

Regulating the Digital Economy
U.S.-India Business Council, Virtual Roundtable
Keynote Address
Mr. Ashok Kumar Gupta, Chairperson, Competition
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1. Good evening. It's a pleasure to be in your midst today for this Virtual Roundtable discussion on ***Approaches to Competition Law in Digital Economy***. We meet at a time when the novel COVID-19 pandemic has emerged as a key challenge for countries around the world. Besides the punishing toll it has exacted in terms of testing the healthcare system, the economic fallout has been just as severe. Economic activities have been affected as supply chains have been disrupted and demand for various goods and services are in a state of flux. Various measures have been introduced by the Indian Government as well as the Competition Commission of India (CCI) to subdue the impact of the pandemic and to ensure that businesses come across few obstacles.

2. However, during this time, the dependency of various companies on the digital economy has gone up substantially. According to market intelligence firm Dealogic, the volume as well as the value of deals that have taken place in the technology space in the first quarter of 2020 have far outpaced investments made in other sectors.¹ The ubiquitous role which technology plays in our lives has become even more accentuated due to the pandemic-induced lockdown in many countries across the world. This may have a concomitant impact on entrenching the power of many technology firms, especially those that are considered as a 'gatekeeper' in today's increasingly digital economy. Therefore, perhaps now is as good a time as ever to take stock of the regulatory framework that governs such technology firms.

¹ <https://www.competitionpolicyinternational.com/big-tech-continues-to-consolidate-despite-pandemic/>

3. Technology markets are increasingly shifting towards a digital platform-centric configuration. Technology now allows firms to compile and refine information into a more useful finished product and that allows the firms to protect its position by creating an ecosystem comprising multiple portals among which users can easily switch. Building of such ecosystems intensifies the likelihood of increased entry barriers, market concentration and reduced innovation.

4. These firms play an intermediation role between various enterprises; have access to large and unique datasets; and are able to move into adjacent markets either through acquisitions or by having access to sensitive business data of other market players on their platforms. This situation is complicated further if the entity controlling a platform also transacts upon it, thereby operating in dual capacity. These characteristics of such online platforms have corresponding concerns for SMEs listed on such platforms as well. For instance, SMEs: (i) may be delisted arbitrarily by the platform; (ii) may have to deal with one-sided amendments to terms and conditions; (iii) may have to contend with data-masking which prevents them from accessing critical customer data; (iv) may find themselves competing with the platform on which they are listed; and (v) may face non-transparency in the search functionality on such platforms.

5. Most competition jurisdictions while regulating the conduct of these firms adopt a consumer welfare standard for assessing the conduct of a firm (s) with market power. Under the consumer welfare standard, the emphasis is on efficiency-based competition on the merits. However, in winner takes all platform markets, if the impugned conduct is not based on the merits, eliminating such anti-competitive behaviour at the earliest assumes utmost importance. The sellers

on one side of the platform are dependent on the intermediary platform(s) to reach out to their consumers. Network effects coupled with even small actions by the platforms may exclude and marginalize rivals, and further strengthen these effects that may be difficult to dilute at a later stage. Any remedy at that stage will be too little and too late as the suppliers side of the market can be potentially eliminated due to the alleged anti-competitive conduct.

6. Hence, any potentially anti-competitive unilateral conduct of platforms or platforms' vertical arrangements with sellers or service providers would require immediate enforcement attention as once the platform attains a critical size not solely due to network effects but due to anti-competitive conduct, switching costs and *status quo* bias will preclude an otherwise conceivable inter platform and intra platform competition. In such instances, it is important to initiate investigation and invoke anti-competitive remedy as early as possible. Timing is crucial in these dynamic markets as the harm to competition will be irrevocable. It would be difficult to take corrective actions as inter platform competition would not develop and the competition harm done to the downstream market of platform's sellers cannot be undone.

7. Due to the breakneck pace with which these online platforms have evolved, markets may have 'tipped' in favour of a single market player or a few players in a given market. This 'tipping' effect is further exacerbated by network effects, lack of 'multi-homing' and lock-in effects. Data and its implications for market power and competition is yet another area that will need an informed approach from the Commission.

8. Globally there are two narratives for the application of competition law in the realm of big data. The first narrative advocating

antitrust intervention states that, large data sets require a more sophisticated database and software techniques to process or to convert it into big data, which in itself is an important entry barrier.² Second narrative asserts that data-rich companies are not an economic threat, but rather an important source of innovation, which policymakers should encourage, not limit because data – especially consumer data – is readily available, non-rivalrous, and ubiquitous. Multiple entities can collect and use the same data without raising foreclosure concerns.³

9. Both narratives being true, the regulators are faced with a challenging task to make up their minds and not get swayed by any of these narratives. While doing so, competition regulators need to consider each and every case on its facts and circumstances thereby balancing business efficiency, innovation and market competition.⁴ Having said that, evidence is mounting and commentary on the opaque data practices of the big tech firms harming competition has gained traction.

