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On

Competition Law & Tech Sector

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Keynote Address

BY

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1. It is a pleasure to be here for the 5th International Conference on **"Competition Law & Tech Sector"**, organised by the ASSOCHAM. As one of the oldest and largest business organizations in India, ASSOCHAM has played a catalytic role not only in shaping the industrial landscape of the country but also in providing a platform for regular policy-dialogue between government and business on a myriad of issues of importance to the industry and economy. It is indeed gratifying to see that you are taking consistent steps and initiatives over the years to bring competition law onto the centre-stage of discussions, this Conference being one of them. At the outset, I compliment ASSOCHAM, for holding this Conference, on a subject of utmost relevance, for the fifth consecutive time.

2. Ladies and gentlemen, as you are aware, India will complete nine years of its competition law enforcement regime this year. In these years, it has been the endeavour of the Competition Commission of India (CCI), the statutory competition authority of the country, to build a culture of competition in markets through effective enforcement of the Competition Act, 2002 and proactive outreach. As you will all agree, a free market only thrives when there is competition and fair play. The Competition Act promotes competition and prevents entrenchment and exploitation of market power by one or a handful of firms by proscribing anti-competitive agreements, abuse of dominance and anti-competitive M&As, across sectors. The core principle is to preserve consumer welfare in terms of price, quality, choice and innovation.

3. Now, what does it mean for the technology sector? Why the tech sector merits a special place in the competition/antitrust discourse? There are some well-known reasons. Certain features of technology industries set them apart from traditional markets. First, technology markets are dynamic and fast moving, driven by rapid innovation. The constant and rapid pace of technological change may impede creation of entrenched positions of market power. Market power of a firm in these markets may turn out to be ephemeral. Competition is *for* the market - disruptive innovations introduce new business

models in tech markets to displace incumbents, as opposed to competition *in* the market. Innovation competition, rather than static price competition, is believed to govern the operation of these markets. In other words, long-run industry performance is likely to be determined by the pace and strength of innovation than by short-run pricing policies.

4. In this backdrop, what competition law enforcement strives to achieve in these markets is to strike a balance between short-term static efficiencies and the longer-term gains that arise from innovation. Assessing tech sector issues, as a competition authority, requires an understanding of the underlying technology and a close following of market developments. The competition rules stay the same. However, the law's engagement with the tech markets is based on an intellectual foundation of how competition works in these markets. The question is not whether antitrust law is relevant to technology markets, but whether the application of the law appropriately accounts for the market realities and specificities of the sector. The need of the hour is to understand these markets with their complexities and assess the requirement and kinds of intervention required. Today I will highlight **five** key issues that lie at the interface of competition law and tech markets.

5. **First, assessment of market power**. As I mentioned earlier, rapid change may sometimes make the existence of market power in tech markets fleeting. In highly innovative markets, it is quite common that, during the early stages of a new industry, successful firms have high market shares for a period, only to be displaced by a rival that makes a disruptive innovation. You will all agree that the velocity of technological obsolescence has been accelerating dramatically, leading to shorter lifecycles of innovation, from few years earlier to few months now in certain cases. We have witnessed rapid evolution in computer operating systems, mobile technology, mobile applications. The movement that we are witnessing now from mobile to apps to artificial intelligence to virtual reality is also rather startling. So, when the circumstances fit, we must recognise that a firm does not have a position of dominance because its product is likely to be displaced, or rendered obsolete by technological innovation/entry. Nevertheless, there can be circumstances where there are potential positions of entrenched market power because for example, a network effect, by virtue of which the more users a platform or network has, the greater its value. The network effect can result in lock-in of such extent that severely limits the possibility of potential displacement of market power.

6. Technology markets are not a homogenous monolith. There are numerous relevant markets within this sector, each with specific competition dynamics. Further, 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. The standard SSNIP approach to market definition may not work in these contexts. The strength of network effects and accordingly the extent of lock-in for consumers varies from one market and one product to another. A one-size-fits-all approach does not work. A nuanced assessment, based on the facts of the case and the market and technology in question is the strategy that the CCI has adopted.

