Something New

Digital Dominant Enterprises Soon to Face Per Se Illegal Challenges in Competition Laws

Introduction and Background

The liberalisation of economies across nations in and around the early nineties of the previous century and the adoption of modern competition laws based on the rule of reason[1] by successive sovereigns has immensely benefitted dominant enterprises from being investigated and penalised for every complaint which may be filed or is likely to be filed by aggrieved parties against them before antitrust authorities from time to time. To date, nearly 140 countries have adopted modern competition laws.

The standard of proof for concluding that there has been contravention of the law justifying a penal order against a dominant enterprise has been 'abuse of dominance' and not 'dominant position per se', hence making available to such enterprises defendable safe harbour arguments.[2] In competition law investigations, such a standard of proof primarily means that the assessment of unilateral economic and commercial conduct and the position of market power of a dominant enterprise thereof must be investigated within the ecosystem in which it operates. Therefore, investigation cannot merely establish 'dominance' of the enterprise in the relevant product or geographic markets to conclude contravention of the law but it must be a conduct-based analysis of 'abuse of such dominant position'.

Therefore, the importance of and reliance on microeconomic theories, coupled with the procedural standard of the rule of reason, more particularly in abuse of dominance cases, has meant that a reasonably complex evidentiary standard of proof against any dominant enterprise has become unavoidable in competition law adjudication. Competition/antitrust law is essentially a mix of microeconomics and law so that every investigation by a competition authority assumes a complex procedure which at times takes longer to reach a logical conclusion. Contrary to the foregoing, the intent of the law is against delay as markets are too dynamic and any uncertainty arising out of procedural delay could make any final orders infructuous.

Until recently, the procedural law to inquire into and investigate any allegations of abuse of dominance has mostly been based on the analysis of market effects which any dominant enterprise may cause or is likely to cause upon other stakeholders in those markets. Thus, depending on the consequences of economic harm, as may be evident from the unilateral conduct of the dominant enterprise(s), the competition authorities may resolve such harm either by behavioural or structural remedies as per the statutory provisions which govern the authorities. Behavioural remedies are typically based on directing the contravener with a 'cease and desist' order and/or 'imposing penalties' both on the enterprise as well as on the individuals of the enterprises who are found to have been responsible for and/or contributed to the occurrence of such contraventions. Structural remedies—though not a common feature—at times are resorted to when the behavioural remedies do not adequately meet the remedial standards *qua* the harm to stakeholders. These remedies typically consist of directing division of the dominant enterprises when the proposed division which is likely to be hived off is directed to be acquired by some other independent enterprises under the supervision of the authority via independent external monitory agencies to complete the process of the acquisition.

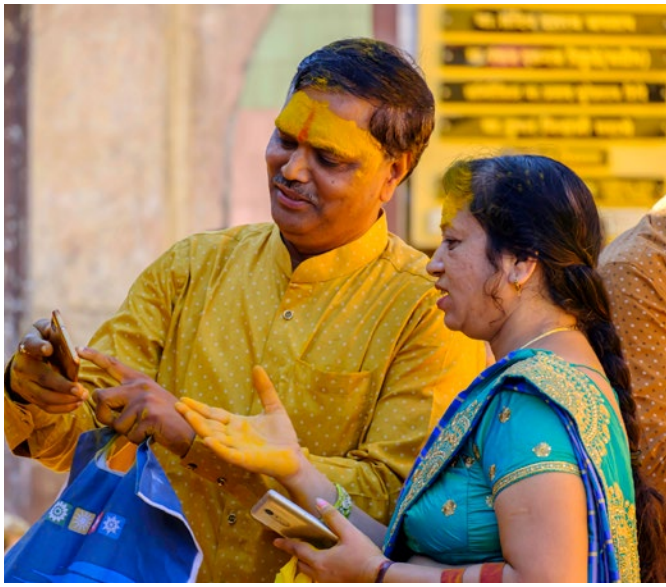
However, the analysis of 'effects on markets' and the investigative techniques thereof have been undergoing rapid changes. The procedural standards of the rule of reason, especially in respect of non-traditional market players, are increasingly becoming debatable. Thus far, the evolution of the competition law, relating to the abuse of dominance, has more or less been in respect of traditional enterprises or, simply put, in a market structure where buyers and sellers are primarily operating physically.

