

# SHAPING COMPETITION REGIME IN THE ERA OF DIGITISATION

## ADMINISTRATIVE STAFF COLLEGE OF INDIA PUBLIC LECTURE

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**Ashok Kumar Gupta**  
Chairperson, Competition Commission of India

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1. Respected Shri K Padmanabhaiah ji, Chairman, Court of Governors, Administrative Staff College of India, Prof. (Dr.) Nirmalya Bagchi, Director General (I/C), ladies and gentlemen.

Good Afternoon

2. It gives me immense pleasure to be in your midst today. At the outset, I must compliment ASCI, not only for their outstanding contribution to management education, but also for their continuous efforts to enrich academic and policy discourse by bringing forth issues that are of immediate and utmost relevance for policymakers and the industry. I take this opportunity to congratulate ASCI on their rich accomplishments. And thank you very much for giving me this opportunity to deliver this public lecture on **Shaping Competition Regime in the Era of Digitization**. I am informed that, in the past, several eminent speakers have delivered lectures as a part of this series; I am glad to be in such august company of previous speakers.

3. As the title of my lecture suggests, I propose to share my reflections on how the competition regime in India is evolving in the face of rapid digitization.

4. To set the context, let me begin by briefly touching upon the foundational aspects of the competition law regime in the country. The cornerstone of **economic reforms** in India, as you are aware, has been its

reliance on market mechanisms to facilitate economic growth. Markets, in a liberalized and globalized economic setting, were meant to serve as an essential economic institution that would let competitive forces drive private initiatives towards public ends. However, heedful of the structural infirmities that markets may suffer from and the strategic behavior of businesses that may not let free and fair competition take hold, a robust **regulatory architecture** had to be put in place to complement the liberalization process. Thus, sectors prone to market failure were undergirded with an *ex ante* regulatory framework to be implemented by sector regulators. On the other hand, to ensure markets across sectors remain competitive, bereft of anti-competitive conduct of enterprises, a competition legislation – the **Competition Act, 2002** was enacted.

5. The **Competition Commission of India** was established to enforce and administer the Act, which proscribes anti-competitive agreements and abuse of dominant position while providing for regulation of combinations – mergers, acquisitions and amalgamations. Through each one of these levers, the Commission strives to identify, deter and remedy market-distorting, competition-inhibiting business practices. The overarching objective is to keep markets in India competitive and contestable, where businesses can compete on merits, while consumers benefit from thriving supply-side competition.

6. To this audience I need not explain that ‘markets’ are not a static, monolithic construct. Markets evolve and markets differ – across industries and over time. New and different factors assume relevance in defining market landscapes. And thus, to remain effective, competition authorities, across jurisdictions, have always had to be dynamic and versatile in the application of their legislative instrument. Nevertheless, **digitization of markets** with the advent of the internet economy has been nothing less than transformational, bringing up a slew of novel questions and concerns for competition authorities.

7. Not very long ago, technology markets were thought to be driven by intense innovative rivalry, characterized by ‘creative destruction’. Market power of incumbents in these markets was considered transient, only to be replaced or dislodged by disruptive entrants – thereby calling for a light touch regulatory stance. However, digital markets with online **multi-sided platforms** at their fulcrum, evidently, have defied this narrative. Far from being self-correcting, digital markets appear to have intrinsic features that help **entrench market power**. While today’s leading digital tech giants themselves disrupted *status quo* with their entry, they went on to attain market positions that now seem unshakable.

8. One distinct characteristic that contributes to durable market power and high market concentration in digital markets is ‘**network effects**’. Users of social media platforms, or consumer communication platforms, tend to be where the crowd is. Regardless of any new and valuable feature that a fledgling platform might have, users would like to be on the one, which has their friends and family. This is known as direct network externality, which erects an intrinsic entry barrier not easy to surmount. Likewise, in e-commerce, most sellers would list their products on platforms, which connect them to maximum number of buyers on the other side. Most app developers would make apps for those operating systems, which have the largest user bases. This is indirect network externality, which users on the incumbent digital platforms benefit from, and thus show platform stickiness – making it exceptionally difficult for a new player to enter, survive and grow. Thus, network effects can make platform markets ‘tip’ towards being concentrated, potentially even to monopoly.

