

# Convergence of competition policy, competition law and public interest in India

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## Abstract

The objectives of competition policy and the application of competition law need defining and redefining along with changing structures of the economy and the maturing of the competition authority. Market structures associated with digital technology and globalization are often not in consonance with the prevalent law framed in economic analysis of traditional product markets. Antitrust interventions by the competition authorities are caught in a bind as was the case with the Competition Commission of India and the Competition Act, 2002. The emphasis on monopolistic competition, or on oligopolistic markets, as anti-competitive, which marked the earlier days of implementation of competition laws, is at variance with the prevalent monopolistic structures of platform markets or technology firms and the market for ideas. Competition authorities are grappling with identifying anti-competitive activities of these markets which tip towards monopolistic structures. In the process there has been a churning of possible diverse antitrust abuses and, as competition law grapples to incorporate these new market structures, there is another churn that is slowly emerging as a major concern—that of convergence of competition policy and public interest. This is an area in antitrust literature which is yet to receive sufficient attention. The core of antitrust intervention—that competition benefits consumers—is undisputed and perhaps axiomatic but what is not axiomatic is that monopolistic market structures can also lead to enhancing public welfare. Emergent trends towards monopolistic markets suggest a rethink of competition policy and law and their convergence for public interest. The focus of this article is on the importance of convergence of competition policy, competition law and public interest in new and emergent markets. It raises questions: Is there convergence or divergence between policy and law and public interest? What is public interest? Do consumers represent public interest and, if so, which set of consumers? Are innovation and technological development, which are part of public interest, also in the ambit of competition policy or are they in the realm of competition law? This is another question which has become acute in recent times. In India and the BRICS group, where usage of internet on smart phones is high, the convergence between competition policy, law and public interest suggests antitrust intervention is guided by public interest.

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## 1. Introduction

Convergence of competition policy, competition law and public interest is taken as axiomatic on the assumption that competition benefits consumers. Convergence does not necessarily mean unanimity of law and policy. They interact but there can be differences in understanding and defining public interest. Competition policy *per se* is not aimed at public interest maximization, defined as national economic development, as opposed to public interest which is defined as maximization of public surplus of perfectly competitive markets. As competitive markets are silent about distributive justice or equity, the possibility of divergence between policy and law arises in defining public interest in at least two situations. The first is the resort to industrial policies (licensing, entry restrictions, sales tax, excise duty) and trade policies (import duties) by governments to protect certain goods (retroviral medicines for HIV) and services (transport) on grounds of public access or public availability. Second, the emergent situation of platform markets and market for ideas, which tend to be concentrated, have seen governments at least in India protecting domestic industries notwithstanding the possibility of competition among platforms (Rochet and Tirole, 2003, 2006) and despite the fact that innovation in digital technology of these markets weighs in favor of public interest. The convergence of competition policy, law and public interest once again comes to the forefront with platform markets and the market for ideas as competition authorities are grappling with competition analysis of these emergent markets.

For the BRICS countries the reality of digitalization and globalization of the economy suggests a rethinking of market intervention by antitrust authorities from the perspective of public interest. References in this article are, however, about decisions of the Competition Commission of India (CCI).

The lack of a formal competition policy in India, it has been argued, can lead to divergence between competition law and competition policy. Examples quoted of anti-competitive restraints include the continuation of protectionist policies towards public sector enterprises or to domestic industries on grounds of nurturing nascent markets. As argued in another article the absence of a formal government statement by way of a competition policy has not been a restraint in the implementation of competition law by the Competition Commission of India (CCI) (Bhattacharjee et al., 2019). Several discussions were held by the Commission on the requirement of a competition policy. Section 21 and Section 21 A of the Competition Act, 2002 provided for coordinating competition policies with public interest. Section 49 pertaining to advocacy provides another platform for ensuring public interest. Further, the Government under Section 54 reserves the right to exempt sectors and industry from the competition law.

The preamble to the Act “keeping in view the economic development of the country” acted as the ballpark for several decisions of the Commission as part of the process of transition to a fully open market economy.

Changing market structures associated with digital technology and globalization have again brought to the forefront the need for a competition policy and the importance of convergence of policy with competition law. Competition policy puts focus on public interest, and convergence of policy and law provides clarity in the implementation of law to public interest. The need for a competition policy, and the lack of it, have come to sharper focus with emergent markets of platforms

and the market for ideas. Emergent market structures are not in consonance with the concept of competition as defined in economic analysis of a product market that framed the Act. The emphasis on monopolistic competition or on oligopolistic markets, which marked the earlier days of implementation of competition law, is at variance with the monopolistic structures of platform markets. Competition authorities are grappling with identifying anti-competitive activities of platform markets which tip towards monopolistic structures. In the process, while there has been a churning of diverse antitrust abuses, competition law and policies pertaining to competition defining public or redefining public interest are integral to the process.

On a personal note, questions I grappled with as Commissioner and clear answers that still elude me are raised in this article. They are: (i) What is public interest? (ii) Do all consumers represent public interest, or do we need to look at a sub-set of consumers? (iii) How has competition policy (defined broadly) shaped competition law? (iv) How do policy and law diverge? This article, however, limits itself to a smaller set of issues of identifying public interest in competition law and of consumer welfare in emergent markets of platforms and the market for ideas. For the BRICS countries the reality of digitalization and globalization of the economy suggests a rethinking of market intervention by antitrust authorities from the perspective of public interest.

