

DIGITAL ECONOMY: EMERGING COMPETITION LAW CONCERNS

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ABSTRACT

Technology-driven enterprises have formed a new digital economy that has transformed the lives of people. They offer many advantages but they have also gathered control over a significant amount of consumer data which helps them establish market dominance. This data so generated also raises serious privacy and security concerns. The enterprises in the digital economy are using novel techniques like predatory pricing, deep discounting, cash burn, etc. to gain network effects. Competition law authorities all over the world are struggling to ensure competitiveness in the digital economy. This article attempts to highlight the issues of competition law and offers some suggestions.

INTRODUCTION

Advancement in technology has given rise to a plethora of novel services and products for consumers. A variety of services includes marketplace services, social networking, entertainment services, and mobile applications. The advent of this new digital economy has given rise to various emerging concerns for the competition law and thereby an attempt has been made in the present article to elaborate on these issues.

Among the mechanisms used in the online economy, the prominent one is network effects. Network effects arise where the benefit is increased with the increasing number of users of a product or service. For example, in the case of a taxi service, the customers will choose the platform with the highest number of drivers to save waiting time, and similarly, the drivers will also choose the platform with most consumers.

Another mechanism is based on the use of financial capital for increasing users. The platforms which have access to huge capital resort to practices like deep discounting, cash-back offers, and other schemes designed to attract new users and establish the network effect. In this process, they incur huge losses. These practices create a hindrance to competition in the market whereby a player with more capital can attract more users and the new players are unable to enter the market. It can also be seen that there are very few players in the market and they constantly purchase the business of small players to remain dominant in the market.

1. Digital Economy

To understand the competition issues about the digital economy, there is a need to define the same. The term 'Digital Economy' was given in the book "*The Digital Economy: Promise and Peril in the Age of Networked Intelligence*" authored by Don Tapscott.^[1] The Organization for Economic Cooperation and Development (OECD) in its 2012 hearing on the digital economy described that "*the digital economy comprises markets based on digital technologies that facilitate the trade of goods and services through e-commerce.*" The term 'digital economy' is an umbrella term used to describe markets that focus on digital technologies. It typically involves the trade of data, services, or goods through electronic commerce as a medium.^[2] It also highlighted that the expansion of the digital sector has been a key driver of economic growth in recent years and the shift towards a digital world has had effects on society that extend beyond the digital technology context alone.

With the increase in access to the internet and increased penetration of smart-phones, there has been an increasing impact of the digital economy on the economic and social lives of people all around the world. The digital economy is featured with aspects that are fundamentally

different from the traditional sectors in the economy. The digital economy is dynamic and is driven by unique features. There are different mediums like Computer, Mobiles, and Television for providing services in the digital economy.

Another crucial aspect of the digital economy is that it is driven by the data generated from users. This data so generated has a significant value in terms of advertisements based upon user and also privacy risks have emanated from this data so generated.

Features of Digital Economy

The digital economy has the following key features:

i. Dynamic: - Increased innovation and technological changes. The technology is rapidly changing and so does the services offered by the digital platforms. Mobile phones in the present time have become more and more sophisticated, so do the services offered over the phones.

ii. Cost Reduction with scale expansion. The sector generally requires huge investment initially in the fixed assets. For example, in making software huge research and development is involved. But once made cost of making copies is negligible. Thus, with the expansion, the cost is reduced.

iii. An increase in demand leads to economies of scale. People wish to prefer the service provider which has the most number of customers. This phenomenon is termed network effects. The platforms like taxi aggregators that connect drivers with the commuters, benefit by way of network effects. The commuters are inclined to the platform with most drivers and the drivers join the platform with most commuters.

E-Commerce

E-Commerce is one of the major parts of the digital economy and has significantly changed the way of doing business. The Organization for Economic Co-operation and Development (OECD) has defined in the following words: - "*E-Commerce transaction is the sale or purchase of goods or services, conducted over computer networks by methods specifically designed to receive or place of orders*".^[3]

The Ministry of Electronics and Information Technology (MeitY) has defined in the following words: "*E-Commerce is a type of business model, or segment of a larger business model, that enables a firm or individual to conduct business over an electronic network, typically the internet. Electronic commerce operates in all four of the major market segments: business to business, business to consumer, consumer to consumer and consumer to business*".^[4]

E-Commerce in India and abroad is divided into four categories.^[5] In the first category, goods are provided to the users in the digital form, e.g., Netflix, YouTube Red, Amazon Prime Video. In the second category, the firms provide the facility of search and purchase of goods. It includes firms like Amazon, Flipkart, and eBay, Hotel booking websites like MakeMyTrip and Expedia. Another category is where transactions take place on a Business-to-Business level that facilitates trade between businesses. The fourth category is auction platforms like eBay.

