CPI's Asia Column Presents:

Disruptive Innovations: CCI's Progressive Outlook

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Introduction

If one looks back at the progress of human kind- one will see that every step forward was always greeted with great scepticism. Inventions and new theories propounded were never accepted easily, for the simple reason that they were not understood well enough. In fact, innovations were always viewed as disruptive ideas. All innovators were ahead of their times and the merit of their ideas was acknowledged only after they were tried, tested and proved to be not only good but also better than the old ones. But time and again history has shown us that old ideas did bow out giving place to the new when their worth was proven, society was benefited and efficiency increased manifold – be it the transformation from doves to the postal system, telegraph, telephone, cellular phones and now the world wide web, that has revolutionized communications. Computers were viewed with great suspicion as they would leave a whole section of people jobless. However, these very same computers created an entirely new industry in the form of the software industry – which is one of the biggest in the world and employs millions today. All of these innovations which seemed disruptive initially have now woven themselves inextricably into the processes of production as well as consumption and have led to great technological advancement and overall economic development. Thus, the relationship between economic development and innovation, in particular disruptive innovation, cannot be overstated.

Typically based on the use of digital technology, disruptive innovations utilize new technologies/business models to provide simpler, cheaper, more accessible and convenient products/services, thereby leading to the displacement of incumbent products, firms or even industries in some cases. Such innovations can take different forms and are not limited to the introduction of new products alone- they are characterized by innovative pricing structures, new distribution practices and introduction of entirely new business services/models. In the last decade, India has also witnessed an unprecedented growth in "disruptive innovations" –so much so that they have revolutionized many markets. For instance, e-commerce platforms such as Amazon, Flipkart and Myntra have swept the market and are competing neck to neck with traditional retailers/brick and mortar shops; app-based taxi services such as Uber and Ola have transformed the transportation market; internet television networks such as Netflix and Hotstar have replaced traditional video home rental services; Whatsapp, Facetime, Google Duo and Skype have altered conventional means of communication; Airbnb has changed the hotel market; Cleartrip, MakemyTrip and OYO have disrupted the traditional hotel reservation market while Scootsy and Swiggy have transformed the food delivery market.

By consequence, disruptive innovations have changed the dynamics of marketplaces and resulted in the creation of new markets which are far more efficient than conventional markets- not only in terms of quality but also in terms of cost and convenience. While such innovations have provided ample opportunities thereby forcing market players to adapt for the benefit of consumers, it has also led to an increase in opposition from incumbent operators given the apparent impact on competition in the market place. Thus, spawning several interesting antitrust discussions. At the heart of these discussions lies the role of antitrust/competition authorities in being able to regulate such disruptions in a manner that will promote "new and innovative forms of competition", thus fostering economic development while also addressing any potential anti-competitive concerns that may arise.

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This article seeks to highlight the effects of disruptive innovation in the Indian context while focussing on the Competition Commission of India's ("**CCI**") decisional practice in assessing competition concerns in nascent innovation driven markets and as a result, its contribution to the evolution of such markets.

Competitive effects of disruptive innovation

In addition to the introduction of new products and business models, disruptive innovation seeks to remove inefficient intermediaries, lowers barriers to entry and incentivizes new entrants to provide comparable goods/services, increases consumer choice, forces incumbents to improve in order to compete effectively with the "disruption" and reduces information asymmetry (given the increased reliance on technology enabled platforms) - all of which spur innovation, contribute to enhanced efficiencies and greater competition in the market. Considering that such innovations are "consumer centric" and predominantly focus on providing greater convenience, they receive significant attention within a short span of time and by virtue of the *networks effect*[2] become increasingly popular. This holds particularly true for app-based taxi services such as Uber and Ola which gained immense popularity within the span of a few months in India. Consequently, the first-mover/innovator usually has the advantage and rapidly garners market power - thus, assuming a seemingly dominant position and pushing current market players to the fringes.

