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Antitrust in the Indian digital market – dawn of a new era?

20 April 2020

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Much of the competition world has turned its attention in recent years to the digital economy, prompting new questions about market definition, dominance and more. The Competition Commission of India has shown a willingness to adapt its approach as the watchdog catches up with global enforcement in the digital economy. Khaitan & Co partner Sagardeep Rathi and senior associate Swati Bala take a close look at some of the key issues and cases.

The coming decades of antitrust markedly belong to e-commerce, leaving the antitrust regulators across the globe grappling with novel issues. Concerns like monopoly and duopoly, self-preferencing and leveraging, big data and network effects, dual pricing and deep discounting dominate their list. The unique characteristics of e-commerce mean the development of antitrust jurisprudence will remain in flux, and the recent spate of antitrust cases globally as well as in India evidences that.

Any antitrust scrutiny comprises essential metrics like relevant market, market power, and the alleged anticompetitive conduct. Out of these, defining markets in the dynamic context of the e-commerce market is the most critical step. The Competition Commission of India (CCI), which showed reluctance initially to consider online and offline channels as distinct, has now moved a step ahead and distinguished an online product market in the pending Amazon and Flipkart probe. Similarly, the CCI has ordered probes against MakeMyTrip (MMT) in the market for online hotel booking, while two-and-a-half years ago – while reviewing the MMT/Ibibo merger – it defined an overall travel market, including offline options.

Defining a relevant market has the potential to lead to both false positives and false negatives, and it is the reason why the first line of defence for companies is to assert as broad a market as possible.

Once the market is defined, evaluating market power in that market is another complicated exercise. Issues like how important market shares are in a hi-tech market, what the correct time horizon is, how important are network effects, and whether easy switching by customers from one portal to another nullifies that, assume great significance.

Unsurprisingly, the CCI is of the prima facie view that MMT is dominant due to its high market share in the online hotel booking market, while Ola – with a similarly high market share in the radio taxi service market – was held to be not dominant, given the specific facts and circumstances of the cases. The CCI also now understands that deep pockets may be employed for exclusionary tactics. In fact, the Supreme Court, while directing the Director General of the CCI to investigate the conduct of Uber, noted that incurring high losses with the intent to eliminate competition could indicate market power.

Regarding anticompetitive conduct, there is an apparent trend of the CCI emphasising the inclusive nature of section 3(4) of the Competition Act, 2002, which presently specifies five types of vertical restraints. If correct, it could mean capturing novel types of vertical restraints, like a most favoured nation clause. That would align the Indian competition regime with those in the EU and the US, where provisions are broadly worded to capture all kinds of anticompetitive conduct. In fact, along the same lines, the Competition (Amendment) Bill, 2020 (Amendment Bill) proposes to expand the scope of section 3(4) to include all types of agreements that may or may not strictly be categorised as horizontal or vertical.

The ongoing probes of Amazon and Flipkart, MMT and Oyo, and Uber illustrate how the CCI wants the antitrust regime to progress. An association of micro, small and medium enterprises (MSME) challenged the exclusive launch of smartphones on Amazon and Flipkart as anticompetitive, leading to a direction to probe them. In fact, the issue of exclusive launches is not new to the CCI. For example, in previous cases involving Oppo and Vivo, the CCI found exclusive online sales legitimate because these brands faced competition from others.

Likewise, the exclusive launch of a book on Flipkart was given a green light since the product faced competition. What then made exclusive launches of smartphones on Amazon and Flipkart prima facie anticompetitive is too early to speculate; however, this case is different because they cornered not one but several brands together, making foreclosure a real concern.

Notwithstanding that, much remains to be seen in view of the 2019 foreign direct investment rules for ecommerce, which addresses the same issues of exclusivity, discounting, and preferential treatment. Interestingly, despite the outcry by MSME traders and the government's hard attitude on these issues, the

case is limited to the smartphone market, which makes us wonder if the remedies would be limited to the smartphone category.

Another general concern voiced in the market is “deep discounting” by the behemoth platforms. The antitrust law is clear that it is not deep discounting, but pricing below cost or predatory pricing, which is the real concern. However, what is unclear is benchmarking of costs for the platform market, especially with its “free” product offerings that are typically funded by cross-subsidies, advertisements, or premium subscriptions.

Not long back, in a case involving WhatsApp’s free messaging service, the CCI found WhatsApp to be dominant but held that providing a free messaging service is a standard practice, and therefore, not anticompetitive. True, a lot of messaging services and other services are free; it still begs the question does it create entry barriers for standalone apps that do not have the backing of big companies. In the MMT case, the CCI noted that platforms provide deep discounts to establish network effects but discounts of MMT do not appear introductory, raising another issue as to what stage introductory deep discounting becomes network-building predatory pricing.

The previous decision regarding Ola and Uber, where the CCI took a complacent view on undercutting, does not answer that either. One thing that seems abundantly clear is the renewed interest of the CCI to bring competition on the merits in the e-commerce market, and the recent Market Study on E-Commerce in India by the CCI indicates a big step in that direction.

Regarding merger control in the e-commerce market, the CCI has assessed several transactions. The MMT case is classic in that while consolidation helps growth, it may simultaneously enhance the risk of enforcement compliance. It is also hard to miss the observation of the CCI in the MMT case that small players exit because of takeovers, which is in sync with the latest move in the Amendment Bill to adopt a deal-value threshold to bring the so-called shark acquisitions in the tech market within the ambit of the merger regulation. Further, the CCI will also not shy away from demanding commitments in tech-related merger cases, as it did in the case of Hyundai and Kia, where the automakers gave voluntary commitments that collaboration with Ola would be non-exclusive.

Given this background, it is difficult to foretell if the CCI has moved from a cautious to an aggressive stance in the tech market, but it certainly seems eager to keep pace with the rapid digitisation. It is assuring that the CCI emphasises it will take a holistic approach; however, an urgent need is felt to adopt a “more economic” approach as is done by the EU since the 1990s, or we run the danger of unduly restricting a significant distribution channel. Platforms must compete on the merits, but they also deserve a clear, reasoned, and predictable evolution of antitrust jurisprudence.

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