E-Commerce features fierce price competition between sellers to earn the patronage of the vast consumer base. The large customer base allows them to have more and more offers and discounts. The offline sellers compete on factors like service and in-store. This has given rise to difficult questions of balancing efficiency, exclusivity, and exclusion in other jurisdictions and is likely to seep into the Indian context as well.^[6]

The availability of internet infrastructure and mobile facilities has led to phenomenal growth in e-commerce activities in India. Currently, of the financial year 2019, there are 636.73 million subscribers of the internet^[7]. The accessibility to the internet has been increasing rapidly and is acting as a catalyst to the growth of the e-commerce industry. The annual growth rate revenue of e-commerce in India is 51% which is the highest in the world. "It has been expected it will jump from the US \$ 39 billion in 2017 to US\$ 120 billion in 2020".^[8] "The e-commerce industry in India is on an upward growth trajectory and is expected to surpass the US to become

the second-largest e-commerce market in the world by 2034".^[9] Innovations like digital payments, digital advertisements, hyper-local analytics played a role in the growth of the industry.

Search Engines

In the past years, search engines like Google and Bing have become very large scale and multi-billion dollar business models.^[10] Advertisements have been the major source of revenue for search engines.^[11] The advertisements based on the behavior is a predominant model for search engines in which users are displayed advertisements based on their usage of the search engine. Google CEO Eric Schmidt stated: "If we target the right ad to the right person at the right time and they click it, we win".^[12]

Social Networking

Social Networking platforms are a very crucial part of the digital economy. They provide a virtual network where the users can easily connect with their family and friends.

In the year 2007, Danah M. Boyd and Nicole B. Ellison defined social media as: "*Web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system.*"^[13]

Social networking portals are being used nowadays for a variety of purposes. Like Facebook is for social contacting purposes and LinkedIn for business contacting purposes. There are apps like Tinder, Happen, etc. for online dating. There are 1.2 billion users on Facebook, but the product cost being zero does not explain where the revenue comes from. The social media industry works on a simple principle, "*If you are not paying for the product, the product is you*".^[14] Revenue is earned from the behavioral advertisement based on the user's search and other activities.^[15]

1. Competition Law Issues in the Digital Economy

The digital economy has transformed the entire economic structure worldwide, which has given rise to multiple concerns for the authorities. Of which, the competition law issues are the prominent issues. These concerns have been summarized in the following:

1. **Information Asymmetry:** The online platforms have transformed the business, expanded the market access, and lowered the costs of distribution. However, the competition has become price-centric and which in turn has been affecting factors like quality, goodwill, and others. The data gathered by the platforms online has a crucial role to play in the price setting. They are able to charge different prices to different consumers. For example, the companies are able to know at what price you purchased a similar product earlier, and hence charge you the price accordingly.
2. **Exclusivity Agreements:** Suppliers and platforms enter into exclusive agreements which may be of two kinds: one in which a product is launched on a particular online platform only and another where the platform list only a particular brand for a product category. Various mobile companies have been entering into such agreements for the launch of new models of mobile phones. Such agreements also take place in the food and accommodation service category.
3. **Predatory Pricing:** The online platforms have been selling products at huge discounts and pricing at which retail offline stores are not able to compete. However, in order to establish predatory pricing, it is essential that the enterprise is in a dominant position in the market and predatory pricing has opted with an intention to eliminate the competition.
4. **Platform Neutrality:** It is one of the most highlighted issues, where the e-commerce sites serve as a platform and competitor for the sellers. There are two categories, one where the website has its own private label and another where the website has preferred sellers. In both cases, the platform can influence the control over the platform and act in favor of their label or preferred sellers.
5. **Price Dynamism:** It is also one of the major concerns expressed. The firms are able to change the prices in accordance with the prevalent market conditions.

