Centre for
The Digital Future

Report

# Ensuring competition in digital markets

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## Executive Summary

The exercise of formulating a regulatory framework for digital markets is of great relevance to the Indian economy and the public at large. Therefore, developing it should involve rigorous, not just passionate, debate. Recent amendments in the Competition Act, such as the proposals to enforce copyright laws more stringently in digital markets, and introduction of deal value thresholds for merger notifications or the move to impose fines against anti-competitive behaviour based on definite fining guidelines, with total global turnover as starting point of penalty calculation, are steps in the right direction. This article, however, takes exception to the type of blanket ex-ante regulations propounded by the Standing Committee on Finance (SCF) in its report on "Anti-competitive practices by Big Tech Companies". The objective of competition policy for digital markets should be to build up the domestic ecosystem. And in this regard, ex-ante regulations need to be evaluated more carefully to assess if they create more problems than they address.

The idea of these regulations that propose punishing specific actions irrespective of their outcomes seems rooted in a limited, static understanding of digital markets that tends to frame all large firms operating in them as gatekeepers who face no competition. Monopolies in these markets, it is claimed, emerge quickly and then stay in a dominant position. We propose that rather than counting the number of firms in the market or calculating their market share, *contestability* is how market power should be understood and measured in digital markets. The potential for competition to arise in these markets is high, and this threat creates competitive pressures.

Further, digital markets are not homogenous. A practice that is anti-competitive in the market for smartphone apps, may be essential to the existence of ride-hailing services. Ex-ante regulations, at least the way they are currently framed, are not context-specific and therefore can be counter-productive. This attempt to paint all firms operating with a digital presence with the same brush will also likely create opportunities for regulatory arbitrage. Firms, which until recently emphasised the digital nature of their business to escape regulatory oversight, will attempt to highlight aspects of their business not in the regulatory crosshairs. The traditional ex-post competition policy is per-force context-specific, and sector-specific regulations, not competition policy is the best place to determine which actions are (un)desirable in specific markets.

In addition to these principle objections, the attempt at harmonising (by adopting ex-ante regulations) India's regulatory structure with that of rich countries, is not in India's strategic best interests. Instead, we should chart our path, as we have with UPI and ONDC. The lack of data on digital markets in the country makes it difficult to assess which areas and markets need regulatory intervention. The information asymmetry between firms and regulators will make any regulatory oversight, including enforcement of ex-ante regulations almost impossible. We would do well to introduce transparency reports requirements for large firms operating in digital markets. These transparency reports would allow CCI to monitor, and investigate if required, the effect of the practices of big tech firms on competition, and build a body of knowledge which can form the basis for a regulatory structure designed to create a thriving digital ecosystem in India that can serve the world.

## *1. Introduction*

The Standing Committee on Finance (SCF), under Chairperson Sh. Jayant Sinha presented its report on "Anti-competitive practices by Big Tech Companies" to both houses of parliament on December 22, 2022. This report lays the groundwork for a new regulatory framework for digital markets based on ex-ante regulations. Since then Sh. Jayant Sinha has already proposed a private member's bill and the Ministry of Corporate Affairs (MCA) has also established a committee to review the recommendations made by the Parliamentary Committee regarding the Digital Competition Act (DCA). All of this suggests an urgency among lawmakers and regulators to directly address the role of big tech in the Indian digital ecosystem.

Companies that operate in digital markets affect the everyday lives of millions of Indians. In fact, these markets will likely be critical to not only creating new avenues for value creation in the digital space but also providing the impetus required for large parts of the traditional economy in India to enter the global marketplace. The exercise of formulating a regulatory framework for them is of great relevance to the public, and therefore the process of developing it should involve rigorous, and not just passionate, debate.

In that spirit, it is important to highlight that this article agrees with the concerns and even some recommendations of the SCF report, follow-up clarifications and aligned opinions.

The total cash reserves of Apple and Google alone, as of 2023, was USD 371.7 billion. To put that in perspective, the total spending by the government of India in 2022-2023 was USD 512 Billion, a large proportion of which was financed by borrowings. While these firms sit on mountains of accumulated wealth available as liquid cash. Besides their financial muscle, these tech behemoths have unprecedented control over data and information flows. And while these are proposed to be regulated through specialized data protection and digital safety laws in most jurisdictions, the concern among lawmakers and regulators all over the world is understandable.