The markets gradually changed from physical to online and have, in the last few years, especially after the Covid pandemic, exponentially been tilting towards online models. This shift has brought with it multiple opportunities and challenges of doing business. These disruptions have engaged the attention of competition authorities to assess and meet these newer challenges. To name a few challenges in online marketplaces, one example is the concept of 'multisided markets' where an individual, for example, may be a traveller and require options of travel besides boarding and lodging and local transportation at the destination. Thus, the online marketplaces may be equipped to provide multiple services through a network, for example, from airline ticketing to hotel reservations to arranging the services of local cab aggregators to arranging business meetings; the list goes on. Therefore, 'network effects' have become one of the key elements for understanding the overall online market when each market, within the business chain, is a separate independent business and the ultimate beneficiary is an individual traveller. The ultimate beneficiary undoubtedly becomes better off as far as overall enhancement of economic efficiencies are concerned, although at a higher total cost. The nuances of these interconnected independent online markets are so complex that the competition authorities need to enhance their domain knowledge on technology beyond the classical literature of competition law relatable to traditional markets. Physical interfaces in the online marketplaces between upstream raw material suppliers and end consumers via the manufacturers and distributors have blurred.

These inherent challenges between traditional and online marketplaces have prompted policymakers and other stakeholders to think beyond the classical literature of competition economics and law which ultimately resulted in suggesting a comprehensive competition law for regulating enterprises operating within digital markets. The Digital Markets Act ('DMA') was introduced by the European Union ('EU').[3] Other nations followed it for their respective jurisdictions based on their overall economic policies and governing constitutions. The core intent and objectives of DMA-type legislation is to monitor, regulate and control the unfettered growth of big digital enterprises—popularly called the 'Big Tech' companies—from disrupting the market ecosystems. The market disruptions by Big Tech companies may marginalise the rest of the players in the markets. Such marginalisation may force many enterprises to exit the markets prematurely and permanently. The top Big Tech enterprises, per the DMA, are primarily Google, Meta, Apple, Microsoft and Amazon ('Big Tech').

Indian Scenario

Pursuant to publishing the 53rd Report of the Parliamentary Standing Committee, a Committee on Digital Competition Law was constituted by the Government of India[4] ('the Committee') to review the existing regime under the Competition Act 2002 (as amended from time to time) and to evaluate the need for an *ex-ante* procedure for digital markets as opposed to the existing *ex-post facto* procedures of competition law framework for all markets operating within India. The Committee held a series of consultations with key stakeholders, but not expressly with consumer associations, and examined both the domestic legal framework and the international regulatory practices for regulation of digital services. A policy document dated 27 February 2024 was published in early March 2024 and the digital competition policy and



the Draft Digital Competition Bill were made available to stakeholders for comments, if any. The policy document of the Digital Competition Law states as follows:

> Widespread adoption of technology and rapid growth of digital businesses have had a significant impact on the Indian society and the economy. Digitalisation has fundamentally changed the way consumers interact with each other and with providers of goods and services.
>
> Digitalisation may have several pro-competitive benefits. Market contestability and fair practices encourage innovation and the creation of new products and services. A robust governance framework is, however, needed to support an orderly expansion of the digital ecosystem and address potential anti-competitive harm.
>
> The current ex-post framework under the Competition Act, 2002 was conceived with a view to ensuring contestability and fairness in traditional markets, at a time when it was not possible to imagine the current scale of digitalisation. Certain aspects of the ex-post framework, including the time-consuming nature of enforcement proceedings, may not be appropriate for digital markets, given the unique characteristics of such markets. Recent times have also seen widespread stakeholder concerns about potential anti-competitive behaviour of large enterprises providing digital services.[5]

Interestingly, the principal competition law of India, the Competition Act 2002, has been comprehensively amended in April 2023[6], which attempts to meet the gaps in the enforcement of principal law relating to 'abuse of dominance' more cogently. The procedural or operational regulations of the newer amended provisions are currently being notified by the Competition Commission of India ('CCI') from time to time, ensuring smooth implementation of the amended law. The existing Competition Act 2002 is sector agnostic legislation. It empowers the CCI to investigate both traditional and non-traditional, that is, the digital enterprises as and when allegations have been made before it by aggrieved parties. Thus far, even Big Tech enterprises have repeatedly been investigated by the CCI along with its investigating wing, the office of the Director General ('DG'), and quite a few such adjudicatory actions are sub-judice, either before the Appellate Tribunal or before the CCI. It is noteworthy that some of the Big Tech enterprises challenged the investigating processes along with the jurisdiction of the CCI and the DG before the Constitutional Courts ('High Courts of India') in writ jurisdictions but failed to convince these higher courts, including the Supreme Court of India, in final appeals. Thus, despite being a sector agnostic authority, the CCI's jurisdiction to investigate Big Tech in allegations of abuse of dominance in digital markets has been settled at the highest level of the judicial hierarchy in India.