6. Platform to Business Contracts: Another issue that has been raised by users of the platform is the imposition of unfair terms by the platforms over the suppliers. The suppliers allege that the platforms allegedly determine and revise the terms of the contracts unilaterally. The suppliers in the food and accommodation segment have averred that the platforms determine search on the basis of commission paid.
7. Price Parity Clauses: Price Parity Clauses restrict the suppliers from selling the goods or services on another platform at a lower price. Such a clause may be 'wide' or 'narrow'. The clause is considered 'wide' if the supplier cannot sell at a lower price over its own website also; it is 'narrow' if the restriction is for other platforms. Price Parity clauses give rise to various competition concerns because the suppliers are incompetent to compete on the commission rates and low-cost platforms would not be able to enter the market.
8. Deep Discounts: The online platforms while acting as an intermediary between the supplier and the customers have been indulged in the practice of offering discounts. These discounts offered by them have raised various concerns. Firstly, the discounts are not the same for all suppliers over the platform, hence it creates a price difference for the same product or service. Secondly, because the discounts are offered by the platform, the supplier loses his control over the final price and makes the consumer depend upon the platform. Lastly, in certain cases, platforms have been offering prices lower than the cost which makes it anti-competitive for the brick and mortar stores.

These concerns are required to be addressed by the competition law authorities. The digital economy is relatively new for the authorities hence new techniques must be adopted. Determining the relevant market is also a crucial factor that has posed a challenge in the digital economy. Also, certain services are offered for free and hence numerical data is losing significance. The pricing strategies of these enterprises are also complex whereby they charge from both the parties i.e. customers and the service providers in some cases.

4. DATA AND PRIVACY IN THE DIGITAL ECONOMY

"Data is the new oil. Therefore, just like oil or any other natural resource, it is important to protect data, prevent its misuse, regulate the use and processing of data and address the concerns related to privacy and security."^[16] The digital economy is driven by the data and hence the data generated by the users is a valuable resource that needs protection.

The importance of data protection has increased due to more and more economic activities taking place online. There is a huge amount of information being generated, stored, and transmitted across the globe. The data flow needs to be regulated so as to address concerns of consumer confidence as well as the privacy of the individuals. The right to privacy has been recognized as a fundamental right enshrined under Article 21 of the Indian Constitution.^[17] In the judgment delivered by the Supreme Court in *Justice K.S. Puttaswamy v. Union of India*^[18], the court emphasized upon the regime for data protection in the following words, *"Formulation of a regime for data protection is a complex exercise which needs to be undertaken by the State after a careful balancing of the requirements of privacy coupled with other values which the protection of data sub-serves together with the legitimate concerns of the State.* The data protection regime must necessarily be balanced. An insufficient regime would be causing a breach of privacy of the individuals. An overly stringent regime, on the other hand, would cause serious hamper to trade flows.

The Department for Promotion of Industry and Internal Trade released the Draft e-commerce policy (draft policy) on February 23, 2019. The policy states that in light of the increasing importance of data protection and privacy, it aims regulation of cross border data flow. The policy terms data as, "any type of information converted into a binary digital form that is efficient to store, process, and transfer across different devices, platforms, servers, and borders."

The data generated may be monetized by the corporations in various ways by analyzing, processing, and utilizing the data. Online advertisements nowadays are based upon the activities of the user. The Draft Policy asserts that “*An Individual owns the right to his data*”, thereby granting the right to an individual over the data generated by him. Further states that “*the data that is generated in India belongs to Indians, as do the derivatives therefrom*”. Thus, draft policy terms data as a “national asset” and that it must be held by the government in ‘trust’.

The Draft Policy has restricted the cross-border transfer of data generated by way of e-commerce and social media activities. The policy aims to restrict the sharing of data with business entities outside India even with the consent of the customer. The data cannot be made available to the foreign government, without prior permission of Indian authorities. The government by way of the draft policy is seeking to exercise sovereignty over the data generated in the country.

The draft policy addresses the major concerns which have been raised due to the increasing growth of the digital economy in India. The policy terms data as the new oil and has adopted an extreme protectionist approach towards the cross – border data flows. The policy must comprehensively define its scope and lay down the provisions with clarity so as to avoid unwanted consequences.

5. RESOLUTION OF COMPETITION ISSUES

The United Nations Conference on Trade and Development (UNCTAD) released a note^[19] on *Competition Issues in the Digital Economy*, It stated that “Digital platforms are characterized by their network effects and by being multisided, as well as by having high switching costs, economies of scale and levels of control of data, all of which are pertinent in the definition of the relevant market.” The note highlights that the tools based on price increase are not appropriate to determine the relevant market in the digital economy because they provide free services in exchange for data. Hence, the observation of data flows is important.

