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From Ex-Post Enforcement to Ex-Ante Regulation: Rethinking Competition Law for Digital Markets in India

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ABSTRACT

The rapid expansion of digital markets has transformed the structure of competition, replacing many conventional market characteristics with network effects, economies of scale, data-driven business models, multi-sided platforms and rapidly evolving technological ecosystems. Digital platforms generate substantial benefits for consumers and businesses by reducing transaction costs, expanding market access and facilitating innovation. At the same time, the concentration of economic power within a limited number of technologically dominant enterprises has generated new forms of anti-competitive conduct, including self-preferencing, anti-steering restrictions, bundling and tying, exclusive arrangements, data exploitation, deep discounting, the manipulation of search rankings, restrictions on third-party applications and algorithmic collusion. This article examines those practices within India's competition law framework and considers the institutional challenges confronting the Competition Commission of India. It asks whether conventional ex-post enforcement is adequate for digital markets and argues for a calibrated transition towards ex-ante regulation, evaluating the Competition Act, 2002, the Competition (Amendment) Act, 2023, the evolving role of the Commission and comparative regulatory developments. The article does not contend that the Commission has failed or that conventional competition law has become irrelevant. It contends rather that the structural characteristics of digital markets require competition regulation to become more anticipatory, more technology-sensitive and more institutionally specialised. It proposes a Digital Market Wing within the Commission, a digital competition observatory, periodic compliance reporting by systemically important platforms, greater algorithmic transparency, obligations of interoperability and institutionalised settlement and commitment mechanisms. It concludes that the optimal model for India combines the strengths of ex-post enforcement with proportionate ex-ante obligations rather than replacing the existing regime.

Keywords: *Digital markets, Competition law, Ex-ante regulation, Ex-post enforcement, Competition Commission of India, Algorithmic collusion, Platform regulation*

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I. Introduction

Digitalisation has fundamentally altered the manner in which markets are created, accessed and controlled. Digital platforms enable enterprises to reach consumers across geographical boundaries, reduce transaction costs and open new opportunities for entrepreneurship and innovation. Electronic commerce, digital payments, online advertising, social media, application stores and digital intermediation have accordingly become important components of contemporary economic activity. The expansion of such markets has at the same time created regulatory difficulty, because the characteristics that make digital businesses efficient can also facilitate the concentration of market power.

The competition concerns of digital markets cannot always be understood through the assumptions underlying conventional markets. Conventional markets generally exhibit diminishing returns to scale, whereas digital platforms may experience increasing returns, because an additional user may increase the value of the platform without a proportionate increase in marginal cost. Network effects, learning effects and economies of scale may therefore produce rapid concentration. A platform with a large existing user base becomes increasingly attractive to further users, which creates substantial barriers to entry for competing platforms.[1]

That phenomenon creates a regulatory dilemma. By the time an anti-competitive practice is established through conventional investigation and adjudication, the relevant market may already have tipped towards one or two dominant platforms. There is accordingly a need to consider competitive behaviour before market structures become irreversibly concentrated.

The Competition Act, 2002 remains the principal legislative framework for addressing anti-competitive conduct in India, sections 3 and 4 addressing anti-competitive agreements and the abuse of a dominant position respectively.[2] The digital economy has nonetheless generated practices that do not fit neatly within the conventional categories of competition harm. A platform may act simultaneously as intermediary and as competitor, may hold extensive information about its business users, may determine search rankings, may control access to consumers and may operate across several interconnected markets.

The central argument of this article is not that Indian competition law has become obsolete. The Competition Commission of India has actively adapted competition principles to digital markets and has investigated major technology enterprises. The difficulty lies rather in the timing of

[1] Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017).
[2] The Competition Act, 2002, §§ 3-4, No. 12, Acts of Parliament, 2003 (India).

enforcement, in technological complexity and in institutional capacity. This article therefore argues for a transition from an exclusively reactive model towards a hybrid framework combining ex-post enforcement with proportionate ex-ante obligations.

II. DIGITAL MARKETS AND THE CHANGING NATURE OF COMPETITION

Digital markets differ from conventional markets in several structural respects. First, digital businesses can scale rapidly, because the marginal cost of serving an additional user may be low once the underlying infrastructure is established. Secondly, network effects mean that the usefulness of a platform may increase as its user base expands. Thirdly, digital businesses frequently operate through multi-sided platforms connecting different categories of user, among them consumers, sellers, advertisers and application developers.