The article is divided into four sections. The introduction comes first, the second section looks at public interest in the context of competition law. Market regulation in India has traversed a long path from Monopolies and Restrictive Trade Practices Act (MRTP) in 1980 to Competition Act, 2002 which is now under revision. A wide and diverse canvas of antitrust involvement is available for analysis which is examined in the next section. Decisions of Competition Commission of India (CCI) are re-examined through the lens of public interest in interpreting the law. The last section presents conclusions.

## **2. Defining public interest—competition policy and competition law in India**

Public interest is a political concept defined in general terms of welfare or well-being of the general public and in the process emerges as an economic concept. In this article public interest is seen in the context of industrial and trade policies of the Government as there is no specific competition policy. Change in these policies is on the presumption that a larger number of people (the public) will benefit. Acceptance of benefits and public interest is *ex-ante* substantiated by studies on the costs and benefits of existing industrial and trade policies, *nee* competition policy.

Market regulation in India goes back to 1965. Introduced in two phases, market regulation was in keeping with the prevailing approach to industrial policy and the related ideology in terms of resource allocation and market functioning. Competition policy and competition law are normally applied to a market economy. A market economy is where consumer sovereignty with consumer choice is given primacy and consumer interest is equated with public interest.

The first phase 1950–1991 was characterized by a socialist pattern of mixed economy and demonstrated a preference for government involvement in economic activity. The approach of policy to industry, also known as import-substitution (or closed economy model), was less concerned about competition and more with con-

centration of economic power. This dispensation saw the legislation of the MRTP. The second phase (1991–present) focused on introducing market-oriented economic policies under the concept of Liberalization, Globalization and Privatization policy (1991). These policies led to the deregulation and de-licensing of sectors that were exclusive to public sector enterprises. The second phase paved the way for the entry of the private sector into activities which had been reserved for the public sector. The shift in industrial policies with emphasis on market orientation and competition prompted the need for a market regulator to orient towards competition as against the prevailing structural MRTP. The Competition Act 2002 was introduced in the second phase of industrial reforms. The law was designed to create and facilitate market activity in accordance with the country's industrial policies.

The Act was enacted in 2002. It remained suspended for nearly five years until it was amended in 2007. It took another three years before the CCI became operational. The long time lag between enactment and implementation had the potential of rendering the Act out of tune with market conditions which had by then evolved towards high tech markets since the Act was conceived and enacted. As an economics-based law, the implementation of the competition law by CCI has tended to be marked by tensions with a preference for legal regulatory interventions rather than for “economics of market facilitation.” The approach towards competition and markets was more “form-based” than “effects-based.” For instance, if a firm is dominant in terms of the criteria set out in the Act, abuse of dominance was considered but inevitable as in legal terminology “No enterprise or group shall abuse its dominant position” without the requirement of economic analysis to establish abuse. It is more appropriate to define CCI's approach as “quasi *per se*” than “effects-based.”

The slow process of maturing of CCI in a replay of the concerns of the first phase of industrial policy of distributive justice and equity comes to sharper focus in the implementation of the Act. Discomfort with platform markets was discernible in the initial decisions of CCI with markets that had features associated with platform markets. In recent filings of platform market cases and of vertical restraints and antitrust arguments in licensing of patents, this discomfort is more marked. The move from control of markets to regulation, from MRTP to the Act was a major shift both in terms of ideology and industrial strategy, replete with inhibitions of transition. The process of shifting from one economic strategy to another involved a long phase of discussion and deliberations preceded by several expert committees set up by the Government to understand the shortcomings of existing policies. Similarly, introducing the competition law was neither automatic nor immediate. Committees and their reports, public discourse inside and outside the Parliament, preceded the adoption of competition law in India. Specific to the competition law the High Level Committee on Competition Policy and Law<sup>1</sup> was constituted. The report was submitted on 22<sup>nd</sup> May, 2000 to the Central Government.

Preconditions to economic liberalization focused on understanding the limitations of a state directed and state dominated industrial policies. Industrial

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<sup>1</sup> High Level Committee on Competition Policy and Law (The Raghavan Committee). Department of Company Affairs, Government of India, New Delhi, 2000. [https://theindiancompetitionlaw.files.wordpress.com/2013/02/report\\_of\\_high\\_level\\_committee\\_on\\_competition\\_policy\\_law\\_svs\\_raghavan\\_committee.pdf](https://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf)

policies refer to the licensing policies where industries were classified into those open to the private sector with a license and those restricted to public sector enterprises under the Industries Development and Regulation Act and modified under the Industrial Licensing Policy in 1973 and 1985. The notions of open, restricted and reserved categories were defined in the Act. The issue of a license to a firm identified the product, the technology and location of the unit. In this framework a wide gambit of taxes, duties and subsidies including tariff barriers (import duties, import licenses) was introduced which protected industries from internal and external competition and defined the permissible technology when foreign collaboration was involved (Gouri, 1989, 1993; Chikermane, 2018).