The note also emphasizes that the competition law authorities must ensure additional criteria for the definition of the relevant market in digital sectors. For instance, in 2017 Germany revised its competition law and introduced a provision recognizing free products or services provided by platforms as a market, stating that “the assumption of a market shall not be invalidated by the fact that a good or service is provided free of charge” (section 18(2a))^[20].

In order to determine market dominance, a crucial factor is an access to and control of data which confers market power to the enterprises. The platforms are multisided and hence the determination of the dominance is to be checked on both the demand and supply side. The unique features of digital platforms make it difficult to establish a theory of harm or determine the type of abuse on the competition.

The Competition Commission of India (CCI) is striving to address the competition law issues in the arena of the digital economy; it released the “Market Study on E-commerce in India”^[21] on 8th January 2020. The object of the study was to understand the functioning and market implications of increasing e-commerce activities. Chapter 3 of the Report describes the following issues in e-commerce:

1. Platform Neutrality: In regard to the issue, CCI observed that the effect of such preferential treatment on competition shall depend on certain factors like the nature of the market, the market power of the platforms, and justifications (if, any) for such preferential treatment. Hence, such matters must be determined on a case-by-case basis. However, the CCI observed that there must be transparency on part of the websites. Transparency can be achieved by way of making available information about search ranking criteria, reviews, and rating mechanisms. CCI also acknowledged that there are limits to extent of information that can be made available and hence urged platforms to strike balance.

2. Platform to Business Contracts: The report observes that online platforms have created immense opportunities for the business in terms of market access. But the platforms have an upper hand in deciding the terms of the contract and have the power to act in a manner that may be prejudicial to the suppliers. The report also observes that the unfair conditions by dominant enterprises are prohibited under the Act. Further, if the agreements are exclusionary in nature they can also be examined under the Act.
3. Price Parity Clauses: Price Parity Clauses restrict the suppliers from selling the goods or services on another platform at a lower price. Price Parity clauses give rise to various competition concerns because the suppliers are incompetent to compete on the commission rates and low-cost platforms would not be able to enter the market. However, the parity clauses can also be justified in certain circumstances as they protect investment incentives. The supplier may display its product on a superior quality platform to draw attention and sell through its own website or another platform. This makes the examination dependent upon cases to case basis and can be examined under the Act.
4. Exclusive Agreements: CCI has observed these agreements are not per se anti-competitive; however, they have raised concerns. Hence, they are required to be examined on a case-to-case basis under the Act.
5. Deep Discounts: CCI observed that the discounts have been offered by platforms to generate traffic and are the basis of *the growth over profit* model of their working. The assessment of the discounts has to be fact-based and on a case-by-case basis.

CCI also observed that platforms should adopt a self-regulatory mechanism which involves:

1. Search Ranking: setting out terms and conditions of ranking.
2. Set out a policy on the collection, use, and sharing of the data.
3. Transparency in user review and rating mechanism.
4. Revision in the contract terms to follow a procedure.
5. Set out a clear and transparent discount policy.

Market Study by CCI is a commendable effort in the direction of regulating the e-commerce sector of the economy. The study has elaborately highlighted the issues and has also suggested the measures to resolve the issues.

6. CONCLUSION

Digital Economy is a new phenomenon for the authorities all around the world and hence the problem of ensuring competitiveness in this economy is universal. The primary function of the competition policy is to ensure that there is no abuse of dominance in the market and the new firms are able to enter the market freely. In the particular case of the Digital economy, it must be ensured that innovation leads the way and not the use of financial capital.

In the spheres of the digital economy i.e., e-commerce social networks, search engines are all dominated by a few enterprises. Hence, it makes it necessary to look into the practice, and the models of these enterprises do not violate the competition policy. The digital economy is one of the fastest-growing areas of the Indian Economy which requires persistent checks and balances.

Also, the likelihood of firms in the digitalized economy involving in anti-competitive practices is similar in the case of the traditional economy. But the tests and techniques required are significantly different. The digital economy is dynamic in nature; it has indirect network effects; it is a multi-sided economy and also contains zero-priced products. These factors make an assessment of the market harder. They also increase the area of market assessment to a significant extent. This results in many challenges and a need for change in the approach used by the competition authorities worldwide to ensure fairness in the market.

The changes are desirable in the techniques and not the law. The focus of the authorities should move towards business models to ascertain the mode of profits of the enterprises under

scrutiny. The dynamic nature of the economy makes it necessary that the approach of the authorities also keeps changing in accordance with need.

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