‘Re-imagining Competition Policy and Law in the Era of Disruptions’

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Key Note Address
BY

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1. It gives me great pleasure to join you all in commemorating the World Competition Day. I take this opportunity to recognise the efforts put in by CUTS in promoting this idea of instituting a special day in the service of Competition. Competition is a fundamental tenet of well-functioning markets and increasingly the political economy is recognising the centrality of well-functioning markets in the entire governance paradigm. Yet, as you are aware, competition is not automatic, and can be harmed by anti-competitive conduct of firms as also by restrictive government policies at all levels of government including central, state and municipal. As Nobel Laureate Joseph E. Stiglitz rightly said:

> *“A strong Competition Policy is not just a luxury to be enjoyed by rich countries, but a real necessity for those striving to create democratic market economies”.*

Over the last two decades, competition law has been embraced across the globe. About 130 countries, both developed and

developing, have instituted competition law and competition authorities.

2. One of the most prominent issues in the competition policy discourse today is the rapid change in markets, led by technology, innovation and disruptions. I am glad that you have brought this extremely relevant and important subject onto the centre stage of discussion on the World Competition Day this year.

3. Friends, disruptive innovation is not a new phenomenon. However, in the recent times, disruption has been precipitated by increasingly accessible information technology and lowered entry barriers. Disruptive innovation is now a very common market strategy. It is an alternative path for entering the market rather than engaging in frontal competition with incumbents, where they would be disadvantaged due to lack of economies of scale. The current wave of digital disruption involves a confluence of enabling 'high technologies' that have been co-ordinated in such a way that they have facilitated low cost commercial exploitation via simplified application softwares.

4. In addition to the introduction of new products and business models, disruptive innovation seeks to remove inefficient intermediaries, increases consumer choice, forces incumbents to improve in order to compete effectively with the "disruption" and reduces information asymmetry – all of which spur innovation, contribute to enhanced efficiencies and greater competition in the market.

5. In an age of relentless disruptions caused by technology and innovation, India too has witnessed the emergence of a new class of entrepreneurs and innovators, who are revolutionizing industries and business landscapes piggybacking on the new technologies and the opportunities they offer. While there is a general acceptance of the immense benefits that innovative products and business models bring to the consumer, the consequent elbowing out of traditional players has sometimes led to kneejerk reactions by the regulators in an attempt to create a “level playing field”.

6. In some sectors, where traditional business models which have been dislodged by the emergence of radical innovations, it has been seen that the traditional players have resorted to lobbying with domestic regulators for adoption of regulations that can delay or even block such innovations. In some cases the traditional businesses have taken matters to court on some pretext or the other in the hope of seeking favourable decisions protecting their businesses from the onslaught of the digital economy products and services. There is a view that it was precisely the ‘soft’ and in some cases an absent, regulatory regime that allowed these technologies to flourish.

7. Now, the question that arises is, what should be the role of antitrust in the markets, which are primarily driven by innovation? Does dealing with disruptions and innovation-led markets warrant a different or modified antitrust approach?

8. The key objective of competition policy is to encourage an atmosphere of competition in markets and thereby enhance efficiency in industries. Disruptive innovation fulfils this objective by encouraging both static and dynamic efficiency. In terms of static efficiency, disruptive innovation can improve productive efficiency, by increasing the utility of otherwise unutilized resources. For instance, the emergence of app-based taxis has tapped on a previously un-marketed pool of commuters. This it has done by linking up producers and consumers directly. On the other hand, disruptive innovation can sustain a rapid pace of innovation leading to long-term dynamic efficiency.

9. So, the challenge for the competition regulators is to ensure that markets remain open to innovative entrants and to analyse competition issues keeping in view the specificities of the markets in question. A whole gamut of new and interesting, as well as positive and normative questions are arising before us while creating a comprehensive and sound analytical framework for 'innovation-driven' markets.

10. Firstly, the issue of delineation of **relevant markets**. Disruptive innovation today hails from synergizing the features of existing technologies that are valued by consumers to produce new self-complementing products or by leveraging upon the 'internet of things', linking up existing technologies to promote a more

integrated and unique customer experience, effectively transcending market boundaries.

As market boundaries get diffused and adjacent markets are captured, increasingly we see that a given market at one point in time mutates into another through the exploitation of complementarities. For instance who could visualise that a search engine would metamorphose into a driverless car.

11. The standard Small but Significant Non Transitory Increase in Price (SSNIP) approach to market definition may not work in these contexts.

