

Digital Markets Must be Defined Well for Competition Regulation

The rise of the digital sector has presented unique challenges for Indian regulatory authorities, including the Competition Commission of India (“**CCI**”), thanks to significant differences in the way such markets operate compared to traditional markets. Further, several issues emerging from the growth of digital markets are being analyzed by regulators in other countries simultaneously, resulting in a lack of guidance from other jurisdictions.

There is growing demand, worldwide and in India, to hold digital platforms responsible and accountable for adverse impacts caused by them. This is evidenced by recent investigations initiated by the CCI into the operations of digital platforms such as Google, WhatsApp, Apple, Zomato, Swiggy, etc.

A preliminary step involved in such probes is that of defining a ‘relevant market’ within which such digital platforms operate. The Competition Act, 2002 (“**Competition Act**”) requires the CCI to define a ‘relevant market’ based on what is regarded as interchangeable or substitutable by a consumer (“**Relevant Market Test**”). The factors required for consideration by the CCI while defining a ‘relevant market’ include the physical characteristics or end use of goods, price of goods or services, consumer preferences, regulatory trade barriers, and local specification requirements, among others.

CCI’S APPROACH SO FAR

Until 2016, while defining a ‘relevant market’ for e-commerce companies and marketplaces (such as Snapdeal, Ebay, Yepme, Cloudfair, etc.), the CCI viewed online and offline segments as different channels of distribution and not different relevant

markets¹. This was based on the CCI's view that the two segments differ in terms of discounts and the shopping experience, and buyers would typically weigh both online and offline options before making their purchase decisions. Further, if prices of the same product or service available online were to increase significantly, then the consumer was likely to buy the product or service from an offline channel, and vice versa.

In 2018, when examining a complaint filed against e-commerce companies that alleged 'abuse of dominance' by way of predatory pricing and preferential treatment to certain sellers, the CCI diverged from its initial view and recognized the possibility of a distinction between online and offline segments, observing as follows: *"No doubt, to the end consumers, the distinction line between online and offline sellers is sometimes blurry, yet it cannot be denied that online marketplaces offer convenience for sellers as well as the buyers. For the sellers, they save costs in terms of setting up of a store, sales staff, electricity and other maintenance charges. The benefits afforded to buyers includes comfort of shopping from their homes thus saving time, commuting charges and at the same time they can compare multiple goods."*² In this case, while the CCI defined the 'relevant market' as 'services provided by online marketplace platforms for selling goods in India', it dismissed the complaint observing that the e-commerce market in India was still an emerging market and that no one player in the market appeared to be in a dominant position. In October 2019, it drew a defined distinction in its *prima facie* order initiating a probe against MakeMyTrip, observing as follows: *"[d]elineation of relevant market is based on market realities as they exist at the time of assessment. In rapidly changing markets in particular, market assessment cannot have a static approach. The Combination case cited by MMT-Go took place over two and a half years back. While this may not be a period sufficiently long for traditional markets to undergo perceptible change, the pace of evolution of digital markets is significantly faster. The intervening period has seen the online travel portals and the customised service that they provide to consumers on account of big data analytics to have established a distinct and significantly more prominent position in the hotel reservation space in India. In view of the increased popularity and use of OTAs by a large segment of consumers in India, hotel operators now perceive them as a distinct mode of distribution which cannot be simply replaced or substituted by other offline*

¹ See, the CCI's order in *Deepak Verma v. Clues Network Pvt. Ltd. & Ors.*, Case No. 34 of 2016, dated July 26, 2016; as available at: <https://www.cci.gov.in/sites/default/files/342016.pdf> & the CCI's order in *Ashish Ahuja v. Snapdeal.com & Anr.*, Case No. 17 of 2014, dated May 19, 2014; as available at: <https://www.cci.gov.in/sites/default/files/172014.pdf>

² See, the CCI's order in *All India Online Vendors Association v. Flipkart India Private Limited & Anr.*, Case No. 20 of 2018, dated November 6, 2018; as available at: <https://www.cci.gov.in/sites/default/files/20-of-2018.pdf>; this order was subsequently reversed by the appellate tribunal. As on date, the Supreme Court of India has stayed the appellate tribunal's order.

*modes or direct sale without losing out significantly on consumer reach.*³ In this case, the CCI defined the ‘relevant market’ as ‘the market for online intermediation services for booking of hotels in India’. This case is still under consideration.

Following the MakeMyTrip case, the CCI has considered ‘relevant markets’ of certain online-only players in several cases related to digital markets. For instance, it has defined the relevant market for (a) Google as ‘the market for Online General Web Search Services in India and the market for Online Search Advertising Services in India’⁴, for (b) WhatsApp as ‘the market for Over-The-Top (OTT) messaging apps through smartphones in India’⁵ and for (c) Apple as ‘the market for app stores for iOS in India’⁶.

Subsequent orders of the CCI in cases where arguments were made that offline products or services could be substitutable with online products or services did not clearly apply the Relevant Market Test, and did not clarify whether all products and services that could be considered interchangeable by consumers were considered while arriving at a ‘relevant market’ definition.

For example, a recent CCI order initiating investigation against the food delivery platforms states “*as already mentioned, the allegation in the matter being under Section 3(4) of the Act, there is no need to go into precise relevant market delineation. Suffice to say that Zomato and Swiggy are prominent online food delivery platforms and operate as online intermediaries for food ordering and delivery*”⁷. However, in an order in 2013⁸, the CCI has clarified that ‘market power’ is a crucial consideration for analyzing allegations under Section 3(4) of the Competition Act (*i.e.*, vertical restraints). The CCI’s final order in this case should consider carefully the question of ‘relevant market’, including in respect of substitutes and interchangeable options for consumers (such as direct ordering from restaurants - online as well as offline, etc.), in order to arrive at an appropriate conclusion on the allegations.

