# DOMINANT DIGITAL PLATFORMS: COMPETITION LAW AND POLICY CHALLENGES

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***Abstract***

*Over time, new scientific advancements have permeated all aspects of life, from online grocery shopping to finding a suitable companion on dating services. With the advent of technological advancement in commerce and the quick growth of the digital economy, India now has a chance to reverse the triple scourge of unemployment, inequality, and poverty that has afflicted the country for decades. India must, however, create a commercial and regulatory environment to extract and distribute the promised benefits of digitalization in a way that ensures inclusive economic growth, i.e. 1) Increased and effective employment; 2) Equality; and 3) Shared prosperity to reap the benefits of digitalization promised.*

*The digital economy in poor countries already threatens a new age of global concentration and, with it, a deeper marginalization of vulnerable countries and enterprises despite its many promises. The development of small enterprises, consumers, and ultimately economic growth in India's growing economy requires deliberate regulation to avoid consequences that could be harmful to these groups. With the introduction of COVID19, which is expected to accelerate the movement of more items and services online, the demand for deliberate regulation has never been greater. For the digital economy's fairness, this paper examines how the Competition Act of 2002, as amended, can be put into practice and the Competition Commission's plans in this regard. Because competition policy alone will not get India where it wants to go, this paper also outlines the aspects of the regulatory framework needed to get the most out of the digital economy's potential. Unfavorable regulatory conditions, such as good competition legislation, diligent and well-informed consumers, an inventive company culture, and open commercial partners can help India turn things around so that the digital economy delivers on its inclusive economic growth promise.*

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## INTRODUCTION

Beyond a few traditional setups, the digital economy encompasses all markets where commodities and services are produced, distributed, traded, or consumed by a wide range of individuals, agents, and via business platforms.

Table 1 shows various important metrics of India's digital economy participation in Comparison to other developing economies in BRICS. The Covid 19 and its mutating variants' impact on online activity is predicted to lead to a large increase in these numbers by 2022.

| **BRICS NATIONS** | **Population** | **Smartphone Connections** | **Internet Penetration** | **Active Social Media Users** | **Growth in internet penetration in one year** | **Growth In Active Social Media Users in One Year** |
|---|---|---|---|---|---|---|
| BRAZIL | 211.8 million | 205.8 million | 71% | 66% | +6% | +8.2% |
| RUSSIA | 145.9 million | 237.6 million | 81% | 48% | -0.4% | 0% |
| INDIA | 1.3 billion | 1.06 billion | 50% | 29% | +23% | +48% |
| CHINA | 1.4 billion | 1.6 billion | 59% | 72% | +3.1% | +1.5% |
| SOUTH INDIA | 58.9 million | 103.5 million | 62% | 37% | +3.1% | +19% |

## TERMS TO UNDERSTAND COMPETITION POLICY AND LAWS ISSUES IN DIGITAL ECONOMY

### DIGITAL ECONOMY

The Digital economy is based on Digital services that have a network impact and encourages market concentration. Customers can get digital services via a variety of channels, which makes the market more open to new entrants. This makes it easier for competitors to challenge existing

market leaders' positions. As a result of network effects and contestability, the industry has unique dynamics compared to other industries.

## DIGITAL PLATFORM

A digital platform is a technology-enabled business concept that allows two or more interdependent parties to exchange information. The platform connects diverse business users to transact. Digital platforms allow firms to swiftly and accurately share high-quality information with customers, allowing them to invent new goods and services and improve collaboration among the various stakeholders in the business ecosystem. Using digital platforms to connect two or more aspects of your organization creates tremendous network effects and increases the value as more members join. It is possible to speed the development of the digital platform for new services by integrating third-party Application Program Interface APIs into the platform (APIs). Modern technology stacks can be found in a variety of "as a service" platforms. Data ownership and intellectual property rights are protected and fostered by the clear governance conditions of the digital platforms.[1]