With the introduction of the Digital Competition Policy and the Draft Digital Competition Bill ('DCB'), the existing strong enforcement mandate of the CCI and its investigating wing may become far stronger than ever before against digital enterprises. However, it is reiterated that the Supreme Court of India has repeatedly confirmed the jurisdiction of the CCI on merits and points of law to investigate allegations of abuse of dominance against digital enterprises and all such decisions besides binding the CCI, bind all other inferior courts of India.

It is interesting to note that the Committee, besides other recommendations, has recommended two important aspects while issuing the Policy Document. First, it laid down a framework of 'enforcement' and second, it also suggested possible 'remedies'. These recommendations are shared verbatim below.

> ***Enforcement***
> The Committee recommends borrowing the procedural framework from the Competition Act for the purposes of the Draft Digital Competition Bill (DCB), given that the enforcement of both these laws is to be entrusted with the CCI. The Committee also strongly advises that the CCI must strengthen the capacity of its Digital Markets and Data Unit with experts from the field of technology to keep pace with the rapid evolution of digital markets. Further, the Committee recommends instituting a separate bench within the National Company Law Appellate Tribunal to ensure timely disposal of appeals filed against the CCI's orders, particularly those relating to digital markets.
>
> ***Remedies***
> The Committee proposes that a monetary penalty for noncompliance with ex-ante

obligations is restricted to a maximum of 10% of the global turnover of the Systemically Significant Digital Enterprises ('SSDE') in line with the penalty regime under the Competition Act. Additionally, in cases where the SSDE is part of a group of enterprises, the Committee recommends that the 'global turnover' cap is calculated in relation to the turnover of the entire group. The Committee further recommends that the precise quantum of penalty be determined by the CCI with due regard to the penalty guidelines under the Draft DCB. In addition to the above, separate penalties have been provided for contraventions resulting from incorrect reporting and vicarious liability of key managerial persons.

The DCB of India is a subset of the existing Competition Act of India. The DCB limits the CCI's mandate to adjudicate and regulate only dominant Big Tech Companies including enterprises of Indian origin breaching the thresholds *via* the *per se illegal ex-ante* route, unlike abuse of dominance based on the rule of reason per the principal Competition Act. It does not, therefore, confer any mandate on the CCI to adjudicate or regulate collusive conduct of competing Big Tech enterprises, more specifically antitrust breaches relating to cartels and bid rigging.

Conclusion

We need to wait and watch the unfolding of these newer regulatory challenges intended to be implemented against dominant Big Tech enterprises. Last but not least, the end consumers who, to my mind, may have benefitted from digital ecosystems thus far but may not have been seriously consulted while drafting the Digital Competition Bill, may like to share their views if the opportunity is given to them. If one were to conduct a survey of the ordinary prudently informed Indian citizen, including perhaps those of any other nations, and raise a single question as to whether they are aware of digital competition law, I am sure that nearly a majority, which could go as high as 75 per cent, may feign ignorance about this hot topic engaging the attention of all stakeholders except consumers. That is precisely the bottom line and takeaway of this article. It is too early to either support the Draft Digital Competition Bill of India or discard the same forthwith without assessing its merits and demerits. There are substantial overlaps with other legislation which may impact enforcement of the proposed DCB, hence the competition authority must upgrade its domain knowledge as also recommended by the high-powered Committee. The laws relating to information technology, data privacy and intellectual property of India are some of the laws which may need to be looked into carefully to ensure harmony among independent enforcing authorities and to minimise the waiting periods in concluding important quasi-judicial decisions.

Endnotes

[1] An analysis to determine if an agreement possibly restricts competition through examination of the agreement's positive and negative antitrust effects.

[2] Rules used to find that conduct is lawful (as opposed to presumptions of illegality) in certain situations and if certain conditions are met.

[3] The DMA entered into force on 1 November 2022, the Rules started applying on 2 May 2023, thresholds were notified on 3 July 2023, designation of gatekeepers was announced on 6 September 2023 and obligations of enterprises commenced in March 2024.

[4] 6 February 2023.

[5] Extract from the Preface of the Policy document of Digital Competition Law.

[6] Obtained assent of the President of India on 11 April 2023.

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