9. What further helps consolidate the incumbents’ market position in digital markets is the **scale advantage that is derived from user data**. Data plays a central role in online markets. This was highlighted by the Chairman, ASCI in his opening remarks also. Value creation on online platforms is reinforced

through data capture and data deployment **feedback loop**. The data advantage of market leaders, which/who have amassed wealth of personal data over a period of time, overshadows the offerings of newer platforms in terms of quality and data-fed personalisation. As a result, the big tends to get bigger, while a small entrant struggles to attain a critical mass of users and user data.

10. From a regulators' perspective, what is also critical to take note of is the fundamentally different dimensions of consumer welfare (or consumer harm) in the digital world. Traditionally, regulation, competition regulation in particular, has been steeped in price theory. In the digital economy however, **'zero-price'** markets are ubiquitous. Monetary price cannot therefore be the relevant metric in assessing the effect of business conduct on consumer welfare. What is important to note is that a monetary price of zero does not mean consumers are not giving something up in exchange for the products they consume. Data or personal attention is the price they pay for the so-called 'free' digital products. Data collection by platforms, especially gatekeeper firms, lead to creation of super profiles of consumers as they can control, track and link consumer behaviours across platforms, online services and websites. This helps in real-time targeted advertising at the level of each individual consumer and enables personalised pricing.<sup>1</sup>

11. The ability to gather data on individual consumers, process it algorithmically, and set prices automatically may help develop and spread price discrimination strategies. As a result, price discrimination may become more widespread, and its effect may be qualitatively different from what economic theory tells us. High-level targeting is not just an intrusion of privacy. It has a serious competition dimension as well. It further strengthens the ability and incentive to erect barriers to entry and maintain dominance by limiting competitors' access to data, preventing others from sharing the data, and

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<sup>1</sup> Keynote Address on Digital Markets and Competition – Non-Price Competition, Chairperson, CCI. U.S.-India Business Council, Virtual Roundtable. <https://cci.gov.in/node/6177>

opposing data-portability policies that threaten data-related competitive advantages.

12. Data also needs to be seen as a resource in the sense that rolling out new products and identifying unmet needs rely heavily on data. The access to large data by incumbent firms that are also invested in vertical complementors can skew competition in favour of the incumbents. There have been discussions on encouraging vertical interoperability for promoting competition within digital platforms or ecosystems to prevent the emergence of market power through anticompetitive leveraging.<sup>2</sup> The theories of consumer harm therefore now include **non-price factors**, often associated with the scope and purpose of personal data collection and use. **Consumer privacy**, for instance, is a critical non-price parameter, besides innovation and quality that now routinely features in the antitrust toolkit. The nature of data, the difficulty in understanding the operation of algorithms, and other complexities require authorities to apply new tools and approaches to investigate and inquire into anti-competitive behaviour in digital markets.

13. Another emerging aspect of digital markets that adds to their complexity from a competition standpoint is the prevalence of **multi-product ecosystems** run by major digital companies. The business models of these companies are often built around large ecosystems of complementary products and in some cases even similar products. They operate not only multi-sided platforms, but are active across multiple platform markets. No doubt, there can be important supply side synergies to facilitate ecosystem development, such as economies of scope, data synergies, technology linkages etc. Nevertheless, this may allow leveraging of market power and related advantages by the platform into adjacent markets, giving the established platforms an unbeatable edge over potential or existing standalone competitors, limiting entry prospects.

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<sup>2</sup> *Ibid.*

14. In **India**, we have been witnessing **adoption of digital technologies** at an astonishing pace, to which the Covid-19 pandemic has provided further impetus. Rapid digitisation is transforming a wide array of sectors, such as communication, retail, food, health, education, finance etc. For instance, at 87%, India has the highest fintech adoption rate in the world against the global average of 64%.<sup>3</sup> In 2020, India constituted 14 per cent of the total 2018 billion app installations in the world.<sup>4</sup> In 2021, India became the second largest market in the world for app downloads.<sup>5</sup> Clearly, India has emerged as one of the biggest and fastest-growing digital consumer bases.

