

Towards a Competition Enabling Framework in Asia Pacific: *Opportunities and Challenges*

REFORMING INDIA'S COMPETITION ACT:
CONSIDERATIONS & BEST PRACTICES



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Reforming India's Competition Act:
Considerations & Best Practices

CPI Live



Background Note:

- This Panel concerns the reform of India's competition rules, in light of recent developments and international laws.
- The Panel will focus on various issues, including privacy and data regulation and its interaction with competition rules.

Participants:



Vivek GHOSAL | Professor and Head of the Department of Economics, Rensselaer Polytechnic Institute



Dhanendra KUMAR | Former Chairman, Competition Commission of India



T.S. SOMASHEKAR | Professor of Economics, National Law School of India University



Rahul SINGH | Associate Professor of Law, National Law School of India University, Bangalore



Pradeep MEHTA | Secretariat General, CUTS International

Moderator:



Geeta GHOURI | Former Commissioner, CCI

Panel Summary

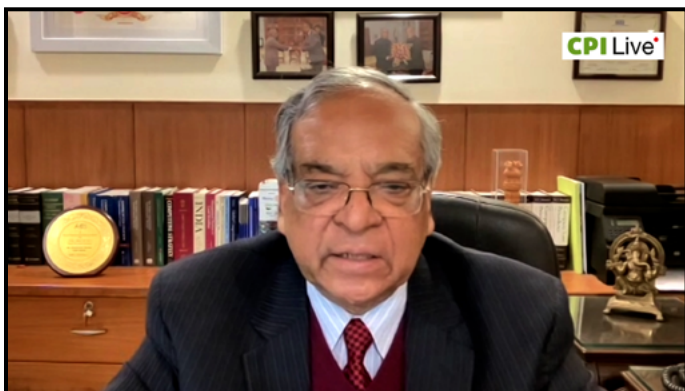
The Panel was chaired by **Geeta GOURI**, former member of the Competition Commission of India. The Panel included **Dhanendra KUMAR**, former Chairman of the Competition Commission of India; **Pradeep MEHTA**, founder secretary general of the Jaipur-based Consumer Unity & Trust Society; **T.S. SOMASHEKAR**, Professor of Economics, NLSIU; **Vivek GHOSAL**, Professor, Rensselaer Polytechnic Institute; and **Rahul SINGH**, Associate Professor of Law, NLSIU.

Geeta GOURI opened the panel, noting the recent Competition Law Review Committee Report, the *Harshita Chawla v. WhatsApp* case, and the issues they raise for the interaction between competition law and privacy.

Dhanendra KUMAR noted that the two domains of law have interactions.

Key Talking Points | Dhanendra KUMAR

- Privacy and a competition law impinge on each other. This matter also came up before the Competition Commission in the case of Facebook, when they also referred to their study report on the telecom sector.
- There needs to be a balance between the rights of citizens, companies, and society as regards access to data.
- Privacy would have an interplay with the competition law. But they remain separate disciplines.



Dhanendra KUMAR | Former Chairman, Competition Commission of India

Geeta GOURI notes that the right to be forgotten needs to be understood at the way people in India look at privacy. There may be a need to distinguish between Western and Indian conceptions of privacy.

Vivek GHOSAL agreed that privacy is a value that varies across cultures. Moreover, in his view, it is more a regulatory than a competition law matter.

Key Talking Points | Vivek GHOSAL

- Data in and of itself is not a problem. It is a question of how it is used. Data and competition laws need to be distinct.
- Also, if you look at privacy, it is true that when you look at surveys of individuals and you ask them, do you care about privacy? Individuals claim to care about privacy, but in practice simply “click-through” agreements.



Vivek GHOSAL | Professor and Head of the Department of Economics, Rensselaer Polytechnic Institute

Geeta GOURI Queried how one decides whether data is valuable or not? Privacy has different value in the West compared to Europe.

Pradeep MEHTA raised three points concerning the value of data to ecosystem operators and users:

Key Talking Points | Pradeep MEHTA

- First, there is a large amount of data is collected and if it is anonymized and used for commercial interests does not breach any privacy rules. Privacy is a regulatory matter: it is not a competition issue, but, if it is used for commercial purposes, it can be a subject matter for competition law enforcement.
- For instance, if such data is used to leverage one's own product it can amount to unfair practice, breach of platform neutrality, and can also amount to abuse of dominance.

