

# A Competition Law for Shaping the Future of the Indian Economy: *Competition Commission of India 2.0*

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# A Competition Law for Shaping the Future of the Indian Economy: *Competition Commission of India 2.0*

By Dr. Sangeeta Verma<sup>1</sup>

It may seem obvious and trite that fair and competitive markets are essential for economic growth. Competition is recognized as a catalyst for development and production, as increased competition sharpens incentives to reduce costs and enhance productivity. As we all know, India has completed more than 30 years of truly transformative change in its economic history that set the country on a sustainable growth path. India's economy has not only become more open, but also increasingly liberalized.

Be it the gradual withdrawal of state controls over business activities, the dismantling of trade and investment barriers, or the embrace of globalization, the underlying rationale was always to unleash competitive market forces to achieve greater efficiency, better innovation, and greater consumer welfare. The enforcement of the Competition Act and the establishment of the Competition Commission of India ("CCI") was a clear signal to the corporate world that the state would be relinquishing the allocation of resources to markets.

Having just become the world's fifth largest economy, India is now in a crucial phase, poised to soon take third place. This has been possible thanks to several steps taken by government that have led to the formalization of India's economy and the rise of a market-driven system of resource allocation. It is undeniable that the country's economic performance has become a vital, indeed a defining, metric in shaping the country's role in global affairs. The notion that economic performance is the foundation of national power has gained currency, and well-functioning markets will ensure that the Indian economy seamlessly moves into its next phase of growth.

However, a chasm may remain between the intent and the outcome if the playing fields in markets are not even and if the beneficial

workings of market forces are blocked, restrained, or distorted by the actions of the market participants themselves. Hence, there is a need for a robust legal framework that undergirds market economies with clearly defined ground rules of fair play and competition. Thus, CCI began its journey in 2009 as a market watchdog in earnest and embarked upon its mandate to correct market distortions and failures through the twin tools of advocacy and enforcement across various sectors of Indian economy, which ranged from aviation, banking, insurance, capital markets, healthcare, commodities, entertainment, and real estate, to new-age markets.

Post-pandemic, the Indian economy is returning to the pre-pandemic growth path, even as the global economic environment remains sluggish and shaky. Economic reforms have successively focused on product markets, capital markets, and the business environment, with an overall emphasis on improving efficiency. India's potential growth has been elevated, as affirmed by this year's Economic Survey. In comparison to the estimated global growth of 2.7 percent and the projected 1.1 percent growth of advanced economies, India is expected to grow at a rate of about 6.7 percent in 2023.<sup>2</sup> Indian industry is at a crucial stage in steering its recovery out of the multiple crises it had encountered in the recent past. It is now more important than ever that our markets work well, and that fair and vibrant competition supports our businesses in their legitimate efforts to turn around and grow

The preamble of the Competition Act is prefaced by the words "keeping in view the economic development of the country." This, to my mind, is not meant to circumscribe the Commission's functioning or dilute its focus on competition. It is, rather, aimed at highlighting the link between competition and economic development and also, perhaps, to call attention to the fact that,

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<sup>1</sup> Acting Chairperson, Competition Commission of India.

<sup>2</sup> Economic Survey of India 2022-23.

while the principles of economics may be more or less uniform across the world, competition assessment conducted by different regulatory authorities will invariably be informed by the peculiarities of each market as well as the state of development of the economy.

As enforcers of competition law, it is critical that authorities have clarity on market conditions, as well as the counterfactuals for each case. This is needed so that enforcers can choose between competing enforcement priorities and remedies in order to achieve optimal deterrence of anti-competitive conduct while also preserving incentives for innovation. As we know, innovation is becoming a key driver of overall economic progress. Economic thinking, tools, and evidence brings us closer to these objectives. The Commission has endeavored towards a nuanced application of the law, taking into account sector specificities and the larger economic and policy milieu, crafting careful interventions only where necessary.