15. This has opened up an enormous range of possibilities. At the same time, this has also led us to rely on a small cohort of large technology platforms. Not only users like you and me, businesses in India – retailers, hotels, restaurants, media, app developers – today depend on a handful of intermediary platforms to connect with their customers online. With their control over user data and online real estate, platforms are in a unique position to shape and influence consumer choices on the one hand, and steer consumer traffic to the businesses on the other. This **‘gatekeeper position’** of the platforms, seen in conjunction with their innate features that I mentioned earlier, is giving rise to concerns for competition and contestability. Even small actions by these platforms may exclude and marginalise rivals and distort competition between their business users, which can have larger economy-wide ramifications. Eliminating such anti-competitive conduct at the earliest is of utmost importance.<sup>6</sup> At the moment, we are looking into several antitrust cases in sectors such as online retail, online hotel booking, search engines, online advertising, operating systems, payment systems etc. Our focus is on

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<sup>3</sup> <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1759602>

<sup>4</sup> [Harnessing India's Digital Economy: Private Sector Championing the Cause of Digitalisation \(investindia.gov.in\)](https://investindia.gov.in/Harnessing-India's-Digital-Economy-Private-Sector-Championing-the-Cause-of-Digitalisation)

<sup>5</sup> [India second largest market globally for app downloads in 2021: Report - The Hindu Business Line](https://www.thehindubusinessline.com/news/india-second-largest-market-globally-for-app-downloads-in-2021-report-report-the-hindu-business-line)

<sup>6</sup> Keynote Address on Initiative on Choice, Competition and Innovation (ICCI), Chairperson CCI, Launch Event Centre for Digital Future <http://cci.gov.in/sites/default/files/speeches/Digital-Future-speech.pdf?download=1>

speedy and effective interventions, grounded in nuanced and evidence-based assessment.

16. Let me take this opportunity to **discuss some of the issues** that digital markets in India today face from a competition standpoint. As we all know, online commerce is gaining importance across sectors in India. With their search and compare functionalities, online marketplaces have the potential to spur price competition, lower search cost for consumers and provide them with a wide array of choices. For businesses, e-commerce holds the promise to expand market access and to aid innovative business models. However, given its high market concentration, with few key intermediary platforms, business users of these platforms, such as retailers, have raised concerns regarding **platform neutrality**. The ability to influence competition arises partly because the platforms determine the rules according to which users, including consumers, businesses and providers of complementary services, interact on it. For instance, preferencing certain sellers over others may inhibit intra-brand competition. They can also make use of algorithms to engage in activities that may result in the reduction of inter-brand and intra-brand competition on the platform. A reduction in exposure on the platform could result in loss of sales for sellers. It may also lead to an increase in costs for sellers if the sellers, in order to increase their visibility on the platform, have to engage in promotional activities, such as advertising on the platform.

17. The platform-dependence has also given rise to an **imbalance in bargaining power** between the platforms and the businesses that depend on them. Businesses are voicing concerns regarding lack of transparency, information asymmetry and exploitation of superior bargaining position by the gatekeeper platforms by way of imposition of unfair terms of engagement. This creates an environment where the trust of businesses on digital platforms is undermined.

18. A fragmented supply side and only a few major intermediary platforms creates this situation of asymmetry. In certain markets, there is only one major platform, which the business users rely upon to connect with their consumers. The issues of unilateral revision in contract terms and alleged opacity in the functioning of these platforms have led to growing unease and tension in platform-business relations. Such an environment of mistrust may not be conducive for realizing the full potential of digital technology, which promises myriad benefits to consumers, businesses and the economy.

19. The distribution architecture for businesses is undergoing a shift globally including in India, with digital distribution channels growing at an astonishing pace. Given that, presence on the gatekeeper platforms becomes critical. In such a scenario, if the platform engages in exclusive tie-ups in a certain product segment, that can foreclose markets and constrict competition in certain circumstances.

20. Let me now turn to the issues that are coming up in the context of multimarket presence of digital players. If such players make their 'must have' products available only when their other products are also taken in a composite **bundle**, such **leveraging** can harm competition. Leveraging and exploitative conduct of multi-market players can also take place by means of **data sharing**. Lower data protection could lead not only to concerns of consumer exploitation but may also have exclusionary effects.