## CHANNEL TO DELIVER DIGITAL SERVICES TO END-USERS

We prefer the term "value web" to the more standard "value chain" when describing the industry since it better represents the distinctive peculiarities of the sector. An interconnected network of services and assets is what is meant by the term "value web," which refers to a collection of interconnected value chains. In the web, each service and asset is a node. Users can receive content or service in a variety of ways depending on the nodes used in the network configuration they choose. There are several ways for end-users to experience this, such as being able to watch the daily news on television or a computer or smartphone, as well as being able to choose where they watch the news (inside or outside their home) and on what device (phone, tablet, PC, or TV). Providers of content and service have even more options to choose from when delivering information or services because each stage is generally followed by several alternatives for organizing the next phase. This increases the number of choices. Most service and content providers use a variety of choices at once. There are a few companies that have invested in their assets and are present at every step. It's unusual for a company to focus on and build assets for only one step. It's common for enterprises to mix their assets (such as content and brand recognition) with those of others to generate new offerings for end-users while delivering a product or service. Some of the most important assets might be viewed as a platform

[1] Available at: https://www.credencys.com/blog/what-is-a-digital-platform/

for future growth. Services and content can be delivered or aggregated via a platform, which serves as a conduit between service providers and end-users. A virtually infinite number of nodes connect the various levels of the digital economy, creating a complex system that is always evolving. There are various ways to reach customers and it is impossible to exclude certain parties, such as competitors, from the platform stack.

## DIGITAL PLATFORMS: MODELS AND STRATEGIES

There are three different platform-based business models.

- *The Subscription Model* in which the end-users pay for a service (like Netflix);
- *The Advertisement Model* in which the end-users provide revenues indirectly by being exposed to advertising (like YouTube);
- *The Access Model* in content or app developers pay to reach end-users (like an App store). A common characteristic of these platform-based business models is that they are all based on exploiting network effects which may be –
- *Direct network effect* means that a platform becomes more attractive for consumers if the total number of consumers grows.
- *Indirect network effect* means that a platform becomes more attractive for consumers (service/content providers) if the number of service/content providers (consumers) grows. Network effects tend to lead to high concentration or even tipping in the sense that the winner takes all in the markets where these effects are present. As a platform grows in popularity, it becomes increasingly difficult for its competitors to threaten its position. Because of this, first-mover advantages might make a tremendous difference and the competitive game may culminate in a winner-takes-all result. In many internet business models, gaining the attention of the end-user is essential. As a result, they compete for viewers. Because charging a (direct) fee to end-users isn't always lucrative, price doesn't appear as prominently in the marketing mix of internet business models. Advertisers often pay more for access to a target audience. It is easier for a corporation to compete for attention if it has numerous platforms in different sectors and uses user data to bring them together. A multi-service/platform operator can optimize the experience for both end-users and advertisers by merging user data from several platforms. For both end-users and advertisers, digital platform operators are trying to make them indispensable by taking on a gatekeeper role.

## THE ROLE OF INNOVATION

Gatekeeper positions can be quickly converted into (dominant) positions with considerable market power, allowing gatekeepers to reap high profits. Those large profits encourage others to enter the market with new ideas to challenge the strong market positions that already exist. Once the market has tipped, it is rare for a new entrant to be successful by just imitating the existing company strategy. It is because of this that new entrants are looking for ways to differentiate themselves by addressing the wide range of consumer preferences.

As a result, the competitors can bypass traditional barriers to end-user access more easily. It is not difficult to enter the market, but surviving and growing are the real challenges because every attempt to do so will fail. Digital companies, on the other hand, are constantly preparing for the unexpected by constantly experimenting with new processes, new goods, and various combinations of the previously stated items to be ready for any eventuality. The boundaries of the market are continually being redrawn by both incumbents and newcomers.