12. Here is the issue of two sided and multisided markets or platform markets. Many of these markets are characterized by the presence of two distinct sides interacting through a common platform. Platforms often treat one side as a profit center and the other side is subsidised. In cases of online search engines, social networks etc. users on this other side don't pay any monetary consideration at all. One question that is put forward is - whether one can define an antitrust market and determine market power in the provision of these so-called "free services". Both of these trends mean that the rigid application of 'rules of thumb' for market definition may not work in this case.

13. Secondly, rapid change may sometimes make the existence of **market power** in these markets fleeting or transient. In highly innovative markets, it is relatively common that, during the early stages of a new industry, successful firms have high market shares

during a period of time, only to be displaced by a rival that makes another disruptive innovation. Over-reliance on market shares as proxy for competition will generally be ineffective in such situations. I must mention here that the Competition Act, 2002 provides a holistic framework for determination of dominant position. It is not a market-share based static view that guides the assessment of dominance. Other factors such as entry barriers, stage of evolution of the market, competitors' strength and other specificities of the market in question are taken into account, while arriving at a conclusive view on dominance. In our recent order in the radio-taxi market, the Commission has observed on the same lines. For the sake of saving time I am not quoting it here. and I quote,

> *"durable market share can be an important indicator for lack of competitive constraints and accordingly for dominance. However, that does not imply that uniform market share thresholds and a standard time-period to assess durability of market share can be applied in the same manner to all businesses/sectors. The variance across industries in terms of their inherent characteristics, such as nature of competition, technology and innovation dimensions, calls for a case-by-case assessment of market share and its implications for dominance with reference to the totality of the market dynamics and competitive strategies of firms. Moreover, market share is but one of the indicators enshrined in Section 19(4) of the Act for assessing dominance, and the same cannot be seen in isolation to give a conclusive finding. Particularly, in case of new economy/hi-tech markets, high market shares, in the early years*

of introduction of a new technology, may turn out to be ephemeral."

The Commission as a Collegium is expected to decide on the dominance of an enterprise based on any or all the factors in section 19(4) of the Act.

14. Moreover, market power or dominance *per se* is not an antitrust concern even in technology and innovation-driven markets. It is the **conduct** of the innovating companies that needs to be competition compliant. It is when a dominant incumbent firm uses its market power to stifle innovation or to retard technological progress, when innovators get together to thwart competing technology, when mergers between innovators adversely affect incentives to innovate, it is then that competition law steps in.

15. The other important facet of innovation markets is that long-run industry performance is likely to be determined by the pace and strength of innovation than by short-run pricing policies. Antitrust enforcement goals in these markets accordingly must be to strike an appropriate balance between static efficiencies and the longer-term gains that arise from innovation. Right from evaluation of market power in a dynamic context under the threat of potential competition to the assessment of dynamic efficiencies – the competition authorities need to embed the dynamic perspective in their analysis. Consistent application of this approach across different areas of antitrust is intellectually demanding and antitrust scholarship in this area is still evolving.

16. Price is the determining factor in predation as defined in the relevant CCI Regulation. With the arrival of innovation and disruption the issue of Investment based predation as different from Price based predation has been highlighted, and with reason. Pricing of investment could have effects in the market more or less similar to pricing of the end product. This is something that deserves attention in the coming days.

17. I will now touch upon **merger regulation**. Possible detriment to innovation is becoming an increasing concern in merger review cases. There has been a rapid ascent of “innovation effects” as a factor in merger challenges in recent times. The Competition Act in section 20(4)(l) includes “nature and extent of innovation” as one of the factors for deciding on Appreciable Adverse Effect on Competition (AAEC) in Indian markets. This enables the Commission to treat technology and disruptive sectors differentially. If the merging firms are each other’s next best substitute or the merger is likely to affect choice for consumers by eliminating an independent innovator, it may be challenged by the competition authority.

18. A specific area of concern in mergers in the innovation markets, is the non-compete clause, whereby companies formally agree not to compete in the relevant market. This may affect not only the present competition but future innovation as well. CCI has generally taken the position that non-compete obligations should cover only products, either being manufactured or in the process of development, and be reasonable in respect of duration, normally 3

years. The objective is to ensure that the mergers do not adversely affect innovation and introduction of better or new products.

19. One issue that is often raised is whether the traditional antitrust toolkit is adequate to meet the analytical requirements of the new economy markets. I am personally of the view that the Competition Act, 2002 has substantial flexibility to account for these new dimensions in antitrust cases. It provides the flexibility to attune the case analyses to the sector, and the issue at hand, within the broad framework prescribed. The need of the hour is to understand these markets with their complexities and assess the requirement and kinds of intervention required. Fortunately, the new economics of multisided platforms provides insights into strategies these firms may engage in as well as cautioning against the rote application of antitrust analysis designed for single-sided firms to multisided ones.