These characteristics can create what may broadly be described as winner-take-all or winner-take-most dynamics. Once a platform acquires a sufficiently large user base, competing platforms may find it difficult to attract users, because users themselves have limited incentive to migrate from an established ecosystem. A dominant platform may then use its position to enter adjacent markets, to bundle services or to acquire emerging competitors.[3]

Data constitutes a further source of competitive advantage. Digital platforms collect information about consumer preferences, transactions, searches and interactions. The accumulation of such data may improve services and innovation, but it may equally create barriers for competitors that lack comparable informational resources. Data therefore functions as an input into market power and not merely as a matter of privacy.[4]

The significance of these characteristics is particularly apparent in markets where consumers pay no monetary price. Price-centred analysis may be inadequate where a service is supplied without direct payment and users exchange personal information or attention for access.[5] The approach of the Commission towards digital platforms has increasingly recognised that broader conception of consumer welfare. Digital competition cannot accordingly be assessed by asking only whether prices have risen. Quality, innovation, privacy, access, control over data, interoperability and the ability of competitors to enter and remain in the market must also be considered.

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[3] Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973 (2019).
[4] Ian Brown & Douwe Korff, *Data Protection and Digital Competition* (2020).
[5] Erik Brynjolfsson & Felix Eggers, *Using Massive Online Choice Experiments to Measure Changes in Well-Being*, 116 PROC. NAT'L ACAD. SCI. (2019).

III. Emerging anti-competitive practices in digital markets

The Parliamentary Standing Committee on Finance, in its report on anti-competitive practices by large technology companies, identified a number of practices requiring closer regulatory attention and grouped them into ten categories: anti-steering, platform neutrality and self-preferencing, bundling and tying, the use of non-public data, acquisitions and mergers, deep discounting, exclusive arrangements, preferences in search and ranking, restrictions on third-party applications, and practices in digital advertising.[6]

A. Anti-steering and platform restrictions

Anti-steering provisions restrict business users from directing consumers towards alternative payment systems or competing services. Application stores provide a significant illustration. Where a platform requires the use of its proprietary payment infrastructure, competing payment providers may be denied meaningful access to users. The treatment of the Google Play Store and of Apple's App Store demonstrates how control over access can create competitive advantages in adjacent payment markets. The difficulty is therefore not the contractual term alone, but the combination of gatekeeping power with contractual restriction.

B. Self-preferencing and platform neutrality

A platform may operate simultaneously as intermediary and as competitor, and that dual role creates an incentive to favour its own products or services. Self-preferencing may occur through search rankings, recommendations, pre-installation or preferential visibility. The allegations concerning the treatment of Google Pay, including preferential positioning and search-related advantage, illustrate how a platform may use control over an intermediary service to strengthen its position in an adjacent market.[7]

Platform neutrality therefore becomes an important regulatory principle. The object should not necessarily be to prohibit every form of preferential treatment, but to ensure that preferential treatment does not rest upon the discriminatory manipulation of a gatekeeping position.

C. Bundling and tying

Bundling and tying occur where access to one service is made conditional upon the use or purchase of another. Digital ecosystems make such strategies powerful, because a dominant platform may control several interconnected layers of a market. The Mobile Application

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[6] Parliamentary Standing Committee on Finance, *Anti-Competitive Practices by Big Tech Companies in Digital Space*, Ministry of Corporate Affairs, Government of India (2022).

[7] *See* Louis Kaplow, *The Meaning of Vertical Agreement and the Structure of Competition Law*, 80 Antitrust L.J. 563 (2016).

Distribution Agreements operated by Google illustrate the concern that mandatory pre-installation may extend dominance from one digital market into another.