The process was long, involving implications for the prevailing industrial licensing policies on concentration of industries; impact on productivity, quality and resource cost. These were assessments of ground realities in a prelude to introducing changes in industrial policies and related institutional framework of a market economy, including regulatory authorities. The introduction of economic liberalization policies (1991) was preceded by the Committee of experts and their recommendations, although with the caveat that not all recommendations of the expert committees were accepted or implemented by the Government. The conversion of accepted and implemented policies into various legal structures that create an appropriate institution for market-oriented economy's needs and requirements was also a slow process as seen in the timelines between policy enunciation and legal formulations.

### *2.1. Timelines in market regulation*

A quick glimpse of timelines from a control regime and to regulation and market-oriented regime that roughly covered the period 1950 to 1991 is useful. In terms of industrial policy the Industrial Policy Resolution of 1948 (as amended in 1973 and 1980), played a key role in drawing the boundaries of markets and involvement of private parties under the Industrial Development and Regulation Act 1956 (IDRA). As explained, all manufacturing units had to be registered with the authorities and required a license. Permission from the government was required for starting a new industry by the private sector. The license was given only for the product to be manufactured, the technology that will be used and the location at which the unit was to take place as per the application made by the firms. The Five Year Plans formalized by the Government detailed the requirements and capacity in each sector. Markets had no role to play in these decisions, nor was competition considered important. The financial sector was also subject to licenses issued by the Reserve Bank of India whether for starting a bank, stock exchange or non-banking financial companies (NBFC). The real sector and the financial sector reflected each other.

The Government in 1964 constituted the Monopolies Enquiry Commission, headed by Justice K. C. Dasgupta, in response to concern about the growing concentration of economic power in private hands and prevalence of monopolistic practices of the extant industrial strategy. The Committee submitted its reports in 1965 affirming the possibility of concentration of economic power in the present structure of licensing. Thereafter, in 1966, the Planning Commission of India set up a Committee under the Chairmanship of R. K. Hazari to review the industrial licensing system under IDRA. The report was submitted in 1967 which

confirmed that licenses were cornered by a few industrial houses by applying for multiple licenses and in different sectors. This had the effect of foreclosing entry by new firms. The report reiterated the apprehensions formulated by the Dasgupta Committee Report and raised the first set of concerns on the efficacy of licensing and tight controls on industrialization and investment in terms of balanced industrial development. The Hazari Committee was followed by the S. Dutt Committee in 1969 to enquire into the working of the licensing system in the country. The Committee found the industrial licensing policy very restrictive, resulting in the growing concentration of firms in 20 Larger Business Houses, 53 Large Industrial Houses and 60 large independent concerns. It expressed reservations about the expansion of the scope of state controls. The recommendations of the Dutt Committee Report led to the enactment of the Monopolies and Restrictive Trade Practices Act, 1965, and the establishment of the Monopoly Control Authority as the first market regulator.

The objective of MRTP Act was a law to handle economic power arising out of its concentration. Its main thrust was the prevention of such concentration to the common detriment; control of monopolies; prohibition of monopolistic trade practices; and prohibition of unfair trade practices (Mehta, 2006). Subsequent committees<sup>2</sup> focused on the effects of restrictive trade policies, financial policies that accompanied the regulation of industries by licensing and restricting entry of private sector in some sectors. This raised public concerns regarding the monopolization of economic power.

In 1991, there was a shift in policy. The New Economic Policy (NEP) was introduced with liberalization of trade policy and industrial policy, fiscal policy and monetary policy, the main tools of an open economy. Referred to as economic liberalization, it was a paradigm shift re-defining the role of the government in economic activities as investor and entrepreneur across sectors to only those related to sovereign functions of the state. Section 2(h) in the Act captures the new role of the government in terms of defining an enterprise. This refers to “but does not include any activity of the Government relating to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.” The government’s emphasis at this stage was on involving the private sector in almost all economic activities except sovereign functions and on the removal of all controls by de-licensing, deregulation and opening areas of investments to the private sector. Trade policy, industrial, fiscal and monetary policies were the macro policies that heralded reductions in controls in the respective areas; liberalization of trade policy consists of two parts, liberalization of capital account and liberalization of current account. Controls are with regard to tariffs and import duties. In the case of industrial policies the main emphasis was on deregulation and removal of licensing requirements. This was mainly through the removal of reservations for public sector in Schedule I and II industries permitting private sector participation. Announcements on tariffs, subsidies and tax concessions are contained in the Annual Budget (Gouri, 1995).

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<sup>2</sup> Committee on import-export policies and procedures (The P. C. Alexander Committee). Government of India, 1978; Committee on banking sector reforms (M. Narasimham Committee I). Government of India, 1991; Committee on financial sector reforms (M. Narasimham Committee II), Government of India, 1998.

Two sets of debates dominated this stage. The first one focused on assessing the costs and benefits of changes in trade policies, fiscal and monetary policies in terms of their impact on growth and employment. Structural policy changes in industrial policy, fiscal policy, and in liberalization of current account versus capital account were at the center of the debate with each set of reforms preceded by discussions and analysis of high powered committees. The second set of debates focused on privatization of the public sector or state-owned units and on private participation in infrastructure and public utilities, particularly power and telecom.