The response in India so far has been measured. The move to give CCI additional powers to review M&A activity based on deal value thresholds, investigate anticompetitive agreements which are neither horizontal nor vertical, and impose more proportionate penalties should give the CCI more ability to discipline anti-competitive behaviour. The increase in the scale of damages will provide more teeth to enforcement action. Further, introduction of settlements and commitments mechanisms and mandatory penalty deposits for first appeal are unique and may prove to be effective solutions to reduce the time taken to correct digital markets.

However, there are proposals, especially those relating to ex-ante regulations specifying anti-competitive practices that upturn the commonly agreed upon basis for and role of competition policy and therefore, must be evaluated more carefully to check if they create more problems than they address. If the concerns are around practices that specific firms in digital markets engage in, then a traditional competition policy that punishes the abuse of market dominance based on an ex-post assessment of harm and/or damage is better suited.

And for concerns not related to specific instances of abuse of market power, competition policy is not where they should be looked at. India's digital markets are substantial, and growing and have the potential to scale up significantly, and therefore the evaluation must focus on whether they are suited to building up the domestic digital ecosystem.

The thrust of this article is to present arguments on the problems and issues with ex-ante regulations and propose an alternative way to develop competition law for digital markets in India. The next section points out that this conversation should not be framed or limited by a simplistic understanding of big tech players as gatekeepers. The second section claims that digital markets are contestable, questioning the dystopian prediction of unchallengeable monopolies in the digital markets, on which the proposal for ex-ante regulation rests. The third section points out a flaw inherent to any ex-ante specification, but certainly of the type proposed, is that it does not distinguish between sectors and therefore cannot account for the context in which specific practices or strategies are used. A regulatory structure that targets such a large proportion of firms will almost certainly create opportunities for regulatory arbitrage. The fourth section shows that India's strategic interests are not aligned with the countries it attempts to harmonize its regulations with. Instead, India should chart its path by reducing the asymmetry of information across firms and regulators in digital markets. The article concludes with a summary of policy recommendations.

## *2. Framing the conversation: Digital gatekeepers*

The term ‘gatekeepers’ is often used to describe the activities of Big Tech firms. Detractors allege that these gatekeepers, keep new players out, stifle innovation, harm consumer welfare, at least in the long run, and are thereby detrimental to a thriving digital ecosystem. The term is admittedly catchy and succinctly conveys a deep distrust of large corporations. It is rooted in a dislike for profit-seeking and insinuates an image of large, mostly foreign, firms walling up paradise to charge an entry fee from the little people.

A conversation on the complexities of regulating digital markets cannot and should not be limited by poorly defined catchphrases. Even so, their effect on the people having the conversation is hard to deny, making an attempt at better understanding the term a necessary precursor to more subtle arguments.

The first question that an allegation of gatekeeping raises is what is being guarded. The detractors seem to suggest that the gate has been built around the digital commons. Those more aware would emphasize that these commons were discovered due to investments made by governments (e.g. DARPA played a key role in developing the internet).[1]

But what is typically lost in this conversation is the distinction between the existence of the digital commons, our experience of it and the virtuous cycle that links the two. The digital commons exist on physical infrastructure, but their value is derived from the products, services and experiences offered to consumers accessing it, which in turn requires entrepreneurs to take risks, make investments and innovate. A better analogy for firms in the

[1] DARPA is the US Defence Advanced Research Projects Agency, which supported the development of the earlier internet and the protocols that constitute it.

digital market, particularly platforms, is that of a guided tour operator. They facilitate access to the commons and the discovery of other products and service providers. In most cases, the commons can be and are accessed without relying on these operators. Consumers typically have multiple operators to choose from, for instance, discovery via search engines competes with that on social media platforms.

Some operators provide more value or a higher level of personalization or just a better experience and are consequently more popular. Would anyone begrudge a guided tour operator to the Taj Mahal charging its clients and the shops and hotel it takes these clients to? The better the experience of the tour, the more the number of customers who will explore the commons. This creates markets for more products and services, increasing the value of the digital commons. This virtuous cycle is how digital markets have grown at breakneck speed. Do note, that this is not a one to one analogy, nor is that the purpose of using it here. There are many differences in the two circumstances not least that connections between third parties and digital platforms ('sponsored content') are more transparent than those between third parties and tour operators (hotels and shops). Nevertheless, the analogy does bring home the point that innovative activity enhances the experience of the commons.