We also recognize that the operating environment for businesses is not static, but is constantly evolving. Today, we see that a large number of sectors in the economy have a growing interface with technology, particularly digital technology and the internet. As we strive to become a digitally empowered society and a knowledge economy, we need to embrace these changes in a way that creates opportunities for all. The government's focus on creating public digital infrastructure has proved to be a game changer, enabling private entrepreneurs to invest and innovate. The India Stack, the Open Network for Digital Commerce ("ONDC"), the Account Aggregator framework, and the National Data and Analytics Platform ("NDAP") are all aimed at democratizing access and enhancing the economic potential of individuals.<sup>3</sup>

It is imperative for competition agencies to ensure that market outcomes in digital sectors are driven by market forces and not by the self-perpetuating, anti-competitive strategies of a small cohort of players. As ecosystem operators, big technology platforms are uniquely

positioned to affect competition in multiple markets. It is also important to recognize that price is not the relevant metric in this industry. Instead, aspects of access and control over data, search visibility, and demand-side features such as consumers' behavioral biases, influence competition in digital settings. Interventions in digital cases are premised on novel theories of harm guided by the economics of multi-sided markets. Once practices that mute competition are identified, it is important to address them through precise and carefully crafted remedies.

As newer dimensions of digital markets unfold and new digital products emerge, competition law will continue to provide the necessary safeguards to preserve a digital environment that is fair and contestable. However, there is growing recognition across jurisdictions that the enforcement of competition law may be supplemented with suitable legislative measures for *ex ante* regulation of digital platforms, such that a set of well-defined and enforceable ground rules may be laid down for digital platforms that act as key intermediaries in different markets. For a set of known anti-competitive practices, a case-by-case assessment may not be necessary. Further, repeating the adjudication process with respect to these identified practices for each product or service may not be desirable from a regulatory efficacy and resource optimization standpoint. The recent report of the Parliamentary Standing Committee on the anti-competitive practices of Big Tech has recommended that the Government of India examine the need for an *ex ante* regulatory mechanism in the context of systemically important digital intermediaries. A Committee on Digital Competition Law ("CDCL") has been constituted by the central government and is deliberating on this matter.

Recent developments in digital markets also point to the importance of strengthening institutional capability within the CCI. The Commission has already started the process of setting up a Digital Markets and Data Unit ("DMDU") that will act as a specialized

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<sup>3</sup> Democratizing access. Developing public digital infrastructure is game changer for economy: CCI Chief Sangeeta Verma, <https://www.thehindubusinessline.com/economy/developing-public-digital-infrastructure-is-game-changer-for-economy-cci-chief-sangeeta-verma/article66575401.ece>.

interdisciplinary center of expertise for digital markets within the CCI.

In the case of combination reviews, digitization has given rise to a set of new challenges here as well. There have been concerns that the toolbox at the disposal of competition authorities may need to be widened. Theories of harm may need to be augmented, as the focus cannot just be on price. In digital markets, factors such as data, quality, choice, and innovation shape the digital competition landscape. These would, therefore, be relevant metrics for formulating the theories of harm in the assessment of digital combinations. Similarly, in cases of acquisition of nascent firms, a major challenge would be the formation of a relevant counterfactual. How likely is it that the target will mature into a competitor in the absence of the merger? This may be difficult to gauge at the time of acquisition.

Those of us who manage competition authorities are well aware that market studies are now an integral part of our work, providing us with a range of useful insights into the state of competition in a given market and helping uncover harms to competition that are caused not only by firm behavior but also by structural infirmities. In that sense, market studies have a wider scope than enforcement actions. Depending on the purpose of the market study, the main outcomes can be either competition law enforcement interventions, recommendations to the government for changes in laws/regulations and public policies, or both. These outcomes can be followed by recommendations to a sector regulator for specific action in the market; recommendations to businesses on self-regulation; recommendations to the government for changes in market structure and; finally, recommendations to the consumer protection agency for action.

In the last few years, the Commission has published several market studies to communicate with stakeholders regarding important competition issues in sectors such as e-commerce, telecom, pharmaceuticals, common ownership by institutional investors, cab aggregators, and, more recently, films. The recently concluded market study on film

distribution discussed the role of various associations within the chain, the superior bargaining power of some entities, and the resulting imbalances in the distribution of risks and revenue-sharing. The impact of new-age technologies in cinema, as well as tying and bundling arrangements at the exhibition level, were also studied. Relying on the findings from this study, the Commission recommended the film industry to devise certain self-regulatory measures for various categories of stakeholders.

The Commission also conducted a market study on the taxi cab aggregator industry. The study identified some key competition issues arising out of information asymmetry and non-transparency concerns and relating to the description and calculation of fares, surge pricing, data sharing, and allocation of rides to driver partners. Based on the recommendations of the study, the CCI issued an advisory to cab aggregators to adopt self-regulatory measures and ensure a well-functioning ride-hailing ecosystem.