Once a dominant position has been established, it may be argued that there is a greater likelihood of abuse of such dominant position - which can take many forms, including predatory pricing to drive out existing players from the market or excessive pricing once the existing players have been driven out of the market. However, it must be appreciated that since these business models are premised on greater innovation, they face the threat of "creative destruction" and of being outdated, continually. Therefore, such business models despite garnering market power may face competition not only from smaller companies (in terms of market shares) which may have better technology but also from traditional incumbents who may displace the disruptive business models if the latter fail or do not stabilise in the long run. In fact, the threat of being replaced by a potential entrant with newer and better technology acts as a deterrent on the disruptive technology based models from engaging in anti-competitive practices. Arguably, the transient nature of the disruptive business models in itself acts as a pro-competitive factor in the market. Therefore, in high technology markets, the players have to *run as fast as they can just to stand still*.[3]

It is thus evident that the pro-competitive effects of disruptive innovations far outweigh their potential anti-competitive concerns. In the above context, it is also important to highlight that Section 4 of the Competition Act, 2002 ("**Act**") does not penalize the existence of a dominant position, i.e., big is not bad. What is, in fact, prohibited under the Act, is only the abuse of such dominant position. The true essence of competition is when firms innovate and effectively compete for the largest share in the market – this in itself is not abusive and should not be hindered in any manner. As such, the approach towards disruptive models should be based on the premise that the objective of competition law is to preserve *competition* and not protect *competitors.* It is, therefore, imperative for antitrust regulators to undertake a nuanced analysis

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2 An effect wherein usage of a product/service by one customer only increases its usage by other customers.

3 This is called the *Red Queen Game* phenomena, WJ Kolasky, "*What is Competition? A Comparison of US and European Perspectives*" Antitrust Bulletin 32 (2004).

of disruptive models of business, before brushing the first mover as dominant and as a consequence, stifling innovation.

CCI’s decisional practice

With the power to impose the highest economic penalties and stringent behavioural prohibitions having grave consequences, the role of the CCI is crucial in the development of disruptive business models. Tracing the decisional practice of the CCI, it is safe to say that the CCI, has adopted a pro-innovation approach while dealing with disruptive innovation models. For instance, in *In Re: Mr. Ashish Ahuja and Snapdeal.com & Anr.*[4]*,* the CCI held that *online and offline retail constituted two distinct distribution channels of the retail market and were not different relevant markets*. This was observed in the context of an information filed by an informant (who sold pen drives and other storage devices on Snapdeal, an online marketplace), alleging a violation of the provisions of the Act by Snapdeal and SanDisk. While the informant was initially selling pen drives and other storage devices through Snapdeal, the same was discontinued by Snapdeal, on the ground that only authorised dealers of SanDisk could sell SanDisk’s products and therefore, the informant was required to obtain a no-objection certificate from SanDisk. As a result, the informant alleged that Snapdeal and SanDisk were engaging in anti-competitive practices and abusing their dominant position. While dismissing these allegations, the CCI steered away from defining the online retail market as a distinct relevant market. Pertinently, the CCI observed that *while the online market and brick and mortar markets differed in terms of discounts and shopping experience, the consumers weighed the options available in both markets*. As such, if the price in the online market increased significantly, the consumers were likely to shift to the traditional brick and mortar shops, thereby evidencing that the two were substitutable. Further, in analysing the alleged dominance of Snapdeal, the CCI also considered the fact that Snapdeal was not engaged in the relevant market (i.e. purchase or sale of storage devices), rather it only owned and managed an online portal modelled like a marketplace that enabled the sellers who stock storage devices to sell such devices through its web portal for a commission. Further, since Snapdeal faced competition in the e-commerce market in India from other players such as Flipkart, Amazon, eBay, ShopClues, Yebhi, jungle.com, rediff.com, indiatimes.com etc., Snapdeal was not found to be dominant.