Debates regarding competition were muted largely on account of misgivings regarding competition and markets in India. Discussions on the market tend to raise the specter of distributive justice and equity associated with market failures, ignoring the fact that state failures were the primary force behind the shift in economic policies (Venugopal Reddy, 1989). There was a large debate in India on the subject of state failures, especially for privatization of public sector enterprises. Low productivity and inefficiencies in the public sector quantified state failures (see Chakravarty, 2006a). Moreover, in the Indian federal structure, which is the Union of States where state governments often do not belong to the same party as the central government and are divided by ideologies and voter base, it is difficult to arrive at a policy consensus. This leads to a preference for policies that are politically neutral and non-controversial. It also explains the government's approach of establishing committees and of building broad consensus before introducing and implementing new policies.

Conversion of accepted and implemented policies into legal structures and to the creation of institutions by the government appropriate to a market-oriented economy therefore took place in phases: for instance, legislation for the creation of the Securities and Exchange Board of India, the Securities and Exchange Board of India Act, was introduced in 1992; the Telecom Regulatory Authority Act was introduced in 1997; the Insurance Regulatory and Development Authority Act was enacted in 1999; the Competition Act was first enacted in 2002, however, it was only implemented after a major amendment in 2007; the Electricity Act enacted in 2003 led to the establishment of Electricity Regulatory Commissions in the Center and in each state; and the Petroleum and Natural Gas Regulatory Board Act was enacted in 2006. In terms of sequencing in the real sector, regulatory intervention of autonomous commissions was initially in the public utilities of telecom and electricity.

Discussions for a modern competition law started with the World Trade Organization meeting at Singapore in 1996 where clearly the emphasis was on trade liberalization in a globalized world (Chakravarty, 2006a, 2006b). The Minister of Finance in his Budget Speech of 1999 announced the formation of a High Level Committee on Competition Policy and Law (popularly known as the Raghavan Committee) in 2000. This Committee drafted the Competition Act which was first put to Parliament as a Bill for discussion in 2001 and enacted in 2002. Subsequent to a petition and the decision of the Supreme Court in *Brahm Dutt v. Union of India* (January 20, 2005) the Act was amended and Parliament passed the Amended Act in 2007. Several amendments to the Act were suggested and incorporated by the Parliamentary Committee following the Supreme Court decision based on the doctrine of separation of powers between the advisory and the regulatory and the adjudicatory functions in keeping with the Constitution

of India. The amendments to the Act included several modifications to substantive issues pertaining to the functioning of CCI and in implementation of the Act. The amended act divided the competition authority into (a) CCI as an administrative expert body and (b) Competition Appellate Tribunal (COMPAT) to carry out adjudicatory functions. Decisions of the Commission can be appealed only to COMPAT and thereafter to the Supreme Court. The CCI, however, retains its quasi-judicial powers given the right to levy fines and adjudicate on cases filed with it.

The difficulty encountered in framing the Competition Act, and in subsequently implementing the law, can be traced to the meshed legacy of intertwined policies and institutions of the previous regime. The policies of control and restriction had created stakeholders in the existing structure averse to change. Large industrial houses played a dominant role in influencing shifts in industrial strategy, opposing any move towards open markets, and the competitiveness that displaced their comfortable position (Jha, 2002; Venugopal Reddy, 2003). Surprisingly, the left-wing intelligentsia tended to support large houses but argued from the perspective of organized labor who constitutes less than 20% of the working force. CCI had to resort to considerable advocacy and persuasion for implementing the section pertaining to Mergers & Acquisitions which had been put on hold by the Ministry of Commerce. Therefore, in order to establish their writ, new regulatory institutions such as CCI had to contend with the *mélange* of institutions and policies already pre-existing in India. The situation was rendered complicated because some of these institutions and policies were yet to be aligned with shifts in industrial policies. More significantly, it saw the beginnings of the need for a competition law and for maintaining convergence between competition law and public interest.

## 2.2. Competition Act, 2002 and the beginnings of a market economy

The Act, unlike the MRTP, was envisaged not only as a market regulator but also as a facilitator of markets with focus on the objective—as the Preamble clarifies—to “sustain and promote competition in markets, to protect the interests of consumers and to protect freedom of trade.” The mandate of the competition authority was multiple; the preamble emphasizes consumer interest and freedom of trade. There is no clear enunciation of the objective of competition policy and of competition law and in keeping abreast of rapid technological developments associated with digital markets. “Consumer” in the Act is defined broadly to include producers and end-consumers. To quote:

- “Section 2(f) consumer means and includes any person who—
- (i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised... when such use is made with the approval of such person, *whether such purchase of goods is for resale or for any commercial purpose or for personal use;*
  - (ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised... are availed of with the approval of the first-mentioned person *whether such hiring or availing of services is for any commercial purpose or for personal use.*”

The Indian Competition Act 2002 seeks to prevent anti-competitive agreements, both horizontal and vertical (Section 3), prevent abuse of dominant position (Section 4) and regulate mergers and acquisitions above a threshold (Sections 5&6).