21. Some of these issues are being looked into by the Commission. In fact there has been a steady rise in cases received by CCI from digital markets.

22. The Commission is also complementing enforcement with non-enforcement tools such as market studies. Technology markets are ever evolving. Bridging knowledge gaps and staying up to speed with new



technologies, as they emerge, is a continuous process. The challenge for regulators is to keep abreast of the developments in these markets, and continue to evolve and refine the tools.<sup>7</sup>

23. The Commission is proactively reaching out to stakeholders through market studies for understanding markets, issues that may have implications for competition and the possible remedies. The market study on e-commerce brought to fore certain issues such as 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, which different stakeholder groups highlighted during the course of the study.<sup>8</sup>

24. Bargaining power imbalance and information asymmetry between platforms and their business users appeared to be at the core of many of these issues. Improving transparency over certain areas of the platforms' functioning can bridge information asymmetry, which in turn can positively influence competition not only on the platform but also between platforms, the study noted. Under its advocacy mandate, CCI urged e-commerce platforms to institute a set of self-regulatory measures over certain areas 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.<sup>9</sup>

25. The telecom study brought out new issues and challenges emerging from the competition law perspective, with the market moving towards data-

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<sup>7</sup> Chief Guest Address, ASSOCHAM 6<sup>th</sup> International Two Days Virtual Conference 2021 on Competition Law: Risk, Challenges and The Way Forward, Chairperson, CCI  
<http://cci.gov.in/sites/default/files/speeches/AssochamSpeech.pdf?download=1>

<sup>8</sup> Market Study on E-Commerce In India-Key Findings and Observations, CCI  
[https://www.cci.gov.in/sites/default/files/whats\\_newdocument/Market-study-on-e-Commerce-in-India.pdf](https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf)

<sup>9</sup> *Ibid*

based applications and services and technology-led convergence across the value chain. Competition concerns arising out of data were also flagged in the study, and it was highlighted that the antitrust law framework is broad enough to address the exploitative and exclusionary behaviour arising out of privacy standards and entities commanding market power. The study accentuated the need for a harmonious regulatory environment, focusing on strengthening cooperation among sectoral regulators and the competition authority.<sup>10</sup>

26. We also organise intensive discussions in the form of workshops to understand the ever-evolving markets and also appreciate the Indian specificities. These workshops are multi stakeholder brainstorming sessions to uncover all aspects related to such markets that may have a bearing on competition in India.

27. Last month we reached out to stakeholders representing a diverse range of viewpoints including industry and experts in the startup ecosystem. As the startup ecosystem in India evolves and matures, the Startup/Big Tech interface is set to grow in importance. Internationalisation of R&D has resulted in companies becoming eager to build on India's initial advantage in software development and engage in both technology deepening and technology widening activities. There is potential for immense value creation resulting from the complementarities between the strengths of big technology companies operating these platforms and startups. India, slated to produce over 100 unicorns by 2025, is likely to witness increased alliance between big tech and startups, some of whom may join the Big Tech league by their exponential growth and valuation.<sup>11</sup>

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<sup>10</sup> Market Study on the Telecom Sector In India - Key Findings and Observations, CCI  
[https://www.cci.gov.in/sites/default/files/whats\\_newdocument/Market-Study-on-the-Telecom-Sector-In-India.pdf](https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-Study-on-the-Telecom-Sector-In-India.pdf)

<sup>11</sup> Special Address at the Workshop on Startup Ecosystem and Competition, Chairperson, CCI.  
<https://cci.gov.in/sites/default/files/speeches/Special-Address-Workshop-on-Startup-Ecosystem-and-Competition.pdf?download=1>

28. Big tech, through their exclusive control over search engines, retail e-commerce, app stores and social media control the bottleneck infrastructure on the internet. Both the demand side and the supply side depend on these platforms for access and rely on platforms' rankings and algorithms in order to interact efficiently and therefore, the essentiality of such platforms cannot be ignored.<sup>12</sup>

