisms to adequately address P2B competition issues.
- Creation of a new digital markets regulator will be a resource intensive exercise for the public exchequer and require considerable capacity building and the time to do so. Moreover, digital markets being a niche area presently, a new regulator may be prone to regulatory capture.

The *ex-ante* model may be implemented in the following two-prong manner:

A. Designation of gatekeeper platforms

The success of the *ex-ante* model will hinge on precise identification of 'gatekeeper' platforms in digital markets. The Competition Act can be amended to prescribe criteria for qualifying as a 'gatekeeper' platform. The criteria may be formulated using metrics such as number of registered/active consumers and sellers on the platform, number of transactions taking place and volume of revenue generated. In line with internationally emerging practices, additional criteria may include assessment of resources of the platform, volumes of data aggregated, its bargaining position vis-à-vis its business users and consumers, its gatekeeping function and ability to set the rules of the ecosystem. The platform must have the obligation to *suo moto* notify the regulator once it reaches the prescribed threshold.

Once a platform crosses the proposed threshold and is designated as such, the status may be kept valid for a specified period of time before it is mandatorily reviewed.

B. Framing codes of conduct for 'gatekeeper' platforms

Digital platforms have vastly different business models and monetisation schemes. For example, Google may rely on advertising as its main source of revenue whereas Amazon may have no business interest in promoting pure play advertisements on its platform. It would be erroneous to think of them as homogenous competitors in one common sector. Rather they are gatekeepers of completely different markets with completely different incentives. Reliance on technology and data generated by their users is one of their only underlying commonalities. Therefore, it is imperative that any attempt at regulating digital platforms must be tailored to the business model of the platform. Furthering this approach, *ex-ante* regulation may be implemented as mandatory 'codes of conduct' framed by the CCI based on the gatekeeper's business model.

While formulating tailored codes for each business model will be a time and resource extensive exercise, it will ensure that obligations stipulated in the code are relevant to the gatekeeper. Such an approach will also ensure a fine balance between the need for certainty and foreseeability for market players, and the need for flexibility for regulators to keep pace with swiftly evolving digital markets.

Certain practices that may be prohibited *ex-ante* subject to the business model of the platform include self-preferencing, discriminatory treatment between business users, using data anti-competitively and including most-favoured nation clauses in contracts between business users and the platform. In addition to enumerating prohibitions, the code of conduct may also mandate certain practices to be carried out by platforms such as facilitating data interoperability, enabling multi-homing, facilitating data mobility and ensuring transparency in usage of data. Adequate market studies and consultation with stakeholders including the 'gatekeeper' platform and its users must be carried out prior to formulating a code of conduct and such code must be periodically reviewed to ensure its relevance. Breach of the code must entail commensurate action for the *ex-ante* regulation to be meaningful.

To conclude, while our recommendations are presented in two steps, step 1 must only be seen as a stop gap and preparation for step 2 must be commenced at the earliest. Once markets tip, the government may not be in the bargaining position that it enjoys today.

Annexure-A

The following is a list of experts and stakeholders consulted by us in the form of panel discussions, closed-door roundtable consultations as well as one to one conversations.[2]

- **Dr. KP Krishnan** - IEPF Chair Professor in Regulatory Economics
- **Mr. Rahul Matthan** - Founding Partner and Head of Technology Practice Group, Trilegal
- **Dr. Cristina Caffarra** - Senior Consultant (European Competition), Charles River Associates, UK.
- **Ms. Payal Malik** - Advisor (Economics) and Head, Economics Division, CCI
- **Mr. Manas Kumar Chaudhuri** - Partner, Khaitan & Co.
- **Prof. Aditya Bhattacharjea** - Professor of Economics, Delhi School of Economics, University of Delhi, India
- **Dr. Christophe Carugati** - Senior Policy Analyst, Center for Data Innovation
- **Ms. Aditi Sara Verghese** - Policy Analyst, International Trade and Investment, World Economic Forum
- **Mr. Bharat Budholia** - Partner, AZB & Partners
- **Mr. Rudresh Singh** – Partner, L&L Partners
- **Mr. Abir Roy** - Co-founder and Practice Head (Competition), Sarvada Legal
- **Dr. Magali Eben** - Lecturer (Competition Law), University of Glasgow
- **Dr. Sudhanshu Kumar** - Asst. Professor at National Academy of Legal Studies and Research (NALSAR) University
- **Mr. Thomas Fenn** - Member of the Managing Committee of National Restaurants Association of India (NRAI) and Founder of Mahabelly Restaurant
- **Mr. Rahul Singh** - Associate Professor at National Law School of India University

[2] Please note that 1) the final recommendations may not necessarily be concurrent with the view of every individual expert and stakeholder mentioned in this Annexure, 2) the list below does not contain the names of those stakeholders who requested anonymity.

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