THE EVOLUTION OF COMPETITION LAW IN DIGITAL MARKETS IN INDIA

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I. INTRODUCTION

In step with global developments, Indian markets have been rapidly changing, characterized by the adoption of new technologies and innovation in almost all sectors of the economy. With recent disruptive policies including demonetization and the thrust towards digitalization, e-commerce has seen sudden growth in India. Online retail sales alone in India were expected to have reached U.S. $32.7 billion by 2018, led by Flipkart, Amazon India, and Paytm Mall.[2] With e-commerce projected to increase at a compound annual growth rate ("CAGR") of 44.77 percent as recently as 2016, and to reach U.S.$ 63.7 billion by 2020, India is one of the world's fastest growing retail markets.

Competition law has a broad and deep role to play in these fast-changing market conditions. Indian competition law, under Section 3 of the Competition Act, 2002 (the "Act"), deals with anticompetitive agreements. While Section 3(3) specifically deals with horizontal agreements, Section 3(4) covers vertical agreements. Section 4 addresses issues related to abuses of dominance. Sections 5 and 6 deal with regulation of mergers, amalgamations, and acquisitions ("combinations").

The touchstone of antitrust assessment under the Act is an appreciable adverse effect on competition ("AAEC") test. This test is not defined in the Act, although Section 19(3) sets out factors to be taken into account by the Competition Commission of India (the "Commission") to decide on the existence (or not) of an AAEC, as far as agreements are concerned.

The Commission started enforcing antitrust rules on May 20, 2009. Enforcement of combinations started on June 1, 2011. In the decade-long enforcement history of the Commission, major sectors where antitrust actions have been taken include pharmaceuticals, real estate, civil aviation, the financial sector, electricity, digital markets, sports and entertainment, as well as public procurement.

The jurisprudence on horizontal and vertical agreements in the digital and e-commerce sector in India has been largely limited, owing to the fact that the Act is still relatively young. Questions have often been raised as to the adequacy of Indian law to address suspected competition issues related to digital and e-commerce markets.

2 A. Peter & N. Singh, *Online Vertical Restraints and Abuse of Dominant Position: The Emerging Indian Perspectives* in *Global Competition Law Enforcement: New Players and New Challenges*, (Eds) Kovacic & Buccirossi, Kluwer (2019).

II. ANTICOMPETITIVE AGREEMENTS

Anti-competitive agreements traditionally fall in two broad categories - horizontal agreements and vertical agreements. Certain horizontal agreements that cause deadweight losses to all stakeholders and bring benefits only to their perpetrators are classified as "hardcore" cartels. Vertical agreements are agreements between economic players at different levels in the value chain, and are not treated as anticompetitive unless the Commission finds that they cause or are likely to cause an AAEC in India. A distinct category of cartels containing a mix of horizontal and vertical agreements, i.e. "hub-and-spoke" arrangements, have been alleged before the Commission only in a limited number of cases.

The essence of a hub-and-spoke cartel is that competing firms, instead of communicating directly between themselves, do so through a third party with which they have a vertical relationship. In a hub-and-spoke cartel, the spokes are connected to the hub, while the hub fulfils the role of a "serving hatch."[3] The spokes (also referred to as the "rim"), are competitors horizontally colluding amongst themselves, and the "hub" is an upstream supplier or downstream customer[4] that facilitates collusion between the spokes. These arrangements consist of both vertical and horizontal agreements at the same time, with horizontal coordination occurring between the spokes to adhere to terms set out by the hub, and a vertical agreement between the hub and each spoke individually.