7. The Act is an enabler. It allows for such a case-by-case holistic analysis, providing the flexibility to attune the case analyses to the sector and the issue at hand within a broad framework prescribed. It is not a market-share based static view that guides the assessment of dominance. A whole host of other factors including entry barriers, competitors' strength, etc. are taken into account, in the determination of dominance. The beauty is that the Act, with so many factors, is forward looking. In our recent order in the app-based radio-taxi market in Bangalore, the Commission did not find dominance of a player despite it having the highest market share.

8. While on this, I must say that the internet-based tech services are throwing up certain novel issues as far as market power is concerned. India is now among the top five countries with over 450 million Internet users. This rapid digitalisation has led to the creation of new online services that are changing the way people search for information, interact with each other, pay for things and consume content. What we also notice is the horizontal integration within online markets leading to creation of large online 'platforms'. Users are not paying money to these platforms, they are paying an implicit price in form of personal data. This has spurred a discussion on whether data can be viewed as an asset and as a source of market power. Business models based on vast collection and processing of big data in nearly real-time are enabling players in the digital space to offer a wide-range of innovative and customised services. On the other hand, what is yet to unfold is whether data-driven network effects can be a source of market power and create a tendency for markets to tip. As the breadth and quality of data increase over the next years, the positive feedback loop between machine learning and big data will only accelerate.

9. In any case, we do not condemn the mere fact that one firm has entrenched market power in a particular industry. To take such a stance would damage incentives to innovate, and would be a denial of the realities of market preferences. Nevertheless, the finding that entrenched market power can exist even in tech sector means that the way that market power is used would be subject to competition scrutiny.

10. This takes me to the **second issue** that I would like to touch upon - the competition concerns that emanate from the conduct of online players in the form of **online vertical restraints.** As we know, online platforms improve information flows by bringing together information from different suppliers and product offerings. As customers are able to more quickly and more efficiently access and process information, their search cost goes down. These benefits notwithstanding, some kinds of vertical restraints imposed by the platforms on suppliers can raise specific competition concerns.

11. For example, the "across platforms parity" agreements (APPAs) or "retail most favoured nation" clause (retail MFN). These are agreements between a seller and an online platform where the seller undertakes not to charge on that platform a price that is higher than the price that he charges on other platforms. These

provisions seek to provide assurance to the downstream platform that it and its customers receive goods or services from the supplier, at terms that are at least as favourable as those offered to other buyers. The competition problems that this may cause are softening of competition and reduced incentives for on-line retailers to lower their commission rates, because they get no benefit in competition terms as a result. Where several on-line retailers have a MFN clause with the same supplier, they are in a sense fixing the price between retailers.

12. There's a lively debate going on, in the academic and the enforcement circles. The question is under what circumstances APPA's are harmful or beneficial. We see that APPA's have the potential to increase prices across the market. However, APPA's may also generate efficiencies, such as solving a free rider problem. Therefore, we would analyse APPA's case-by-case. There may, in certain instances, be some objective need to impose such restrictions. Platform invests in brand, traffic and features that enhance user experience. Users employ platform to learn and search. Then the provider and user can free ride by booking off the platform. In other instances, existing offline retailers may force producers to impose vertical restraints just to shield themselves from intense price competition from new online retailers, which may be harmful to consumers. It thus becomes essential

to weigh the anti-competitive effects against the pro-competitive rationale in light of the facts and circumstances of the case under scrutiny. Our strategy seeks to ensure that enterprises and consumers benefit from obvious efficiencies related to vertical agreements, but that they do not suffer from anti-competitive effects.

13. On the horizontal level, the role of **algorithms and artificial intelligence in collusion** is an area that is increasingly being discussed in academic and policy forums. As more online players use AI and pricing algorithms, will it create new ways to collude? How will antitrust law work when decisions are no longer made by humans but instead by machines? Antitrust's archetypal villains—price-fixing bosses in a smoke-filled room—may be a thing of the past. One school of thought propounds that as big data analytics increases the speed of communicating price changes, detecting any cheating or deviations and punishing such deviations, this can provide new and enhanced means to foster collusion. *The academic literature suggests four possible scenarios of algorithm-induced collusion: a)* ***Messenger*** *, where humans use computers and the IT environment to better execute cartels, b)* ***Hub and Spoke****, where a single algorithm is used to determine price by numerous users, c)* ***The Predictable Agent,*** *where pricing algorithms act*

as predictable agents and continually adjust to each other's prices and market, i.e. algorithm-enhanced conscious parallelism and d) ***Digital eye,*** *where AI operating in enhanced market transparency leads to an anti-competitive outcome.* Finding ways to prevent collusion between self-learning algorithms might be one of the biggest challenges that competition law enforcers have ever faced. I am sure in the Panel that you have on this subject, the minutiae of these issues will be discussed. At the CCI, we are constantly striving to be abreast with the intellectual discourse and attune our investigative capacity and tools to unravel evidence to these purported theories.