- That said, we need to have more market studies to get more clarity on digital market function and firm behaviors. People in the West claim to care about privacy, but in practice “click through” the standard agreements. There is a lot of research to be done.



Pradeep MEHTA | Secretariat General, CUTS International

T.S. SOMASHEKAR raised the following points:

Key Talking Points | T.S. SOMASHEKAR

- Specifically with respect to Apple and the commission for in-app purchases of 30 percent, the question is why are companies able to do this?
- When dealing with privacy, this would come within the realm of competition. If a firm forces someone to part with their data, it is a price. Insofar as it is a price, a competition authority can look at it.
- It is also important to look at why firms would want that price. They must have a reason (see the *Facebook/Whatsapp* merger). It may have value in future. In particular in terms of moving into markets in future.



T.S. SOMASHEKAR | Professor of Economics, National Law School of India University

Geeta GOURI queried what data is relevant, particularly in a cross-cultural context?

Rahul SINGH queried who is best placed to regulate this? Should it be the Competition Commission or someone else? For example, there are technical differences between messaging apps in terms of how they deal with privacy and data collection. Does the CCI have the expertise to regulate this? Or should it be another regulatory body?

Geeta GOURI queried what the criteria should be to determine when a regulator such as the CCI should intervene in a case involving personal data

Dhanendra KUMAR noted that Indian (and most other) competition laws were designed for traditional markets and struggle to be applied in the digital economy.

Key Talking Points | Dhanendra KUMAR

- The shape and structure of economics have changed in the digital economy. Price is no longer the only relevant factor. The value of data is also key. For example, Facebook paid much more than the nominal value of WhatsApp.
- The Competition Law Review Committee looked at this. One issue is whether deal size should be taken into account in merger thresholds (rather than simply turnover).
- This among other things is something that needs to be taken into account in any reform to competition rules.

Geeta GOURI queried how traditional tools (e.g. HHI indices) need to be modified to deal with new markets.

T.S. SOMASHEKAR noted the difficulties in dealing with innovative digital markets.

Key Talking Points | T.S. SOMASHEKAR

- It is important to quantify the value of data and the extent to which it is fungible. For example, is mapping data used to develop navigation products useful for advertising? Is this data available from other sources?
- Data derived from one market can be used to expand into another – e.g. from mapping to self-driving cars.
- It is important to bear in mind the privacy and data protection aspects of companies using data from one

market to move into another. What agency should enforce these rules? What is the role of the Competition Commission? It may not be the right agency, and there is no necessary problem with multiple agencies dealing with this.

Rahul SINGH made certain observations concerning interim injunctions.

Key Talking Points | Rahul SINGH

- The competition act in India has provided for interim injunctions from the beginning. What has been interesting is the commission's new-found approach towards issuing interim injunctions in certain sectors.
- The digital economy's interface with data is that a very nascent stage. It's very early stage. Sometimes it's unclear as to which exact direction it will take.
- India has become a leader in online payments, despite the absence of any intervention by the CCI. Perhaps it is good to celebrate the CCI's reticence towards intervention.



Rahul SINGH | Associate Professor of Law, National Law School of India University, Bangalore

Vivek GHOSAL noted the significance of data from the perspective of marketplace platforms and advertisers, and queried the thresholds that should be used before data use might become a competition issue.

Key Talking Points | Vivek GHOSAL

- One of the biggest challenges is players that run marketplaces (e.g. Amazon) and they do with data. Are they destroying the level playing field? E.g. Amazon uses its data to develop its AmazonBasics own-

brand line. The question is to what extent does a player need to be large (e.g. in terms of market share) before this becomes a problem.

- Second, there is the issue of advertising. Data in part has been collected to work out where demand will be in future. The ability to forecast demand using data allows advertising players to reap much more advertising revenue.
- From a competition policy standpoint, these inflection points might depend on data you quantities, clients and market share. HHI might need to be redefined for the particular product, which is data in this case. These are very critical issues for competition law enforcement.

Pradeep MEHTA noted that the digital economy is still in a nascent stage.

Key Talking Points | Pradeep MEHTA

- It may be too early to begin to reform the underlying competition laws given this nascent stage of development. The law doesn't require any reform. The key question at present is enforcement. The analytical capacity of the Competition Authority needs to be enhanced.
- Regulators often become overzealous and that may kill innovation. Quite often, regulators don't even have a regulatory mindset, they have a controlling mindset.