Similarly, in *In Re: Mr. Deepak Verma and Clues Network Private Limited & Ors.*[5]*,* where the informant had alleged that e-commerce websites/online portals were indulging in unfair trade practices by providing defective goods, the CCI reiterated that *the online retail market did not constitute a separate relevant market*. The CCI clarified that the allegations were mainly in the nature of deficiencies in the provision of goods and services and did not bring out any competition issue. However, the allegations were broadly assessed from the perspective of anti-competitive agreements and abuse of dominance. Due to the absence of any agreement between the different e-commerce entities, a finding of Section 3 of the Act (i.e., horizontal agreements between competitors) was not found. On the issue of dominance, the CCI noted that despite the emerging trend of buyers shifting from offline to online retail market, the online distribution channel constituted only 1 per cent. of the total retail market (as of 2013), thereby negating the requirement of drawing a differentiation between the two. Further, since the informant alleged that all e-commerce websites were engaging in abusive conduct, in substance, the allegation

[4] Case No. 17 of 2014.
[5] Case No. 34 of 2016.

pertained to "collective dominance", a concept not recognised under the Act. Accordingly, the matter was closed.

The CCI's inclination towards adopting a broad approach in defining the relevant market in high technology markets gives further momentum to the evolving business friendly stance of the CCI. For instance, in addition to considering standard business practices as an important factor in its competitive assessment[6], the CCI has also acknowledged the pro-competitive effects arising from disruptive innovation. . For instance, in *In Re: Mr. Mohit Manglani and Flipkart & Ors.*[7], dismissing allegations in relation to whether exclusive agreements entered into between e-portals and manufacturers were anti-competitive, the CCI noted that *with new e-portals entering the market, competition was only increasing and thus, the exclusive agreements did not prima facie create entry barriers*. It was further observed that distribution through the online channel only provided an opportunity to the consumers to compare the prices as well as the pros and cons of the product. Through the option of delivery right at their door steps, consumers were provided the opportunity to accept the goods at their convenience. Further, the CCI did not look into the allegation of dominance on the ground that several e-portals operated in India and that the relevant market could not be defined as the market for the specific product in respect of which the exclusive agreement was entered into.

Going a step further, in *In Re: M/s. Mega Cabs Private Limited and ANI Technologies*[8], the CCI ruled *that inability of the traditional players to compete with the efficiency of the new entrant (innovator) did not equate to creation of entry barriers within the meaning of the Act*. In this case, Mega Cabs had alleged that ANI Technologies, the operator of Ola Cabs, had abused its dominant position and entered into anti-competitive agreements with the drivers, by giving the drivers over 85 per cent. of the revenue of each trip, and consequently operating in losses. Further, Mega Cabs alleged that owing to heavy dependence on technology, costs involved in creating apps along with the additional burden to share commission with the drivers and providing them incentives to continue operations, it was not viable for any new player to enter into the radio taxi market. However, the CCI found no merit in these allegations and held that *while Ola Cabs was a prominent player with a high market share in New Delhi, it was not dominant,* thereby acknowledging that market shares are not always a true test of market power. This is also akin to the position adopted in the European Union, wherein the General Court while analysing the *Cisco systems case*[9] recognized that market shares may fluctuate in consumer communications sector because of its *fast-growing nature and the existence of short innovation cycles*. Therefore, implying that large market shares alone cannot be determinative of market power in the long run.

Recently, while rejecting allegations of abuse of dominance by Ola Cabs in Bengaluru, the CCI reiterated the above position, that in high technology markets, *high market shares, in the early years of introduction of a new technology, may turn out to be ephemeral*. Considering that such markets function on the principle of *networks effect*, market leadership position can be fragile or transient during the initial stage of evolution of the market, being the stage for *network creation*.[10] Thus, acknowledging that the objective of competition law is to *preserve competition* and not *protect competitors*. Additionally, the CCI has shown restraint in regulating market behaviour,

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6 *In re: Shri Vinod Kumar Gupta and Whatsapp Inc.*, Case No. 99 of 2016; *In re: Fx Enterprise Solutions India Pvt. Ltd. vs. Hyundai Motor India Limited*, Case No. 36/2014.