While some direct communication between the spokes may take place, indirect communication through a hub is the quintessence of such an arrangement. For instance, in the Apple e-books case in the U.S., the court found that Apple had orchestrated a horizontal conspiracy among five leading publishers in the U.S. by entering into individual agreements with each, leading to an increase in the prices paid by consumers for e-books.[5]

In India, a hub-and-spoke cartel was alleged in *Jasper* v. *Kaff Appliances*.[6] It was alleged that Kaff issued a notice stating that Kaff's goods sold on Jasper's online marketplace, Snapdeal, were spurious and that Kaff would not honor warranties on products sold through Snapdeal. Jasper alleged that Kaff's action, in discriminating against the online sale channel, was a hub-and-spoke arrangement between Kaff and retail outlets. Jasper also alleged that an e-mail clearly revealed that Kaff was attempting to impose a price restriction in the form of a Minimum Operating Price ("MOP") on Jasper's website, designed to force sales to be made at a minimum price, and that Kaff threatened to ban online sales if such prices were not maintained. However, the directions to the Director General ("DG") of the Commission for investigation were based on a violation of Section 3(4)(e) of the Act relating to resale price maintenance ("RPM") only, and the issue of a possible hub-and-spoke conspiracy was not examined by the Commission.

In digital markets, algorithms can be employed to limit competition through agreements, concerted practices, and other subtle means. In *Samir Agrawal v. ANI Technologies*,[7] the Commission had the opportunity to decide whether the use of the same algorithm by the drivers of Ola/Uber through the use of a common platform amounted to cartelization under the Act. It was alleged that the Opposite Parties ("OPs"), i.e. Ola/Uber, acted as "hub" used by the competing drivers (the "spokes") to collude on prices. The Commission took the view that although the drivers may have followed the prices determined algorithmically by the platform (Ola/Uber), this could not be deemed to amount to collusion between the drivers. The Commission observed that a hub-and-spoke cartel would require an agreement between all drivers to set prices through the platform, or an agreement for the platform to coordinate prices between them, but there did not appear to be any such agreement between drivers themselves to delegate pricing power to the platforms or cab aggregators.

3 *JJB Sports plc v. Office of Fair Trading*, Case 1022/1/1/03 [2004] CAT 17, para 141.

4 Harrington Jr, Joseph E., How Do Hub-and-Spoke Cartels Operate? Lessons from Nine Case Studies (August 24, 2018), available at https://ssrn.com/abstract=3238244.

5 *United States v. Apple, Inc.*, 791 F.3d 290, 314 (2d Cir. 2015).

6 Case No 61 of 2014, Competition Commission of India.

7 Case No 37 of 2018, Competition Commission of India.

In the e-commerce sector, the Commission has had the occasion to assess certain allegations brought by informants as cases of exclusive distribution under Section 3(4). In *Ashish Ahuja v. SanDisk*,[8] the Commission investigated allegations against Snapdeal, an e-commerce portal, and SanDisk Corporation, a manufacturer of electronic storage devices. SanDisk insisted that only its authorized online channel partners could sell its products through Snapdeal. The informant alleged that Sandisk and Snapdeal entered into an agreement to prevent the informant from selling certain Sandisk products, and that such an arrangement violated Section 3 of the Act, as the conduct of the OPs was intended to force the informant to become a Sandisk authorized dealer. The Commission held that SanDisk was within its rights to protect the integrity of its distribution channel.

In *Mohit Manglani v. Flipkart and Ors*,[9] it was alleged that e-commerce websites and product sellers entered into exclusive agreements to sell the selected product exclusively on the selected portal to the exclusion of other e-portals or physical channels. It was also alleged that each e-portal had a 100 percent market share for the product it was exclusively dealing, leading to dominance. The Commission did not find any foreclosure, as most of the products the informant identified as being sold through exclusive e-partners (the OPs) were facing competitive constraints. The informants' contention that the conduct caused an AAEC was rejected on the ground that through the option of home delivery, consumers had the opportunity to receive the purchase at their convenience, which saved them precious time compared to visiting brick-and-mortar retail outlets. As regards allegations pertaining to Section 4, the Commission dismissed the informant's allegation that each exclusive product sold by each e-portal could be taken to constitute a relevant market in itself.