## CONTROL THE ACCESS TO DATA AND TECHNOLOGY

There is strategic value in personal data, but large platforms are often reluctant to share it. Interoperability between large platforms from different operators is, therefore, extremely limited. Multi-homing (using multiple platforms at the same time) is impossible because of the lack of interoperability. Because of the network and lock-in effects, it helps large platforms maintain their market position by creating, maintaining, and raising entry barriers. For large incumbent platforms, there is a lower risk of entry and fewer incentives to keep innovating without interoperability. To maintain one's position as a gatekeeper, one can control the use of technology. Thus, patents play a significant role in the OS market wars (Operating System), as they grant control over technology and standards access.

## MERGER CONTROL

Proactive merger control is used by competition authorities around the world to achieve competition policy objectives cost-effectively. Merger control is a forward-looking exercise that aims to predict the likely effects of a merger on the competitive dynamics of a particular market as well as, in some developing countries, the public interest. It is, however, largely dependent on the ability of the competition authorities to avoid two types of mistakes when it comes to merger control. In the first case, a merger that should have been allowed is prevented; in the second, a merger that should have been prohibited is approved and, as a result, put into effect.

In the context of major digital platform mergers, it has been argued that the competition authorities' apparent proclivity to approve digital transactions limits the likelihood of false positives. There have been an increasing number of false negatives in the context of digital transactions, which suggests that there has been a dearth of enforcement in this sector. When considering mergers in digital markets, the question arises as to whether or not the competition authorities have the necessary resources and capabilities in place to deal with them.

## MERGER THRESHOLDS

Many jurisdictions have implemented merger control thresholds as a way to accommodate the naturally limited resources of competition authorities. As a result, mergers are typically only made public and evaluated when the merging parties meet certain financial thresholds, such as turnover figures and asset values or market share thresholds. Using financial thresholds has the unintended consequence of allowing market-altering transactions to slip through the cracks of competition authorities because mergers with significant effects on digital markets may fall well below the prescribed monetary thresholds. This is the case when a newly formed digital business does not yet have a significant revenue stream or sufficient assets to meet the required levels of notifiability. Merger creeps, a risk that many small start-ups are acquired through transactions that may appear insignificant on an individual basis but have significant competition implications for the market when considered collectively, compounds this worry.

Competition Commission and Sectoral Regulators argue that, in light of the changing dynamics of the digital market, the traditional financial threshold-based approach to merger notifiability needs to be reconsidered and perhaps replaced. Competition Commission of India is now debating the best metric to use when determining whether a merger should be reported in digital markets. It's a combination of deal value and market share metrics that India is using to determine whether or not to notify the transaction.

## KILLER ACQUISITIONS

It is a practice known as "killer acquisitions" that refers to acquiring start-up or nascent companies in rival or complementary markets to eliminate them before they can become formidable rivals. Firms can effectively eliminate competitors to avoid future competitive constraints by acquiring smaller rivals, which in most jurisdictions does not trigger mandatory notification requirements.

Competition authorities are no strangers to savage acquisitions. They're so common in the pharmaceutical industry. Competition authorities believe that acquisitions of this magnitude are a common occurrence in digital markets. A merger transaction may eliminate a competitor from the market. Such intervention is necessary to ensure that mergers do not reduce competition or harm consumers (by, for instance, reducing consumer choice).

The acquisition of small start-ups by large corporations is a fundamental feature of digital markets. Procompetitive effects result from the acquisition of start-ups to obtain the capital needed to expand. An increasing number of Indian companies are acquiring startups to expand or improve their product lines, and CCI will be keeping an eye on this trend in the coming years.

These concerns have led to greater scrutiny of digital transactions in India, which would normally not warrant notification. CCI recently released amendments to the Small Merger Guidelines introducing *green channel route*, which call for notification of small merger transactions involving digital market players based on deal value (which is significantly lower and has the effect of capturing transactions with start-ups) and/or the parties' market shares.

Competition authorities across India recognize the importance of scrutinizing transactions affecting digital markets. The COVID-19 pandemic has forced authorities to anticipate how competition and consumer welfare may be impacted without conducting market-wide analyses into the effects of such transactions. In the case of digital market transactions, it appears that a more vigilant and protective enforcement approach may be taken.