10. The argument runs as follows: Data is key to digital platforms because, when analysed closely, it can provide real-time knowledge of consumer behaviour across applications. This has led to an “attention economy”, in which Big Tech players work to capture users’ attention, build profiles of their choices and habits, and then sell those profiles to advertisers. In such a scenario, it can be difficult for traditional laws to redress anti-competitive conduct since a case-by-case approach, despite the empirical rigour often employed, has its limitations in such a digital economy. A case-by-case approach, by its very definition,

²Maurice E. Stucke, Allen P. Grunes, ‘No Mistake About It: The Important Role of Antitrust in the Era of Big Data’ ‘The Antitrust Source (April, 2015)

³ Joe Kennedy, “The Myth of Data Monopoly: Why Antitrust Concerns About Data Are Overblown”, Information Technology & Innovation Foundation, March 2017, available at http://www2.itif.org/2017-datacompetition.pdf?_ga=1.129315724.1474415869.1490229315

⁴https://cerre.eu/sites/cerre/files/170216_CERRE_CompData_FinalReport.pdf

does not take a look at the larger picture and only deals with the case on its merits. In the digital economy, however, certain structural problems have arisen which cannot be addressed solely by the case-by-case approach. These problems are not attributable to the conduct of any one company and are reflected in phenomena such as: (i) excessive concentration in a sector; (ii) high entry barriers; (iii) lack of access to data etc. The incentive to engage in anti-competitive conducts partly arises as the platforms are the ones who determine the rules according to which users, including consumers, business users and providers of complementary services, interact on it. Thus, in digital markets certain business restrictions may be needed to preserve, protect and facilitate competition and to ensure that platform rules do not impede competition without objective justification.

11. In such instances, relying on just antitrust enforcement may not prove effective in promoting competition on the merits. Enforcement in digital markets may need to be complemented with a code of conduct that identifies certain do's and don'ts. The code of conduct would help in defining the contours of anti-competitive conduct in digital markets and would ensure transparency and clarity in the functioning of the platforms.

12. It is here that the issue of a novel legal approach could be considered. However, this should not be taken to mean that existing laws are to be revised. It merely means that the existing laws need to be enforced even more rigorously and be complemented by some innovative regulatory architecture. Is it time for introducing *ex ante* regulation of online platforms? Should there be Platform-to-Business (P2B) regulations, which may seek to address the issue of fairness and transparency between SMEs and online platforms. EU and other advanced jurisdictions are moving towards this regulatory architecture. You all will also be aware that the House of Representatives

Subcommittee on Antitrust, Commercial and Administrative Law is currently holding a series of hearings to examine the issue of 'online platforms and market power'. Regulators and lawmakers alike increasingly are focused on the intersection of data privacy and competition issues.

13. In India the e-commerce market study conducted by the Commission proved to be a valuable tool for the Commission's advocacy efforts and helped in identifying concerns and articulate self-regulatory measures to be adopted by industry, with the aim to reduce information asymmetry, promote competition on the merits and to foster a sustainable e-commerce ecosystem in India. These self-regulatory measures include:

- (i) platforms to improve transparency over certain areas of the platforms' functioning, such as search ranking, collection, use and sharing of data and user review and rating mechanism.
- (ii) platforms to devise ways to govern the following aspects to protect the interests of all contracting parties –i) negotiating framework for basic contract terms ii) discount policy iii) penalties and iv) conflict resolution.

14. We need to examine whether the findings of market studies can be converted to code of conduct requiring compliance from the industry. The EC has also announced the need to have a new 'competition tool' which would augment the current legal framework in the European Union. This seems to be a departure from traditional antitrust law enforcement by envisioning action against dominant companies before such dominant companies foreclose their competitors and raise their costs.

15. The Commission is undertaking a market study on mergers and acquisition in the digital sector with the aim to identify such transactions that have the potential of inhibiting future competition in the digital space. In digital markets due to low assets or turnover of target companies some acquisitions do not trigger the notification thresholds. We are trying to trace the trends be it e-commerce or other digital companies. This is a challenge world-wide, and only in a few jurisdictions have voluntary powers of review. We in India don't have any provision for bringing such acquisitions under the competition act purview. However, as a part of a recently begun market study, we are trying to understand the trends so that a call can be taken if we consider introducing a deal size threshold for assessing deals from competition perspective at a later stage through amendment in our Competition Act.

16. In addition to this a few more amendments are in the offing to account for the peculiarities of digital markets, which include: (i) covering hubs in the assessment of hub and spoke cartels and imputing liability to such hubs based on the existing rebuttable presumption rule in the Competition Act, 2002 and; (ii) widening the scope of anti-competitive agreements to cover all kind of agreements which do not fall within a categorisation of either a horizontal or vertical arrangement.

17. A perusal of the law-making efforts and consultation exercises reveal that India too, is adopting a collaborative approach in regulating the digital economy. As mentioned earlier, online platforms often leverage their dominance regarding the possession of unique datasets and thwart competition in their current markets or enter adjacent markets. The Personal Data Protection Bill, 2019 however, makes it a must for all 'data fiduciaries' - that is, any organisation that stores, collects or processes data - to provide for data portability. This allows

an individual whose data is being stored, collected or processed (referred to as a 'data principal') to seek his/her data in machine-readable format and have it transferred to another entity. This step would arguably reduce entry barriers for new firms and encourage competition. We need to strike a balance so that we can embrace the social benefits of big data while avoiding harm to the individual. The Competition Commission of India will be addressing the competition issues that fall within its purview. However, most importantly, there could be potential abuse of dominance cases, which might also involve a breach of data protection rules. There should be appropriate remedies, which address both anticompetitive practices and data harms.

18. In conclusion, I must say that Markets are not static; they are ever changing. A regulator's task is much like hitting at moving targets. The regulatory stance needs to be periodically nuanced and the enforcement toolbox need to be adapted to these changes so that the instrumentality remains 'fit for purpose'.