The last few years have seen some hectic consultative activity among key stakeholders of the law, which has now culminated in the enactment of the Competition Amendment Act, 2023. In order to draw from experience and prepare for future challenges in the enforcement of the competition law framework in India, the Competition Law Review Committee was constituted by the Ministry of Corporate Affairs in 2018. The committee was tasked with the reviewing and recommending modifications that would lead to a robust competition regime by taking the inputs of key stakeholders and suggesting changes in both the substantive and procedural aspects of the law. The committee report and the ensuing legislative process has equipped the law with several provisions that not only provide more tools for enforcement in line with international best practices, but also provide regulatory certainty and promote a trust-based business environment.

I would here like to mention four such proposed amendments amongst many. First, is the introduction of a limitation period for filing any information or reference before the CCI. The second is the recognition of hub-and-spoke

types cartel arrangements, whereby a non-horizontal component of a cartel arrangement falls within the scope of the Act. Third, is settlement and commitments: it is common knowledge that these issues have emerged as an important pillar in the field of antitrust enforcement, and their importance is particularly pronounced in the present age of digital markets, where delivering market corrections faster is imperative. Fourth, is the introduction of the Leniency Plus programme, which would enable a cartel cooperating with the CCI to obtain additional reductions to penalties in exchange for disclosing the existence of another cartel unknown to the CCI. I believe this would incentivize more applicants to come forward with full, true, and vital disclosures about multiple cartels and allow the CCI to save time and resources on cartels investigations.

Several amendments have been proposed in the combination regime. It will be fair to note that the proposed amendments are consistent with the extant philosophy of merger regulation in India to facilitate ease of doing business by providing regulatory certainty, a framework for faster market correction, and a trust-based regulatory regime. These include reducing the timeline for inquiry into combinations from 210 days to 150 days; statutory recognition of the Green Channel mechanism as well as of certain combinations which by reason of their structure do not raise competition concerns

In new-age markets, it is understood that the possession of intangible assets such as data, growth, and network effects have become means of gaining significant market position and are reflected in the valuation of the entity. The Competition Amendment Act, 2023, has introduced a transaction threshold value of INR 2,000 crore<sup>4</sup> as an additional criterion for notifying M&As for approval. This would be applicable only if the target has “significant business operations in India.”

In an interconnected and globalized world, it is also imperative that we remain aware of the developments taking place in different

jurisdictions at a global level, particularly in the context of new-age markets. In digital markets, various jurisdictions, based on their experience and difficulties in regulating big tech, have proposed or undertaken various *ex ante* legislative measures. The global developments seem to indicate that, due to the peculiar and unique characteristics of digital markets, some *ex ante* legislative measures may be required to supplement the extant *ex post* antitrust tools in regulating big tech in an effective and robust manner. *Ex ante* regulation and *ex post* competition enforcement can work in tandem, as they pursue complementary and associated goals rooted in competition.

The central government’s pro-growth agenda will be increasingly dependent on how the corporate sector performs. The size of the Indian economy is expected to increase from USD 3.5 trillion in 2022–23 to USD 5 trillion in 2026–27.<sup>5</sup> The government has been taking steps to make the country a 5 trillion economy at an earlier date, and a large and complicated matrix of macro- and micro-economic policies, coupled with effective implementation strategies, will be required to achieve this goal. The quality of institutions, which have a strong bearing on competitiveness and growth, is vital to this. Effective regulatory incentives and regulatory governance regimes both need to be in place to take on these challenges of the new order. In this context, the significance of competition regulation in the development paradigm cannot be overstated. Reflecting on the challenges and responsibilities of the Commission in the years to come, at our 10-year celebrations, the Hon’ble Minister of Finance, Smt. Nirmala Sitharaman stated that CCI will have to gear itself for “CCI 2.0.” She eloquently parsed the role of CCI 2.0 in an era of competition without borders, observing that markets are increasingly moving towards the removal of geographical boundaries, but the impact of firm conduct nevertheless echoes in Indian markets. Thus, regulators have to constantly work towards assessing these impacts and take appropriate measures.

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<sup>4</sup> 1 crore is equivalent to 10 million.

<sup>5</sup> IMF’s World Economic Outlook.