The internet can be seen as a commons, but it would have been quite barren if it was not for the feedback loop between the tour operators and product/service providers. The digital market analogues of tour operators, like any other business, can and do abuse their dominant position in the market. But it is such abuse that should be of concern, not their existence. Terminology like gatekeepers positions them automatically as rent-seekers, who expropriate surplus away from all other players while not adding any value.

Regulators would do well to acknowledge that the digital marketplace is not a finished product, there is a lot more that can and will be done. . The rise of AI - specifically, ChatGPT is a brilliant example. Generative AI is the next step in the evolution of messaging, search and a whole lot of other use-cases. We should not be in a hurry to dismantle the regulatory structure built on an understanding of incentives required for value-creation in an ecosystem, which has fostered innovation and growth in the digital space so far.

Consider the concrete case of mobile phone operating systems. Google (Android) and Apple (iOS) create, maintain, and update their respective offerings. They provide security updates, new features, screen apps to reduce incidents of fraud etc. These services require resources to provide and therefore require that resources be generated from patrons. So it should be straightforward to appreciate the need for them to charge someone in return for services they provide. There should of course be arguments about whether they are charging too much, or whom they should charge (consumers or app developers or both), or in general if they are restricting the possibility of any competitors. These are the questions of interest for ex-post competition enforcement unless the clearly identified anti-competitive harm cannot be mitigated by enforcement. But terms like gatekeepers hide the need to ask these questions and arrive at reasonable ways of addressing, and encourage cavalier action by decision-makers.

**Recommendation:** Simplistic labels replace arguments, shaping perceptions and making it tough, if not impossible to engage in nuanced arguments. In this case, the term gatekeepers

simultaneously describe the objects of regulation and the type of (very harsh) action that must be taken. Letting such insinuations enter the lexicon of a serious conversation on regulations signals unwillingness or inability or both, to think beyond the first-level effects of policy. India carries the historical baggage of being an over-regulated, protected economy where regulations are passed to favour specific players. It would be prudent to avoid simplistic explanations of market phenomena that reek of an anti-business, protectionist position.

## *3. Ex-ante regulations for contestable markets?*

Even a cursory reading of the proposal for ex-ante regulations reveals the underlying premise that the mechanics underlying (all) digital markets drive them quickly and inexorably towards winner-take-all outcomes **and that** this dominance persists over time.

Digital markets, particularly platforms, exhibit substantial scale effects. On the supply side, there are the usual economies of scale - with high upfront costs and near-zero marginal costs - and also data-driven learning-by-doing effects. On the demand side, there are direct and indirect network effects that drive scale. Added to this mix are economies of scope which again leverage data. However, the question for regulation is whether this domination is unchallenged or whether there are new players ready to enter these markets. That is are these markets *contestable*? Competition does not come only from players in the market but also from those who are waiting to enter.

In 1999 (Q2), at the peak of the dot-com era, 5 out of the top 10 largest public companies in the world by market capitalisation were firms that could reasonably be called tech - Microsoft, Cisco, Intel, Lucent and Nokia. By 2009 (Q2), only Microsoft had survived as a member of the elite list. In 2019 (Q2), at the beginning of the pandemic and of the domination of stock markets by large tech firms, 7 of the top 10 were tech firms. Microsoft again was the only entrant from the club of 1999. By Jan 2023, two of 7, Alibaba and Tencent had dropped out of the list, while Tesla and Nvidia had joined, surpassing Meta. Market capitalisation is a crude measure of dominance, but it does serve to show that perceptions of the importance and dominance of firms change.

At least at this level of aggregation, it seems that digital markets are dynamic, with new ideas and firms coming up to displace existing incumbents. At the same time, it also suggests that tech firms can generate large surpluses and be very valuable (not unlike oil or railways in the days gone by). This distinction, between becoming a large valuable company and staying a large valuable company by successfully suppressing competition is the critical one from the point of view of competition policy. The key then is contestability, not merely the existence of monopoly-like firms.