The issue of RPM as such is not novel. RPM can be understood as any agreement to sell goods on the condition that the price to be charged for resale by the purchaser must be that stipulated by the seller, unless it is clearly stated otherwise. Multiple cases of offline RPM have been dealt with by the Commission, including *M/s ESYS Information Technologies v. Intel Corporation*,[10] *Ganashyam Das Vij v. Bajaj Corp.*,[11] *Shubham Sanitary*,[12] and *Prime Magazine v. Wiley*.[13]

The digital era has introduced new challenges, such as situations where RPM clauses used in online channels are adopted by manufacturers with the strategic intent to increase prices rather than to serve consumers. RPM restrictions imposed on certain online retailers tend to have a broader impact on overall online price levels in the industry, as most online retailers also use pricing algorithms to automatically adapt retail prices to those of competitors. In dealing with online RPM cases, the Commission has maintained the view that in digital markets and online platforms, the customary structure may not be present in every situation, especially in constantly evolving markets, and that any entity/firm contributing value to a product/service will be deemed to be a part of the value chain[14].

The Commission, in its order in *Jasper v. Kaff*,[15] hinted that Section 3(4), which lists RPM as a potentially prohibited vertical restraint, is fully equipped to deal with all substantial issues pertaining to online RPM. In this case, the Commission ordered an inquiry into alleged RPM by Kaff with respect to the sale of kitchen appliances. Kaff warned Jasper that if it did not maintain the market operating price ("MOP") of Kaff kitchen appliances, Kaff would not allow their sale on the marketplace. It is noteworthy that the investigation was limited to the issue of RPM and did not touch upon any refusal to deal allegations.

8 Case No 17 of 2014, Competition Commission of India.

9 Case No 80 of 2014, Competition Commission of India.

10 Case No 48 of 2011, Competition Commission of India.

11 Case No 68 of 2013, Competition Commission of India.

12 Case No 09 of 2015, Competition Commission of India.

13 Case No 07 of 2016, Competition Commission of India.

14 *Jasper v. Kaff Appliances*, Case No 61 of 2014, Competition Commission of India.

15 Case No 61 of 2014, Competition Commission of India.

Fx Enterprises v. Hyundai[16] was the first case where the Commission directly ruled on RPM, holding that a restriction imposed by Hyundai on the maximum permissible discount that may be given by a dealer to end-consumers amounted to RPM in violation of the Act, and imposed a fine of Rs. 870 million. It was alleged, *inter alia*, that Hyundai imposed a "discount control mechanism," through which dealers were only permitted to provide a maximum permissible discount, prohibiting them from giving discounts to consumers above a recommended range. The Commission was of the view that Hyundai sought to impose an arrangement resulting in unlawful RPM, which included monitoring of the maximum permissible discount level through the discount control mechanism. It is noteworthy that such a discount control mechanism is of special importance in RPM cases in digital e-commerce markets. Such mechanisms or other sophisticated monitoring tools make RPM easier to sustain in online markets by allowing manufacturers to effectively track resale prices and to intervene swiftly in case of deviations from the imposed prices.

No occasion has yet arisen for the Commission to pronounce on so-called Internet Minimum Advertised Price ("IMAP") or Most Favored Nation ("MFN") clauses.

III. ABUSE OF DOMINANT POSITION

Section 4 of the Act prohibits abuses of a dominant position, and defines dominance as a position of strength enjoyed by an enterprise, enabling it to act independently of competitive forces prevailing in the market, or to affect competitors or consumers in its favor. The approach towards assessment of abusive conduct under Indian law is based on whether the dominant enterprise engages in exclusionary or exploitative conduct in the form of unfair or discriminatory prices and/or conditions, leveraging, or denial of market access.

Digital platforms are characterized by the gathering of user data, high upfront sunk costs, economies of scale, and low marginal costs. The drive to build large data banks, along with control of such data, may encourage digital platforms to expand into other related businesses.[17] Taken together, such factors may be sufficient to confer market power on such platforms, enabling them to engage in anticompetitive conduct.

In general, any type of behavior that constitutes an abuse in an offline industry is also likely to constitute an abuse online. The competitive strength of online businesses is increasingly being determined by the amount, variety and quality of the data they hold. Big data, a relatively recent phenomenon, is important in the digital world, as it is a necessary input for a variety of products and services competing with (or complementary to) the services offered by incumbent providers of services such as online search engines, social networks and e-commerce platforms. On the other hand, big data may also offer significant benefits[18] to consumers, such as improved quality, customized products and services at low prices, and enhanced innovation.