29. As I mentioned earlier, control over data by the gatekeeper firms is a major area of concern as it may lead to unfair business practices. This disproportionate control, when magnified by the absence of interoperability and data portability, makes leveraging in neighbouring markets easier and increases the possibility of exclusionary conduct. The right to data portability provides consumers autonomy and control over their personal information and restores some balance to the dynamics between consumers and providers of digital services. In addition, the right to data portability is expected to increase competition and the range of options for consumers in digital markets.<sup>13</sup>

30. Data portability makes it easier for consumers to switch between providers, and for new providers to offer tailored products or services based on prior information. In digital markets **differential access to data**, by the market participants can undermine competition 'on the merits'.<sup>14</sup> The result is that consumers will have less choice. The myriad of benefits that digital markets bring may outweigh by higher prices, lower quality, and reduced innovation. The Competition authorities' vigil and other data protection measures gain importance in such a scenario.

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<sup>12</sup> *Ibid*

<sup>13</sup> *Ibid*

<sup>14</sup> Competition and data protection in digital markets: a joint statement between the CMA and the ICO [https://awards.concurrences.com/IMG/pdf/joint\\_cma\\_ico\\_public\\_statement\\_-\\_final\\_v2\\_180521-3.pdf?73366/a14cf0cf28e21db40ea00a3dd55937b92a2e048f](https://awards.concurrences.com/IMG/pdf/joint_cma_ico_public_statement_-_final_v2_180521-3.pdf?73366/a14cf0cf28e21db40ea00a3dd55937b92a2e048f)

31. There are synergies between competition and data protection objectives, and many regulatory interventions in digital markets can be designed in a way that supports both objectives. The broad areas of synergies are user choice and control; standards and regulations to protect privacy; and data-related interventions to promote competition.<sup>15</sup>

32. In the last few years, the Indian startup ecosystem has witnessed a spate of high-profile M&A transactions. These acquisitions span across various cutting-edge sectors such as fin-tech, enterprise-tech, health-tech, ed-tech, among others. The profile of the acquirers has also changed. Nowadays a new trend has emerged wherein Startups are on an acquisition spree encouraged by increased access to funding from institutional investors. No firm trends are emerging; not only startups are buying startups, but are also acquiring established businesses. The main motivations being to expand market reach, product portfolios, geographic spread or simply to bolster talent pools. Such acquisitions also allow startups to raise larger funding rounds at higher valuations. High funding momentum in the institutional investor's market is also resulting in an acquisition spree. Established Indian corporates have also expanded their digital footprint by acquiring startups.<sup>16</sup>

33. These acquisitions may be pro-competitive, generating substantial synergies and efficiencies, yet, there may be acquisitions that may have anticompetitive risks. Our casework shows that digital markets and platforms are of various kinds, so are the nature of transactions. Not all digital markets are alike, not all data is alike, and not all transactions are alike. Our efforts have been to understand the specific circumstances, business models, strategies, the rationale of the transaction and also the counterfactual. In some cases, standard metrics and theories sufficed,

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<sup>15</sup> *Ibid*

<sup>16</sup> *See 11 above*

while in some we had to augment the theories of harm for the case assessment.

34. In this context, it is pertinent to mention that characteristics of digital markets have led to the adoption of business models that do not generate sufficient turnover to trigger M&A mandatory notification under the asset/turnover thresholds set out under competition laws. It is now widely recognised across jurisdictions that the asset/turnover-based criteria may fail to capture potentially anti-competitive transactions in new age digital markets. The Competition Act Amendment Bill looks to expand the ambit of notification criteria by incorporating '**any other criteria**', which may help bring digital transactions within the fold of combination review.

35. The Commission recently conducted a study on these trends with the purpose of bridging information gaps that currently limit the understanding of combination in the digital markets for policy and regulatory needs. The study provides a trend and number of deals in the digital sector in India that escaped the scrutiny of the CCI owing to **asset/turnover falling below the thresholds**. Is there any objective threshold that can be introduced for the notification of such deals? This is a work in progress to inform policymaking in case of digital mergers.