It is therefore very likely that digital markets are and will continue to have characteristics of Schumpeterian markets, where the possibility of competition drives incumbents and potential competitors.[2] Any slip-ups by the incumbent or fundamental innovation by an

[2] Companies may compete for-the-market rather than in the market. See, for example, Geroski, P. A. (2003). Competition in markets and competition for markets. *Journal of Industry, Competition and Trade*, *3*, 151-166.

entrant can drive out an established player and create a new incumbent. This is in fact the present Indian standard of dominance - that as long as incumbents cannot ignore what their competitors (or markets) are doing, which is the case across digital markets, regulators should reconsider intervening. The number of firms or the market share of a firm at any given point in time is, thus, not a good measure of competition in isolation and should not be used to assess if a competition policy intervention is warranted This makes the case for ex-ante regulations even more tenuous. It seems a snapshot of the market is being used to pre-empt that interventions are essential and specify the type and nature of these interventions. A snapshot provides a static view and this view is then used to claim that the market is static/unchanging and will be so. This is a case of assuming the conclusion and not a good framework to build a regulatory structure for the future of digital markets.

An attempt to develop a more dynamic picture of the market would require an examination of the actions being taken by market participants. For instance, if one were to presume that digital markets do not have contestability within 4 to 5 years, then it would be reasonable to expect that investors and entrepreneurs would not waste valuable resources in competing with incumbents (either directly in their markets or in adjacent markets). Similarly, it would be tough for large incumbents to justify large research and development expenditures to their shareholders if their dominance in the market was seen as being secure. But these expectations are not borne out by the actions of market participants.

Dealroom and London & Partners in their report on venture capital investments claim tech start-ups were funded to the tune of $485.2 Billion in 2022. This rather large amount is a 33% reduction on the $723 billion invested in 2021. Of this, India is the fourth largest recipient, with $24.1 Billion worth of investment in tech start-ups. With increased scrutiny of acquisitions made by big tech, it is clear that these new companies are not being setup with the sole aim of selling them to the incumbents

At the same time, even the detractors of big tech players do not blame them for not investing in R&D. For instance, Alphabet's (parent company of Google) R&D spending in 2021 amounted to 12.3% of sales. Meta reported it as being 21% of its sales.[3] This is orders of magnitude larger than the average spend of S&P 500 companies which amounts to about 2.82% of revenue on R&D (reported by Morningstar Inc.). India, in fact, has been a big beneficiary, with large investments being made by big tech firms in setting up research centres in the country.[4]

The actions taken by market participants belie the premise that digital markets are not contestable, that they inevitably create winners which take all for all time to come. Perhaps, it is reasonable to presume that these players probably have a different understanding of digital markets, one that is premised on sustained innovation, and its ability to transform markets and therefore, the players in them. The tech sector is replete with famous examples of start-ups with their beginnings in garages and university dorms challenging global firms

[3] Wall Street Journal, March 2022: https://www.wsj.com/articles/big-tech-is-spending-billions-on-ai-research-investors-should-keep-an-eye-out-11646740800

[4] Nasscom-Deloitte June 2021 - GCC Value Proposition For India: https://nasscom.in/knowledge-center/publications/gcc-value-proposition-india

within a generation. It is perhaps wise to keep this not-so-distant past in mind when making dire predictions about digital markets.

**Recommendation:** Innovation is not limited by the imagination of regulators and academics. New ideas of the sort that cannot be imagined by most will come up to challenge existing ones. The objective from a regulatory standpoint should be to ensure that these new ideas have access to adequate capital. This is only possible if a sufficiently large number of ideas are funded, which will only happen if investors expect supernormal returns if an idea works. The current position seems to be targeting firms making large profits even over short periods based on the presumption that they will remain in a position to keep making large profits. This can unwittingly entrench incumbents. Regulatory action needs to ensure contestability in markets.

## *4. Are ex-ante regulations context-specific? Does it matter?*

Ex-post assessments and investigations everywhere, including in competition policy, are typically triggered by undesirable outcomes. In the event of a bad outcome, the firm's business practices can be evaluated in the context of the market it operates in, to determine if it caused any harm. This allows for nuanced analysis. Ex-ante regulations, on the other hand, will specify undesirable actions or practices, the exercise of which will trigger regulatory action.