**ABUSE OF DOMINANCE**

If a company has a significant market share, it must conduct its business in a way that does not constitute an abuse of power. Large incumbents control a large share of digital markets due to a combination of factors including strong multi-sided network effects, high startup costs, low variable costs, and economies of scale.

Competition Commission of India and Sectoral Regulators have identified practices that, if implemented by the most powerful companies, could harm competition. In the context of digital markets, the question is whether existing theories of harm can be applied or if new theories of harm need to be considered. As a result, it isn't clear how certain online market abuses will be dealt with. As things stand, some conduct is automatically considered an anti-competitive violation with no room for pro-competitive justifications(*perse rule*), while other conduct is examined in light of its impact on competition(AAEC applying *rule of reason*).

## SELF-PREFERENCING

Giving preference to your own vertically integrated products and services over your competitors' is known as self-preferencing. Dominant Enterprise can gain an advantage through self-preferencing on the other by dominant existence.

According to the CCI, self-preferencing can lead to entrenchment of power and exclusion of competitors. Although self-preferencing could be viewed as an exclusionary act in and of itself, it also overlaps with other conduct that may constitute an abuse of dominance, such as tying or bundling arrangements, refusing to supply, and discriminatory behavior prevalent in vertical and conglomerate mergers which are generally kept out off CCI Merger control mechanism.

## ACQUISITION OF DATA

Internet use generates an estimated 2.5 quintillion bytes of data per person, per day. To gain a competitive advantage in the digital market, dominant companies must be able to acquire large volumes of data. Large digital firms' market power may increase as a result of the collection and use of data. In addition, if dominant firms use information gleaned from one market to gain an advantage in another, concerns will grow.

Competition Authority is concerned that companies may use user data to thwart their competitors. Accordingly, it has been debated whether or not data constitutes an "essential facility," and if so, how anti-competitive is a refusal to provide large datasets. An essential facility requires a resource that cannot be easily replicated and without which competitors cannot reasonably provide products or services to customers. An "essential facility" owner in India could be accused of abusing his or her position of power by not allowing its competitors into the facility where it is economically feasible.

Treating data as an "essential facility" and requiring data owners to share it with their competitors has numerous drawbacks. Data is everywhere and can be replicated. As a result, other parties may already have access to the same data as data-rich entities. Given that data can vary in value and usefulness due to the proprietary algorithms used to extract it, one company's information may not necessarily be necessary for another company's market participation. Allowing competitors to reverse-engineer proprietary algorithms may encourage free-riding by imposing a burden on data-rich companies to share their data with the public. Finally, this will discourage investment in large-scale data collection and the development of data-driven

platforms. In addition, the recent emergence of stricter data privacy laws in India and around the world may raise concerns about the transfer of data to competitors.

## USE OF ALGORITHMS

To put it simply, an algorithm is a formula, procedure, or set of instructions designed to accomplish a specific task through the use of predetermined steps. Data is collected, analysed, and processed using algorithms in digital markets. Algorithms are being viewed as a potential source of anti-competitive behavior and consumer harm.

Ranking algorithms can be used to-

- manipulate consumers and limit their options;
- algorithms can be used to apply different pricing/terms to different consumers,
- algorithms can be used to manipulate platform rankings to exclude rivals.

Detecting and assessing anti-competitive algorithms in the current framework is a problem. It's also a challenge for the Competition Commission and sectoral regulators to determine whether "unilateral" conduct, such as the use of algorithms that lead to more automated processes, can be considered "abusive or not?"

## CARTEL CONDUCT

Due to the widespread adoption of algorithms and machine learning in a wide range of markets, competition authorities are concerned that digital markets have altered the nature of interactions and are questioning whether the use of algorithms can facilitate agreements or coordination on price and other trading conditions more efficiently than traditional human interactions.