D. Data exploitation

The accumulation of data can reinforce existing dominance, since a platform may use data collected in one market to strengthen its position in another. That produces a feedback mechanism: more users generate more data, more data improves the services offered, improved services attract further users, and the enlarged user base generates more data still. Such a cycle can make entry progressively more difficult for competitors. Similar concerns have arisen in relation to food-delivery platforms and their use of information about consumer purchasing to reinforce market position.[8]

E. Killer acquisitions and deep discounting

Digital platforms may acquire emerging competitors before those businesses develop into substantial competitive threats. Conventional merger thresholds resting heavily upon turnover or asset values may not capture the competitive significance of such transactions, a difficulty illustrated by the acquisition of WhatsApp by Facebook, which involved a high transaction value alongside comparatively limited conventional financial indicators. The Competition (Amendment) Act, 2023 has since introduced a deal-value threshold directed at that problem.[9]

Deep discounting presents a further challenge. Platforms may use substantial discounts to attract consumers and sellers, potentially strengthening network effects and weakening smaller competitors, and preferential discounts offered to selected sellers may distort competition within a platform ecosystem.[10]

F. Algorithmic collusion

The most technologically challenging issue is algorithmic collusion. Conventional cartel regulation assumes some form of coordination or agreement, whereas automated pricing systems may produce parallel or coordinated outcomes without any readily identifiable human agreement. Although the statutory concept of an agreement is broad enough to encompass informal arrangements,[11] determining whether algorithmic coordination amounts to actionable collusion presents both evidentiary and conceptual difficulty. Indian law has long distinguished

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[8] *National Restaurant Association of India v. Zomato Ltd.*, 2022 S.C.C. OnLine C.C.I. 22 (India).
[9] The Competition (Amendment) Act, 2023, No. 9, Acts of Parliament, 2023 (India).
[10] Andrea Pozzi, *The Effect of Internet Distribution on Brick-and-Mortar Sales*, 44 RAND J. ECON. 569 (2013).
[11] *FICCI Multiplex Association of India v. United Producers/Distributors Forum*, 2011 Comp. L.R. 0079 (C.C.I.) (India).

conscious parallelism from concerted action,[12] and that distinction becomes harder to apply where the parallelism is generated by machine.

IV. The limitations of an exclusively ex-post model

The traditional model of competition law is predominantly ex-post. A suspected practice occurs, an investigation follows, evidence is collected, the relevant market is defined, competitive effects are assessed, and a remedy or penalty is eventually imposed. That model remains essential, because a competition authority must observe due process and must avoid condemning legitimate innovation. Digital markets nonetheless present circumstances in which the delay inherent in conventional enforcement itself becomes a difficulty.

The first difficulty concerns market tipping. Digital markets may move rapidly towards concentration because network effects reward incumbency, and a market winner may emerge within a few years, before a regulator can intervene effectively.

The second concerns the assessment of the relevant market, which is complicated by multi-sided platforms and zero-price services. A competition authority must consider different user groups and the interaction between them rather than treating the platform as an ordinary single-sided market.

The third concerns access to evidence. Digital platforms may operate across jurisdictions, may hold competitively sensitive information abroad and may control the technical data required to understand their algorithms. Competition authorities internationally have identified access to data, specialised expertise and cross-border investigation as significant obstacles to enforcement.

The fourth concerns the difficulty of monitoring platform neutrality through isolated investigations. A platform may repeatedly alter its ranking mechanisms, its contractual arrangements or its discounting strategies, so that a case-by-case model may address one practice while leaving the underlying structural incentive intact. The market study on electronic commerce conducted by the Commission recognised several such problems, among them platform neutrality, platform-to-business contracts, price parity, exclusive agreements and discounting.[13] Some of these concerns require stronger mechanisms of transparency and monitoring rather than reliance upon voluntary self-regulation alone.

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[12] *Union of India v. Hindustan Development Corp.*, A.I.R. 1994 S.C. 988 (India).

[13] Competition Commission of India, *Market Study on E-Commerce in India: Key Findings and Observations* (2020).

V. From ex-post enforcement to ex-ante regulation

Ex-ante regulation does not mean replacing competition law with rigid governmental control of digital business. It means establishing certain obligations before harmful conduct materialises, particularly for platforms possessing substantial and durable market power. The rationale is preventive: where a platform's structural position enables it to engage repeatedly in self-preferencing, discriminatory access, anti-steering or data-related exclusion, waiting for each practice to be investigated separately produces inefficient regulation.[14]

This article therefore proposes a more anticipatory approach while retaining the Commission as the principal competition authority. It does not treat the Commission as a failed institution but recommends that its institutional capacity be adapted to the conditions of digital markets.

