

E-commerce and Challenges for Antitrust Enforcement

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1. There is hardly any domain of our lives, and therefore of commerce, that is immune from the digital revolution. 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 in the past few years and is slated to be on a high growth trajectory in the coming years as well. At present, the Indian e-commerce sector is the 9th largest in the world but by 2034 it would become second largest in the world. 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
2. 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. Also, the network effects that characterise the multi-sided platforms which are central to the e-commerce sector, may lead to the creation of a 'winner-takes-all' or a 'winner-takes-most' situations. While antitrust 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 scales do not tilt further due to strategic barriers raised by incumbents.

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

3. 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 launched a market study in the e-commerce sector in May this year. There was **no a priori hypothesis** of harm to competition caused by any pre-identified business practice(s) of any market player(s) that the study intended to test. 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 was a combination of secondary research and collection of primary data/information through a questionnaire survey of relevant stakeholders, focused group discussions (FGDs) with each surveyed stakeholder group and one-on-one meetings with individual businesses.
4. There is an ongoing debate on how digital markets should be looked at, how distinct are these ecosystems from the traditional market configurations, what should be the parameters of competition analysis, whether regulations or case-by-case application of competition law would suit the needs better. As a competition authority, we wanted to make this debate less abstract and more driven by practical insights. Hence, the market study.
5. The study helped gather useful insights and valuable 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 players involved in e-commerce. The study also provided an opportunity to learn from the business enterprises on how they are responding to the advent of digital technology and digital trade and helped gauge the key parameters of competition in digital commerce.

6. The study has also brought to fore certain issues which different stakeholder groups have highlighted during the course of the study. These were presented in a **workshop** where representatives of all stakeholder groups were invited to deliberate on the issues.
- The study points to an increased intensity of price competition across the sectors studied. Online trade has led to greater price transparency. Sellers, service providers and platforms are tracking competitors' prices and adjusting the price levels in response so as to remain competitive. While the idea of dynamic pricing strategy is not new, the internet has transformed the way price information is disseminated.
 - A broad and growing range of products, strong logistics and delivery network are bringing consumers on to the platforms. The indirect network effects and data-driven positive feedback loops contribute to the growing importance of online platforms and most sellers/service providers in India, both in goods and services, now depend on intermediary platforms to access consumers online as consumers increasingly rely on these platforms to search for and purchase products.
 - The issue of **platform neutrality** has come up in the context of online platforms. As per the business users of these platforms, certain platforms are directly or indirectly operating a hybrid model wherein they provide the digital infrastructure to connect sellers with buyers, while simultaneously engaging as a seller on the platform, which puts them in direct competition with the sellers and creates an inherent conflict of interest, as per the stakeholders. This was observed in the product retail platforms through **preferred sellers** and **private labels** of the platforms and in the food services sector through the platforms' own **cloud kitchen brands**. According to the business

users, when e-commerce platforms serve as both a marketplace and a competitor on that platform, they have the incentive to leverage their control over the platform. The platforms have a variety of mechanisms that they can use to act upon such incentive, including their access to transaction data and prioritisation of search results. The market outcome on the platforms should be driven by competition between the sellers on the merits, it should not be influenced or determined by the platform operator. The idea is that the platforms should not pick winners.

- The issue of **lopsided contract terms between platforms and businesses** has also come up. A fragmented supply side and only a few major intermediary platforms create a situation of asymmetry of market position/ bargaining power and dependence of individual businesses on these platforms. Platforms create significant market opportunities and offer great potential for businesses to widen their customer and market access. This also leads to a growing dependence of businesses on these platforms. The business users of platforms across the sectors studied voiced their concern regarding the one-sided contract terms imposed by the platforms and unilateral revisions in the terms owing to little or no bargaining power of individual enterprises vis-à-vis the platforms. They urged for the terms of engagement to be more fair and equitable. It was pointed out that the platform-business contract terms are changed unilaterally and with a perceptible shift in consumer behaviour towards ordering online, enterprises have to rely on platforms even if they impose exorbitant commissions and unreasonable terms.
- The issue of **deep discounts** offered or jointly funded by platforms with the business users came up as a concern that according to the enterprises is feeding the growth-over-profit strategy of the platforms but often goes against the commercial interest and

business proposition of the business users. The pricing and other key decisional power is shifting from businesses to the intermediary platforms.

- Vertical restraints such as platform parity clauses and exclusive agreements between certain platforms and large business users were also observed.
7. 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.
8. Nevertheless, the bargaining power imbalance and information asymmetry between platforms and their business users seem to be at the core of many issues that have come up in the market study. And irrespective of the market position of the intermediary platform and without a determination of violation of the competition law, 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.

9. The **final study findings** will be released by the Commission later this month. And the Commission, as a pre-emptive or precautionary measure, **may issue a soft advisory** to e-commerce platforms to self-regulate certain aspects of their practices to foster trust and a predictable relationship with the business users so that full competitive potential of e-commerce can be harnessed. These may include:

- i. **Transparency over ranking:** More information on the main parameters determining ranking on their webpages and the reasons for the relative importance of those main parameters as opposed to other parameters.
- ii. **Transparency over data:** There should be clear and transparent agreement on collection, use and sharing of data between Platforms as intermediaries and business users.
- iii. **Transparency over review and rating mechanisms:** Consumer reviews and rating mechanisms have a bearing on search ranking. Adequate transparency over these mechanisms is necessary for ensuring information symmetry which is a prerequisite for fair competition.

10. These are complex issues and gauging the net impact on competition may not be as simple and straightforward. The study has triggered debate and discussion on these issues. The release of the Study would also allow us to further incorporate the feedback in our final advisory such that practices of e-commerce platforms promote competition and consumer welfare.