CCI is aware that enterprises can engage in cartel conduct through algorithms inadvertently, and this is recognized by the digital market. With an algorithm, a set of tokens or objects can be processed in an orderly and repeatable manner. Rather than being explicitly programmed, algorithms iteratively learn from the data they encounter. Competition authorities would be unable to detect new forms of cartel conduct if they lacked the necessary expertise and technological tools to identify potentially anticompetitive algorithms and other machine learning capabilities.

As an illustration, a business may use algorithms to keep up with changing market conditions while also maximizing investment or profit returns. Self-learning algorithms may be able to align

the prices of a company with the prices of its competitors in a tacit collaboration. Antitrust authorities face a challenge in distinguishing between a capitalistic flow of virtual information resulting in tacit collusion (where the algorithm uses a sample of labeled data to learn a general rule that maps inputs to outputs) and mere market transparency and machine learning adaptation to such detected market trends.

## THE ROLE OF COMPETITION POLICY

Policy frameworks are being challenged by the rapid pace of technological change. Among these are consumer protection, privacy, taxation, and intellectual property rights policies. This includes competition policy. Amid the debate over current policies, public values may be at risk. In addition, these rapid developments may lead to competition issues. In this article, we look at ten issues that arise as a result of or are exacerbated by, the peculiarities of the digital market. These difficulties are:

- First and foremost, monopolies in the digital world can inhibit competition and innovation;
- They can also monopolize other markets;
- They have an incentive to lock in customers;
- they have privacy and data protection issues to contend with;
- They may hinder the development of a Digital Single Market;
- Patents can be used to prevent access to technology,
- The most advantageous position of Internet Service Providers (ISPs) as gatekeepers can hurt market dynamics.
- Competitiveness may be harmed as a result of tax planning/avoidance.

Competition authorities and policymakers should focus on preventing barriers to entry, making it easier to enter markets, and encouraging innovation, according to our analysis of these issues. Competition authorities should have a cautious attitude towards actual competition challenges and rely on the self-correcting powers of the market, provided that certain public values such as taxation, privacy, and security are protected by appropriate additional policy frameworks. [2]Competition policy instruments can sometimes be used to temporarily fix the problem if changing appropriate policy fields is problematic and if public values are ineffective and

[2] Amazon (Case SA.38944), Available at: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38944

noncurative then it causes competition problems such as granting control over technology and standards.

## PROBLEMS INVOLVING PARTICULAR CHALLENGES FOR THE APPLICATION OF COMPETITION LAW

Initial three problems concern the tendency of digital markets to tip, resulting in digital monopolies. These problems are closely related: once digital giants have placed themselves in a gatekeeper position, they lock in end-users at both sides of the platform and aim to make themselves indispensable; once they have made themselves indispensable, large digital giants could potentially hamper competition and innovation; not only in their markets but also in other markets via the leveraging of market power.

Concerning such problems pre-emptive mergers as potentially problematic. A pre-emptive merger is aimed at preventing a (potential) competitor from disrupting one's business model by acquiring the company. Similarly, leveraging market power and entering into a set of multiple exclusive agreements are potentially problematic behaviors when they close down or prevent the creation of alternative routes to reach end-users. Such behaviors would fall within the reach of Competition Law.

It is difficult to distinguish anti-competitive motives from normal business strategies; particularly because it involves future markets. Wrongly labelling behavior as being anticompetitive may have adverse effects on the dynamics in the market. For example, while there may be pre-emptive motives for the acquisitions of small companies, competition authorities should remain cautious not to consider all acquisitions as anti-competitive. This might have serious adverse effects on innovations as the prospects of take-over form an incentive to innovate.

When applying competition law, competition authorities are faced with a different set of challenges. These challenges involve the analytical steps and instruments used for assessing the relevant market and dominance. The analytical steps typically start with describing the market boundaries

(1) Analysis of market power-Dominance, Market Share, Profit Margin, etc

(2) Whether the behavior of firms is anti-competitive?

(3) Geographical Limits: Digital firms, however, constantly redefine the boundaries of the market by competing largely based on innovation.