There is also a separate chapter on competition advocacy (Chapter VII in the Act titled Competition Advocacy). No other regulatory commission in India has advocacy as a mandated activity. The Section deals with two issues. Firstly, Central Government or state governments in formulating policy on competition or any other matter related to competition will refer the matter to CCI for its opinion. This is similar to Section 21 mentioned earlier. Secondly, to inform stakeholders and the public on the importance of competition and the powers of CCI, advocacy encourages access to information on antitrust activities from the public, say of cartels from executives in bidding auctions etc. or apprehension on abuse of dominance. This is useful information that CCI follows up through *suo moto* investigations. Interestingly, the Act does not define “Competition,” neither does the phrase “appreciable adverse effect on competition (AAEC)” which, in my view, may allow for spaces required for an economics based law where every assertion must be contextually based and assessed in terms of competitiveness of the market structure. The Act stayed within the economics of competition referred to as the product market framework where competition is in binaries of competition versus monopoly. In terms of public interest implementation of the law looked at consumer benefits in the broader definition of consumers which, as mentioned, includes both producers and consumers and of equating welfare with consumer surplus and producer surplus (Bishop and Walker, 2009). In the absence of a competition policy there have been divergent views on the welfare standard to be adopted while implementing the law. The underlying assumption of the Act is that a monopolist can fix a higher price while restricting output to where marginal revenue (MR) equals marginal costs (MC), thus  $P > MR = MC$  rather than the competitive condition of  $P = MR = MC$ . Competition authorities concerned about consumer harm in emergent markets could take a different approach when assessing  $P > MR = MC$ . The consequent increase in producer’s surplus in the above pricing mechanism resulting in a decrease or shift in consumer surplus raises the peculiar anomaly of defining public interest in competition policy.

Similarly, restrictions of competition refer to AAEC in relation to degrees of perception as regards “appreciable adverse effect” of monopolistic competition which gets translated into identifying the consumer whose welfare is maximized with competition.

The domain impact of competition law on business and on economic activity welfare was assessed through the lens of maximization of producers’ welfare. In evaluating anti-competitive effects, the focus on producer surplus rests on the understanding that more producers in monopolistic markets where there is one dominant firm ensures that public interest is enhanced. Section 4(1) of the Act states that “No enterprise or group shall abuse its dominant position” with the use of the definitive verb “shall” as opposed to “may”—a quasi *per se* approach rather than an effects-based one towards monopolistic markets. In implementation of the law a quasi *per se* approach was applied rather than mere *per se*. The move towards full effects analysis was a slow process

even in matured competition jurisdictions of the EU and the US. The use of economics and effects analysis took several years of antitrust experience. In Europe, the *ordo-liberal* approach emphasized a softer approach than in the US. The objective of competition law in both jurisdictions is to safeguard “effective competition.”

In the product market text book on economics the introduction of more producers into the market would definitely enhance competition. Defining welfare is more complex in the case of platform markets with competition among platforms with a wide list of beneficiaries, producers and consumers, as we shall see later. The approach can no longer be *per se*.

The “*relevant market*” has to be first defined for abuse to be established. This includes both the relevant product market and the relevant geographic market. On the face of it defining a market appears to be an easy and simple exercise. Going by the definition of the relevant market the exercise lies in finding substitutes among products and among firms and is an established mechanism. As per the Act “substitutability between products is the defining factor by reasons of characteristics of the products or services, their price and intended use.” Using substitutability among products in drawing the boundaries of the relevant market runs into difficulties in defining the relevant market in platform markets. The Small but Significant Non-transitory Increase in Prices (SSNIP) test used in drawing the boundaries of the relevant market for assessment of antitrust abuse may lose relevance in these markets. CCI to date has not applied the SSNIP test for defining the relevant market. What is debated in CCI is the market definition as filed by the informant and weighed against any counter definition given by the opposite party. Several cases including those discussed in the next section point to the complexities of market definition.

In the economic toolkit, enshrined in the Competition Act 2002, identifying the relevant market and the dominant player in platform markets is not a simple or straightforward exercise. Network effects, direct and indirect, tip the market in favor of monopolistic platforms connecting several markets, leading to inter-relatedness between platform markets. Defining the relevant market is difficult as is assessing the benefits of platform markets. Platforms on the Internet are intermediaries of exchange. Who asserts power that was so well defined in the prevailing competition law (Act) becomes evasive as does the concept of geographical markets. As a result, as virtual markets of platforms redefine competition, so does public interest. Currently, government policy towards foreign investment in e-commerce platforms has been more protective towards domestic investors. Spillovers of competition policy on competition law are discernible in cases filed with CCI on “abuse of dominance” of platform markets (2-sided and multi-sided) and on license fee (royalty) to technology firms.

### 3. Competition law implementation and public interest

Can public interest be re-defined? Several cases filed early on with CCI presented challenges in assessing anti-trust abuse with the tools available under the Act and are discussed in this section. The early cases reveal divergence between competition law and public interest. The more recent cases show a divergence between competition policy and public interest. The Act is under

revision now 18 years since enactment and 13 years after CCI became fully operational.

