Centre for The Digital Future

Op Ed

Before or after: Ensuring competition in digital markets

BY

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MARCH, 2023

The last few months have seen significant and rapid developments in the digital competition law landscape. On December 22, 2022, the Parliamentary Standing Committee on Finance (SCF) placed a report titled "Anti-competitive practices by Big Tech Companies" before the parliament. The report suggested the drafting of a separate set of rules for ensuring competition in the digital economy. On February 6, the Ministry of Corporate Affairs (MCA) formed a Committee on Digital Competition Law (CDCL) to "examine the need for a separate law on competition in digital markets". However, the committee has been asked to not only submit its report within three months but also a draft Digital Competition Act (DCA). This is either very efficient or very hasty depending on how one views it.

The SCF report lists 10 Anti-Competitive Practices (ACPs) that big-tech firms indulge in. The practices identified are broad in nature, not uncommon in digital markets and they could, in some market contexts, be anti-competitive. But our understanding of the full effects of these strategies is still developing, especially in the Indian context. The concern is the suggestion that the proposed DCA outlaw these practices *ex-ante*, devoid of any market context, and not allow companies to engage in these practices at all.

The irony is that while we have borrowed the phrase *ex-ante* from the EU, we championed *ex-ante* competition regulation, through the now-abolished Monopolies and Restrictive Trade Practices (MRTP) Act. The MRTP Act was passed in 1969 and failed to ensure competitive markets. There is enough evidence that suggests that the Act ended up protecting competitors rather than competition. Indeed "most cases under that Act involved consumer complaints and contractual disputes unrelated to competition. Very few cartels were prosecuted, the development of a rule of reason for vertical agreements was hamstrung by the legislature, and merger review was terminated in 1991.[1] The Act was repealed in 2009 when the Competition Commission of India started functioning. The establishment of the CCI and a move to *ex-post* anti-trust was a move in the right direction.

An *ex-ante* approach to regulation necessarily means that who the rules will apply to has to be decided when the rules are made. In this case, these will be the Systemically Important Digital Intermediaries (SIDIs) as suggested by the SCF report. Unfortunately, no matter how one defines SIDIs, the only way to routinely identify a SIDI will be to collect the required information from *all* digital companies. To stop the underage from entering and consuming alcohol, drinking establishments have to check everyone's identity (though it hurts when one visibly reaches an age when one does not qualify for 'carding' anymore!).

The proposed approach is eerily similar to the MRTP Act. MRTP applied to companies which were either large (assets exceeding ₹20 Crore) or dominant (assets exceeding ₹1 Crore and share of the market exceeding one-third, later reduced to one-fourth in 1982). All such

[1] Bhattacharjea, A. (2008). India's New Competition Law: A Comparative Assessment. *Journal of Competition Law and Economics*, *4*(3), 609-638.

companies were required to register themselves and obtain government permission for mergers, amalgamations and takeovers, as also for the establishment of new undertakings and substantial expansion of old ones. The DCA would operate in the same way where the company's business strategies would be routinely subjected to regulatory approval.

The proposed regulatory approach will also treat all digital platforms, irrespective of the sector of operation, the same. So an e-commerce platform will be treated the same as a ride-hailing platform and they both will be treated the same as a digital payments platform. However, these platforms operate in very different markets with competitive pressures and existing regulatory oversight.

More worryingly, the understanding on which the anti-competitiveness of the proposed practices is built comes from contexts different from ours. Platform business models are complex and varied. Platforms offering similar services often have different monetisation strategies. Some charge a pure subscription fee, some a combination of a subscription and transaction fee and others only a transaction fee. Yet others may monetise consumer presence and attention using third-party advertising. One business model may be more appropriate to a setting where customers cannot pay directly but do not mind a little intrusion in the form of advertising, while another to a setting where customers are more willing to pay a direct cost rather than view targeted advertisements. Digital expansion in India may require a different balance between priorities than say a society like the EU.

This is not to say there should be no regulation on digital companies. Protecting consumers in the digital age - their privacy and their data - is crucial. A well-designed data protection regulation, which India will get soon, is essential. Platforms should also be required to deal transparently and fairly with their business users. Well-designed not simply well-meaning regulations are needed to promote competition in the digital economy. And, before we abandon *ex-post* anti-trust, we need more detailed analyses of the business strategies of digital companies in the specific context of India.

We have a capable competition regulator in the CCI. In the recent past, it has moved against the anti-competitive strategies of digital platforms. The competition law amendment bill, which will give the CCI more teeth to deal with the digital economy is also being finalised. The SCF report suggests setting up a digital markets unit (DMU) within the CCI. Digital markets are indeed different from traditional ones and a better economic understanding of their working will enable better-designed regulation. One hopes that the DMU will also have some capable economists. The first task of the DMU should be to carry out research studies, release discussion papers, and create a body of knowledge on which specific regulations can be crafted or existing rules amended.

India is charting a different course for its digital economy. Our needs and context are different from the EU or the US. Then why are we so reliant on their regulatory approach to the digital economy? Footwear does protect the feet when walking on gravel. But ones that are not the right size may hurt more than the gravel.

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