36. The Commission is also conscious of the fact that in a developing economy like India where industry is gearing up to make the nation self-reliant as well as to expand its global footprint, mergers and acquisitions are a potent instrument to optimise scale and improve efficiency. Competition screening of M&As over the years has shown that a vast majority of transactions do not raise any competition concern. A green channel has been recently introduced for automatic approval of combinations. This is a first of its kind trust-based system in the world,

where notifiable transactions having no overlaps, be it horizontal, vertical or complementary between the parties, are deemed approved upon its filing. It is expected to promote a speedy, transparent and accountable merger review, striking a balance between facilitation and enforcement. The green channel route has gained traction with one out of every five transactions being filed under this route, demonstrating stakeholders' confidence.<sup>17</sup>

37. Friends, we are conscious that Commission in addition to its enforcement and adjudication functions has been accorded a role of an expert body with multifarious functions. In addition to directing investigation or orders against specific entities with the aim of eliminating a practice found pernicious; as an expert body our role extends to promoting a culture of competition in all economic spheres including policy. Economic policymaking is an act of balancing various objectives and encouraging competition driven efficiency in allocations is one such objective that should be placed on the table in policymaking discussions. To this end, the participation of CCI in policy deliberations and engagement with various arms of the government assumes great importance. Given the apparent dichotomy between competition and regulation, competition authorities have a vital role to play in ensuring optimal regulation that protects consumer interest while allowing competition to flourish. Sustained and effective competition advocacy to ensure a pro-competitive policy environment is thus integral to any competition agency's mandate and these interventions draw upon heavily from the law and economics framework.

38. The Government of India is in the process of introducing a number of regulatory reforms to address issues in the digital space. The CCI has recently participated in the deliberations for drafting of National E-commerce policy of India. The Commission has provided its inputs and feedback for

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<sup>17</sup> Keynote Address, Inaugural Series of Webinar on Competition Law, Bangalore Chamber of Commerce, Chairperson, CCI, <http://cci.gov.in/sites/default/files/speeches/SpeechCPBangalore.pdf?download=1>

building a robust and vibrant e-commerce ecosystem and for addressing regulatory gaps in the e-commerce space.

39. A few final observations on capacity issues that are required to be addressed. For building capability and specialised skillsets to analyse digital market issues, we have been focusing on a) upskilling of our staff and b) engagement with external experts to get specialist advice and support as and when required.

40. Academic research, market studies and enforcement experience over the past years in key digital markets, such as, online search, online marketplaces, mobile operating system etc., have helped understand these platform-centric ecosystems better. Nevertheless, there remain complex and relatively lesser-explored areas like functioning of algorithms – how they can undergird or facilitate anti-competitive conduct and antitrust risks and efficiency gains of new and next generation technologies like blockchain, AI etc.

41. Algorithms could be used to make explicit collusion more stable or to collude without any explicit agreement or communication between firms. Concerns have also been raised that with the ever-evolving machine learning technology, pricing algorithms may autonomously learn to collude, without any human interaction. One of the priorities in this area is to develop an understanding about- the competition harm that may arise as a result of biases in algorithm, the kind of evidence needed to establish that and the remedies required to mitigate these concerns. The area would require building up of technical expertise. Similarly, Blockchain, which is a general-purpose distributed ledger technology, can disrupt markets and institutions across the world. Viewed from a competition policy perspective this might create both opportunities to enhance competition & efficiency and risks of anticompetitive conduct.

42. In view of the growing number of cases and complexity in the digital sector and the increasing need for data and technology skills, we are now planning to set up a dedicated digital markets unit within the Commission as a centre of expertise for digital markets. In addition to our staff from the law, economics and finance streams, we plan to staff the unit with new professional profiles such as data scientists, algorithm experts, etc. The specialist team will assist the Commission in digital market cases, help in evidence gathering and will be the nodal point for stakeholder engagement across industry, academia, other regulators and government.

43. As a competition authority, CCI will continue to assist with the government's endeavour of digitisation by promoting competitive digital markets. Having developed robust frameworks and in-depth understanding of digital markets, our approach in these markets will be carefully crafted, nuanced and minimalistic, so that we do not compromise the efficiencies or stifle the innovation incentives of digital firms and, at the same time, ensure that the markets remain competitive. With this, I once again thank you ASCI for giving me this opportunity.