

**Speech of Chairperson, CCI,
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Ladies & Gentlemen

Good morning to all of you!

It gives me immense pleasure to be here this morning and speak to this august audience. I am glad that PHD Chamber of Commerce and Industry, provides this platform for an open engagement on pertinent issues of the industry, interface with competition law. This Conference has set an agenda for 2 very important and topical issues that I will address sequentially. First, I will briefly cover IPR and competition law interface and then talk about competition law and e commerce. The latter has been, on the top of our agenda and given the importance of this sunrise sector to the economy, we have recently released a market study with key findings and observations.

1. The fundamental goal of competition law is to protect the process of competition in markets for consumer welfare. In today's knowledge-economy, innovation in products, processes and business models is central to the competitive process. Thus, competition law attempts to preserve an economic environment in which innovation can flourish.

When a dominant firm uses its market power to stifle innovation or to retard technological progress, when entities with significant market power get together to thwart competing innovations, when mergers between innovators adversely affect incentives to innovate, then the competition law steps in.

2. IPR, on the other hand, creates the economic incentive to invest in innovation and R&D which is often a long and lonely march of an idea from conception to commercialisation. The fear of misappropriation by rivals curtails innovation incentives. IPR, by guaranteeing 'appropriability', creates the right incentive structure.

3. Competition law and IP law both are thus considered integral to the institutional framework that undergirds the ecosystem that encourages innovation. They both serve the goal of promoting innovation - IPR by providing *ex ante* incentive to innovate and competition law by curbing anticompetitive use of IPRs *ex-post*. In the most innovative nations, strong IP protection has taken place in the presence of a well-functioning competition law regime.

4. Having said that, exercise of IPRs in certain circumstances may raise competition concerns. Owning IPR cannot absolve an enterprise from its responsibility of not to use it as an anti-competitive means to the detriment of consumers.

5. The Competition Commission of India has generally been of the view that exercise of IPR will require imposition of certain restrictions on a licensee. The competition law in India recognises this under section 3(5) (i) of the Act and allows enterprises to impose reasonable conditions

which may be necessary for protection of IP rights conferred upon them by various Indian IP statutes. However, the scope of this provision is interpreted considering the facts and circumstances of each case in a 'rule of reason' framework which is guided by factors laid down in the Act.

6. Let me take this opportunity to discuss briefly some issues which have been at the intersection of IPR and competition, across the world and in India.

7. **First, terms of IP licensing.** Licensing helps the IP owner commercialise its IP. It allows access to the IP protected technology to the follow-on innovators as also to the players engaged in development of complementary technologies. In certain instances, conditions imposed by the IP owner on the licence can restrict competition.

8. It is essentially, a reasonability test that competition authorities undertake to assess any impugned license term. A case-by-case approach is followed. Some of the issues that have warranted antitrust scrutiny are -

- Requirement to commit a long-term contract such that alternative arrangements with rival technology licensors would become unfeasible
- Requiring a licensee to agree to get additional technology or products from the patent holder that are not related to the licensed patents
- Territorial and field-of-use restrictions
- Outright refusal to license

- Grantbacks, i.e. requirement to give back to the licensor any improvement made during the licencing period to whatever was licenced. The restrictions are found to be in contravention of competition law only when they are beyond the scope of IPR or their anti-competitive effects outweigh their efficiency benefits.

- For instance, in the **Automobile** case, i.e. **Shamsher Kataria v. Honda Siel Cars India Ltd. & ors.**, the Original Equipment Manufacturers (OEMs) sought exemption under section 3(5) of the Act stating that selling of spare parts in the open market may compromise their IPR with respect to design of spare parts.

- The Commission held that mere sale of spare parts, which are manufactured end products, in the open market outside the authorized distributors does not compromise upon the IPRs held by the OEMs.

- On the other hand, in the case of **K Sera Sera vs Digital Cinema Initiatives**, the allegation was that Digital Cinema, a joint venture of Disney, Fox, Sony, Paramount, Warner Brothers and Universal Studios, was not allowing release of the Hollywood movies in digital form in theatres in India which did not have Digital Cinema Initiative-compliant servers and projectors and this restriction was allegedly anti-competitive. The Commission observed that the requirement of using DCI-compliant equipment was for protecting the movie content from piracy and hence not anti-competitive.

9. Here I may also mention that, ownership of IPR does not *ipso facto* confer a dominant position. There can be competing IP- protected

technologies in a relevant market. However, an IP owner who is dominant in a relevant market cannot act in an abusive manner – either exclusionary and/or exploitative. This is prohibited under the Act.

○ For instance, **the Department of Agriculture Cooperation and Farmers Welfare ('MOA&FW')** filed a case against **Mahyco Monsanto Biotech (India) Limited** for abusing its dominant position while Licensing of Bt cotton technology. The case is under consideration of the Commission.

10. IPR has also been an element in merger review where **mergers** lead to a concentration of IP assets with the merged entity. If the assets are complementary, there may be efficiencies attached to the merger. However, that might reduce the merged entity's incentive to enter into licensing contracts with third parties. Thus, efficiency effects of such mergers are weighed against the anticompetitive effects arising from exclusionary conduct. The Bayer-Monsanto merger was approved by the Commission imposing certain conditions and one of them was:-

- The combined entity will maintain a policy of broad-based non-exclusive licensing of GM and non-GM traits currently commercialised in India or to be introduced by the combined entity in the future, on fair, reasonable and non-discriminatory basis.