In *Matrimony v. Google*[19] ("*Google I,*") the Commission observed that the large volumes of information generated from searches conducted on such platforms constitute such "big data," enabling search platforms to attract advertisers, target relevant advertisements, and conduct their search business. At the same time, the Commission was mindful of the fact that big data does not come without a cost, and that consumers may be increasingly facing a loss of control over their personal data, while exposing themselves to intrusive advertising and behavioral discrimination.

Such big data has the potential to be an entry barrier when online platforms collate a vast amount of data capable of being processed at high speed. In online aggregator business model, prevalent in unorganized and highly populated sectors such as hotels, taxis, etc., an aggregator company provides aggregation services under their brand. Such aggregators may refuse to grant data access to affiliates offering the same products on their own websites, often leading to disputes between the two. Since online multi-sided platforms do not rely on physical infrastructure, the internationally recognized "essential facilities" doctrine may need to be modified to apply to data accessibility or ranking by online competitors.

16 Case No 36 & 08 of 2014, Competition Commission of India.

17 Competition issues in the digital economy, Note by the UNCTAD secretariat, May 1, 2019.

18 D. Daniel Sokol & Roisin Comerford, Antitrust and Regulating Big Data, 23 Geo. Mason L. Rev. 1129 (2016).

19 Case No 7 & 30 of 2012, Competition Commission of India.

Section 4 of the Act can be interpreted to recognize the essential facilities doctrine as a form of exclusionary anticompetitive conduct, through which a dominant enterprise refuses to grant access to a type of infrastructure or other form of facility that rivals need in order to compete. The doctrine has been examined by the Commission in the cases of *Arshiya Rail Infrastructure Limited (ARIL) v. Container Corporation of India (CONCOR)*[20] and *Shamsher Kataria v. Honda Siel.*[21] The Commission has, however, not yet been faced with a situation where big data would be an essential facility, i.e. a situation where online platforms would have the ability and incentive to erect entry barriers and maintain dominance, by limiting access to or refusing to share data that would be an important tool for competing platforms.

The fact that digital markets are often two/multisided with strong network effects can pose a challenge to the traditional approach to market definition, rendering it difficult even for experienced competition authorities to define the relevant market. As regards offline vs. online sales, the Commission, in *Ashish Ahuja v. SanDisk*,[22] held that they were merely different distribution channels for the same product, and hence were not two different relevant markets. In reaching this conclusion, the Commission had regard to the fact that both offline and online channels can differ in terms of discounts and shopping experience, and buyers weigh the options available in both to come to a final purchase decision. If the online price increases significantly, then the consumer is likely to shift to offline outlets, and *vice versa*. The same view was taken in *Deepak Verma v. Clues Network*,[23] and *Confederation of Real Estate Brokers Association of India v. Magicbricks.com.*[24]

It was argued by Google in *Google I* that the DG's definition of the relevant market ought to have included offline advertising. However, the Commission was of the view that online and offline advertising services are not comparable. Also, in *Google I*, the Commission held that online general web search services cannot be equated with specialized search services, and consequently held online general web search services to be a distinct relevant product market.

One of the questions often raised in two-sided/multisided platforms is whether the relationship between the platform and the respective market sides should be considered to be separate or whether there is a single market. In *RKG Hospitalities v. Oravel Stays*,[25] the Commission highlighted the fact that OYO and other similar players primarily operate as two-sided platforms connecting budget hotels with potential consumers. On one side, they serve budget hotels and on the other side they serve potential consumers looking for budget accommodation. The Commission held that since that case pertained to a complaint raised by a partner hotel, the relevant product market determination needed to take into account all alternatives available to such budget hotels, and the competitive constraints faced by the focal product, i.e. the service provided by OYO. The Commission noted that what OYO offers to budget hotels is essentially a franchising service comprising a bouquet of services, which enables the franchisee hotels to reap the benefits of the OYO brand (in return for a commission or share in revenues), while ensuring minimum monthly guaranteed revenues to the partner hotel. In this light, the Commission defined the relevant product market to be the "market for franchising services for budget hotels."