Dhanendra KUMAR made points regarding the role of competition regulation in the contemporary economy:

Key Talking Points | Dhanendra KUMAR

- The role of competition law is to encourage innovation, to encourage infusion of new technology and bring in new applications.
- The role of competition regulators is not only to promote competition in the market, but also to promote innovation and dynamic efficiencies.

SPEAKERS



Vivek GHOSAL

Dr. Ghosal is the Head of the Department of Economics and the Virginia and Lloyd W. Rittenhouse Professor of Humanities and Social Sciences at Rensselaer Polytechnic Institute. His current research and policy interests include: (1) firm strategy related to innovation, M&As, and pricing; (2) biopharmaceuticals markets focusing on innovation, pricing and FDA regulations; (3) firms' decision-making under uncertainty; (4) anti-trust laws and enforcement; and (5) regulatory reform to enhance competition and innovation. The courses he currently teaches include: (1) Economics of Biotechnology and Medical Innovations; and (2) Economics of Regulations and Firm Strategy.

Before joining Rensselaer in 2016, he was a professor at Georgia Institute of Technology, as well as the Director of the M.S. and Ph.D. Programs.

Prior to Georgia Tech, he was an Economist at the Antitrust Division, U.S. Department of Justice (1998-2001). There, he worked on mergers and acquisitions, horizontal and vertical market power, tying agreements, joint ventures, regulatory reform, and innovation and efficiency, and investigated markets including electricity, nuclear fuel, natural gas, coal, information technology, and many more.

Dhanendra KUMAR



Mr. Dhanendra Kumar was the first Chairman CCI. He was instrumental in setting up its enforcement machinery, regulations, systems and procedures, and steering the Commission in its initial years of existence (2009-11), specially its M&A regime.

On completion of his term in CCI, he headed the Experts' Committee to frame the Draft National Competition Policy, and suggesting amendments to the Competition Act, 2002. He also Chaired the Committee of experts of the Ministry of Housing to suggest regulatory reforms in the real estate and housing sector.

Mr. Kumar is currently advising, among others, the Indian Institute of Corporate Affairs (of Ministry of Corporate Affairs) as Hony Principal Advisor, and Chief Mentor for the School of Competition Law and Policy- the National Centre of Excellence in Competition and Regulatory Affairs. He is frequently invited to deliver lectures at NLU Delhi, and elsewhere.

T.S. SOMASHEKAR



Started his teaching career at St. Joseph's College, Bangalore, in 1998 and was a visiting faculty in NLSIU between October 2001 and January 2002. He joined NLSIU as a regular faculty in March 2002. His areas of interest and research include Law and Economics, Industrial Organisation, Business Strategy, Public Policy Analysis and the World Trade Organisation. He was an Erasmus Mundus Fellow in the Institute for Law and Economics at the University of Hamburg, Germany in 2006. In 2008 he was an advisor to the Ministry of Commerce and Industries, Government of Karnataka, to help formulate the industrial policy.

Rahul SINGH



Rahul Singh is a Partner in the Competition Law Practice Group in the Bengaluru office of Khaitan & Co. Rahul has expertise in the inter-disciplinary methodology of competition law-and-economics. Between 2012 and 2016, Rahul worked as a counsel and (national) head of competition practice at a large Indian law firm.

Rahul has worked with the Competition Commission of India, New Delhi as a Member of the Advisory Committee on Regulation. In this capacity, he has trained scores of officials at the Competition Commission of India in the inter-disciplinary competition law-and-economics.

Pradeep MEHTA



Mr. Pradeep Mehta is the founder Secretary General of the Jaipur-based Consumer Unity & Trust Society (CUTS International), a leading economic policy research, advocacy and networking, non-governmental group in India, with offices in Nairobi, Lusaka, Hanoi, Accra, Geneva and Washington DC. CUTS was established in 1983 and has completed 35 years.

Currently he is a Member of the CII's International Trade Policy Council. He has served as: Member of the Board of Trade; Better Regulatory Advisory Group; and Steering Committee on Ecomark; Think Tank on "Framework for a National Policy on E-commerce" of the Government of India. Among several advisory positions, he has been and/or is honorary Adviser to the Commerce and Industries Minister of India, Trade, Commerce & Industry Minister of Zambia and to the Director General of the WTO.

Geeta GOURI



Geeta Gouri, former Member of the CCI, is an economist with 15 years of experience working as a Regulatory Economist. She served as Member (Economics) at the CCI for 5 years and prior to that as Director (Tariffs) at the Andhra Pradesh Electricity Regulatory Commission.