7 Case No. 80 of 2014.

8 Case No. 82 of 2015.

9 Case T-79/12, *Cisco Systems Inc. and Messagenet SpA v. Commission*, judgment of 11 December 2013, par. 69.

10 *In Re: Fast Track Call Cab Pvt. Ltd, Meru Travel Solutions Pvt. Ltd. v. ANI Technologies Pvt. Ltd.*, Case No. 6 & 74 of 2015 ("**Ola Bengaluru Case**").

particularly to give impetus to new entrants and prevent chilling of competition. To this end, the CCI has also clarified that competition is a means towards a greater end which presumes that competition in or for the market *inter alia* leads to desirable outcomes for the consumers, ensuring wide variety of quality products/services at best possible prices, and is not an end in itself.[11] Thus, clearly evidencing its intent to not intervene in cases where the harm accrues to competitors alone.

Keeping with the above approach, while delineating the scope of the relevant product market in *In Re: Bharti Airtel Limited and Reliance Industries Limited & Reliance Jio Infocomm Limited* [12], the CCI opted for a broad definition encompassing the entire wireless telecommunication services market as opposed to the narrow market of 4G services only, on the basis that "*in this ongoing process of evolution, it is not appropriate to differentiate wireless telecommunication services based on technologies used for providing such services*". The concerns in this case arose from the free services being offered by Reliance Jio Infocomm Limited ("**Reliance Jio**") which the informant alleged to be predatory in nature. Further, it was alleged that Reliance Industries Limited (the flagship company of Reliance conglomerate led by Mr. Mukesh Ambani) used its financial strength in other markets to enter into the telecom market through Reliance Jio. However, upon assessment of the relevant market, it was observed that the market was characterised by the presence of several players resulting in sufficient choice to consumers who could shift from one service provider to another with ease. *The CCI emphasised that Reliance Jio was a new entrant*, and in a competitive market scenario marked by the presence of big incumbent players, *it would not be anticompetitive for an entrant to incentivise customers towards its own services by giving attractive offers and schemes*.

Based on the CCI's decisional practice in the above cases, it is evident that if the CCI had applied a strict approach to disruptive business models on the basis of a narrow/highly differentiated definition of the relevant market or market shares alone (without considering the competition which the innovators face from potential innovation and traditional market players), it would have led to assessing emerging markets even before the markets had the opportunity to stabilise. Such premature intervention by an antitrust regulator could disrupt the development of disruptive business models which may in turn even reduce the innovator's incentive to innovate in the future. The CCI itself has recognised that any interference in a market which is yet to evolve fully, would not only disturb the market dynamics, but also pose a risk of prescribing sub-optimal solution to the nascent market situation.[13]

Conclusion

With an increased emphasis on digitalization, incentives for start-ups and the overall *ease of doing business*, India has been ranked third in terms of showcasing promise for maximum disruptive technology breakthroughs. The time is therefore ripe for disruptive innovation to provide an impetus to traditional industries/markets in India. However, given that the growth of any industry/market requires a stable, foreseeable regulation and a focussed government policy, the role of the CCI, in particular, can either exacerbate or inhibit the development of a market/industry, by virtue of the policy it adopts.

While conventional competition regulations/tools may not be wholly applicable in assessing the true impact of disruptive innovations in the market, it will be essential to strike the much-needed

11 *ibid*.
12 Case No. 3 of 2017.
13 Ola Bengaluru Case, *supra* note 10.

balance between giving disruptors *carte blanche* and excessively stifling competition and innovation. This has been accepted in mature jurisdictions such as the European Union as well, where it is believed that a rigid application of traditional antitrust rules to these markets *risks severely restricting competition, innovation, and consumer welfare* and *competition authorities should only intervene in dynamically competitive markets where the potential for anti-competitive harm is large and the potential benefits from intervention are great*.[14] Commendably, despite being a fairly young regulator, the CCI seems to be in line with international best practices since it has so far appreciated the importance of innovation and refrained from premature intervention in nascent innovation driven markets, thus providing necessary headroom for disruptive innovations in India.

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[14] *White Paper on Competition, Competitors, and Consumer Welfare: Observations On DG Competition's Discussion Paper on Article 82*, 9 (2006).