### 3.1. *MCX-Stock Exchange v. National Stock Exchange & Ors*

Among CCI's early cases the case of *MCX-Stock Exchange v. National Stock Exchange & Ors* particularly stands out for presenting a unique challenge to CCI (Case No. 13 of 2009. Order dated: 23.06.2011). The National Stock Exchange operates in the equity market whilst the MCX-Stock Exchange largely deals with the commodity market. In this case, MCX-Stock Exchange lodged a complaint against the National Stock Exchange for engaging in predatory pricing by charging a zero transaction cost for traders in the newly permitted currency derivative (CD) market and hence of leveraging in the newly licensed market. Exposure to the complexity of platforms and network economics was new to antitrust authorities, more so for CCI, a young competition authority. The case was not analyzed in the context of platforms and network economics but only from the point of view of abuse of dominant position (paragraphs 10.19, 10.20 and 10.21 of the Order).

The relevant market was defined as “the stock exchange services in respect of the CD segment in India.” The dissenting Order considered the stock exchange as a platform and the CD segment a vertical on the platform (paragraphs 10.26 to 10.38 of the Order). The majority Order established dominance of the National Stock Exchange in stock-market services and not in the Commodity Derivative segment by reference to Section [19(4)] of the Act.

In arriving at its decision, CCI concurred with MCX-Stock Exchange that the pricing scheme employed by the National Stock Exchange was predatory (unfair) because the transaction cost (at zero) was lower than the marginal cost. The rationale that zero pricing is an appropriate strategy for deepening the market to enable consumers to share the benefits of network economies was not considered given the definition of the relevant market. Platforms such as NSE are characterized by high capital expenditure (CAPEX) and low operating expenditure (OPEX) which permits innovative pricing schemes. Marginal cost calculated on operating costs can be negligible or even zero and cannot be considered as predatory as per the Act set out in the regulations of the Commission.

In terms of the Act predatory (unfair) pricing is a restraint on new entrants where the incumbent is abusing its dominance. Within the Act the CCI decision was correct but was it correct in terms of public interest? As a platform that linked debt, equity and currency derivative markets, it was important for providing a variety of hedging instruments in the foreign exchange currency market, especially for traders and small firms in the export business. The license to set up a CD vertical in the stock-exchange was a decision of the Reserve Bank of India. The intent was to encourage small businesses to export their products. Existing provision for coverage of foreign exchange risk provided by banks is not designed for the requirements of individual firms. Apart from this, it is also more expensive than a CD platform where there are a number of players on either side of the platform. The decision of CCI, while well within the framework of the Act, was oblivious to the economics of

platform market users. End users are consumers of currency derivatives, as is also the export sector.

### 3.2. *The Print India case*

For virtual markets national boundaries of a geographic market as notified in the Act have no meaning. CCI faced the issue of defining markets in an online scenario for the first time in the case of *Prints India v. Springer* (Case No. 16 of 2010. Order dated: 03.07. 2012). Prints India, a bricks and mortar publishing company, alleged that Springer, an international publishing firm in the Scientific, Technology and Medicine (STM) journal segment in India, was engaging in unfair conditions (practices). However, geographic markets of an online publishing house do not fall within the confines of boundaries of a nation state, raising the issue of jurisdiction of the relevant anti-trust authority. Publishing is now an online business and each business house is an online platform that seamlessly connects authors and readers world-wide. The case defined the market in terms of the relevant product market as permitted under Section 2(r) of the Act.

In a globalized world inter-country jurisdictional sanctions from their respective antitrust authorities are required. Mergers at present have to be cleared by competition authorities where the merging firms have business in that country. In the case of abuse of dominance, advice is sought voluntarily as the antitrust allegation pertains to the domestic market. Exchange of information among competition authorities helps in identifying the anti-competitive abuses and settlement of the case. BRICS has emerged as a major forum for the exchange of information among the competition authorities on a regular basis and during the annual meetings. A larger forum of exchange is the International Competition Network (ICN). CCI has separate agreements for information sharing with FTC (the US).

### 3.3. *The Google case*

The case against Google filed by Matrimony.com and by Consumer Unity & Trusts Society CUTS in a replica of the case on sponsored shopping sites in the EU was the first full-fledged case related to platform markets. As a search engine, Google was alleged to have been manipulating its search and advertising business, so favoring its own verticals (discriminatory) and eventually causing consumer harm. In the *Google case* (Cases No. 07 and 30 of 2012. Order dated: 02.08.2018) identification of the relevant market took an interesting twist when CCI established abuse in the market for website portals of travel-services as one of the two relevant markets identified in the order, namely online general search market and online advertisement market. This decision once again drew attention to the fundamental question of what constitutes a relevant market for antitrust abuse. Abuse was with reference to the travel verticals in which case the definition of the market in the main order defuses the concept of relevant market. Within the definition of relevant market provided in the Act, the underlying intent is of a market where an enterprise operates or intends to extend its business referred to as “*leveraging*” in the Act (Section 4(2)(e)). In the case of verticals of platforms, does a search engine have a preference in ranking some websites or is their business as a search engine determined by other factors such

as wider coverage, easy accessibility to consumers who surf the network, and prompt and clear website information?

The Google case in the EU decision was in considering abuse in terms of influence over consumer behavior, referring to the “heat map” test of Microsoft. The majority Order of CCI followed suit. They found abuse in the sponsored search catalogue of Google Flight where preference was observed for a few selected firms by way of placement in the search catalogue. The argument was that consumer decisions are prompted in the case of sponsored search catalogues. The “heat map” test measured by stray eye movements of consumers influenced the majority decisions. There was, however, no substantive proof in terms of conversion of eye movements to sales volumes. A recent study undertaken by CCI on e-commerce platform markets estimated a conversion rate of 10% on the “double click” in internet-based e-commerce platform markets (CCI, 2020). The dissent Order did not find enough evidence of Google favoring a few travel firms to accept the allegation of anti-competitive behavior in terms of creating entry barriers.