A. A digital market wing

A specialised Digital Market Wing within the Commission could supply the technological and economic expertise that digital markets require. Its responsibilities might include monitoring digital platforms, analysing algorithmic conduct, conducting market studies and developing standards of compliance for particular sectors, and it might formulate a code of competitive conduct for platform markets, developed in consultation with businesses, consumers, experts and other stakeholders. That approach carries an institutional advantage: India would not need to create an entirely separate regulator, since the existing competition authority would acquire specialised capacity.

B. A digital competition observatory

A digital competition observatory could monitor trends in platform markets, technological developments, data practices and emerging competitive risks, with the object of identifying market changes before they develop into serious competition failures. Continuous monitoring of that kind would assist the Commission in moving from a reactive towards an anticipatory model.

C. Interoperability

Interoperability can reduce the lock-in associated with dominant platforms. Where competing services can interact effectively with one another, consumers and business users may find it easier to switch between them, and interoperability has accordingly been proposed as a pro-competitive instrument.[15] Obligations of interoperability should nonetheless be proportionate

[14] *See* Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).
[15] Wolfgang Kerber & Heike Schweitzer, *Interoperability in the Digital Economy*, J. INTELL. PROP. INFO. TECH. & E-COMMERCE L. (2017).

and technologically feasible, since obligations drawn too widely may undermine cybersecurity, intellectual property and the incentive to innovate.

D. Settlement, commitment and negotiation

Disputes in digital competition can consume substantial investigative resources. Mechanisms of settlement and commitment can provide faster resolution where that is appropriate, while allowing the authority to obtain behavioural remedies.[16] Such mechanisms exist in other jurisdictions and have now been introduced in India by the amendment of 2023.[17] There is a further case for legally enforceable frameworks of negotiation concerning important terms between platform and business user, among them commissions, services and contractual revision.

VI. CONCLUSION AND SUGGESTIONS

Digitalisation has not rendered competition law irrelevant. It has exposed the limits of applying conventional enforcement mechanisms to markets with fundamentally different structural characteristics. Network effects, economies of scale, the accumulation of data, multi-sidedness, zero-price services, algorithmic decision-making and gatekeeping power can together allow digital markets to concentrate rapidly.

India already possesses significant institutional experience in addressing digital competition concerns. The Commission has investigated major digital platforms and has applied existing principles to practices involving search, mobile ecosystems, electronic commerce, data and platform relationships. It would therefore be inaccurate to characterise the Commission as a failed institution. The more appropriate conclusion is that its regulatory approach must continue to evolve.

The principal weakness of a purely ex-post model is temporal. Digital markets can tip before lengthy investigations are complete, and once network effects, data advantages and ecosystem dependence become entrenched, a penalty imposed later may not restore the competitive conditions that existed before concentration occurred.

India should therefore move towards a hybrid regime. Ex-post enforcement should continue to address established violations, while ex-ante regulation should prevent predictable forms of exclusionary conduct by systemically significant platforms. The Digital Market Wing, the digital competition observatory, periodic compliance reporting, algorithmic transparency,

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[16] DOUGLAS H. GINSBURG & JOSHUA D. WRIGHT, ANTITRUST SETTLEMENTS: THE CULTURE OF CONSENT (2012).
[17] The Competition (Amendment) Act, 2023, *supra* note 9; *see also* ABIR ROY & JAYANT KUMAR, COMPETITION LAW IN INDIA (2d ed., Eastern Law House 2018).

interoperability and institutionalised settlement mechanisms proposed above may collectively strengthen that framework. The proposition is not that India requires less competition law but that it requires more adaptive competition law, capable of anticipating technologically enabled foreclosure while preserving space for innovation and consumer choice.

The future of Indian digital competition law lies neither in retrospective punishment alone nor in rigid preventive regulation, but in a carefully calibrated movement from ex-post enforcement towards complementary ex-ante regulation, with the Commission retaining its central institutional role while developing specialised technological and economic capacity. Such an approach would allow Indian competition law to respond to the realities of platform markets while maintaining the fundamental objective of competition policy: the preservation of contestable markets, consumer welfare, innovation and fair opportunity to participate.

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