This raises two broad possibilities:

1) Regulations will pre-empt and specify all the various conditions and contexts in which companies operate to avoid punishing firms that have not caused any harm.
2) Regulations will or cannot be as detailed resulting in firms being penalised for actions and practices that are either imperative or do not cause any harm/damage in the specific context they operate in.

The proposal for ex-ante regulations may be still in the preliminary stages, but even the most detailed versions of the proposition do not seem to specify that similar actions can have different effects in different contexts. To see why context is important, consider the anti-steering provisions proposed by the standing committee on finance. They cite the case of both Google's Play Store and Apple's App Store being found to have steering provisions on their platforms. They cite the CCI's 2020 prima facie order directing an investigation against Alphabet Inc., the parent company of Google:

*"In relation to mandatory use of Play's payment system for paid apps & in-app purchases, the Commission is of prima facie view that mandatory use of application store's payment system for paid apps & in-app purchases restricts the choice available to the app developers to select a payment processing system of their choice, especially considering when Google charges a commission of 30% (15% in certain cases) for all app purchases and IAPs. Further, considering that Play is the dominant source of downloading apps in the Android OS (90% of the downloads) and its condition requiring the use of the application store's payment system for paid apps & in-app purchases, it appears that Google controls the significant volume of payments processed in this market."*

In this context, the CCI found enough grounds to order an investigation and it has since penalised Google for similar activities.

However, consider the case of a ride-hailing app like Ola or Uber. They also typically engage in the process of steering payments from passengers to drivers via their platform. But there is a key difference between the ride-hailing market and the app market. In the former, the driver and the passenger meet in person and they can, if they so wish, disintermediate the platform. The passenger can pay directly to the driver and the driver can choose not to pay anything to the platform. Even if it is not disintermediated, the threat of it happening is competitive pressure on the commission the platform can charge. Drivers and passengers can coordinate without the platform, as they did in the days gone by. But the existence of a platform that creates matches in real-time based on distance and availability is more efficient. The steering provisions built into these platforms, like, preventing passengers from getting drivers' phone numbers the first time they match (they can always share numbers once they meet), routing payments through the app etc. prevent a free-riding externality (each individual prefers to save the commission, which drives the matching platform out of business, reducing overall welfare) from restricting efficiency gains.

More technical arguments can be made to distinguish the two markets. For instance, network effects for ride-hailing apps are local while those for apps are potentially global or at least more widespread. But the thrust of the argument here is that all platforms are not the same and should not be treated as such under any regulatory regime. If they are treated the same, as the current proposals suggest, then ex-ante regulations would likely impose a high cost on all stakeholders.

**Recommendation:** Any set of ex-ante competition policy regulations must, in principle, differentiate between different contexts in which different firms operate. In practice, this would be an onerous and possibly ultimately futile exercise given the variety of contexts in which firms already operate, let alone the new frontiers that will be breached in the times to come. It is perhaps worth reconsidering the virtue of traditional ex-post-competition policy actions.

## 5. *Regulations picking winners: Competition and arbitrage*

Any business can interact and transact with its customers digitally. The widespread success of digital payments in India has shown as much. But does every business that conducts business in the digital space operate in a digital market? The distinction may seem to be pedantic but can be critical in assessing the role of ex-ante regulations. For instance, in the case of ride-hailing apps, disallowing steering measures will generate incentives to move away from an ad-valorem commission model to a lump sum payment. This in turn makes it more attractive to backwards integrate and operate a fleet of cars they own. They might still offer a digital interface, but they would no longer be a platform business, but a rather old-fashioned operator of a fleet of cars. Are such operators somehow better for market competition? The platform model allows a new firm to enter with a relatively low upfront investment and creates a decentralized market with many players. A market with fleet operators, on the other

hand, has a much higher entry barrier and all the capital in the market is concentrated in the hands of firms.