### 3.4. Platform markets

The complexity of platform markets first encountered in the MCX-SX v. NSE case, and later in Google, indicates that the one-size fits all approach may be inadequate in protecting public interest. The Google case further pointed to the limitation of borrowed antitrust analysis. Platform markets are intermediaries between markets on either side, and can be 2-sided or multi-sided. This poses a considerable challenge for competition authorities in defining the relevant market and in identifying the relevant consumer. As markets are interlinked, three categories of beneficiaries are clearly identifiable. They are: (i) producers/sellers on the platform; (ii) consumers of goods and services; (iii) citizens, if consumer benefits are restricted to consumers of a country. Caution is warranted in pronouncing something anti-competitive on the grounds of dominance of a platform. The economics of a platform which depends on generating direct and indirect network effects tends towards monopolistic structures strengthened by technology (algorithm) and consumer preference. In these markets welfare has been defined by the major competition authorities (the US and the EU) as maximization of consumer surplus and not maximization of producer and consumer surplus as defined by economists as total welfare (Bishop and Walker, 2009). The emphasis is on consumer harm. In the Indian competition scenario reference is still to maximization of producer and consumer surplus which takes us to the central issue of defining public interest in terms of competition among platforms. Retaining maximization of producer and consumer surplus, it can be argued, has its merits as producers are one of two or three groups of platform users. In the absence, however, of a clear-cut competition policy defining public interest in terms of national economic development there has been a reversion to protectionist policies of the pre economic liberalization days discussed in Section 2, resulting in obfuscation of public interest in terms of national economic development and of public interest in terms of consumer surplus of competitive markets. Restrictions imposed on Amazon and Flipkart e-commerce platforms are defining public interest in terms of national economic development. As per

Government notification<sup>3</sup> a distinction is drawn between foreign direct investment (FDI) in e-commerce activities and domestic investment by demarcation of e-commerce activities into (a) inventory-based model and (b) market-based model. FDI is allowed only in the market-based model where Flipkart and Amazon can act as a facilitator between buyers and sellers with restrictions on ownership of inventory including restriction of sale by group companies. This restricts the benefit of e-commerce platforms to consumers and their access to a wide variety of goods and services. At the same time, protection to consumers takes away the sting of competing in innovation again, so depriving consumers of the gains of competition. This is a divergence of competition policy, competition law and public interest.

CCI has adopted a cautionary approach with regard to e-commerce platforms. A recent case still under investigation concerns allegations by the Delhi Vyapar Mahasangh regarding steep discounts offered on prices of select vendors indulged by Flipkart and Amazon (Case No. 40 of 2019). The Commission notes “that Flipkart marketplace and Amazon marketplace are e-commerce entities, following a marketplace based model of e-commerce. They essentially provide online intermediation services to sellers on one side and consumers on the other. These platforms/marketplaces and the sellers selling on these platforms operate at different stages of the vertical/supply chain. Thus any agreement between the platforms and sellers selling through these platforms can be examined under Section 3(4) of the Act, which deals with agreements amongst enterprises or persons at different stages or levels of the production chain in different markets.”

Both firms engage in e-commerce and both are big foreign players in B2B segments. B2B refers to Business to Business that is only wholesale trade, while B2C refers to retail trade of Business to Consumers. The recent notifications issued by the Central Government permitting 100% FDI into platforms have several caveats that restrict the domain of business of FDI's e-commerce to B2B business only and not permitting B2C business. The relevant market was not defined as the case was taken under contracts between sellers on the platform markets under Section 3(4) of the Act. This section on vertical agreements deals with vertical restraints where the requirement of defining the market does not arise. Rather the investigation will proceed on vertical restraints in agreements of market players with intent of creating entry barriers. The *prima facie* Order, however, notes the opportunity given to new entrepreneurs to sell — in this case — smart phones on the platforms, thereby increasing the choice opportunities to consumers of goods and service.

Unlike in its antitrust aspect, CCI's approach with respect to mergers and acquisitions (referred to in the Act as “combinations”), is non-adversarial. CCI specifically noted this in its Order on Wal-Mart's acquisition of Flipkart, stating that “Unlike anti-competitive agreements and abuse of dominance conduct, that are prohibited, combinations (i.e. mergers, amalgamations and acquisitions) are only regulated under the Act” (Combination Registration No. C-2018/05/571. Order dated: 08.08.2018). However, as in antitrust cases, CCI has engaged in limited economic analysis of proposed mergers and acquisitions, focusing only on determining market shares of the merging entities and exploring whether the prevailing market structure makes it easier for market players to assert competitive

<sup>3</sup> Government of India (2018). Press note 2. Ministry of Commerce.

constraints by creating entry barriers or otherwise. CCI's approach has been more expansive and less concerned about the size of the merged entity. The relevant market was defined as B2B sales through e-commerce. In evaluating the proposed merger CCI was concerned whether horizontal and vertical overlaps between the two firms could generate anti-competitive outcomes. The combined market share of B2B would be less than 5% of wholesale trade which in turn constitutes about 30–40% of the retail trade segment. The share of Walmart was less than 0.5%. The market share of Walmart or Flipkart did not raise any red flags.