Platform markets also raise the issue as to whether there are circumstances under which a market can be viewed in isolation from the other side, or whether the interplay between both sides is always to be taken into account.[26] In *Google I* it was held by the Commission that the two sides of the market described above complement each other and are interdependent.

Another issue in defining relevant markets for online platforms is that the traditional SSNIP test may not be a practical tool, as the platform may argue that they provide free products or services. Google raised this argument in *Google I*, but the Commission rejected it, holding that users offer indirect consideration to Google by providing their attention (or "eyeballs") to the Search Engine Results Page ("SERP,") and allowing Google to collect and use their information. Also, Google argued that consumers incur near zero search costs when gathering information for purchase decisions online, and that there is no purchase or sale of goods or services, as Google provides search services to users free of cost. This argument was rejected by the Commission, observing that several mobile applications/websites work through an advertiser funded model, but this does not imply that users do not provide any consideration for using these products and services.

20 Case No 64 of 2010 & 12 of 2011, Competition Commission of India.

21 Case No 03 of 2011, Competition Commission of India.

22 Case No 17 of 2014, Competition Commission of India.

23 Case No 34 of 2016, Competition Commission of India.

24 Case No 23 of 2016, Competition Commission of India.

25 Case No 03 of 2019, Competition Commission of India.

26 D. Daniel Sokol & Roisin Comerford, Antitrust and Regulating Big Data, 23 Geo. Mason L. Rev. 1129 (2016).

It is noteworthy that the definition of price under Section 2(o) of the Act defines "price" as including any "valuable consideration," whether it is "direct or indirect, or deferred, and includes any consideration which in effect relates to the sale of any goods or to the performance of any services although ostensibly relating to any other matter or thing. This definition is wide enough to reject Google's argument by including personal data, attention, and revealed preferences as "valuable consideration."

Predatory pricing, as per the Indian Act, is the sale of goods or services at prices lower than the cost of production, as defined in the CCI (Determination of Cost of Production) Regulations, 2009, with the intent to reduce competition or eliminate competition or competitor(s). In India, the abuse of predation involves pricing below cost and predatory intent. This is unlike the situation in the U.S., where besides pricing below cost, there is also a "recoupment" test which must be satisfied for a finding of predation. Specifically, in the U.S., the plaintiff must prove that the defendant had a "dangerous probability of recouping its investment in below cost prices."

In India, allegations of predatory pricing have been raised against firms operating ride sharing/aggregator business models by traditional incumbent taxi companies whose businesses have been disrupted by aggregators. The Commission in *Fast track Call Cab/Meru v. ANI Technologies*[27] rejected ANI technologies' argument that it was merely a technology software service provider, holding that it is a radio taxi service provider. However, despite its high market share of 60-70 percent, ANI Technologies was not found to be dominant, due to Uber posing strong competitive constraints (the Commission noted that the incumbents were left catching up with a new entrant armed with a new technology which allowed it to arrogate to itself a large unmet demand).

During the investigation, Uber, which entered the relevant market in 2013-14, expanded its network rapidly to account for nearly one third of the active fleet in 2015-16. In terms of annual number of trips, its share increased from 1-2 percent in 2013-14 to 30-31 percent in 2015-16. Finally, the Commission did not see the need to intervene, as it found that the market was still evolving. Besides, efficiency considerations also appeared to favor ANI Technologies, which was providing ease of booking and ride tracking, besides having exponential growth in the market due to the presence of taxi aggregators. The Commission closed the matter for want of dominance and consequently did not examine the issue of predation.

Data protection and privacy concerns are also often raised in the context of digital platforms. Terms of use and privacy policies tend to be complex and written in an obscure manner hard for consumers to understand. Though data privacy is not the primary concern of competition authorities, data considerations may nevertheless be relevant for dominant players. The issue of privacy came before the Commission in *Vinod Kumar Gupta v. WhatsApp*,[28] where it was alleged that WhatsApp was abusing a dominant position by introducing a new privacy policy compelling users to share their account details and other information with Facebook. However, WhatsApp offered users the option to opt out of sharing such information with Facebook within 30 days of agreeing to the updated policy. This option was seen by the Commission to be sufficient to absolve WhatsApp of allegations that it compelled consumers to accept the updated policy.