14. The **fourth issue** cuts across all technology industries - **Intellectual Property Rights (IPR).** The technology industries heavily rely on intellectual property, and access to standards and interoperability are crucial. Research and development may involve substantial risk and resources and therefore the need for protection of IPR is paramount in the innovation economy. IPR awards exclusive rights as a reward for innovation. However, simply holding IPR cannot absolve an enterprise from its responsibility not to use it as anti-competitive means. The restrictions imposed in an IPR license must not go beyond the scope of the IPR to exploit users or exclude rivals. It is important to curb such anti-competitive use of IPRs

since it can raise price in the short run and more importantly hinder follow-on innovation in the long-run.

15. The Indian competition law takes cognizance of intellectual property rights (IPRs) and provides protection to their holders under Section 3 relating to anti-competitive agreements. It allows IPR holders to impose reasonable conditions on their licensees in exercise of their IPRs. However, this protection is not absolute. If the conditions imposed are not reasonable and if the terms of the agreements adversely affect competition in the market, the Commission could investigate the license terms. Thus, ownership of IPRs does not provide a shield for abusing the same.

16. Many potential competition issues surround the standardisation process. Standards create economies of scale, scope, ensure interoperability and therefore are generally beneficial for technology markets. At the same time ownership of IPRs essential to standards confer market power, which can be abused exploitatively. FRAND commitments, which are designed to ensure that standard-essential patents are accessible to the users on Fair, Reasonable and Non-discriminatory terms assume particular significance in this context. Determination of such terms leaves a vast scope for disagreement between the licensor and licensees, often causing antitrust

litigations. A couple of these cases have come to the Commission and are currently under investigation.

17. My last point relates to **mergers**. Possible detriment to innovation is becoming an increasing concern in merger review cases in technology markets. There has been a rapid ascent of "innovation effects" as a factor in merger challenges in matured jurisdictions. If the merging firms are each other's next best substitute or the merger is likely to affect diversity by eliminating an independent innovator, it may be challenged by the competition authority.

18. Further, the traditional asset/turnover criteria may fail to capture potentially anti-competitive transactions in tech sector. An agency's authority to review and challenge proposed transactions is limited to those transactions subject to mandatory notification requirements. In technology sector, some transactions may fall below turnover-based thresholds because the target's products are offered for free, or have yet to come to market, and generate little turnover. In such instances, the target's value may not best be correlated to its sales. The value of the target's sales is a rather poor indicator of the merger's significance for competition. Thus, asset/turnover-based notification thresholds may have a 'blind spot', if relied on solely.

19. In India, the 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 sector wherein the asset base of the firms is low falls between the cracks, vesting a lot of power in already dominant firms that are expanding across verticals. For the merger control regime in India to achieve its intended goals across sectors, we may have to revisit the desirability of uniform thresholds across sectors and also the need to include alternative notification criteria such as 'size of transaction', as available in some mature jurisdictions, which better reflects the potential of a transaction to impact competition in the new economy sectors.

20. Ladies and Gentlemen, India is one of the largest and fastest growing economies in the world with a rapidly developing technology sector. The potential benefit of using technology and innovation to reach India's consumers is enormous. In recent years, we have seen both domestic and international firms take technology and e-commerce as the path for entering Indian markets to provide new products and services. This is a welcome development. The task before the competition authority is to ensure that the conduct of these players are

competition compliant, the playing fields are level and the markets are open to new innovative entrants. This is a tall order, which requires fusion of the efforts of the regulator and the regulated. Exchanges like today can help us all understand these markets better, revisit the issues from multiple perspectives and find the right balance in the antitrust approach to the technology sector.

21. With these words, I wish the Conference all success.

Thank you.