11. Let me also touch upon the issue of **standardisation**. Many potential competition issues surround the standardisation process. Standards create economies of scale, scope, ensure interoperability and therefore are generally beneficial for technology markets.

12. However, ownership of IPRs essential to standards, which we commonly call the **standard essential patents**, confer market power, which can be abused exploitatively. FRAND commitments, which 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. In three separate cases before CCI, Micromax, Intex and Best IT alleged that Ericsson abused its dominant position in Standard Essential Patents for 2G, 3G and 4G technologies. They alleged that Ericsson had imposed excessive royalties, breached F/RAND commitments, tied non-essential patents with SEPs and sought an injunction against a willing licensee.

13. The Competition Act, 2002 has an enabling provision for mutual consultation between authorities. In cases relating to IPR, the CCI may make reference to the concerned IP authority to obtain and consider its opinion before issuing an order. Concomitantly, the IP authorities may also seek CCI's opinion during the course of their proceedings.

14. The Commission intends to intervene only where it is deemed necessary to ensure that intellectual property is not misused for anti-competitive purposes to the detriment of consumers.

15. I am happy to see that you have a session focusing on e-commerce. During the last few years, **e-commerce activities have been growing across the globe** both on the demand and supply sides, with increasing number of individuals transacting online, as well as steadily growing number of businesses receiving orders online. E-commerce in India too

has grown at a fast pace in the past few years and is slated to be on a high growth trajectory in the coming years as well. Aided by the increase in mobile and internet penetration, fall in telecom tariffs, emergence of varied payment options, e-commerce in India is expected to reach US\$ 200 billion by 2026 from US\$ 38.5 billion in 2017.¹

16. The growth of **e-commerce has the potential to increase competition**, to bring about information transparency, to enhance consumer choice and to prompt and facilitate innovation in business models. At the same time, like any other market, digital markets are not impervious to anti-competitive conduct. While the competition law cannot and should not try and upend the economics that drive these markets, timely detection and appropriate intervention to correct anti-competitive practices is of key importance in these markets so that the markets remain contestable.

17. With a view to better understand the functioning of e-commerce in India and its implications for markets and competition, the Competition Commission of India conducted a **market study** in the e-commerce sector recently. The objective was to engage with industry and ascertain the Commission's enforcement and advocacy priorities in relation to e-commerce, based on a greater clarity on the market developments and emerging competition-barriers, if any. **The study findings and the Commission's observations on the key competition issues that have emerged from the study have been released recently.**

18. The study confirms that **online commerce is gaining importance**. Online commerce, as the study shows, has increased price transparency

¹ <https://www.ibef.org/industry/ecommerce.aspx>

and price competition. The search and compare functionalities of online platforms have lowered search cost for consumers and have provided them with a wide array of alternatives to choose from. For businesses, e-commerce has helped expand market participation by aiding innovative business models. The competition issues that have come up in the study include the **alleged lack of platform neutrality, unfair platform-to-business contract terms, exclusive contracts between online marketplace platforms and sellers/service providers, platform price parity restrictions and the issue of deep discounts.**

19. Many of these issues are suitable to be examined by the Commission on a **case-by-case basis**, and the likely effect of these conducts on competition will depend *inter alia* on the nature of the market that the platform operates in, market power of the platform, i.e. the competitive constraints the platform faces, and any pro-competitive rationale justifying such conduct. Assessment of such clauses will have to be context-specific so as to account for their business rationale alongside their potential competition-reducing effects. The CCI has dealt with a number of cases in the digital space including in the e-commerce sector. The Commission in these cases has adopted a **nuanced approach** by taking into account the competition dynamics of each market. Through its decisions, it has time and again emphasized that technology markets cannot be seen as a homogenous monolith but instead each market and case has to be examined on its own merits.

20. The Market Study has given us sufficient understanding and helped us gather useful insights and information on the key features of e-commerce in India, the different business models of e-commerce players, and the various aspects of commercial arrangements between market

participants involved in e-commerce. The insights gained from the study will inform antitrust enforcement in these markets. Nevertheless, the **bargaining power imbalance and information asymmetry between platforms and their business users** are at the core of many issues that have come up in the market study. The report enumerates certain areas for self-regulation by the e-commerce marketplace platforms, **such as search ranking criteria, collection, use & sharing of data, user review and rating mechanism, revision in contract terms and discount policy** with a view to reduce information asymmetry, promote competition on the merits and to foster a sustainable e-commerce ecosystem in India. Thus, the Commission under its advocacy mandate has urged the e-commerce platforms to improve transparency over certain areas of their functioning that will help in bridging information asymmetry, which in turn can positively influence competition not only on the platform but also between platforms. Also, in order to foster a sustainable e-commerce ecosystem in India all industry participants should deliberate on business practices that can make this happen.

21. The Indian e-commerce sector is the 9th largest in the world and by 2034 it would become the second largest, but for that to happen the Competition Commission and other regulators should work closely with the industry in order to be prepared to deal with challenges. Thus, forums such as these promoted by PHDCCI and the ensuing discussions will be extremely important for opening the channels of communication between the industry and regulator and will go a long way in harnessing the best outcomes for the industry and nation. With these words, I thank the organisers for giving me this opportunity. It will help us to initiate a dialogue with the e-commerce platforms and the business users so that legitimate business practices emerge that result in a win-win for all.