Digital platforms, due to their multi-sided nature, may be in a position to impose potentially disadvantageous terms and conditions on different sides of the platform. On the consumer side, a platform may govern transactions using terms and conditions for the services or goods being traded, and exercise direct control over their performance (e.g., setting out rules for cancellations, refunds, automated price settings, dealing with complaints, or managing payments).

Discrimination between trading partners in relation to prices or other conditions of trade may also be operated by dominant digital platforms. In *Google I*, the Commission held that Google created an uneven playing field for competitors by "favoring" Google's own services and partners through manipulation of its search results to the advantage of its vertical partners, while Google's own sites appeared prominently on the search results page whether or not they were the most relevant or popular. In addition, an aggregator may give preferential or favorable treatment to its own partners, or its own firms set up to compete with the affiliates listed on its platform.

27 Case No 06 & 74 of 2015, Competition Commission of India.

28 Case No 99 of 2016, Competition Commission of India.

Anticompetitive practices may also include imposition of unfair prices or other unfair conditions of trade; limitation of production, supply or technical development; or the conclusion of contracts on the condition that the other contracting party agrees to accept or deliver additional goods or services. Imposition of unfair and discriminatory conditions on online search advertising customers was also alleged in *Google I*. The Commission held that Google's ranking of its Universal Results prior to 2010, which was found not to be strictly determined by relevance, was a violation of Section 4(2)(a)(i). Also, the Commission found that the prominent display and placement of a so-called Commercial Flight Unit on the SERP, with a link to Google's specialized search options and services (Google Flights), amounted to the unfair imposition of search services on users, depriving them of additional choices.

Similarly, in *Umar Javed v. Google*[29] ("*Google II*"), a case that is pending investigation, the Commission took the *prima facie* view that mandatory pre-installation of the entire Google Mobile Services ("GMS") suite under its Mobile Application Distribution Agreement ("MADA") for mobile device manufacturers amounts to the imposition of unfair conditions, in contravention of Section 4(2)(a)(i) of the Act. *Prima facie*, the conduct was also found to have limited technical or scientific development relating to goods or services to the prejudice of consumers in contravention of Section 4(2)(b) of the Act. The Commission is yet to decide the ultimate outcome in *Google II*.

As discussed above, the concentration of big data in the hands of a few dominant firms or monopolists and their consequent refusal to share information with potential competitors or new entrants may not only limit effective competition to the detriment of consumers, but also lead to foreclosure, denying market access to competitors. In *Google I*, it was alleged by Matrimony that Google denied such access to competing search engines. The Commission observed that by restricting websites from partnering with competing search services, Google was denying its competitors access to the search business, marginalizing competitors and endangering their viability, while strengthening its own position. Consequently, the Commission held that Google's competitors were denied access to the online search syndication services market in contravention of Section 4(2)(c) of the Act. In *Google II*, the Commission has also found that, *prima facie*, Google allegedly denies market access to competing search apps in contravention of Section 4(2)(c) of the Act.

In both online and offline markets, "leveraging" involves a dominant enterprise or platform using its dominant position in one relevant market to enter into or protect it position in the other relevant market. As digital platforms are dual/multisided, dominance on one side can be used to produce anticompetitive conduct on another. This is because platforms not only serve as critical infrastructure, but are also integrated across markets. In *Google I*, the Commission was of the opinion that *Google* was in a position to impose unfair conditions under negotiated search intermediation agreements with publishers owing to its dominance in the market for online general web search, which it was using to strengthen its position in the market for syndicated search services, in violation of Section 4(2)(e). In its *prima facie* opinion on *Google II*, the Commission also found Google leveraged its Play Store to protect its position in general online search markets.