### 3.5. Market for ideas—need for a new competition policy

The *prima facie* Order on Ericson and Micromax raises the uneasy antitrust concern: how does one assess the anticompetitive behavior of firms who are trading in patents? (Case No. 50 of 2013, Case No. 76 of 2013, Case No. 04 of 2015) These firms are new entrants into the market and are classified as non-performing entity (NPE) or just patent firms. These firms are involved in developing new technologies which are then pooled with patents of other firms or a research organization to be licensed as a package. In the information communication technology (ICT) sector several patents need to be pooled together, meeting required standards for interoperability and compatibility of instruments such as smart phones. Standard Essential Patents (SEP) stand for the pooled package of patents for which standards have been granted by standard setting organizations (SSOs). SEPs have created a separate market, the market for ideas as these firms trade in patents and are between manufacturers and consumers. As forbearers of technology in networks, Artificial Intelligence (AI) and internet of things (IoT), public interest is of high priority when assessing SEP firms for possible antitrust violations.

The number of SEP firms is limited, and to date there are 10 well established firms. Several cases filed with CCI by phone manufacturers against SEP firms have alleged abuse of dominant position (Section 4) in the licensing of GSM, 2G, 3G by imposing exorbitant royalty rates, violating FRAND commitments, discriminatory tariffs and requirement of signing Non-Disclosure Agreement (NDA). A *prima facie* Order was passed by CCI and an investigation into the possibility of abuse of dominance in term of creating entry barriers under Section 4(2)(c) and Leveraging Section 4(2)(e) was initiated.

A patent is a legally created monopoly for encouraging research and technological development. Investment in R&D is heavy and risky as there are no assurances of returns. In the case of SEP standards convert the patents into non-exclusive and non-rival. Standards, once set, can be used by any producer (non-exclusivity) and the use of a particular standard by one producer does not preclude other producers from using the same standard (non-rival). There are therefore no entry barriers for firms to enter the SEP market.

Even if there are few firms the primary question is whether the monopolistic market structures raise antitrust concerns or whether public interest of enhancing network systems and digital technology are considerations that need to be examined. The importance of convergence between competition policy and public interest in the system of wireless communication comes to the forefront. The weight of public interest in forging links between investment in R&D and patent development by phone manufacturers is critical to India where a large proportion of the population

of over 350 million, both urban and rural, are dependent on smart phones and the Internet. Antitrust analysis provokes a rethink on the economic analysis of the market for ideas and how they impact consumer welfare.

#### **4. Concluding observations. Convergence of competition policy, competition law and public interest**

Defining public interest is of immense importance in implementing competition law. Of equal importance is the convergence between competition policy, law and public interest in emergent high tech markets that cover platform markets and markets for ideas. The dynamics of emergent market structures, where technology and consumer preference are contributing factors to monopolistic market structures' antitrust analysis, must focus on a more nuanced understanding of consumer benefits and public interest. Competition promotes consumer welfare, and public interest clearly indicates that maximization of consumer welfare should be at the center of both competition policy and law.

Platform markets—two-sided or multi-sided—get connected to websites of other firms. This structure allows for several small firms such as fintech firms or sellers of smart phones to be verticals to the platform. Some of these verticals may emerge as new platforms with innovative technology or algorithmic potential. The traditional approach towards markets, consisting of producers on one side and consumers on the other side, gets modified with markets on platforms. Consumers are interconnected with different markets, creating in the process indirect network effects which tip platforms to monopoly structures. Platform markets are complex structures and antitrust literature points to the difficulties of identifying the relevant market and of defining abuse of dominance. CCI has progressed in its understanding of platforms from Google to Amazon and Flipkart. Rather than looking at abuse of dominance, the e-commerce study by CCI highlights the possibility of vertical restraints on competition via unfair contracts and agreements. Investigation of the case is ongoing and the decision of CCI is awaited.

The market for ideas extends the platform market to cover firms that trade in patents. This market of value creation includes innovators, implementers and consumers. Innovators are monopolistic in a high risk activity involving heavy investment. CCI's concern is with the monopolistic market structure of SEPs and the scope for exercise of market power by a few firms in the ICT sector as alleged by Micromax. In a vertically differentiated product market a manufacturer or assembler such as Micromax, by licensing a SEP package, has the advantage of choosing high end to low end products in its product mix to meet diverse consumer demand at varying prices.

It is, however, in the market for ideas and of platform markets that the importance of convergence between competition policy and public interest has come to the forefront. In the ICT sector of telecommunications and of wireless communication a different set of questions is posed to antitrust authorities on the nature of abuse or the requirement of intervention by the competition commission. The institutional structure of SEP markets defies standard approaches to competition. The weight of public interest and the link between investment in R&D and development of digital technology reinforces the required convergence of competition policy, law and public interest. The discourse on convergence be-

tween competition policy and public interest is still at a nascent stage as antitrust authorities grapple more with traditional abuses of monopolistic structures rather than look at a wider perspective of public interest as the debate widens to data privacy and antitrust concerns.

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