If this hypothesized future of raid hailing seems too far-fetched, consider the case of Airbnb. Entering a market dominated by hotels with centralized ownership structures, it created a niche for itself by matching property owners with short-term renters. But the key to its success was not its digital interface. Hotels could also be booked online and booking aggregators had already reduced the search cost of finding hotels. It was that properties on AirBnB did not have to comply with the stringent regulations that hotels had to comply with. The lack of compliance costs made them cheaper for both renters and investors/landlords. Consequently, AirBnB, while competing in the market with hotels, got a regulatory exemption for being a digital platform. In this context, therefore, it is conceivable that AirBnB's core offering of rooms to hire should have determined how it should be regulated, rather than its digital presence. In the former, it would be seen as operating in a very competitive market. In the latter, it was a digital pioneer, a potential gatekeeper.

In India, OYO is an example of a firm that started as a digital platform. But competitive market pressures (failure to build trust between two sides of the market - something conventional hotels are good at) and regulatory cognisance have forced it over time to morph into a more conventional hotel business. Owning its properties and taking on compliance costs as its competitors.

A related argument can be developed to understand the emergence of new-age fintech businesses regarding the applicability of appropriate regulations. At least in the Indian context, the unique business proposition of such enterprises is not that they use technology to make lending decisions. Most banks already do, or at least can do something similar. Instead, these firms exist to provide credit to players not serviced by banks or other heavily regulated financial lenders. To see why this is the case, it is important to emphasize that the primary function of banks is to perform the role of maturity transformation: take short-term deposits and transform them into long-term loans and/or investments. But as regulations started specifying the type of investments they can undertake to protect the interests of depositors, entities similar to banks in function but not recognized as such by regulation, started to come up (NBFCs in the Indian case). As the business of these entities grew, their lending practices too were regulated. Fin-tech firms are the next step in this evolution. They may deploy a digital interface to speed up the process of credit delivery and data collection, but at their core, they are bank-like entities, not some novel creation of the digital revolution.

**Recommendation(s):** Digital markets is a catchall term, and is not particularly useful when considering the nuances of the markets in which different firms operate. In at least some cases in the past, firms have benefited from lax regulatory oversight on account of being considered a digital platform. The alternative cannot be to invert the logic and subject digital players to (ex-ante competition) regulations that are not applicable to their competitors deemed to be traditional. It is perhaps best to leave ex-ante regulations to sector-specific regulators and have competition policy operate in its conventional role as an ex-post enforcer.

It is difficult, if not impossible to predict how businesses will evolve. But it is clear that all else being equal, firms will migrate to areas of weaker regulations. Therefore enforcing stringent, outcome-independent ex-ante regulations on as broad an area of operations as digital markets will almost certainly spur the discovery of another area of weak regulatory oversight. Where firms today highlight the "digital nature" of their business proposition, tomorrow, they might emphasize and focus instead on the aspect of their business that is not the regulatory crosshairs. It is best therefore to target parity in the regulatory treatment of businesses across traditional and digital markets/operations. Favouring one over the other will create incentives for the market will lead to suboptimal outcomes with investments responding to regulatory pressures (and the need to position themselves favourably) as opposed to value creation in the market.

## *6. Strategic considerations and the way forward*

Consider the case of climate commitments. India has called for differentiated treatment of developing and developed countries, as it should. The latter benefitted from years of lax regulations that permitted the dumping of carbon into the atmosphere for decades. The former on the other hand, have only recently started polluting at planet-altering levels, if at all. It is perplexing then that India's regulators are keen to harmonize their digital regulations with those of rich and developed economies.

These economies in general, but particularly the United States fostered their tech and digital ecosystem with light touch regulations. The US may potentially have domestic political compulsions to change its regulatory position. And Europe has long made it clear that it will act to prevent the transfer of any consumer surplus to tech firms as it does not expect to get the return owing to its demographic decline. It makes perfect strategic sense for the US and Europe to seek harmonization of regulations when they are tightening theirs. This would prevent them from losing out investments to competitors and would perhaps also increase their bargaining power with specific players. Further, for the EU, their official motivation for their ex ante regulations was to prevent the fragmentation of the internal market.

By harmonising its regulatory structure with theirs, India would perpetuate the existing asymmetry between its economy and that of the developed world. On the flip side, by charting its course by setting up a regulatory system that works in its best interests, it can gain disproportionately by leveraging its potential as a large potential market, a large supply of skilled human resources and a small but growing digital ecosystem.