IV. COMBINATIONS

Digital markets pose complex problems for competition authorities and analysts not only in antitrust analysis but also in combinations. Potential competition concerns that might arise from platform market power can be analyzed through merger control.[30] Innovation can be a major casualty in mergers in technology markets. Therefore, merger reviews in these markets have to focus on likely effects on innovation. Pre-emptive acquisitions of smaller companies by dominant digital or e-commerce firms may be used to thwart potential competition that could pose harm to an incumbent company's business model.

Merger review becomes all the more necessary in cases where the merging firms are close competitors. Dominant firms and near-monopolists in the tech field have exhibited a tendency to acquire disruptive or potentially disruptive firms in adjacent markets to forestall potential competition. Besides, transactions in digital markets are often driven by a motive to gain control over or to access the target's data. Such targets, normally start-ups, are asset-light and low in turnover. Transaction value may not have any direct correlation with the asset or turnover base of such firms. Problematic combinations could be better captured by transaction value rather than by asset- or turnover-based thresholds.

29 Case No 39 of 2018, Competition Commission of India.

30 Competition issues in the digital economy, Note by the UNCTAD secretariat, May 1, 2019.

India has been taking a cautious approach in dealing with digital markets so that upcoming digital companies are not disadvantaged by any rash action by the regulator. At the same time, the Commission remains vigilant of overlaps, be they horizontal or vertical, as a general factor to be considered for the assessment of AAEC. Combinations involving digital players may not be amenable to the traditional merger review process. The Commission approved the acquisition by U.S. retail giant Walmart of a 77 percent stake in Flipkart for U.S.$16 billion, which was facilitated by the limited overlap between the companies' activities. The Commission observed that discounting practices by Flipkart may have to be reviewed by the relevant authorities. The Commission, in its order, observed that issues concerning FDI policy need to be addressed in that policy domain to ensure that online platforms remain a true marketplace providing access to all retailers.

As mentioned above, digital firms are generally asset-light and income flows are largely indirect, unlike in offline markets. The current asset- and turnover- based thresholds for the notifiability of combinations may be allowing some deals in the digital sector to escape scrutiny by the Commission. "Size of transaction" or "deal value" thresholds are being demanded by many. Germany, for example, introduced merger notification thresholds based on transaction value in 2016. The Indian Competition Law Review Committee ("CLRC") recently submitted a report to the Minister of Finance and Corporate Affairs, recommending a transaction-based notification threshold for combinations in digital markets.

V. CONCLUSION

While digital markets and e-commerce strengthen competition and reduce information asymmetries, they also pose substantial challenges for antitrust authorities. Digital markets are growing quickly and raise newer challenges such as hub-and-spoke agreements and algorithmic collusion, which pose conceptual and analytical issues for competition authorities. Such new forms of collusion are not only difficult to track but also it is an uphill task to bring them to book.

RPM in the digital space is much more complex than it is offline. Emerging challenges such as MFN clauses and IMAP may also come up before the Commission sooner or later.

Network effects exhibited by platform entities make market delineation particularly complex. Big data has been shown to be as potent as traditional physical infrastructure, leading to additional data protection and privacy concerns. Dominant firms' control over data may bestow market power to a considerable extent, making maverick firms vulnerable to abusive conduct. Incumbent online platforms may indulge in behavior aimed not only at denying access to competitors, but also at capturing and exploiting other relevant markets.

The question whether the existing legal instruments and provisions are capable of addressing concerns raised by digital markets is a real one. In India, the Commission found that the existing provisions are sufficient when it comes to antitrust. The definition of "price" in the Act is wide enough. In *Jasper v. Kaff*, the Commission hinted that Section 3(4), which lists RPM as a potentially prohibited vertical restraint, is adequate to deal with all substantial issues pertaining to online RPM.

Innovation is at risk of being obstructed, especially in mergers in digital markets. The current asset- and turnover-based thresholds may not be capable of capturing problematic combinations, since digital firms in general are light in assets and low in turnover. As noted, transaction value-based thresholds have been recommended by the CLRC in a report submitted recently to the government.

The approach of the Commission in dealing with digital markets has been rather cautious, lest innovation be blunted through the activism of the regulator, showing that the Commission appears to believe that regulatory intervention in tech industries should be targeted and proportionate.

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