³ See, the CCI’s order in *Federation of Hotel & Restaurant Associations of India v. MakeMyTrip India Pvt. Ltd. & Ors.*, Case No. 14 of 2019, dated October 28, 2019; as available at: https://www.cci.gov.in/sites/default/files/14of2019_0.pdf

⁴ See, the CCI’s order in *Digital News Publishers Association v. Google LLC*, Case No. 41 of 2021, dated January 7, 2022; as available at: https://www.cci.gov.in/sites/default/files/order_41_2021.pdf. See also, *Matrimony.com v. Google LLC*, Case No. 7 & 30 of 2012, dated February 8, 2018; as available at: <https://www.cci.gov.in/sites/default/files/07%20%26%20%2030%20of%202012.pdf>

⁵ See, the CCI’s order *In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users, Suo Moto* Case No. 1 of 2021, dated March 24, 2021; as available at: https://www.cci.gov.in/sites/default/files/SM01of2021_0.pdf

⁶ See, the CCI’s order in *Together We Fight Society v. Apple Inc.*, Case No. 24 of 2021, dated December 31, 2021; as available at: <https://www.cci.gov.in/sites/default/files/24-of-2021.pdf>

⁷ See, the CCI’s order in *National Restaurant Association of India v. Zomato Limited*, Case No. 16 of 2021, dated April 4, 2022; as available at: <http://cci.gov.in/sites/default/files/16-of-2021.pdf>

⁸ See, the CCI’s order in *Sonam Sharma v. Apple Inc.*, Case No. 24 of 2011, dated 19 March 2013; as available at: https://www.cci.gov.in/sites/default/files/242011_0.pdf

Similarly, a 2020 *prima facie* order of the CCI initiating investigation against Amazon and Flipkart observes that online intermediation services are “*key enablers of entrepreneurship*”⁹, but does not provide any analysis of the definition of the ‘relevant market’. Further, this order cites a NASSCOM report on the “Indian e-commerce market” which estimates that Flipkart and Amazon “*constitute a bulk of the online retail market in India.*”

In a 2021 case relating to Urban Clap, the CCI has indicated that the Relevant Market Test should be applied on a case-by-case basis in relation to any industry, observing as follows specifically in relation to the ‘beauty and wellness’ sector: “*The wellness and beauty industry in India is evolving rapidly with the emergence of new and different delivery models to offer greater ease and tailored services to consumers. One of the models that is gaining increasing prominence is that of on-demand at home services, facilitated through online technology platforms. The traditional and predominant modes of service delivery available to users are walk-in salon services provided by beauty parlours and the services provided by independent professionals who are available at the customer doorstep on call. A combination of factors influences consumer choice for beauty/salon services which in turn have a bearing on substitutability between different modes of delivery and different service providers. These are quality of service, convenience, cost, brand image etc., with the relative importance of each of these factors depending on consumer preference as also on the specific categories of beauty services. Determination of substitutability and delineation of the area of effective competition for the Opposite Party ought to account for these nuances and complexities germane to salon services.*”¹⁰ Here, the CCI dismissed the complaint against Urban Clap as it did not find any anti-competitive/ abusive conduct based on the information filed before it.

THE NEED OF THE HOUR

Given the pace at which the digital sector is expanding in India, and the emergence of several issues prompted by this growth, it is essential that the CCI carefully consider the question of ‘relevant market’, and more particularly, the question of whether the online and offline distribution segments of such a market are substitutable in each case and industry. *Prima facie* analysis of the ‘relevant market’ would result in a more efficient and streamlined process of investigation.

⁹ See, the CCI’s order in *Delhi Vyapar Mahasangh v. Flipkart Internet Private Limited & Anr.*, Case No. 40 of 2019, dated January 13, 2020; as available at: <https://www.cci.gov.in/sites/default/files/40-of-2019.pdf>

¹⁰ See, the CCI’s order in *Prachi Agarwal v. Urbanclap Technologies India Private Limited*, Case No. 30 of 2020, dated March 24, 2021; as available at: <https://www.cci.gov.in/sites/default/files/30-of-2020.pdf>

A 'one-size-fits-all' approach to this question will prove unsatisfactory, given the large variation in business models today and the significant number of businesses that have add-on 'online' delivery channels. Accordingly, the CCI should define a 'relevant market' in the digital sector by taking into consideration all substitutable and interchangeable products or services for each industry, including what's available offline.

One way to address concerns in various quarters would be to conduct market surveys to explore consumer preferences, habits and dependence on digital platforms, on a case-to-case basis. While the CCI has undertaken a few market studies, it needs to reach out to consumers on a wider scale and not limit its analysis to secondary studies or surveys. Such an approach may seem rather costly and time-consuming. However, given the magnitude of the consequences that could arise from the question of 'relevant market', each industry and sector must be given due consideration.

India's digital sector needs proper market assessment and, in some cases, correction. For this, a consistent approach that is inclusive of all stakeholders, including the consumer, would ensure that the country's digital story does not face overregulation or other unwarranted hindrances.

In summary, it is imperative that the CCI's approach in digital markets is well considered, consistent and proportionate, so that the digital sector gets space for growth while safeguarding the interests of competition and consumers.

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