20. I would like to mention in particular some of the provisions of Competition Act, 2002 which have major implications for technology industries and disruption markets. There are:

- The *Proviso* to section 3(3) which provides exemption from *presumption* of anti-competitiveness to efficiency enhancing joint ventures;
- Section 4(2)(b)(ii) which considers 'limiting' or 'restricting' technical or scientific development relating to goods or services to the prejudice of consumers, as abuse of dominant position.
- Section 19(3)(e) and 19(3)(f) related to improvement in production or distribution of goods or provision of services

and promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services respectively being treated as favourable factors, while assessing AAEC in the context of agreements under section 3 of the Act.

- Section 20(l) where ‘nature and extent of Innovation’ is one of the factors while determining if a combination has AAEC.

21. The world over the potential of anticompetitive harm of disruptive technologies is still being understood. Big data, AI and data-crunching algorithms all pose antitrust concerns. When computer algorithms and machines take over the role of market players, the spectrum of possible infringements may go beyond traditional collusion. Computers may limit competition not only through agreement or concerted practice, but also through more subtle means. Further, finding ways to prevent collusion between self-learning algorithms might be one of the biggest challenges that competition law enforcers have faced till date. This is the latest frontier of competition law—the cutting edge, where laws, for the most part, are genuinely struggling to keep pace with developments in technology. Where regulators have no idea what has to be done to make human-centric antitrust laws apply effectively to bot-intermediated transactions. The pace of technological development is always likely to outstrip the pace of legislative change. Therefore, competition law may not be the only solution.

22. A competition authority has to be constantly up-dated about the intellectual discourse on these and build investigative capacity to find supporting evidence for the purported theory of harm. Competition policy should 'march to the evidence, not to the slogans' as has rightly been stated. This requires us to put in tremendous efforts and build capabilities, whilst the theories and the counterfactuals keep on building up.

23. One of the prominent ways in which the disruptive firms as they settle down maintain their market power is through vertical restraints. Thus the importance of vertical restraints in anti-trust is on the rise. Keeping this also in view, the Commission has recently started the process of empanelling research institutions from different regions of India to be in readiness to help support the Commission in economic analysis, including analysis of appreciable adverse effects when it concerns 'rule of reason' analysis as is the case with section 3(4) related to vertical agreements. They will be familiarised and trained as regards the law and the relevant economic analysis needed. We are also awaiting the Apex court decision as regards a COMPAT ruling in 'Fast Way Transmission Private Ltd and Others' that denial of market access in any manner (as provided in section 4(2)(c)) of the Act has to be vis-à-vis competitors, i.e. horizontally and not vertically.

24. Being the World Competition day and speaking to the Competition "fraternity" or the 'Friends of Competition' let me conclude with some ruminations on the duty on each one of us in promoting a culture of competition in India.

25. Many developments are occurring in a fast changing economy and an engaged civil society has to be vigilant that the principles of competition are not overlooked or neglected in the desire to reduce regulatory burden. Increased notification thresholds for mergers has lessened the regulatory burden for firms that have to grow in order to be globally competitive. But since the thresholds are applied across sectors, the technology sectors where the asset base of the firms is low falls between the cracks, vesting a lot of market power in already dominant firms that are expanding across verticals. Even before the enhancement of notification thresholds, mergers like that of Face Book and WhatsApp escaped scrutiny of CCI due to the nature of the industry having very low asset base.

26. Another area of concern in these very sectors is common ownership by Equity Funds and institutional investors in competing firms and to some extent investment predation that may cause competitive harm. Agreed, there is a trade-off between regulatory burden and ease of doing business; however there needs to be a balance struck between pro-business and pro-competition policies.

27. As an engaged Civil Society, CUTS has for long been providing regular amicus briefs, has been carrying out research, and has also been regularly publishing research outputs to promote a vigorous environment for competition policy and law in India. And it is important that none of the important developments affecting competition law and policy are lost sight of and gone un-noticed.

28. It is heartening to see a number of ‘Friends of Competition’ present here on this World Competition Day. We have to be ever vigilant, and must endeavour to protect this precious treasure called ‘competition’ in Indian markets.

With these words, I wish the participants all the very best for their future endeavours in the service of competition.

THANK YOU