The unstated concern driving the urgency behind the push towards ex-ante regulations seems to be that the existing players, mostly based out of the US, will expropriate away surpluses and will make it difficult for the next set of global players to emerge from markets like India. Given the value that can be generated in and by digital markets, this concern is likely to be shared by many in the developing world. The goal of fostering a domestic ecosystem that can create home grown champions is a desirable strategic objective. But this objective may not be best served by introducing ex-ante regulations. Instead, as it has in the past in many other areas, India should lead the way, especially for the developing world. It has already done so by creating and proposing new platforms in the public sector (UPI, ONDC etc.). It must also do so in formulating a policy framework for private players.

Currently, the data available does not provide enough insights to decipher what this framework should look like with any reasonable level of certainty. In fact, the same lack of data and the resulting information asymmetry will make it very difficult for CCI to enforce any version of ex-ante regulations. The need of the hour then is data disclosure requirements for large firms operating in digital markets.

**Recommendation:** India was one of the first jurisdictions to introduce a provision under the IT Act that required social media platforms to report the number of complaints they received to take down specific content. In a similar vein, it would be prudent to introduce transparency requirements for firms operating in digital markets from a competition perspective. These transparency reports would allow CCI to monitor the effect of the practices of big tech firms on the competition. This will allow CCI to build a body of knowledge which can form the basis for a regulatory structure designed to create a thriving digital ecosystem in India that can serve the world. A positive spill over of such an approach is that it creates incentives for regulators in capacity building rather than proposing regulations premised on lack of capacity. Notably, similar transparency requirements exist in Japan, which is based on a co-regulatory model between the government and companies. The design of these transparency requirements will be important. They should not impose too much of a burden on companies but at the same time need to bring out enough information so that the regulators can perform their functions adequately. Dialogues between the companies and the regulators therefore will be important.

## *7. Conclusions and recommendations*

The arguments presented in this paper are intended to help in determining how best to regulate big tech firms such that a thriving digital ecosystem can be created in India. While certain moves made in this regard are praiseworthy, the proposal to institute ex-ante regulations for digital markets is something that must be evaluated more carefully.

The debate so far has been coloured by the use of ideologically charged words and phrases which give an incorrect, or at least an incomplete picture of reality, and can lead to wrong policy inferences. It would be prudent to avoid simplistic explanations of market phenomena that signal an anti-business, protectionist position. But in addition to this bit of housekeeping, some recommendations stem from the arguments made in this article:

1. Regulation and competition policy should be seen as separate instruments. Regulations, ex-ante by definition, applicable to a firm must be specific to their product or service. Competition policy should provide the means to punish firms for abuse of dominant position based on an ex-post assessment.

2. Regulations or competition policy should not determine winners and losers in the market. Regulation should not, by design or inadvertently, favour specific business models or strategies. Their aim should be to protect consumer interest. In the pursuit of this, they can and should specify undesirable practices (sector-specific regulations) or punish firms that cause harm (competition policy).

3. Regulatory framework based on a static understanding of the market cannot spur innovation. Regulators or their advisors should not assume that the market cannot evolve just because they cannot see how it will. If market participants have the incentives to innovate, it will be revealed by their choice of investments. Blanket, a-contextual efforts (like ex-ante regulations) reduce the potential for profits across digital markets and will reduce incentives, and therefore investments. This is an undesirable outcome.

4. Enforcing a set of ex-ante-specified anti-competitive practices can create more problems than it addresses. It is better not to hurry in upturning the long-held basis of competition policy. If the short-run objective is to rein in specific practices, the existing ex-post enforcement can be better targeted.

5. We need more time, more evidence, and more competition economists. It would be prudent to lead the way in introducing competition transparency reports requirements for firms operating in digital markets. These reports can be used to assess the type of practices digital firms engage in, their impact on the market and consumers, and the specific areas in which ex-ante regulations would be useful. Given the nature of this information it will be important for these to be decided in dialogue with digital companies.

Over time, as we get access to more data and digital markets exist for longer, ex-ante regulations of the type proposed may turn out to be relevant in some specific cases. But we have persuasive reasons to not implement them at this stage, especially given the costs that they may impose on one of the more dynamic areas and important drivers of the modern Indian economy.