It is most notable that in digital markets, the traditional step-by-step analytical approach is generally ineffective because of strong dynamic feedback effects running from firm behavior to market structure and end-users.

*In response to these challenges, competition authorities may consider:*

- The business models as a starting point, focus on how a company makes profits and which other companies or business models may steal that profit away. Such an approach integrates the market definition and market power assessment stages. It allows to better account for interdependencies between multiple platforms and the interactions between firm conduct and market boundaries;
- Rely less on traditional indicators such as market shares or profit margins. Competition authorities should rather focus on indicators that inform about contestability, such as the presence of entry barriers, the availability of alternative routes to reach end-users (including the presence of measures aimed at locking in end-users), and the degree of innovation in unexplored technologies/services;
- Follow a more future-oriented approach because of the central role of potential competition. In practice this means following a cautious approach and relying on self-correcting powers of digital markets that make permanent harm less likely;
- Involve more external IT experts to help them to understand better business models and future trends;
- Co-operate with competition authorities from various nations/continents while the digital economy (and thus the relevant geographical market) has become worldwide in scope.

*To support competition authorities, policymakers may:*

- Potentially mitigate competition problems by amending Data Protection Regulation. Introducing data portability as a right to transfer one's data from one platform to another (in a commonly used electronic format) would have a positive impact on the interoperability between platforms, lower switching costs, and improve the competitive process;
- draft a guideline/guidance paper on assessing competitive restraints in digital markets;
- review existing guidelines on horizontal mergers, in which particular attention should be paid to:
    - mergers involving non-transaction markets with indirect network effects;

- defining new metrics used in setting the threshold values for determining when a merger needs to be notified;
- developing the concept of 'maverick firms' in the context of dynamic markets.

## OTHER PROBLEMS TO BE ADDRESSED BY COMPETITION POLICY

These solutions to Competition Challenges in addressing digital platform lies in the fact that it involves the risk that State aid for broadband deployment can unnecessarily disturb market dynamics. Reasons that State aid may be distortive because-

- Government decisions experience electoral pressures,
- Governments are not fully informed (asymmetric information), and
- That government are not free from being lobbied.

About broadband markets, all of these factors are prominently present at local level governments. Recognizing these risks, the European Commission issued the Broadband State aid Guidelines.[3] To ensure proper adoption of these guidelines, the following could be done by Competition Authorities in developing nations like India:

- Despite scarce resources, competition authorities should screen the behavior of governments and check whether it is in line with the Commission's Broadband State aid Guidelines[4].
- Competition authorities can establish whether traffic management techniques are used in an anti-competitive manner.
- Policymakers need to rely on competition authorities until a clear line of argumentation has been developed that specifies if and how ex-post control for anticompetitive use of traffic management techniques might have a long-lasting/irreversible impact.

## CONCLUSION

Inclusive economies produce better outcomes for both producers and consumers, and this is the underlying premise of competition policy.

[3] European Commission (2019), Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, Communication from the Commission 2009/C 45/02 (see European Commission 2019).

[4] Acquemin, Alexis (2018), 'Theories of Industrial Organisation and Competition Policy: What are the Links?', Working Paper by the European Commission's Forward Studies Unit, Brussels 2019.

New emphasis has been placed on the empowerment of MSME to foster healthy economic ecosystems, with social imperatives playing an increasingly significant role in competition policy developments. Competition policy has also been used to offer new forms of economic protection to previously disadvantaged people like craftsmen, and artisans in developing economies like India where by accessing digital platforms, they can entice more and more customers. This is due to a desire to provide equal opportunities for all citizens.

In light of this, it is clear that governments around the world have shifted away from the purely economic-based origins of competition regulation and instead adopted a model that acknowledges and, to some extent, caters to the broader needs of modern society. That's why it's likely that public interest imperatives will be crucial in shaping and enforcing digital competition law, especially now that digital innovation has opened up the economy to so many people and businesses that were previously shut out of it.